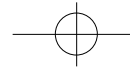


The Politics of **TRANSITION** in Kenya

FROM KANU TO NARC

Edited by:
Walter O. Oyugi
Peter Wanyande
C. Odhiambo-Mbai

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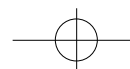
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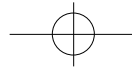


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PREFACE

This book is the product of a collaborative effort between the Department of Political Science and Public Administration, University of Nairobi and the Heinrich Böll Foundation, Kenya Office. The collaboration began in September 2002 following a request by the Department to the Foundation for support to hold a workshop on the Politics of Transition in Kenya. Kenya was in the process of holding its third multi-party elections following the re-introduction of multi-party politics in 1991. The elections provided Kenyans with the first real opportunity to replace a serving president with a new one through the ballot, because the then president had served his second and last five-year term in accordance with the constitution. The elections also provided prospects for Kenya National African Union (KANU), which had ruled the country since independence in 1963 to relinquish power to the opposition party, National Rainbow Coalition (NARC). Scholars of political science at the University of Nairobi were eager to debate the challenges and prospects of this transition.

In accepting to support the workshop, the Foundation also offered to support the publication of the proceedings of the workshop in a book-form to serve as a permanent record to the scholars' academic contribution to the understanding of transition politics. The actual research was conducted by social scientists—mainly political scientists—from the Department of Political Science and Public Administration, University of Nairobi and two practitioners, one from the Electoral Commission of Kenya and the other from the Centre for Governance and Democracy, a local NGO based in Nairobi.



The papers were assigned to discussants who made detailed comments. These and the discussions at the workshop were of great benefit to the authors in revising and updating their contributions after the elections. The volume contains selected papers only.

The book covers a wide array of topics and issues relevant to an understanding and appreciation of transition politics in Kenya. The topics range from colonial to the post-colonial period but with a focus on the post-1992 period. Details of the topics and issues are given in the introduction of the book.

The editors wish to thank Heinrich Böll Foundation for supporting the workshop and the publication of this book, a book that will go a long way in shedding insights into the politics of transition in this country. We also wish to thank the two secretaries of the Department of Political Science and Public Administration, namely Mrs. Cecilia Kamau and Mary Gatheca as well as Jimmy O. Ochieng (a research assistant to one of the editors) for the secretarial and the logistic support they gave to the project. The final responsibility, as always, is that of the individual authors.

Editors

24th June 2003

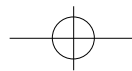
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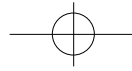
INTRODUCTION

Walter O. Oyugi

The title of the book—*The Politics of Transition in Kenya: From KANU to NARC*—is suggestive of its contents. In actuality, however, the book covers much more than just the transition from KANU/Moi to NARC/Kibaki. The point of departure in the volume is a focus on the politics of transition in a much wider sense: the book grapples with the question of change over the whole range of post-independence politics in Kenya, as well as touching on the transition from colonial rule to self-rule. Transition as used in this book refers to a process leading to change from one regime to another—a change which involves leadership change at the top. In this sense therefore, we can refer to transition within the context of a given political party if the change involves leadership change at the top. The concept also applies in a situation where the process leads to a change not only in the leadership at the top but also in the political party that controls state power. Therefore, the essays in this volume focus mainly on transition processes which are followed by elections in which there is regime change. Although there were four elections in which Moi was returned as president, we do not regard them as transition elections.

With this conception of transition in mind, the material presented in this volume covers both colonial and post-independence transitions. Three transitions are therefore identified, namely, the transition from colonialism to independence, and the subsequent two transitions since then, that is, the transition from Kenyatta to Moi and from Moi to Kibaki, the latter involving also the change from KANU to NARC.





A study of politics of transition in any country usually confronts the problem of duplication inherent in the cross cutting nature of the issues that have to be raised in addressing the subject. This problem becomes apparent in this study in that a number of chapters, though addressing specific issues in a more sustained manner, also end up touching on some of the issues addressed in other chapters. In a way, this enriches the book—since differing perspectives emerge on the same issues.

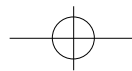
The coverage of transition politics in the first chapter, by Asingo, is broad and starts off by examining the transition from colonialism to independence by highlighting the constitutional engineering undertaken by the British government from the early 1950s, as well as the economic and social institutions which were similarly manipulated by the British government with the sole purpose of leaving behind a system that would later serve the interest of the departing colonial power. The central thesis which ties the analysis of the two subsequent transitions i.e., from Kenyatta to Moi and from Moi to Kibaki, is that the politics of intrigue and manipulation played a major role. This was to be expected in a situation where autocratic personal rule, in the absence of institutionalised governance, was the norm. At the same time the socio-political dynamics within the multi-party system (especially since 1992) are addressed, and are seen to have accounted both for the failure of the opposition parties to dislodge KANU from power in the two multi-party elections and the subsequent developments in the terminal years of the Moi regime, which enabled the opposition to get together, and thereby remove Moi from power giving way to the NARC regime. The analysis of the Kenyan experience is cast within the wider African context.

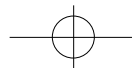
The transition theme is taken a step further in the second chapter where Odhiambo-Mbai builds his argument around two concepts, namely, autocracy and personal rule. The chapter traces the genesis of autocracy not only in Kenya but also in Africa. And in the case of Kenya, the analysis presents the link between autocracy and the emergence of a personal rule regime and shows how the two orientations individually and collectively became a stumbling block to any efforts at political liberalisation, such that even after the resurrection of multi-partyism, what emerged

was what the author calls a multi-party autocratic state under Moi. In the rest of the chapter which constitutes more than a half of the chapter, a presentation of the political developments which occurred in the run-up to the 2002 elections is made, and the circumstances leading to opposition unity and the resultant defeat of KANU are explained. The essay ends by addressing the emergent disharmony within NARC and wonders whether, indeed, autocratic tendencies are not already creeping into the NARC regime.

The theme is further explored in chapter three, by Kanyinga, where recent political events are discussed, including political alliance making and related transition experiences against the perspectives of neo-liberal political ideology. The chapter demonstrates that a neo-liberal political perspective is inadequate for illuminating and lending understanding of the Kenyan political dynamics. However, the central focus of the analysis is on the factors which acted negatively against the establishment of a liberal democratic regime. The chapter addresses a central issue which is also the subject of chapter five, namely, the centrality of ethnicity in political formations and contestations during the Kenyatta and Moi regimes, and argues that ethnic ideology acted against the construction of a liberal democratic society by playing a negative role in the efforts at opposition unity between 1992-2002. The author decries the fact that the coming together of the major opposition parties under NARC was only possible because of the perception of the cooperating parties that their ethnic interests would best be served under the umbrella of NARC. Thus, the writer avers, the reproduction of ethnic divisions in the political arena has continued to inform the practice of politics in the country.

A theme also addressed in these essays is that of alliance building in Kenyan politics, which is the subject of chapter four, by Wanyande. The analysis is anchored on what the writer refers to as the objectives and methods of alliance building. The discussion is given a historical underpinning: it begins with the experience of KANU/KADU merger in 1964, the first alliance since independence. After some sustained analysis, the author identifies ethnicity and personalisation of political parties as the two most important factors that negatively influence efforts at





alliance formations by political parties. These are discussed against the backdrop of the efforts at alliance formation by opposition parties between 1992-2002. The circumstances under which alliance formation became possible in 2002 are discussed and the essay ends by wondering about what the simmering division within NARC portends for the future: what are the implications for such divisions for the achievement of the coalition's declared development goals and objectives?

If there is a theme which cuts across most of the chapters in the volume, it is ethnicity as a factor influencing political behaviour in Kenya. This is not an exclusively Kenyan problem: ethnicity permeates the socio-political fabric of most of the polities of the developing countries. This is not to say that it is not a problem in the relatively more developed countries, if the recent experience in the states formerly under the Soviet empire is anything to go by. Indeed, the problem spares no part of the world, for even in Western Europe, there are widely reported cases of ethnic tensions and conflicts, as for example, the case of Basque separatists in Northern Spain. Another case in point is the Flemish 'crisis' in Belgium. And of course in the United States, every city has corners which are associated with specific ethnic minorities such as the Mexicans, Italians, Irish, Polish, Indians, etc.

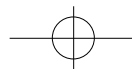
The pervasiveness of the problem globally notwithstanding, the situation in Africa remains one of the most serious in the world. To enlighten the reader about a specific situation, chapter five, by Jonyo, addresses the problem within the Kenyan context by pointing out that political competition in the country continues to be shaped and driven largely by ethnic interests and that political parties themselves are often seen as fronts for ethnic/regional interests. It is in this context that the author dismisses the NARC alliance as being in practice an alliance of ethnic groups, and ends on a note which is likely to generate some debate, namely that the struggle for the Moi succession was de-ethnicised when both NARC and KANU fielded presidential candidates from the same ethnic group!

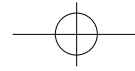
Three chapters in the study address the role of non-state actors in the struggle for political and economic liberalisation in Kenya. The concept of non-state actors includes Civil Society Organisations (CSOs) such as

Non-Government Organisations (NGOs), Community-Based Organisations (CBOs) and other similar formations. Although the analysis of political liberalisation in Kenya has tended to focus on the role of opposition political parties, in practice though, the role which non-state actors have played has been largely responsible for winning the political space that the opposition can now claim to control. It is true that individual opposition politicians like Jaramogi Oginga Odinga and the 'old' George Anyona set the stage for a more direct confrontation with the state over the resurrection of multi-partyism as exemplified in their efforts to launch the Kenya Socialist Party, a move which precipitated the enactment of a legislation to make Kenya a *de jure* one-party state in 1982. And the subsequent confrontations were mainly led by the clergy especially from the late 1980s following the introduction of queue voting in 1986 to which they were strongly opposed on moral and political grounds. Thereafter, however, it would be the religious-based NGOs in combination with other Civil Society Organisations (CSOs) that would keep the fire burning before the politicians resurfaced again in the early 1990s, a development which would bring the politicians and other non-state actors together in a combined effort to launch an assault on the authoritarian regime. This important role which has been played by the non-state actors is captured especially in chapters six and seven.

In chapter six, Nzomo starts off by defining the term civil society and points out the fact that it is a mirror of the Kenyan society (with all its cleavages e.g. class and ethnicity) and that, therefore, it should not be idealised as the panacea to socio-economic or political problems. The author then proceeds to present an account of the development and contribution of these organisations since before independence. From there the chapter discusses the specific roles played by Kenyan civil society organisations during the transition period such as agitation for multi-party democracy, constitutional reforms, human rights and gender equity, before moving on to focus on the present role these organisations are playing in the current constitution making process.

Related to this chapter is chapter seven, by Mitullah, which focuses on the issue of gender inclusion in the transition. It should be pointed out here that the gender agenda has been mainly pushed by women civil soci-





ety organisations. The chapter highlights the under-representation of women in key sectors of political leadership and the economy but ends in an appreciative note by highlighting the gains which women have made in the recent past and especially under the present NARC regime.

Another chapter which addresses this subject (i.e. the role of civil society) is chapter eight. On the main, the chapter is focussed on the study of the role of civil society in the liberalisation of a hitherto authoritarian regime in Latin America—Guatemala. After making a presentation of the experience of that country, Turner draws comparative lessons of experience which are applicable to the Kenyan situation. The Guatemalan case as presented here demonstrates what concerted action by civil society organisations can achieve even under difficult circumstances.

The political transitions that are analysed in this volume have all been preceded by contested elections, except the transition from Kenyatta to Moi. Indeed, the management and conduct of elections has direct bearing on whether the choices that the electors make are made under free and fair contestations and, therefore, whether or not they are reflective of the wishes of the voters. Historically, elections in Kenya were relatively free and fair during the colonial period for those who were given the right to vote. But this was never to be the case after independence. The first elections contested between an opposition party and the ruling party in 1966 were characterised by massive irregularities both before and on the polling day (Mueller 1984; Gertzel 1970). And between 1969-1991 all the elections held were characterised by similar problems as the ruling and only political party, KANU, meddled in the choice of candidates as well as in the conduct of elections; which is why in the post-multi-party era, the management and conduct of elections has been a contested issue with the political opposition and civil society organisations calling for changes in the electoral law and the management thereof.

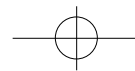
The lessons which have been learnt in the management and conduct of elections in the multi-party era are discussed in chapter nine and ten. In chapter nine, Nyamu discusses the role of the state Electoral Commission, while chapter ten, by Kibara, discusses the experience with monitoring of elections in the country. Both chapters are written by

practitioners with first hand experience in the respective subject areas. Chapter nine presents a bold critique of the performance of the commission at different stages in its evolution while noting the relative improvements in performance which have taken place in the recent elections especially in the preparation of the 2002 elections.

Chapter ten raises some fundamental questions regarding election monitoring. The two key questions raised are: does election monitoring add any value to the electoral process? Can it prevent malpractices? The analysis in the chapter focuses on constraints to free and fair elections in Kenya and the challenges facing election monitoring before turning to discuss the experience in Kenya with election monitoring. It ends by making suggestions about how the monitoring exercise can be improved.

The last but one chapter, on the politics of constitution making, is a comparative analysis of the experiences of Kenya, South Africa and Uganda in this regard. Whereas the constitution-making exercises in South Africa and Uganda were successfully accomplished, in Kenya the process was still on-going when the chapter was submitted. Nonetheless, it raises a number of issues of a comparative nature. First and foremost, the authors, Katumanga and Ng'ethe, draw attention to the different historical and socio-political circumstances under which the processes took place in the three countries, which the authors argue, do to a large extent explain the outcome of the South African and the Ugandan constitution making processes. With regard to the Kenyan case the authors discuss the history and the politics of constitution making, ending with a focus on what was going on at the National Constitution Conference which was at the time of writing, debating the Draft Bill of the Constitution of Kenya Review Commission, which aimed to repeal the existing constitution of Kenya. In the case of Kenya, the authors' conclusion is that the way forward is fraught with uncertainty as clearly indicated by the disputes which have emerged on a number of key provisions in the Draft Bill.

So far all the papers in this volume have been concerned with analysing the past and the present and presenting the factors which have impacted or are impacting positively or negatively on the efforts to open up the



political space for meaningful contestation with a view to achieving at least some minimalist democracy. The last chapter in this volume, by Oyugi, while also addressing some of the issues raised in the foregoing chapters, goes a little further by identifying the major changes which have been introduced with a view to opening up the political space, and assesses the extent to which the changes so far made have been institutionalised, internalised and consolidated. The chapter does so while taking cognisance of the controversy surrounding the utility of the concept of consolidation or the analytical pertinence of the concept. The basic assumption in the analysis is that without consolidation of the little gains that have been made since the resurrection of multi-partyism, there is a great risk that factors of de-consolidation and 'rollback' can creep in to put the clock back. Having expressed these fears, the author nonetheless observes that with regard to the resurrection of multi-partyism, there seems to be enough evidence to suggest that it is unlikely to be threatened at least in consideration of the circumstances of the moment. In conclusion, the author examines the performance of the NARC regime during its first five months in office and there from attempts to sketch the scenario for the future.

Thus all in all, the essays in this volume present to the reader the up-to-date situation in the Kenyan democratisation front and make suggestions and/or develop scenarios for what the future portends for the democratisation project.

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THE POLITICAL ECONOMY OF TRANSITION IN KENYA

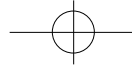
Patrick O. Asingo

INTRODUCTION

For the first time in Kenya's rich post-colonial history, the country faced an election in which the incumbent president was barred by the constitution from seeking re-election. The president identified his preferred heir, pushed him beyond the party nomination stage at the expense of a split in the ruling party, and seemed determined to see him triumph in the general elections, at whatever cost. The opposition too finally put its act together, formed an umbrella opposition body and named a joint presidential candidate. These developments set the stage for one of the most remarkable presidential contests in Kenya's history. In the end, the ruling party's 39 year hold on power was rudely brought to a halt by the joint opposition common front, National Rainbow Coalition (NARC) which won the elections convincingly.

Against this background, this chapter attempts to analyse the impact of the transition on the net trade off between political and economic issues. The underlying assumption is that as an emergent democracy undergoing a poorly managed but crucial political transition, economic prudence is likely to have been sacrificed at the altar of political expediency during the transition period. Indeed, as the curtain slowly fell on the Nyayo era, political parochialism conveniently overshadowed rectitude in economic management.

The chapter is divided into two parts. The first part provides a cursory



retrospection of Kenya's past political transitions, and how they shaped the country's political economy. These transitions have been conveniently labelled Decolonisation transition, Constitutionally-inherited leadership transition and Democratic transition.

The second part takes the post-Moi transition head-on, beginning with a presentation of the background to the transition and how it was handled by the incumbent regime. It ends with an examination of the unfolding dialogue between political and economic issues in light of the emergent political posturing and the general transitional environment.

KENYA'S TRANSITIONAL POLITICAL ECONOMY: A HISTORICAL OVERVIEW

Decolonisation Transition

As the name suggests, decolonisation transition refers to the transfer of political power from the colonial government to the government of an independent Kenyan state managed by indigenous Africans. The transition also involved fundamental constitutional engineering aimed at transforming the state apparatus from instruments of repression and exploitation to agents of African development and self-actualisation. Similarly, it sought to re-invent a more dignified African person enjoying a wide latitude of freedoms and rights. This was vital because the African person in the colonial era had been politically disenfranchised, economically exploited, socially segregated and culturally alienated.

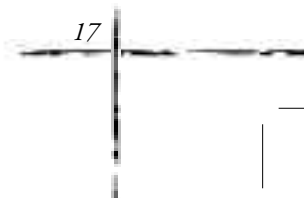
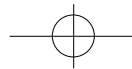
The granting of independence to Kenya in 1963 marked the first major political transition since her emergence as a distinct territorially circumscribed geo-political entity in the late 19th century. The transition was relatively well managed by the British government through a series of landmark political and economic reforms traceable to the Mau Mau uprising of 1952. The uprising occasioned great economic loss including the destruction of property of unestimated value, a heavy death toll estimated at 12,000 people, and about \$400 million spent by the colonial government to quell the rebellion (Miller & Yeager 1994).

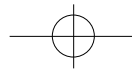
The fact-finding visit by the British secretary of state for colonies, Sir

Oliver Lyttelton, after the uprising culminated in the Lyttelton constitution of 1954. This political document granted the Africans the right to greater participation in the government and politics of Kenya by offering them eight seats in the Legislative Council (Legco) and proposing the creation of a multi-racial civil service. The following year, an ambitious economic blue print for Africans, the Swynnerton Plan, was launched, introducing far-reaching land and agricultural reforms. In 1958, the Lennox-Boyd constitution raised the number of Africans in the Legco to 14 and offered them one more seat in the Executive Council, raising their total number to two. However, it was the first Lancaster House conference of 1960 that guaranteed African majority representation in both the Legislative and Executive Councils.

During the same period, Britain declared her intention to undertake a speedy smooth transition to internal self-government and then to full independence. This declaration was intended to enable the British to retain as much political and economic control as possible in the post-transition era, by pre-empting the emergence of radicalized political leaders and the creation of militant broad-based national organisations which could jeopardise British interests once independence was granted. The underlying rationale was that, "rapid decolonisation lowers the level of conflict between the colonial rulers and the nationalist leaders" (Gordon and Gordon 1996: 63).

The 1960 conference also allowed the formation of nation-wide political parties, which had been banned in 1953. Consequently, the Kenya African National Union (KANU) was launched in May 1960, revolving around the dominant Luo-Kikuyu axis led by James Gichuru, Oginga Odinga and Tom Mboya. Immediately, the ugly face of ethnicity appeared in the political scene, as a group of leaders championing the interests of minority ethnic communities led by Ronald Ngala, Daniel arap Moi and Masinde Muliro, launched the Kenya African Democratic Union (KADU) in June 1960. The KANU-KADU divide soon acquired an ideological dimension as they advocated the formation of a unitary and a federal state respectively. Against this background, the second Lancaster House conference was convened in 1962 not only to resolve the KANU-KADU stalemate, which threatened to





delay independence, but also to work out the final steps to internal self-government.

These transitional changes were negotiated on a *quid pro quo* basis as the British sought an assurance that their interests would be safeguarded after independence. To this end, the African nationalists accepted several economic proposals which were designed to further British interests. First, they agreed to buy out rather than seize without compensation the settler farms for re-distribution to thousands of landless Africans. Second, they undertook to adopt a free-enterprise political economy based on the sanctity of private property. Third, they pledged not only to encourage foreign investments but also to protect the multi-national corporations operating in Kenya. Finally, they agreed to grant most favoured status to the British in matters of trade. In a nutshell “attempting to orchestrate a transition to independence on terms favourable to themselves, British authorities bartered fundamental political and economic concessions for an informal promise of continuing influence in post-colonial Kenya” (Miller and Yeager 1994: 30-31).

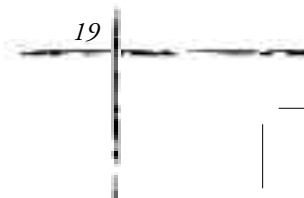
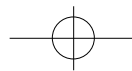
Meanwhile, as the drive to independence moved to top gear, the Africans played an increasingly greater role in the formal economy. Their deeper involvement in the political economy traces back to the rapid expansion of the productive sectors during the Second World War period. Subsequent economic restructuring in the run up to independence saw even further expansion of the African entrepreneurial and working classes. First, several foreign investors already operating in Kenya sought more African labour not only for their skills but also to conform to the Africanisation policy advocated by the nationalists. Second, the multi-national corporations, seeking to secure the Kenyan market and expand their operations beyond the urban and peri-urban markets, established strong links with prospective African agents to help them penetrate the rural areas. Finally, the economic balance swung in favour of import-substitution regime directed towards the domestic market. African entrepreneurs with sufficient capital seized this opportunity to form joint or wholly owned commercial ventures dealing mainly in basic commodities.

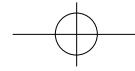
In the meantime, Jomo Kenyatta, who had remained largely out of the

political scene owing to his prolonged stay in Europe and several years of incarceration, had been released in 1961 and assumed leadership of KANU. He led KANU in the 1963 election victory and formed the independence government as Prime Minister on December 12th, 1963 and became Kenya's first President in 1964 when the country attained republican status. Kenyatta had to deal with three urgent transitional problems with deep roots in Kenya's colonial history. First, there was the Somali secessionist threat soon after independence. With the support of the Mogadishu government, the Kenyan Somalis who had even boycotted the 1963 elections engaged the Kenyatta government in an armed confrontation, in their effort to secede from Kenya. It took Kenyatta three years of military operations against the *shifitas* to secure the area. The second problem occurred on 12th January 1964 when Kenyan African soldiers mutinied to protest unfulfilled independence dreams and the continued domination of the armed forces by British officers. Kenyatta used regular British officers to end the mutiny, improved the barrack conditions, and elevated many African officers to key positions.

The third problem had to do with land transfer. Part of the transition deal was that the British government would grant loans to the Kenya government to purchase settler farms from the departing whites. Indeed the British honoured their pledge, thereby enabling the new government to purchase settler farms, some of which were converted into settlement schemes. At the same time, the Africans were encouraged to form co-operatives and land-buying companies, secure loans from the government and purchase co-operative or individual farms. This, however, did not completely solve the land problem, which persisted well beyond the independence decade. This problem notwithstanding, “the immediate post-independence period was characterised by considerable euphoria, not only because of the political gains, but because of a pervasive optimism that it was indeed possible to bring about the so-called revolution of rising expectations” (Balogun and Mutahaba 1983:3).

In order to entrench his leadership, Kenyatta perfected the art of neo-patrimonialism. This involved incorporating into the political system and the bureaucratic institutions the patrimonial logic of ascribing the right





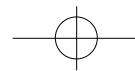
to rule to a person rather than to an office. Kenyatta's neo-patrimonialism was characterised by what Bratton and Walle refer to as systematic clientelism, where public sector jobs, material rewards and economic opportunities were offered as favours to clients who in turn mobilised political support and loyalty to the patron. The corporatist aspirations of the state elites and their reliance on patron-client political ties was largely responsible for the transformation of the Kenyatta regime to an authoritarian state, where "relationships of loyalty and dependence pervade a formal political and administrative system, and officials occupy bureaucratic positions less to perform public services, their ostensible purpose, than to acquire personal wealth and status. Although state functionaries receive an official salary, they also enjoy access to various forms of illicit rents, prebends, and petty corruption, which constitute a sometimes important entitlement of office" (Bratton and Walle 1997:62).

The heavy reliance of private capital on political patronage and state-mediated commercial opportunities for economic advancement tended to curtail the scope for a large-scale private enterprise sector. Indeed most of the large capitalists who emerged were mainly Kikuyu elites with close links to the Kenyatta regime and the Kenyatta family, especially from his Kiambu turf. State control over the size, nature and mix of the emerging African capitalist class appears to have been hinged on the premise that an "expansive capitalist class would deprive the political leaders of the ability to mobilize economic opportunities and resources for political patronage purposes" (Kasfir 1998:112-3).

The building of economic empires around political leadership was not unique to Kenya. In fact, in Botswana and Cote d' Ivoire where a sizeable domestic capitalist class had crossed the bridge from the colonial era, "the state provided valuable support in the form of credit, contracts and concessions, especially to the relatives or political associates of influential state personnel. Those in control of the state thereby sought to consolidate themselves by empowering a supportive African business class from within their own ethnic ranks" (Kasfir 1998:112).

Constitutionally-Inherited Leadership Transition

This refers to the transition from Kenyatta to Moi, and is so labelled

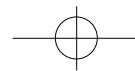


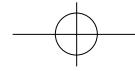
because it involved an inheritance of leadership based on constitutional stipulations. Inheritance is used here not as a familial concept, but to denote swift and non-violent shift of the locus of power from one person to another without invoking the popular verdict of the electorate. The 1978 transition was essentially a change of personalities ignited by the sudden death of the aging founder President, Jomo Kenyatta.

The period before the transition had been characterised by intense succession struggles and intrigues, pitting a section of the Kikuyu elites against the supporters of Vice President Daniel arap Moi. Most of these Kikuyu elites were deeply involved in state-sponsored plundering of the economy. Given the advanced age of their patron, they looked forward to a post-Kenyatta leadership that would protect their ill-gotten wealth while leaving open the floodgate of economic gain. Although Moi appeared to be a compromise candidate who posed no real threat to the major power blocs behind the throne, he was all the same treated suspiciously by a section of the Kikuyu elite who doubted his ability to safeguard their economic interests. Leaders of the powerful Gikuyu, Embu and Meru Association (GEMA), including several relatives of the aging president, led by his nephew Dr. Njoroge Mungai, initiated the "change the constitution movement" to block vice-president Moi's automatic accession to the presidency on Kenyatta's death.

However, with the defeat of Dr. Mungai in the 1974 elections and the advanced age of Mbiyu Koinange, this inner circle of the Kiambaa-Gatundu clique found itself without a viable replacement for Moi, acceptable even to the entire Kikuyu political elite. In addition, they had underestimated Moi's ability and his increasingly close association with finance minister Mwai Kibaki and Attorney-General Charles Njonjo. In fact, it was Njonjo who, with the support of Kenyatta, neutralized the "change the constitution" movement and confirmed Moi as the constitutional successor to Kenyatta (Throup and Hornsby 1998).

Against this background, the actual transfer of power to the Vice President proceeded very smoothly. Moi had used the three-month interregnum after the death of Kenyatta to consolidate his position and marshal enough support to easily secure KANU's final seal of approval as president in November 1978. Some politicians even gave Moi's ascen-





dancy to power a divine interpretation, alleging that “the choice of Moi to succeed Mzee Jomo Kenyatta was made during a conversation between God and the former president, and that being God’s choice, President Moi should be opposed by no mortal” (*Weekly Review* October 11, 1991: 17).

The sudden death of President Kenyatta, the swift and peaceful transfer of power to Moi who was the constitutionally designated heir, and the immediate pronouncement by president Moi that he would follow Kenyatta’s footsteps, retained investor confidence and eliminated the need for political manoeuvres and arm-twisting which could have hurt the economy.

True to the literal meaning of “*Nyayoism*” which became his philosophy, Moi ensured continuity of the principal ideals, policies and philosophies such as “African Socialism” and “*Harambee*” which had been the hallmark of the Kenyatta era. Critics, however, argue that *Nyayoism* led Moi to perfect most of the negative practices predominant in the closing years of the Kenyatta era such as neo-patrimonialism and corruption. Indeed, from the time Moi took over in 1978 until the democratic transition took root in Kenya in 1991, “the scope for criticism and free debate, already limited, was continually narrowed, civil society crippled and human rights infringed” (Kyule 1999: 203).

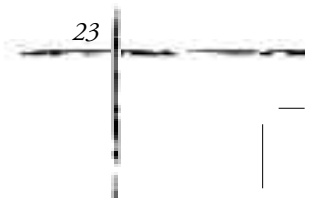
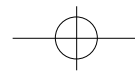
The 1978 constitutionally-inherited leadership transition, though not entirely similar, shows certain affinities with the Brazilian experience in the 1980s. After leading the opposition party, Party of the Brazilian Democratic Movement (PBDM) to election victory in 1985, Tancredo Neves underwent a fatal emergency intestinal surgery on the eve of his inauguration, paving way for his Vice-President-elect, Jose Sarney to become President. Like Kenyatta, Tancredo died abruptly, but with proper constitutional provisions for succession, which were honoured. Like Moi, Sarney undertook to do what death had prevented Tancredo from doing. Sarney set out to implement Tancredo’s populist economic programme, which targeted volatile socio-economic issues like urban labour manipulation and the gross inequality in rural land ownership. However, like Moi, he soon realised the folly of walking strictly in the footsteps of

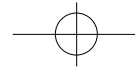
a predecessor. The land re-distribution programme sparked revolt from the landed elites, in a scale and magnitude not foreseen by the planners, forcing Sarney to drop it. He then became his own man and designed new realistic economic policies, which brought the economy back on track and by 1987, the spiraling inflation had gone down considerably (Skidmore 1997).

Moi took over at a time when the coffee-boom, which had begun in 1976, saw economic growth peak at 8.6 per cent. However, export earnings began to decline almost immediately, not because of the transition, but due to the decline in the world coffee prices. This decline did not immediately raise eyebrows because over the years, the industrial and manufacturing sector had already surpassed export agriculture as the economy’s fastest growing sector. Indeed, while agricultural production in the 1970s grew at an annual average rate of 6.5 per cent, industrial growth stood at 11 per cent and by 1979, Kenya’s industrial output equalled that of agriculture at 34 per cent of the GDP.

Moi’s attempt to perpetuate the Kenyatta legacy of neo-patrimonialism did not take off on a roller coaster. Right from the terminal years of the Kenyatta era, demands for cooption were already threatening to outstrip the supply of patronage jobs, land and financial rewards owing to Kenya’s demographic explosion. The diminishing patronage resource base was further exacerbated by the plummeting down of the world coffee prices in the late 1970s, at a time when the country’s tourist darling rating began to level out. Yet, Moi badly needed resources to expand the patronage network beyond Kikuyu-land, especially to his Kalenjin tribesmen. Patronage redistribution through creation of new coalitions was necessary because, “under Kenyatta, the Kikuyu had come to dominate business and commerce, the civil service, many of the professions and, of course, politics ... with a comparatively elaborate communications and power infrastructure, Kikuyu land lay at the heart of the Kenyan economy in a way that the Kalenjin areas, the core of President Moi’s new coalition, did not” (Throup and Hornsby 1998: 26-27).

As Moi entrenched himself through new political networks in the 1980s, the Kikuyu elite became increasingly critical of his regime. His response





was swift and economically damaging to the uncooperative Kikuyu elite who began to lose out state-mediated economic opportunities to the Asians and a few Kalenjin front-runners. Having lost the ability to rule through consensus due to the recalcitrance of the Kikuyu elite, Moi resorted to authoritarianism. Consequently, “in the 1980s, President Moi’s administration attempted to deny many Kikuyu businessmen opposed to the KANU government the economic support they needed and worked with Asian businessmen to undercut Kikuyu economic power” (Kasfir 1998:116).

Democratic Transition

After the Decolonisation transition, the first generation of African leaders sought to consolidate their power and tighten their grip on the state apparatus. The result was a total negation of democratic ideals. Once the one-party system and personal rule were institutionalised, mass political participation became very limited. The frequency of elections and their political significance greatly decreased as the political leaders treated elections with a lot of disdain and were willing to postpone them for the slightest of excuses. The 1960 constitutional referendum in Ghana, for example, was enough reason for Nkrumah to postpone the parliamentary elections scheduled for 1961 to 1965. Such manoeuvres went a long way to lend credence to the unfortunate remark that “the top political leader in many developing countries is more likely to be replaced by political violence, such as coup or assassination, than by a process of succession, such as a genuine election” (Dazinger 1998:431).

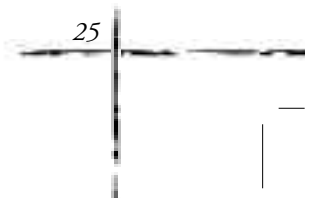
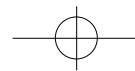
In those few African states which had nurtured a tradition of frequent elections such as Kenya, the elections served more as a public relations exercise than a real power contest. The missing link in this regard was lack of a commitment to an institutionalised non-violent procedure for the transfer of power from one chief executive to the other. This diminished political significance of elections in Africa is reflected in the observation that “the curious thing about a Liberian [read African] election campaign is that although the result is always a foregone conclusion, everyone behaves as if the votes and the speeches and the pamphlets matter. The government prints the ballot papers; the government polices the

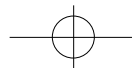
polling booths, yet no one assumes beforehand that the government will win” (Greene 1978:283).

Where relatively free and fair elections were held, their outcomes were rejected if they did not reflect the wishes of the incumbent, as in Lesotho in 1970. In some cases, such as the Sierra Leone election of 1967, the military took over to forestall a smooth hand-over to the winner.

Against this background, domestic and external factors conspired in the early 1990s to over-throw authoritarianism, personal rule and military despotism, and replace them with democratic ideals and practices in most African countries. This is what constituted democratic transition. In fact, according to G.K. Munishi, “democratic transition is a period during which there are struggles and negotiations between those trying to expand the civil rights and liberties of the citizenry in order to eliminate oligarchic oriented privileges, and those who vigorously fight to retain such privileges and to restrict rights” (Onyango 1996:13).

After initial attempts to play hide and seek with democratic forces, African leaders finally succumbed to the pressure to install multi-partyism. The manner in which the transition proceeded varied from one country to another. In fact, in an article entitled “Who is next after Mwinyi?” Gerard Loughran notes that the transition was relatively smoother in Tanzania than Kenya because of the latter’s long history of political pacifism, lack of political prisoners, less evident corruption, insignificant ethnic divisions, and enjoyment of the good will of the donors. Indeed, unlike Kenya’s Saitoti-led KANU Review Committee appointed to seek public opinion on various matters touching on the KANU administration of the country, and during whose hearings views were proffered in overwhelming support of multi-partyism—but which reported overwhelming support for the one-party system—the Nyalali Presidential Commission reported that only 20 per cent of Tanzanians wanted multi-partyism while the rest were content with one-party rule so long as the ruling party, Chama Cha Mapinduzi (CCM), was reformed. Loughran concluded that “in contrast to Kenya’s spasmodic, panicky and tense progress to political pluralism, the process in Tanzania has been revolutionary—though prompted by the same geo-





political pressures and in many quarters, no less reluctant” (*Daily Nation*, April 14, 1992:10).

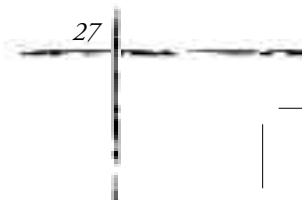
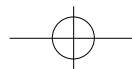
In Kenya, and indeed in most African states, the midwives in the democratisation process did not stretch the process beyond the creation of multi-partyism to establish a fully democratised society. They neither succeeded in creating strong political institutions, structures and processes supportive of democratic values, nor did they nurture a democracy-friendly culture. Meaningful democratic transition is more likely to be sustained where a broad pact on the fundamental rules of the political game precedes initial multi-party elections as in Mozambique, rather than where the making of such a pact is pursued after the multi-party elections are held as happened in Zambia, Kenya and Ethiopia. In Kenya, it was only after the flawed 1992 multi-party elections that the need for further constitutional and legal reforms dawned on the democratic forces. This resulted in the formation of the Inter-Parties Parliamentary Group (IPPG) on legal reforms whose recommendations only marked a few steps in the long journey towards full democratisation. As Mwagiru observes, “it is imperative therefore for democratisation to begin with a discussion and agreement on the game plan and its rules” (Chweya 2002:xi).

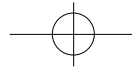
The 1992 multi-party elections in Kenya were very crucial for President Moi and the ruling party, KANU. First, since he took over in the constitutionally inherited leadership transition of 1978, President Moi had never faced an opponent in the polls. He had always retained his position through a stage-managed selection rather than elections. Secondly, the defeat of President Kenneth Kaunda in Zambia had sent a shocking signal on how vulnerable incumbent African leaders are in the face of a serious political contest. Finally, it was the first time that Moi was poised to oversee truly competitive elections to be keenly watched by the rest of the world. Any act of rigging, if that is what he needed to retain power, had to be minimal and professionally done to avoid domestic violence and retain donor confidence.

Just as Moi’s chances of retaining power tended towards nil, two significant developments occurred in the country’s political landscape, which not only spelt the opposition’s defeat but also gave Moi a sigh of relief.

First, the popular mass movement, Forum for the Restoration of Democracy (FORD), expected to sweep the impending elections, split down the middle, courtesy of the personal ambitions and ethnic polarisation of its leadership as well as the manipulation by Moi’s “invisible hand”. The struggle in FORD also appears to have been catalysed by the question of who, between Kenneth Matiba and Oginga Odinga, had played a greater role in the struggle for multi-partyism. Matiba believed that he had struggled and suffered more than anyone else and *ipso facto* deserved nothing less than the presidency. However, Odinga too, had waged a consistent battle with the KANU regime right from the 1960s. In fact, it was his decision to form another political Party in 1982 which pushed KANU into legislating for a *de jure* one party state the same year. Besides, his advanced age, brief stint as the country’s first vice-president, and his role in the formation, leadership and transformation of FORD into a political party were valuable assets in his quest for the presidency. These two irreconcilable leaders with their display of heroism must have played a crucial role in the final split of the party into FORD-Kenya led by Odinga, Paul Muite and a number of young professionals, and FORD-Asili led by Matiba and Martin Shikuku among others.

Second, there was the formation of the Democratic Party of Kenya (DP) by a group of Kikuyu elite who did not believe that Odinga (regarded then as the automatic FORD candidate) could be relied upon to defend their economic interests, given his bitter fall-out with Kenyatta in the 1960s. Most of the DP prime movers were men of means who had benefited immensely from state patronage during the Kenyatta era. Although they lost their bid to block Moi’s ascendancy to power, they continued to behave, in the words of Throup and Hornsby, “as if they had a natural right to govern”. While they played no significant role in the struggle for multi-partyism, the DP luminaries saw the renaissance of political pluralism as an opportunity to reclaim their lost economic hegemony. Indeed, they regarded Moi as having ‘stolen’ their power and used it to endanger their personal wealth. The non-Kikuyu members of the DP were mainly people who had established close links with the DP leader, Mwai Kibaki, during his tenure as the vice president, and those disillusioned with KANU and yet unsure of their potential position in the overcrowded FORD.





The attendance of the DP launch by four members of the extended Kenyatta family, including two of his sons, a nephew, and brother in law, was probably meant to send loud signals to Kikuyu land that the DP was the party that would guarantee their continued prosperity. To this end, “it was singularly appropriate that Njenga Karume, identified as Kenya’s most successful entrepreneur and representative of indigenous capital by Nicola Swainson, should be one of the DP’s leading members and its main financier. The DP, far more than the radical FORD or the clientelist KANU was the party of big business” (Throup and Hornsby 1998:98).

The run up to the 1992 elections was characterised by a lot of violence, particularly the politically instigated ethnic clashes. The spate of seemingly well planned and executed orgy of inter-ethnic violence, hitherto unknown in Kenya’s post-colonial history, appears to have been designed not only to discredit multi-partyism as a system that stirs ethnic animosity but also to displace from certain areas and thereby disenfranchise certain groups of voters unlikely to support the instigators of violence in the elections. Indeed, it has been argued that, “elections such as the 1992 balloting in Kenya reveal the rigid determination of autocratic cliques to cling to power at considerable cost to the polity. To discredit the very notion of political competition, key individuals in the inner circle of the Moi regime were believed to have fomented Rift Valley ethnic clashes that drove 350,000 people from their homes and killed 1,500” (Joseph 1999: 26).

By displacing people, the violence denied them access to their means of livelihood, especially land, thereby disrupting their economic activities. Similarly, the foreign media coverage of the violence and security situation in Kenya discouraged tourists from visiting Kenya, leading to a 40 per cent decline in the number of tourists visiting Kenya as of 1st December, 1992. All these occurrences combined with the withdrawal of donor funding to make a real squeeze on the Kenyan economy.

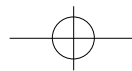
Some of the electioneering slogans adopted during the 1992 elections also had the potential of disrupting the investment environment. A leading presidential contender, Kenneth Matiba, coined the slogan, “Asians

must go”. Interpreted against the background of the Asian experience in the neighbouring Uganda under dictator Idi Amin, the slogan sent shivers down the spines of the Asian business community who are said to control about 85 per cent of the Kenyan economy. During his reign of terror, Amin ravaged the Asian business community in Uganda in apparent redress of what he perceived as unfair domination of the economy by Asian businessmen. In the circumstances, a number of Asian businessmen relocated in the run up to the 1992 elections as confirmed by a leading industrialist, Dr. Manu Chandaria in a recent interview with the *East African Standard*. These were, however, very few Asians who had the where-withal to relocate, but the majority remained hesitant to leave, or simply lacked the wherewithal to do so.

Also of economic significance, was the revelation that the government had printed more money in the run-up to the 1992 elections. In his Christmas message to Kenyans, Mr. Oginga Odinga, independent Kenya’s first Vice-President and FORD-K presidential candidate, alleged that the KANU government had pumped Shs.11 billion in new currency notes into the economy between September and December 1992. This money, which was meant to finance all sorts of election malpractices, caused inflation to spiral out of control.

Intimidation and blackmail of opposition candidates was also common. The banks issued bankruptcy threats to opposition figures who had some outstanding financial obligations or unserviced loans. On 17th November 1992, the out-going Kisumu Town M.P. Job Omino was issued with a warrant of arrest in his capacity as the Chairman of Kenya Football Federation (KFF) over a debt of Ksh. 54,195 arising from goods sold to KFF five years earlier. The following day, Omino was served with yet another notice to clear a debt of Ksh. 17 million allegedly owed to Lalji Meghji Patel & Company. The same day, the out-going Kimilili MP Elijah Mwangale, whose political feet were neither in water nor in a dry place, was served with a notice to pay Ksh. 2 million he owed to the National Bank of Kenya within 7 days or face a bankruptcy charge. The suit then fizzled out when he remained firmly in KANU.

In addition, there was widespread misuse of public resources in the cam-



paigns. Public funds were reportedly used to start projects, such as road construction, which were not meant for completion but aimed at enticing voters. In the hunger prone parts of Kenya, relief food and similar inducements were used as baits to attract votes. These corrupt practices are, however, not unique to Kenya. In fact, "in most African countries, corruption constitutes an important means by which individual wants and needs, especially in patronage-ridden personal regimes, can be satisfied" (Kpundeh 1992: 38).

Interestingly, promises of prudent management of the ailing economy were ominously missing in most campaign speeches. Very few political parties had prepared election manifestos and even where such manifestos existed, there is no evidence that they played any significant role in determining election outcomes. In fact, non-democratic variables, particularly ethnicity, played a more visible role. It is little wonder, therefore, that "the most important theoretical principle underlying most African election studies has been the consensus that African voters tend to make their electoral choices as communities rather than as individuals" (Barongo 1983:80).

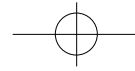
In conclusion, the transition did not bring any meaningful change, besides opening up the political space. President Moi retained his position and most of the powers and privileges he had enjoyed in the single-party era. His triumph in the 1992 elections was attributed to the fatal fragmentation of the opposition, control and misuse of massive financial resources by the ruling party, and myriad of electoral malpractices. Separation of powers remained an elusive ideal as the executive continued to dominate over both the Judiciary and the Legislature. The human rights record did not improve significantly, while the rule of law remained a pipe dream. Corruption continued unabated, while good governance remained an academic concept. In response, there was a remarkable down trend of direct foreign investment and the local investors relocated their funds waiting for improvement in the political and economic situations. Similarly, the flow of foreign capital remained slow and the little that did come shied from long-term investments. These events did not augur well for Kenya's economy, which had begun the fourth independence decade on a declining note.

THE POLITICAL ECONOMY OF THE POST-MOI TRANSITION

Background to the Transition

One of the major gains accrued from the democratic transition in Kenya, and indeed in the whole of Africa, is the provision for a limited presidential tenure. Before this transition, there was the undemocratic notion of a 'life President', which meant that leaders remained in office until death. Even those few African presidents who opted out of office before death such as Siaka Stevens of Sierra Leone, Leopold Sedar Senghor of Senegal, Felix Houphet-Boigny of Ivory Coast, Ahmadou Ahidjo of Cameroon and Julius Nyerere of Tanzania, did so for personal reasons, although this could have included an accurate assessment of the domestic political mood. The extent to which the dogma of 'life president' was entrenched in Africa is reflected in the claim that "during presidential campaigns in some rural areas of Benin, the people asked why they have to elect a new president when the old one is still alive" (Kpundeh 1992:16).

The 1991 constitutional changes in Kenya which re-introduced multi-partyism also provided for a limited presidential tenure of two-five year terms. By then, the incumbent president, Moi, had already served longer than the term specified in the new constitutional requirements, having been in office since 1978. What ensued was a fierce court battle, with the opposition insisting that Moi was not eligible to contest the 1992 elections. In the end, Moi not only won the court battles but went ahead to win the elections as well. This tussle rekindled memories of the 1966 KANU-KPU stand off. After the launch of KPU in 1966, many sitting KANU MPs crossed over to KPU, even from areas hitherto regarded as strongholds of President Kenyatta's support. To put a halt to the mass exodus to the new party, KANU introduced a constitutional amendment providing that any MP who deserts the party that had sponsored him during the general election automatically loses his seat, although such an MP would be free to contest the ensuing by-elections on his new party ticket. KANU intended this amendment to have the effect that all KPU MPs, including those who had defected before the amendment, should lose their seats. KPU on the other hand insisted that the new law only applied to those who defected after it was enacted. In the end the KPU



interpretation carried the day but KANU later sneaked in yet another amendment backdating the previous one, forcing the KPU MPs to seek fresh mandate in a by-election.

Having won the 1992 and 1997 elections, Moi's tenure had been stretched to the limit and he was hence constitutionally barred from seeking re-election in the year 2002. However, as the retirement year drew nearer, Moi began to send mixed signals as to whether he would actually step down or would engineer constitutional change to allow him to go for a third term in office. Three factors made the latter option more likely. First, Moi never reprimanded his lieutenants in KANU who held several political rallies across the country, drumming up support for an extension of his rule. Second, he initially took a very keen interest in the constitutional review process that was going on at the time, fuelling speculations that he wanted to manipulate the process favourably to provide for a third presidential term. Indeed, it is no accident that his later confirmation that he would not seek an extension of his term coincided with his public declaration of loss of interest in the review process. Third, for a long time, Moi deliberately blocked the emergence of any obvious successor from within his own party, KANU. The vice president and heir designate Prof. George Saitoti was confined to his own Kajiado district and never allowed to traverse the country and introduce himself to the rural folk. To all intents and purposes, Saitoti was Moi's principal assistant who never had the opportunity to assist him. Saitoti's situation compares well with the situation in the run-up to the post-Chiluba transition in Zambia in 2001, where Chiluba blocked the emergence of a successor from within his Movement for Multi-party Democracy (MMD) party, outlawed debate on his succession and encouraged supporters to discuss the merits of extending his term. Like Chiluba, Moi finally confirmed that he was not seeking an extension of his term.

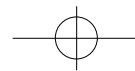
Managing Transition the Moi Way

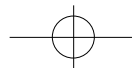
The post-Moi transition was largely expected to transcend mere personality change; it was expected to be a transition to a more accountable, transparent and participatory governance structures and resource allocation systems that would enhance wealth creation and equitable distribu-

tion. In an attempt to leave behind a strong party and ensure that his chosen successor triumphed in the 2002 elections, Moi courted the opposition party, National Development Party (NDP) into a merger with KANU. In the light of the impending transition, the merger was variously interpreted. First, it was viewed by some as a final confirmation that Moi had failed to identify a suitable successor from within KANU, and had therefore settled on the NDP leader, Raila Odinga, an aggressive and practical politician of no mean repute. Second, Moi could have been driven by the fear of retribution for the excesses of his rule in case KANU lost the elections. In this regard, he considered Raila as a potential troublemaker who needed to be brought on board, even if not handed power to. Third, Moi needed to secure the vast NDP constituency to increase KANU's voter-strength. For whatever reason, the merger was sealed on 18th March 2002, in a groundbreaking ceremony at the Moi Sports Complex, Kasarani.

After the merger, Moi was faced with the daunting task of identifying, or if already identified, naming his successor. In what appeared to have been a well-rehearsed chorus, the same leaders who had been agitating for the extension of Moi's presidential term began asking him to name a successor. This was meant to create the impression, when he eventually named his successor, that he was merely responding to a popular public request. Next, Moi's ears and eyes in KANU organised a series of political Harambees across the country, where the name of Uhuru Kenyatta, son of Kenya's first President, was frequently being floated as Moi's preferred heir. Nobody appeared to take note of the 41 year old Kenyatta, who was widely viewed as a political non-entity sneaked into parliament and then into the cabinet after failing to win the Gatundu South parliamentary seat in 1997. However, it turned out that the die had already been cast.

When Moi realised that the vanguard role assigned to his lieutenants to push Kenyatta to the political limelight was not achieving much on the ground, he stepped in, declared his support and began campaigning for Kenyatta. What followed this was a series of events in quick succession, culminating into the split of the party. Initially five key party functionaries declared interest in being nominated KANU presidential can-





didate, and having read Moi's displeasure with their move, coalesced into the Rainbow Alliance to push for democratic party nominations, accusing Moi of imposing an unpopular candidate on the party. Two of these candidates for nomination, Katana Ngala and Musalia Mudavadi, fell prey to Moi's machinations, decamped from the Rainbow Alliance, dropped their candidature and threw their weight behind Uhuru Kenyatta. However, Raila Odinga, Prof. George Saitoti and Kalonzo Musyoka soldiered on, at the risk of having to pay a very heavy price. Saitoti lost his VP post as did cabinet minister Joseph Kamotho and a host of assistant ministers allied to the Rainbow Alliance. This did not cow the Rainbow members who, bolstered by massive public support, became even more defiant, daring the president to sack all of them. This unprecedented open defiance to the party chairman whose word had always remained law is credited to Raila Odinga's intoxicating influence and his aggressive and uncompromising pursuit of what he believes to be right. Indeed, it is highly unlikely that without the KANU-NDP merger anybody from within KANU would have questioned Moi's choice.

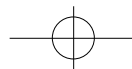
Meanwhile, the search for opposition unity led to the formation of two opposition fronts. First, there was the People's Coalition which brought together Simeon Nyachae's FORD-P, Paul Muite's SAFINA and Kennedy Kiliku's Labour Party of Kenya (LPK). The coalition, which was largely regarded to be inconsequential named Nyachae as its presidential candidate. Second, there was the more promising National Alliance Party of Kenya (NAK) which brought together more than ten political parties, fronted by Mwai Kibaki of DP, Michael Kijana Wamalwa of FORD-K and Charity Ngilu of the National Party of Kenya (NPK). NAK also identified its election line-up, with Kibaki as the Presidential flag-bearer and Wamalwa and Ngilu as Vice President and Prime Minister designates respectively.

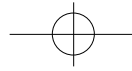
The split in KANU became imminent when Rainbow members refused to present their nomination papers, announced their boycott of the party nomination exercise, and resigned from the government on the eve of the nominations. As KANU converged at Kasarani to endorse Uhuru Kenyatta on the 14th October 2002, the Rainbow Alliance transformed itself into a political party under the name Liberal Democratic Party

(LDP) at a mammoth public rally in Uhuru Park. During the same rally, attended by all key opposition figures, Raila announced on behalf of the LDP that the party had linked up with the People's Coalition to form the Rainbow Coalition. In a clearly pre-arranged sequence, the Rainbow Coalition and the NAK immediately coalesced into an umbrella opposition electoral platform, National Rainbow Coalition (NARC). After a series of political horse-trading, NARC endorsed Kibaki as its presidential candidate, prompting Nyachae and his People's Coalition to pull out of NARC. Nyachae and fellow opposition lone wolves, James Orendo of the Social Democratic Party (SDP) and Waweru Ng'ethe of UMMA Party, opted to seek the presidency on their own parties' tickets.

In preferring Uhuru Kenyatta, Moi appealed to generational attributes emphasizing the need to infuse the vibrancy of youth into national leadership. Examples abound all over the world of youthful leaders. In Africa alone, Blaise Compaore took over the reins of leadership in Burkina Faso in 1987 at the age of 36; Paul Kagame of Rwanda assumed power in 2000 at the age of 43; while Joseph Kabila of DRC succeeded his slain father in 2001 at the age of 32 years. In Sierra Leone, Captain Valentine Strasser not only replaced Major General Joseph Momoh at the age of 27 but also headed the National Provisional Ruling Council (NPRC), whose inner circle comprised of youthful officers in their late twenties and early thirties. Strasser was also ousted in a peaceful internal coup on January 16th 1996 and replaced by Brigadier Julius Maada Bio aged 32 years. Despite all this, leadership is more than just youthfulness. There are many youthful leaders who have messed up their countries. In the 1989 Brazilian elections, for example, voters were captivated by the youthful appeal of Fernando Collor de Mello whom they thought would bring creative solutions to the Brazilian problems and address the rising inflation. However, Mello proved to be a great disappointment and was impeached by parliament in September 1992. Ironically, "his nemesis proved to be the spectre he had campaigned against in 1989: corruption" (Skidmore 1977:187).

Opponents of President Moi's choice pointed at two crucial issues. First, they regarded it as an attempt to introduce dynasties in Kenya. Already, dynasties existed in Kenyan parliamentary representation and Moi





seemed to be introducing it into presidential succession. A good number of MPs in the eighth parliament, as in the previous ones, owed their seats to their 'royal families'. However, since fire begets ash, it is wrong to assume that the son of a great leader would always be a great leader; in other words, Kenyatta the youth, may not be as great as Kenyatta the *Mzee*. Critics of the Kenyatta regime are even doubtful if he was a great leader at all. In his entire career, one finds only three occasions when Kenyatta wore the hat of a great leader—in 1961 when he was released from detention; in 1963 when he led Kenya to independence; and in 1978 when he died. In fact, "the death of Jomo Kenyatta on August 22, 1978, marked a turning point in Kenyan history. There followed an outpouring of emotion throughout the country, eulogies from around the world, and a great display of funereal ceremony. Personal tributes, hymns and Christian pronouncements were beamed by radio to all corners of Kenya. The corruption and heavy-handed rule that had marred Kenyatta's last years seemed forgotten. In death he was again the Father of the Nation, the *Mzee*, the honoured leader" (Miller and Yeager 1974:58).

The other concern raised by the opponents of the Kenyatta-for-President campaign was that Kenyatta rule could be Moi-rule from the back-stage. There have been very powerful back-stage rulers such as Fulgencio Batista of Cuba who ruled directly and from behind the scenes for a record quarter century until he was replaced by Fidel Castro in 1959. Between 1934 and 1940 Batista ruled through puppet presidents. He ruled directly between 1940 and 1944 and resumed his behind-the-scene role throughout the reigns of his protégés, Grau San Martin (1944-1948) and Carlos Prio Socorras (1948-1952) and took direct charge again in 1952 in a coup against Socorras who was trying to become his own man. (Skidmore, 1997)

Other efforts at influencing the political scene from behind the curtains have not been very successful. Having led Cameroon since independence in 1958, President Ahmadou Ahidjo resigned on 4th November 1982 and handed over power to the constitutional heir, Prime Minister Paul Biya. Ahidjo retained leadership of the ruling party, Cameroon National Union (CNU), just as Moi intended to remain in control of KANU.

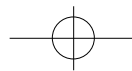
Ahidjo's move like Moi's was viewed as an attempt to limit the power of the new president, deprive him of control of the party, and leave open the nominations for the candidate for the subsequent presidential elections. The transition was exemplary and smooth until June 1983 when Biya dismissed four barons of the old regime, causing rapture between him and his predecessor. In August 1983, Biya alleged a plot to topple his government and from then moved with determination to become his own man. First, he replaced Ahidjo as the party leader in September 1983 and ordered early presidential elections in January 1984. Next, Ahidjo was charged with treason, tried and sentenced to death, before being pardoned by Biya.

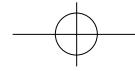
In Sierra Leone, Siaka Stephens handed over power in 1985 to his chosen heir, Major General Joseph Momoh whose only asset was sycophancy and fawning loyalty to him. Unlike Biya, Momoh opted to recycle the old barons of the previous regime, as Stephens retained a powerful behind-the-scenes role. However, Stephens later became disillusioned with Momoh, hatched a plot to assassinate him but was arrested and placed under house arrest when the plot was unearthed. Stephens died after a few months of house arrest, having been estranged from his family. The lesson here is that preferred heirs sometimes turn adversaries once in power.

Meanwhile, as the election campaigns progressed, Kibaki got involved in a serious road accident which kept him out of the rest of the campaign schedule. However, the other NARC functionaries pushed on with the party's campaign agenda which included a pledge for free primary education, commitment to complete the constitutional review process, zero tolerance of corruption, creation of 0.5 million jobs annually, and reviving the collapsed industries and infrastructure. At the end of the grueling campaigns, Kibaki led NARC to a historic election victory and immediately embarked on implementing the election pledges.

Transition, Economic Prudence and Political Expedience

One of the issues, which was expected to characterise the transitional political economy, is political violence which we define as acts of aggression (physical or otherwise) directed towards those perceived to pursue





opposing political persuasions. Although violence has been witnessed in the past elections in Kenya, the scale and magnitude was expected to be higher, given the increasingly militant nature of the civilian militia groups like *Mungiki*, *Kamjesh*, *Taliban*, *Jeshi la Mzee* and *Jeshi la Kingole*. Each of these militia groups had strong links with prominent politicians and political parties and, therefore, could not be ruled out in strategic political equations.

Of these civilian militias, the *Mungiki* posed the greatest threat of large-scale political violence in the transition era. This is not only because of their relative ubiquity and seemingly complex network, but also due to their manner of operation which remained strikingly a throw back to the Hobbesian state of nature. In fact, behind their thinly veiled religious façade, the group vigorously pursues an economic and political agenda. Obviously, their incessant struggles to control *matatu* routes in major urban centres was driven by the pursuit of collective economic empowerment. It would appear that the group's long-term plan was to generate funds to finance their candidates in the elections and to sponsor political violence against their opponents. Once they had moved sufficiently close to the corridors of power, the group hoped to secure overt or covert state protection as they embarked on a more fundamentalist crusade for the revival of obsolete traditional Kikuyu religious ideals and practices.

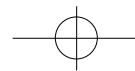
The recalcitrance of such violent groups could not be ignored since they have wreaked havoc in other parts of the continent. During the 1983 Congo-Brazzaville elections, for example, ethnic violence erupted between armed civilian factions, and raged on until the leaders who had fuelled it resorted to more decent forms of rivalry. As Crawford Young observes, "the ethnic youth militias, bearing the sinister labels of 'Zulus', 'Ninjas' and 'Cobras' terrorized Brazzaville for several months in 1983 and provoked large-scale ethnic cleansing of neighborhoods in the capital, operating under the patronage of President Pascal Lissouba, Brazzaville Mayor Benard Kolelas, and former ruler Denis Sassou-Nguesso, respectively" (Joseph 1999:29).

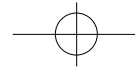
However, these fears of violence were disconfirmed as the elections proceeded peacefully with very isolated cases of violence that had no signif-

icant impact on the economy. There are two reasons for the relatively peaceful transitional elections. First, the presidential race which was expected to spin the wheel of political violence was de-ethnicised as it narrowed down to a Kibaki-Kenyatta contest. The other three candidates, Simeon Nyachae (FORD-P), James Orengo (SDP) and Waweru Ng'ethe (UMMA) defied the public mood which was for opposition unity, and predictably performed dismally in the polls. In fact, the latter two failed to secure even their parliamentary seats. For most Kikuyus, the choice between Kibaki and Kenyatta (both Kikuyus) was a matter of preference rather than a question of life and death. The other communities supporting either of the candidates were not as fanatical in their support as they would have been if one of their own were a serious candidate.

Secondly, the militant groups remained largely docile for most of the election period. Again, the public mood ostracized those who associated with the militia groups, forcing their patrons to keep a safe distance. For example, a demonstration by the *Mungiki* in support of the KANU presidential candidate, Uhuru Kenyatta, was greeted with public furore, forcing him to denounce the group. However, where the patron's political survival was under serious threat, allied groups used violence to bail him out. During the NARC nominations in Westlands, *Jeshi la Mzee*, allied to Fred Gumo, stopped the nominations, confiscated election materials and beat up supporters of Gumo's perennial rival, Betty Njeri Tett. As a result, no party primaries were held. Instead, NARC declared Gumo its parliamentary candidate and granted Tett an automatic nomination to parliament.

Although the election proceeded peacefully, it generated a lot of fear, anxiety and uncertainties about the post-election scenario. There was every indication that neither KANU nor the opposition alliance would easily accept election defeat. The general feeling was that if KANU emerged victorious, then the results were likely to be interpreted as fraudulent and this could spark violent unrest as the opposition sought to make the country ungovernable, to press for re-count or re-run as happened in Cameroon and Senegal. In the October 1992 presidential elections in Cameroon, leading opposition candidate, John Fru Ndi, claimed





that he had been rigged out of victory. This prompted President Paul Biya to put Ndi under house arrest and declare a state of emergency. What followed was a series of violent mass protests as the opposition called for fresh presidential elections. Similarly, during the February 1988 presidential elections in Senegal, President Abdou Diouf defeated Abdoulaye Wade, the same man he had trounced in similar polls in 1983. The announcement of the results which gave Diouf 73.7 per cent against Wade's 25.8 per cent sparked unprecedented violence, leading to the declaration of a state of emergency. Similar outcomes were regarded as very likely events after the 2002 polls.

In the event that the opposition won, KANU was largely expected to be reluctant to hand over power to the opposition. One of KANU's options would have been to nullify the results, as has been done in many African countries. When the preliminary results of the October 1992 presidential polls in Central African Republic indicated that the incumbent Andre Kolingba was running fourth in a field of five candidates, he annulled the elections before full results were released. However, due to domestic and external pressures, particularly the French withdrawal of military and economic assistance, Kolingba organised fresh polls in August 1993, lost to Ange Felix Patasse who had also won the 1992 poll, and handed over power to the victor on October 22, 1993. Similarly, in the December 1993 elections in Guinea, the Supreme Court invalidated results from the prefectures where the leading opposition candidate had won overwhelmingly, fuelling claims that President Lansana Conte had fraudulently retained power.

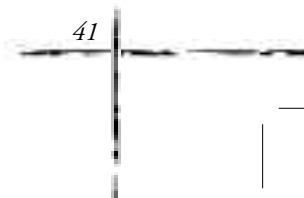
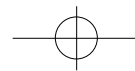
The second option open to KANU under the circumstances would have been to disrupt the election process itself, if it sensed defeat. During the military-supervised transitional presidential elections of March 1996 in Sierra Leone, frantic efforts were made to disrupt the polling process. On the actual voting day, shooting erupted in the Wilberforce Barracks, ostensibly to scare off voters. The voters however stayed put and elections went on giving Ahmed Tejjan Kabba a 51-41 per cent victory over closest challenger, John Karefa Smart.

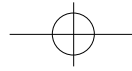
The third option that KANU had in case it lost the elections, and was

unwilling to hand over to the opposition, was to instigate a military take-over either to restore Moi or to install a military government. It is highly unlikely that the Kenyan military is sufficiently united to wholly collude in such a plot. In fact, having been drawn from various parts of the country, the military is a small mirror of the large national society and therefore can be assumed to be as divided as the society itself. Consequently, an effort to force the military into politics would create resentments and divisions among its ranks, which could lead to major civil strife. However, there were also possibilities that the military could intervene on its own if KANU had won and the ensuing violence went out of hand, or if the opposition won and the military anticipated that the prudent economic policies, coupled with monetary and fiscal discipline promised by the opposition, would affect some of their privileges.

This fear of the unknown combined with the depressed economy, dilapidated infrastructure and high production costs, made some investors to relocate to the safer havens across the border. In September 2002, the *East African Standard* newspaper interviewed several Asian business moguls. From the interviews, it emerged that a few Asian businessmen had already relocated or were about to do so. In fact, one of the business tycoons, a Mr. Raj, confirmed that he was seeking to sell his business concern and emigrate to the U.K. due to the unperforming economy, political uncertainties and the fear that in the event of a breakdown in law and order, Asians were likely to be targets of disenchantment and violence. Rajinder Puri of Gilani Supermarkets did not make relocation commitments but was very critical of the prevailing political and economic situation, citing corruption, bad governance and escalating taxes as the factors that could make him easily relocate.

However, it was clear that a number of businessmen anticipated a smooth transition and a quick economic recovery thereafter, and were therefore not intending to relocate. They hinged their optimism on past elections, noting that Kenya is a country of peaceful and tolerant people. To display his confidence, Dr. Manu Chandaria, a leading industrialist, confirmed that he had just pumped Ksh.240 million into a business concern at Mariakani in the coast, adding that "if I was unduly worried about the looming political transition in the country, I would not have





put that kind of money into a business venture" (*East African*, September 23, 2002).

Furthermore, the money market reports and the stock exchange indices did not give any clue of investor mass exodus in the run up to the elections. Such an exodus would normally be accompanied by capital flight, which would inevitably destabilise exchange rates by raising the demand for the dollar or other foreign currencies, thereby depreciating the shilling. The fact that the Kenya shilling maintained its value against the dollar, at an exchange rate of approximately Ksh. 79 for the dollar, and remained stable relative to other major currencies throughout the transition period confirms that there were no alarming purchases of the dollar or other currencies that can be attributed to business tycoons seeking to leave due to uncertainties of the transition.

While most investors may not have relocated, no new significant investments were recorded during the transition period. Most investors are said to have withheld investment funds and adopted a wait-and-see attitude as political events unfolded. Relatedly, the performance of the tourism sector continued nose-diving during the transition period, not only because of fears of violence, but also due to the terrorist attacks on a tourist resort near Mombasa and a simultaneous attempt by the same terrorist group to shoot down a passenger plane carrying mainly tourists from the Kenyan coast.

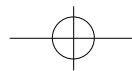
The transitional political economy was also characterised by relatively high financial commitments by candidates and political parties. While some of these expenditures boosted election-related businesses, they also promoted corruption, voter manipulation and bribery. As elections drew nearer, financial and material donations to churches, schools and instantly created women's and youth groups increased. Work also started on many new and stalled projects, not necessarily to complete them but to manipulate voter psychology. As expected, the ruling party took a lead in this direction, spending from both public coffers and from other sources an estimated Ksh. 14 billion to finance campaigns. For example, the Kipipiri constituency electrification project which was started during a by-election in 1995 and stalled soon after KANU lost, was relaunched 20

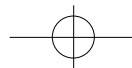
days to the 2002 polls. The electorate was evidently not amused by this insult to their intelligence as they vividly recalled how electric poles which had been erected and were ready for the installation of the power lines were removed from the area after the results of the 1995 by-elections. It is not surprising, therefore, that they still voted overwhelmingly against KANU despite this gesture.

However, it is in Kilome constituency where the largest expenditure and the most extravagant campaign pledges were made. The Kilome KANU parliamentary candidate and business magnate, John Harun Mwau, declared that he did not need a salary and therefore if elected would fully commit his pay to developing the area. To demonstrate his resolve, he facilitated the electrification of Kasikeu market and initiated work on the Salama-Enzae-Mukaa and the Kingwani-Mangala water projects. This was besides direct financial and material inducement of voters. In addition, KANU launched a 10.5 million rural electrification project in the constituency in the run-up to the elections. Although most of these gestures were made within the last week to the elections, the ruling party and its candidate performed disastrously in the polls.

The most compelling question, for which no simple answers may be forthcoming, is how the ruling party raised such colossal sums of money. One immediate source that comes to mind is the politically, connected businesses. Having enjoyed state-protected tax evasion and exemption, as well as transfer pricing among other economic benefits of high level corruption, these businesses view the ruling party as a friend in need and are likely to have supported their comrade-in-arms. The involvement of politically-connected businesses in the electoral process and the manifestation of election induced fiscal indiscipline have been reported in many other African states. A fiscal study of Gambia in the 1990s, for example, estimated losses associated with tax evasion at 70 per cent of the total public revenue, noting that only a fifth of all registered companies filed income tax returns. During the same period, tax frauds and various exemptions granted by the Cameroon government oscillated between 18 per cent and 22 per cent of the GDP (Bratton and Walle 1997).

In order to secure campaign funds, the KANU regime sacrificed eco-





conomic rectitude at the altar of political expediency. A few weeks before the elections, the KANU government bizarrely released Ksh. 4.5 billion in special bonds from the treasury to well-connected contractors to settle questionable pending bills. In the first place, the timing of the move just when the ruling party needed money for the campaigns, was no mere coincidence. Secondly, the hurried manner in which the massive payments were processed and made spoke volumes, given that some of the claims had been in government books for over ten years. In any case, the government enjoys sovereign immunity against civil debts claims from local contractors. Thirdly, although the government had pledged to appoint external consultants and auditors to verify the stock of pending bills in its books, no independent verification of the bills was done before the bonds were released. Even the Consultancy Implementation Committee (CIC), which undertakes internal audits of the pending stock of government bills was kept out of the picture as the payments were processed by a small group of carefully selected civil servants. The deal became the subject of inquiry by the new NARC government following revelations that most of these bills were either fictitious or inflated (*Daily Nation* December 17, 2002).

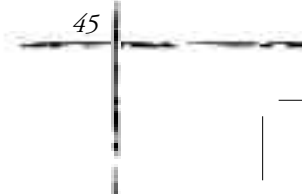
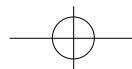
Similarly, just four days to the elections, the KANU government released yet another Ksh. 105 million as payment to Carpentocraft Building Contractors for the construction of Migori district headquarters whose total cost they estimated at Ksh. 160 million. It was later discovered that the cost had been seriously inflated, forcing the Central Bank of Kenya (CBK) to appoint independent experts to ascertain the real value of the work. Relatedly, the government decided to dispose of government houses below their market value to well-connected individuals in the run-up to the elections. The NARC luminaries vehemently objected to the move and warned the buyers that the houses would be repossessed if NARC won the elections. Soon after the elections, the NARC government lived up to their threat and resolved to repossess all government houses which KANU had sold cheaply to obtain quick money for the campaigns.

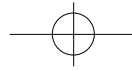
Two other attempts to rip off state corporations failed. First, the government sought to sell the Reinsurance Corporation far below the market price. The deal was nipped in the bud by two MPs, Prof. Peter Anyang'

Nyong'o and Musikari Kombo, who were later appointed to the ministry of Planning and National Development by the NARC government as minister and assistant minister respectively. Secondly, the KANU government proposed to streamline the Agricultural Finance Corporation (AFC), and in the process write off the Ksh. 9 billion debt owed to it. The timing of this move, which came shortly before the dissolution of parliament, and the fact that most of the personalities heavily indebted to AFC are people of means who are able to repay the loans, also sent out political shock waves.

The other source of campaign money for the ruling party appears to have been the inflationary option of printing additional money. Throughout the campaign period, there were reports of fake currency notes circulating in different parts of the country. While the CBK denied knowledge of the existence of the fake money, the FORD-P presidential candidate, Simeon Nyachae, alleged that the government had sanctioned the printing of money. It would appear that the government opted to print fake notes because they can be quickly eased out of circulation after the polls to arrest any inflationary effects. After all, evidence supports the claim that most African governments often choose the populist inflationary path of printing money whenever they are faced with huge budget deficits or when anticipating huge expenditures. In March 1990, the Sierra Leone finance minister reported that in the first half of the fiscal year, the government had already spent 65 per cent of the budgeted annual expenditure on fictitious contracts, procurements of unbudgeted goods, overpricing of the goods purchased by the public sector, payment for non-delivered goods, and excessive overseas trips by government officials. The central bank had no option but to print money equivalent to 20 per cent of the money stock to finance the overspending, thereby exacerbating the already high inflation rates. Later it emerged that the government had actually lost 24 per cent of budget revenue in the same period through tax evasion.

Although the opposition could not compete with the relative fiscal might of the ruling party, they did not remain completely out of the money game. One of the possible sources of funding for serious opposition parties, especially NARC, was expected to be the Kenyan community abroad.





Indeed, several weeks before the elections, NARC leaders, Mwai Kibaki, Wamalwa Kijana and Raila Odinga separately toured several developed countries including the U.S. Britain, Germany and the Scandinavian countries, ostensibly to drum up support for the new party. It is understood that they used this opportunity to fund-raise for the party from the Kenyan community abroad and from an assortment of friendly and supportive institutions, organisations, and individuals.

On the domestic front, it was largely expected that the opposition would receive support from prominent businessmen who were dissatisfied with the prevailing economic regime. However, this support must have been very limited since business moguls who had bankrolled the opposition in the previous elections like gemstone dealer Johnstone Muthama (allied to Charity Ngilu of NARC) and Kiambu business tycoon Njenga Karume (allied to Mwai Kibaki) trooped back to KANU. However, domestic private business has played a significant role in elections elsewhere in the continent. In Cameroon for example, the Bamileke businessmen who had been purposely excluded from profitable rent-seeking opportunities by President Biya provided the bulk of financial support for the opposition. A similar situation in Ghana in 1993 forced President Jerry Rawlings to implore his supporters and the general public not to buy products from some local private businesses since they were using their profits to finance the opposition parties. The situation was even more intricate in Niger, where prominent Hausa business moguls found themselves in a dilemma and therefore hedged their bets by providing discreet support to each of the candidates in the February 1993 presidential elections.

CONCLUSION

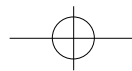
Although Kenya has undergone three other transitions in the past, the post-Moi transition foots the bill as the most crucial in the country's history. In the Decolonisation transition, Kenyans were united behind the African nationalists as they collectively questioned the logic behind foreign domination, exploitation, oppression and misrule over them in their own land. The struggle for change was not driven by any genuine dem-

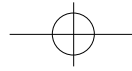
ocratic aspirations but was based on the philosophy of "Africa for Africans". The underlying assumption of this philosophy was that an Africa led by Africans would generate and distribute material wealth for all and sundry. The Decolonisation transition was generally well managed by the colonialists.

The constitutionally-inherited leadership transition was also unique in its own right. It was the first transition during which the baton of leadership was being passed from one African leader, albeit dead, to another. It was undertaken within the framework of a *de facto* one-party system and, true to the one-party tradition, elections played its usual symbolic role in determining Kenyatta's successor. The initial pull and push that characterised the pre-succession period notwithstanding, it was an equally swift and smooth change of State House tenants.

The Democratic transition on the other hand was supposedly based on the need for institutional and structural transformation and re-organisation of the instruments of state power. It was engineered by both domestic and external factors and was only reluctantly accommodated by the Kenyan leadership. The process did not go full length as it was also premised on the wrong philosophy of "Moi must go", which implied mere change of personalities rather than institutions, structures and processes. It was characterised by violence, intimidation, blackmail, corruption, bribery, misuse of public resources and all kinds of economic malaise and gambles, including printing of money by the government to finance election irregularities. The transition merely introduced democratic principles but never nurtured them to full maturity. In the end, Moi won the 1992 elections and the subsequent one in 1997.

The post-Moi transition had a number of interesting dimensions. First, the elusive opposition unity was finally attained, with the creation of NARC. Ironically, it was the two and a half month old NARC which handed the 42 year old KANU its first election defeat since the party's formation. Secondly, expectations of violent elections and post-election chaos luckily were not fulfilled as the elections proceeded peacefully, with KANU smoothly handing over power to NARC. Thirdly, although the anticipated investor mass exodus never happened, a few investors actual-

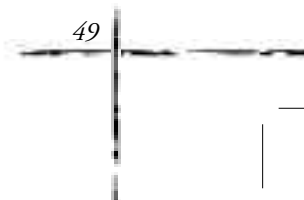
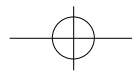


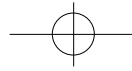


ly relocated. The majority remained but withheld investment funds as they waited for the political dust to settle and the business environment to improve. Fourth, the ruling party abandoned economic and fiscal discipline for costly economic gambles aimed at securing campaign funds. Fifth, the transitional elections also witnessed relatively high expenditures, which boosted election-related businesses while at the same time financing election malpractices like corruption and voter manipulation. Finally, the opposition's domestic sources of funds decreased as leading election financiers gravitated towards KANU. Nonetheless, the opposition sourced external funds especially from the Kenyan community abroad. The NARC government took off with a house cleaning exercise aimed at eradicating corruption and other economic messes that formed a large part of the KANU legacy.

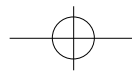
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2

THE RISE AND FALL OF THE AUTOCRATIC STATE IN KENYA

C. Odhiambo-Mbai

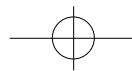
INTRODUCTION

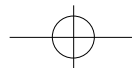
From the mid-1960s to the late 1980s, autocracy or personal rule became a common feature in the states of sub-Saharan Africa. This style of governance has been the single major cause of bad governance in the region. And bad governance has largely been responsible for the general deterioration in the efficient delivery of public services and the decline of economies in the majority of sub-Saharan African countries.

In the case of Kenya, the emergence of autocracy or personal rule can be traced to the mid-1960s when the first independent government caused the dissolution of the only existing opposition political party, and systematically began to amend the original constitution that had carried the promise of the establishment of a liberal democratic state in the country. By the early 1970s, the ruling elite had managed to firmly establish an autocratic state in Kenya.

Throughout the 1970s and 1980s personal rule by Jomo Kenyatta and his successor Daniel arap Moi promoted repression, abuses of human rights, ethnicity, nepotism, patronage and widespread corruption. These factors led to the beginning of the consistent decline of the economy from 1973, and the general deterioration in the efficient delivery of public services in the country that have persisted to date.

In the late 1980s, domestic opposition groups, supported by the international community successfully put pressure on president Moi to open





up the country's political space. Thus, in December 1991, the government approved the restoration of multiparty democracy. And in December 1992, general elections involving more than one political party were held in the country for the first time since the mini-elections of June 1966.

However, despite the re-introduction of multipartyism and the subsequent expansion of the political space, Moi continued to govern the country like a de-facto autocrat. In short, since the restoration of multipartyism in 1991, Kenya has acquired the curious identity of an autocratic multiparty state.

In July 2002, a group of dissidents within the ruling party, Kenya African National Union (KANU), rebelled against President Moi's attempts to impose his own appointed successor on the Party and the country. The rebellion by this group of dissidents soon engulfed the country and eventually resulted in the formation of an umbrella opposition political party called National Rainbow Coalition (NARC). In the December 27, 2002 general elections, NARC overwhelmingly defeated KANU and Moi's preferred presidential candidate, Uhuru Kenyatta.

Meanwhile, since the mid-2001, Kenyans have been involved in the comprehensive review of the country's constitution. The draft of the reviewed constitution that was released in September, 2002 has removed all the provisions in the current Constitution that made it possible for autocracy to flourish. At the same time, the draft has incorporated a number of provisions aimed at enhancing liberal democracy in the country.

The purposes of this paper are therefore two-fold: First, to trace the origins of autocracy or personal rule in Kenya. Second, to evaluate whether the defeat of KANU and Moi's preferred successor actually marks the fall or end of autocracy in the country.

AUTOCRACY OR PERSONAL RULE: THE CONCEPTUAL AND THEORETICAL FRAMEWORK FOR ANALYSIS

According to Elone Nwabuzor and Martha Mwellla (1985: 84) an autocratic state is usually characterized by the following attributes: firstly, the

lack of popular participation by the citizens in governance; second, prevalence of ineffective political party politics; third, the lack of a well articulated ideology; fourth, the use of force or coercion in order to enforce political obedience; fifth, little institutionalization of governance; and, finally, personal rule.

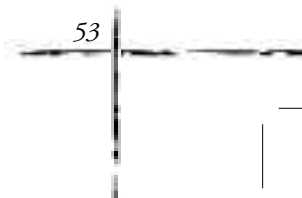
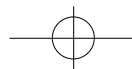
Personal rule is an essential element of autocracy. According to Robert Jackson and Carl Rosberg (1984), "personal rule is a dynamic world of political will and activity that is shaped less by institutions or impersonal social forces than by personal authorities and power; it is a world, therefore, of uncertainty, suspicion, rumour, agitation, intrigue, and sometimes fear, as well as of stratagem, diplomacy, conspiracy, dependency, reward and threat". Jackson and Rosberg (Ibid.) further observe that "personal rule is a distinctive type of political system in which the rivalries and struggles of powerful and willful men, rather than impersonal institutions, ideologies, public policies, or class interest, are fundamental in shaping political life".

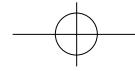
In sub-Saharan African countries, autocracy or personal rule has generally manifested itself through the following practices:

Political conspiracy This is a situation whereby "individuals" usually resort to conspiratorial politics either when they are denied the opportunities to participate in the political process or when they consider that the existing political process is grossly unfair. This factor has been the major cause of widespread coups d'etat and rebel movements in the continent.

Factional politics. This is the practice of jockeying and manoeuvring by different factions of the elite in order to influence a ruler and to increase the faction's political advantage or security in a regime. This is a non-violent approach to the control of state power by a political faction in a regime.

Patron-client relationship. This practice involves the establishment of a chain of patron-client ties extending usually from the centre of a personalized regime, i.e. from the ruler to his lieutenants, clients, and other followers, and through them to their followers upto to the local levels. The rationale for the establishment of such patron-





client relationships is as a rule ensuring access to rewards by the patron(s) upon the fulfilment of certain (political) obligations by the client. This is not simply reflected in practices whereby public officials demand or accept bribes in order to dispense public services; instead, it involves a political culture in which the ruler and his close counterparts indulge in and promote widespread corrupt practices in order to meet their reward obligation to clients in order to sustain the system.

Political purges and rehabilitation. This is a practice whereby those who fall out of favour with the ruler are disciplined by being excluded from participating in the political process. They may fall out of favour for failing or refusing to meet certain obligations or they may be excluded merely for political expediency.

Succession manoeuvres. This is a situation whereby rulers struggle to maintain their position in transitional situations or pass leadership to a designated successor. The consequence of the practice is the overt and covert struggle for power by the contending forces (Jackson and Rosberg, *Ibid.*; Sandbrook 1985).

For autocracy or personal rule to emerge and consolidate itself in sub-Saharan Africa it had to undermine the independence constitutions upon which the former African colonies gained their independence. Generally African independence constitutions promised the establishment of liberal democratic states. Initially, the emergence of governments controlled by 'big men' was applauded and justified on the basis of the need to transform former colonies into nation states. The building of such nation states, it was argued, required the leadership of a modernizing elite under a strong leader, a benign dictator. The common notion at the time was that a regime run by a benign dictator, supported by a clique of elites, would be capable of transforming former African colonies into viable nation-states and bringing about economic development.

During the first decade of independence, this argument gained wide support due to the impressive economic performance that was witnessed in a number of sub-Saharan African countries (Dwivedi 1982). However, during the second decade of independence, upto the early 1980s, when African economies performed consistently poorly, it dawned on even the

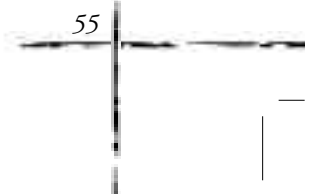
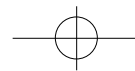
most ardent supporters of autocracy that the system was a failure; it was the main cause of the consistent decline of economic growth and deterioration of efficient delivery of public services in the continent.

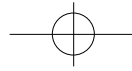
But the reason why the West, and more particularly the donor community, turned a blind eye on the excesses of personal rule regimes in sub-Saharan Africa, and in some instances even propped some of them, was because they wanted to protect their ideological and strategic interests against the East during the entire 'Cold War' period. During this period, the relations between the West and the majority of personal rule regimes in the continent were generally determined on the basis of the stance these regimes took in the East-West ideological rivalry rather than on the basis of whether or not there was repression, abuse of human rights and corruption in these countries.

However, after the end of the Cold War and collapse of the communist block, the West and the donor community began to support the domestic opposition groups in their demands for multipartyism, against personal rule regimes across sub-Saharan Africa. The international community expressed their belief that it was only through multipartyism that democracy could be restored in the region.

From the early 1990s, autocratic regimes in sub-Saharan Africa began to give in to multipartyism one after another. By the beginning of 1995, multiparty elections had taken place in the majority of African states that had practised personal rule in 1988 (Wiseman et al. 1995). However, after almost a decade it cannot be claimed that democracy has been restored in the region. Although widespread repression and abuses of human rights have considerably decreased, several autocratic tendencies such as clientelism, disregard for the rule of law and corruption have generally remained the norm in the region. Moreover, since the introduction of multipartyism it is apparent that the levels of ethnic tensions in the continent have also increased.

The perpetuation of clientelism, corruption and ethnic rivalries under multipartyism have prompted even those who were originally ardent supporters to wonder whether the system is not suited for sub-Saharan Africa. Certain critical questions arise: Why have multiparty elections in





sub-Saharan African countries generally failed to produce genuine democracy in the region? Is it true that multipartyism alone is not a *sine qua non* for the achievement of genuine democracy?

When the implementation of the multiparty project began in earnest in sub-Saharan Africa, it followed at least three patterns. The first pattern is whereby those who managed the autocratic state eventually relented and agreed with the domestic opposition groups to establish a national convention to implement the process. In such cases, one of the tasks that the national conventions performed was the writing of a new constitution that would provide an acceptable legal framework for liberal democracy. It was after new constitutions were approved that multiparty elections were held, supervised by independent election authorities. This pattern to the introduction of multipartyism was adopted mainly among the Francophone countries.

The second pattern was whereby the domestic opposition groups formed a common front to demand multipartyism. And once the leaders of the autocratic regime gave in to the demands, such domestic opposition groups transformed themselves into strong opposition political parties or alliances to challenge the ruling party in the first multiparty general elections. In such cases, constitutions may not have been changed; but even if they were, such changes were carried out mainly under the supervision of the autocratic leaders. As such, the changes may not have necessarily guaranteed structural reforms of the autocratic system. This is the pattern that resulted in the successful removal from power of Kenneth Kaunda in Zambia and Kamuzu Banda of Malawi.

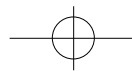
The third pattern was whereby domestic opposition groups initially struggled together against the autocratic state; however once the demands for multi-partyism were achieved the opposition groups split into several registered political parties and contested the first multiparty general elections as separate entities against the ruling parties. In these cases, the autocratic constitutions were also never changed. Thus, elections were held under environments and circumstances that generally favoured the ruling parties. The consequences were that in most of the cases, the opposition political parties failed to remove the autocratic lead-

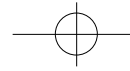
ers from power. This is the pattern that was witnessed in Kenya and Tanzania.

In Kenya, although the Forum for the Restoration of Democracy (FORD) movement successfully struggled to force the Moi regime to give in to the re-introduction of democracy in the country, the movement failed to hold together as a registered opposition party to challenge the ruling party KANU during the general election. This was despite the clear evidence provided by the massive support the movement enjoyed that FORD would have defeated the ruling party, if it had held together, even if KANU were to rig the elections. Moreover, FORD having forced the Moi regime to accept multipartyism fell short of demanding a new constitution that would have provided an appropriate environment for genuinely fair elections, and also guaranteed structural reform of the autocratic state.

From the above analysis, it is clear that the pattern of the implementation of multipartyism in the countries of sub-Saharan Africa that promised the most realistic and genuine transformation of the autocratic state was the one whereby the ruling elite agreed to form a national convention forum to write a new constitution. But the pattern that provided the least promise was the third one, whereby several opposition political parties contested the first general elections against the ruling party in the absence of constitutional reforms.

It follows, therefore, that the most effective and realistic way through which the autocratic states in Africa can be transformed into genuine democracies would have to involve the following processes: one, the writing of a new constitution; two, opposition political parties or groups forming alliances to contest the critical elections as one entity in order to remove the ruling autocratic elites from power. The reason why opposition political parties and groups need big alliances against the ruling elites is to enable them to maximize their resources and also to thwart possible rigging of elections by the ruling parties. Thus, it is the hypothesis of this chapter that for the autocratic state in Kenya to be overthrown, the following conditions must be fulfilled: one, opposition political parties and groups must agree to form a formidable alliance against





the ruling party in order to have a chance of winning elections under an autocratic environment. Two, the opposition alliance must undertake constitutional reforms that would provide for the establishment of a liberal democratic state and the practice and culture of democratic values. The first of the two conditions appears to have been present in Kenya during the December 27, 2002 general elections; the second condition was in the process of being met because constitutional review was underway and a Draft Constitution had even been released.

THE RISE OF THE AUTOCRATIC STATE IN KENYA

At independence in December 1963, Kenya like most of the former British colonies adopted a parliamentary system of government. Under the independence constitution, the executive powers were vested in the Queen. These powers were supposed to be exercised on her behalf by a resident Governor-General in Kenya. The head of government was, however, the Prime Minister. He was first and foremost a member of parliament representing a specific constituency. The prime minister was elected by the Members of Parliament (MPs) from among the members of the political party with the majority of seats in parliament. As a rule he was supposed to be the leader of the political party with the majority of seats in parliament. Both the prime minister and his cabinet were answerable to parliament. As such, they were expected to sit in parliament regularly and respond to the MPs' questions. This was therefore a system of government that guaranteed parliamentary supremacy.

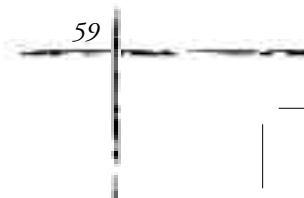
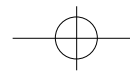
Besides the above provisions, the independence constitution also devolved state power to the local levels by making Kenya a quasi-federal state. In this regard, the constitution created seven regional governments based in the seven provinces of the country, with Nairobi designated a special district. Under each of the regional governments were local authorities that were supposed to be supervised by the regional government. The independence constitution also created a bi-cameral parliament comprising the Senate and the House of Representatives. The Senate was supposed to cater for regional interests in national legislation while the House of Representatives handled national legislation. Finally,

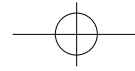
the constitution also provided for multiparty democracy. In short, Kenya's independence constitution laid the foundation for the establishment of a liberal democratic state and the practice of liberal democracy.

However, in just one short year, the ruling elite had systematically and consistently started to undermine the liberal democratic constitution and the values it underpinned. There were a number of key actions that were deliberately undertaken by the ruling elite between 1964 and 1970 that eroded liberal democratic values. The actions were the following: one, systematic amendments of the constitution that transferred power from other arms of government to the executive. Two, the weakening of party politics. Three, the usurpation of the power of local authorities by the executive. Four, the ethnic and nepotistic approach to the Africanisation of the public service. All the actions were aimed at entrenching autocracy or personal rule in the country.

To begin with, the independence general elections were contested by two main political parties—the Kenya African Democratic Union (KADU) and the Kenya African National Union (KANU). KANU won the elections and formed the first government. But immediately after it had formed the government, the KANU ruling elite began to systematically amend the constitution. The first constitutional amendment was the Constitution of Kenya (Amendment) Act No. 28 of 1964 (Gertzel 1970). This amendment transformed Kenya into a republic and drastically altered the position of the chief executive. In this regard the constitution created the position of the President who now became both the Head of State and Head of Government. But although this amendment vested executive powers in the president, the constitution retained most of the provisions for a parliamentary system of government, including the principle of the supremacy of parliament. The bi-cameral parliament was retained. The president was still elected by parliament; he was still required to be a member of parliament and both he and his cabinet were still answerable to parliament.

The reason the KANU ruling elite moved fast after independence to amend the constitution to remove executive powers from the Queen was because it found it embarrassing for the Prime Minister (Jomo Kenyatta)





of an independent Kenya to remain answerable to the Queen of England. Whereas, the KANU ruling elite might have been genuinely justified to vest executive powers in an indigenous president, it did not warrant tampering with the constitution in the manner in which the ruling elite did. Indeed, the constitutional model under which Kenya gained its independence was widely adopted in almost all the former British colonies.

However, the way in which some of the countries, such as India, went about removing executive powers from the Queen was to create the position of president to replace the Queen while retaining the position of Prime Minister as head of government. The powers of Head of Government remained vested in the Prime Minister. By opting for this approach in their constitutional amendment, these countries managed to maintain a viable parliamentary system. It is no wonder, therefore, that the former British colonies, for example India and Jamaica, that retained the parliamentary systems of government they had inherited from the British are also the ones that have managed to sustain viable and effective liberal democracies. But the former British colonies, especially in sub-Saharan Africa, that abandoned the parliamentary system of government and instead opted for the presidential system soon turned into autocratic regimes.

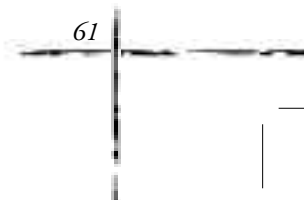
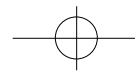
Be that as it may, soon after the first constitutional amendment, the KANU ruling elite embarked on a calculated and rapid amendment of the independence constitution. In total, between 1964 after the first amendment and 1968, the KANU ruling elite forced through parliament nine additional constitutional amendments. All these constitutional amendments were aimed at strengthening the executive, especially the presidency.

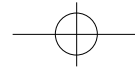
The second action that the ruling elite undertook to erode the foundation of liberal democracy in Kenya was to weaken party politics. In all genuine democracies especially under parliamentary systems of government, political parties are the basis of competitive politics. Thus, the first independence general elections in the country were contested by two political parties—KANU and KADU. However, after the elections the ruling KANU elite began a systematic manoeuvre to have KADU dis-

solved in order to make Kenya a one, party state. The methods used by the KANU ruling elite included frustration of the opposition party, promises of cabinet positions to elected leaders of KADU and intimidation. Soon some of the KADU members in parliament began to cross the floor to join KANU in the government. This trend continued throughout 1964 and in November the same year, KADU decided to dissolve itself and join KANU. Its key leaders, namely, Daniel arap Moi, Ronald Ngala and Masinde Muliro, were soon appointed into the cabinet. Thus, when Kenya became a republic in December 1964 it also became a one-party state.

The other way through which the KANU ruling elite weakened political party politics was to ensure that the ruling party as an institution remained dormant. The development of vibrant political parties in Kenya was originally undermined by the colonial administration. According to Cherry Gertzel (*Ibid.*, 8), during the state of Emergency African political parties were prohibited between June 1953 and June 1955. In June 1955, the colonial administration permitted party activities, but only at the district level. Following this development, a number of district political parties emerged in the country. But it was not until 1960 that the formation of national political parties was allowed. KANU and KADU, the first national political parties to be formed after the Emergency, were established in March and June 1960 respectively. But both parties were not genuinely national political parties; on the contrary, they were first and foremost coalitions of the original district political parties representing different factions of the ruling elite. The primary factors that influenced the coalition building under the two parties were the desire to win the elections and also to protect the interests of the constituencies that were represented in the respective coalitions (Anyang' Nyong'o, 1989). Thus, from the very beginning, it was not in the interest of the key leaders of the ruling elite to build strong national political parties lest they fell into the hands of a few who could then use them for political domination. This culture of factionalism has influenced political parties development in the country ever since. The weak link in party politics in Kenya has been factionalism among the country's ruling elite.

When the two political parties were formed, KANU, which was the more





powerful of the two, exhibited sharper factional divisions than KADU. Almost all members of KADU were conservatives while the larger faction in KANU represented radicalism. The radical faction in KANU was led by people like Oginga Odinga, Bildad Kaggia and Pio Gama Pinto. Given the tilted balance of power, the radical faction of Oginga Odinga and Bildad Kaggia obviously threatened the hold on power of the weaker faction of Kenyatta and Tom Mboya.

Thus, when KADU amalgamated with KANU, its members strengthened the conservative faction in KANU and tilted the balance of power against the radical faction. By the end of 1965, the Kenyatta-Mboya faction felt strong enough to neutralize the Odinga-Kaggia faction (Leys 1975: 220). This was achieved during the KANU national elections that were held in Limuru in March 1966. In these elections, Odinga was removed as the vice president of the party. A number of his supporters' were also voted out from their branch positions. After these elections, KANU ceased to be a political force that could be used to either influence policy or determine the choice of political leaders in the country. These roles were now assumed by the executive, especially the presidency. The situation remained the same until Moi took over from Kenyatta in 1978.

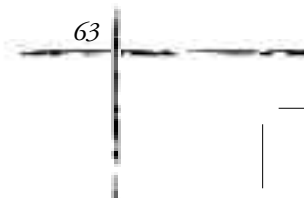
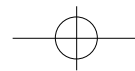
The third way through which the KANU ruling elite undermined the development of a liberal democratic state in Kenya was the usurpation of powers of local authorities. As mentioned earlier, Kenya gained independence as a quasi-federal state whereby regional governments and local authorities under them were entrusted with certain powers and responsibilities. During the constitutional negotiations at Lancaster House in London, KANU was vigorously opposed to federalism (*Majimbo*). But the system was supported by KADU members who felt that the interests of its constituents could best be protected under a federal system of government. Eager to conclude the constitutional talks in order to pave way for the independence elections, KANU negotiators at Lancaster agreed to the provision for federalism in the constitution, but made it known that the party would not implement the system if it won the elections. True to their intention, once KANU won the elections, it frustrated the implementation of federalism by refusing to remit funds to regional gov-

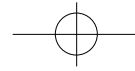
ernments throughout 1964. At the end of that year, the regional system was abolished and Kenya became a unitary state.

The abolition of federalism did not, however, lead to the scrapping and/or withdrawal of the powers of local authorities. Local authorities were retained and they were still entrusted with the responsibility to provide various services such as health, education, community development and local infrastructure. To generate revenue to finance the provision of these services, local authorities enjoyed powers to levy taxes at the local level. However, from 1969, the government began to transfer certain responsibilities that had been entrusted to local authorities to the central government. By January 1971, the remaining major responsibilities such as primary schools, roads, and health services that were still entrusted to the local authorities were transferred to the central ministries. Moreover, the powers of the local authorities to levy taxes at the local level were also withdrawn by the central government (Leys, *Ibid.*: 246).

The explanation given by the government for making these drastic changes was that the local authorities could not provide such services efficiently. The real reasons were, however, quite different. The real reasons were that by usurping the responsibilities and powers of local authorities and concentrating them in the executive, the president and his ruling elite were now in a good position to distribute the national resources in a manner that could effectively facilitate the patron-client relationship that would sustain them in power. The regions that were considered not too loyal to the ruling elite could now be easily punished, but those that were loyal could be rewarded handsomely. Thus, the usurpation of the powers and responsibilities of local authorities by the executive eroded further the foundation of liberal democracy in the country.

The final major action that the KANU ruling elite undertook to undermine liberal democracy in the country was the adoption of a poor Africanisation strategy. Soon after independence, the Africanisation of the key public positions that were occupied by white employees became critical. However, instead of applying the principle of merit that is the hallmark of the Weberian Bureaucratic Model upon which Kenya's public service was based, the KANU ruling elite resorted to ethnicity and





nepotism as the main criteria for appointing those who were to fill the key positions that were being vacated by white public servants. Thus, the majority of those appointed into key positions were drawn mainly from the president's own community—the Kikuyu (Anyang' Nyong'o, *Ibid.*: 241). But even from among the Kikuyu, those who were given the positions were those who were considered to be closely related to the members of the inner core of the ruling elite. A significant number of them were children of the former colonial chiefs and prominent 'home guards' during the Mau Mau period. The main reason the ruling elite entrusted such key public positions to this category of Kenyan Africans was that such people could owe their total loyalty to the ruling elite and also maintain the *status quo* (Anyang' Nyong'o, *Ibid.*). And it was this category of public servants that was expected to exercise the enormous powers that had been systematically transferred from other branches of government to the executive, on behalf of the president.

By the end of 1970, the KANU ruling elite had successfully managed to erode the foundation of liberal democracy in Kenya completely and to establish personal rule in the country. At its peak, in the mid-1970s, the powers of the government revolved exclusively around Kenyatta. Colin Leys describes the situation thus:

Kenyatta's court was based primarily at his country home at Gatundu about 25 miles from Nairobi in Kiambu district; but like the courts of old it moved with him, to State House in Nairobi, to his coastal lodge near Mombasa, and his lodge at Nakuru in Rift Valley. This corresponded to his actual roles of Kikuyu paramount chief and national leader of the comprador alliance. (Leys, *Ibid.*: 246)

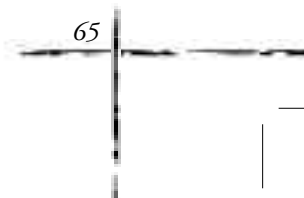
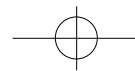
Leys continues:

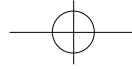
To the court came delegations of all kinds; district, regional, tribal and also factional. Most of them came from particular districts often in huge numbers, accompanied by teams of traditional dancers and choirs of school children, organized and led by the MPs and local councillors and provincial and district officers from the area. They gave displays of dancing and singing; the leaders presented cheques for various causes sponsored by the president and expressed their sentiments of loyalty and

respect; and would finally outline various needs and grievances. In return, the president would thank them, commend the dancers and songs, exhort them to unity and hard work and discuss their requests, explaining why some could not be met and undertaking to attend to others. (Leys *Ibid.*, 247).

It is this type of regime that President Moi inherited upon Kenyatta's death in August 1978 and superintended for twenty-four years, until December 30, 2002. The manner in which President Moi managed Kenya's autocratic state differed from Kenyatta's in three main ways. Firstly, unlike Kenyatta, Moi lacked sophistication in handling pertinent issues; his utterances were often crude and mediocre. Secondly, Moi was unable to appoint into key public positions those who combined the qualities of being directly loyal to him and at the same time had managerial abilities, as was the case with Kenyatta. This was mainly because, unlike Kenyatta, who hailed from the numerous Kikuyu community that was endowed with a huge reservoir of career civil servants to select his team from, Moi hailed from the small Tugen community that was not similarly endowed. Therefore, whenever Moi attempted to recruit those who were directly loyal to him, such appointees often lacked sufficient qualifications and experience to manage public institutions efficiently. The consequences were the widespread mismanagement of public institutions and the inefficient delivery of public services that characterized Moi's rule for the most part of the twenty-four years he was in power.

Thirdly, during Moi's rule corruption increased enormously. Corruption is usually an attribute of personal rule. This is because it is through corrupt deals that the resources for rewarding clients are mobilized. Thus, the vice was already a major problem even during Kenyatta's reign. However, Kenyatta was lucky to have inherited from colonialism huge amounts of state resources such as land that he could afford to dish out to his chain of clients countrywide without attracting much public notice (Barkan 1992). When Moi took over the leadership, most of such resources had begun to dwindle. Thus, in order to reward his clients President Moi's regime resorted to direct looting of the resources of state institutions. The practice fuelled corruption in the country.





A MULTI-PARTY AUTOCRATIC STATE: 1992 - 2002

Although the KANU ruling elite successfully managed to erode the foundation of liberal democracy and to establish an autocratic state in the country, this was not achieved without resistance. Resistance to autocracy in Kenya began almost immediately following the first amendment of the independence constitution. Initially it appeared as organized dissent by the KANU backbenchers against the government on various policy issues (Gertzel 1970).

In April 1966, following his removal from KANU, Oginga Odinga was invited to lead the yet unregistered political party—the Kenya People's Union (KPU). The establishment of KPU once again restored multipartyism in the country. But from the date of its establishment, the KANU ruling elite deliberately frustrated the activities of KPU. For instance during the 1968 local government elections, the government ensured that all the KPU candidates were disqualified from contesting the elections. And in 1969 just a few weeks to the second national general elections, the government decided to ban KPU and detain its leaders (Leys, *Ibid.*: 246). Thus, from 1970, Kenya reverted back to a *de facto* one-party autocratic state.

The banning of KPU undermined the only existing opportunity for overt opposition to autocracy in the country. As a result, most of the dissident groups went underground. In 1971, a group of both civilian and military dissidents were arrested and subsequently imprisoned for plotting against the government, but this did not deter opposition to personal rule in the country.

In August 1982, a section of the armed forces staged a coup attempt against the government. The coup was quickly crushed by the loyal forces, but the government was left tremendously shaken. Following the coup attempt, the government rushed a constitution amendment through parliament that inserted the infamous section 2A into the Constitution. Section 2A, for the first time, prohibited the formation of an opposition political party in the country. Again this action did not deter the formation of clandestine groups against the government. Throughout the 1980s, a number of clandestine opposition groups

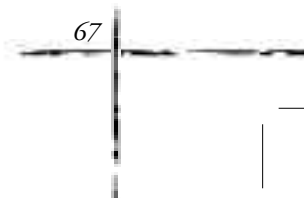
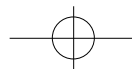
emerged in the country. Notable among such groups was the one known as *Mwakenya*; Nobody really knew publicly who the leaders of the group were. In an attempt to clamp down on the mushrooming clandestine groups, the government became even more responsive.

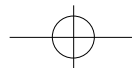
However, despite the concerted efforts by the various opposition groups in the country to overthrow Moi's personal rule, Western countries and the donor community continued to finance the regime. This was because to the West and the donor community, a West-leaning Kenya was of great strategic importance to the West in its ideological struggle against the communist bloc during the 'Cold War'. The West would not, therefore, want the Kenyan regime destabilized. Thus, the West was ready to turn a blind eye to repression and numerous abuses of human rights by the regime.

In 1989, following the collapse of the Soviet Union and the end of the Cold War, the West and the donor community began to put pressure on the Moi regime to restore multiparty democracy. The much-needed support boosted the efforts of the domestic opposition forces now grouped under the umbrella of FORD. In December 1991, the government eventually gave in to the demands to restore multipartyism in the country. And in December 1992, the first multiparty general elections were held in the country since the mini-elections of 1966.

The 1992 multiparty general elections resulted in victory for KANU amid claims of rigging. In December 1997, the second multi-party general elections were held in the country. Again KANU emerged victorious while the opposition parties refused to accept the results claiming that the elections had been rigged.

Although the country had reverted to a multi-party system in December 1991, Moi continued to govern Kenya as an autocratic state. Granted, during the period, Kenyans enjoyed certain civil liberties usually found in liberal democracies such as freedom of speech, freedom of the media, freedom of association, and freedom of movement that were virtually non-existent before 1991. However, most of the tendencies of personal rule remained the norm under Moi's regime. Corruption continued unabated in public life; President Moi and key officials continued to





manage public institutions in total disregard to the law; President Moi continued to pronounce decrees even when such decrees were in total conflict with the country's constitution and laws; the executive and especially the presidency remained more powerful than the other branches of government. As such, the executive continued to take parliament for granted on even constitutional matters. The president could even reverse decisions arrived at by his cabinet. Three cases may serve to illustrate the situation.

First, on Thursday, February 23, 1996, in an attempt to save the sugar industry from the threat of imported sugar that was flooding the country, President Moi summoned his cabinet for a meeting. At the cabinet meeting, it was noted that most of the sugar flooding the country was being imported illegally by those who avoided paying duty in the first place. Moreover, Kenya did not actually need all the sugar that found its way into the domestic market. Based on these facts, the cabinet resolved to ban any further importation of sugar into the country with immediate effect. The Minister for Finance was then instructed to take action by gazetting the cabinet decision which he promptly did (*Daily Nation*, February 24, 1996). But on Saturday, February 25, 1996, without summoning another cabinet meeting, the President decided to unilaterally reverse the earlier decision by the cabinet and to lift the ban on importation of sugar. The former Minister for Transport and Communication and Member of Parliament for Rongo Constituency, Dalmas Otieno, and whose constituents depended on sugar cane farming for their incomes, tried to challenge the President's action. He was summarily dismissed.

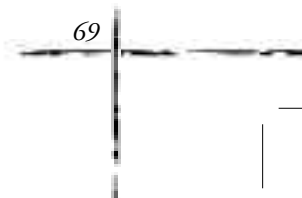
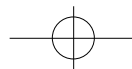
Second, on Wednesday, February 28, 1996, officials of a women's group—Maendeleo ya Wanawake—paid a visit to President Moi at the State House, Nairobi. At the meeting with the officials, Moi announced that the pending election of the organization's officials would be held from March 18 and not March 14, 1996 as had earlier been decided by the women's body. It is difficult to understand under what powers Moi was altering the date of elections of an organization of which he was not even a member (*Daily Nation*, Thursday February 29, 1996).

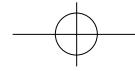
Finally, on Saturday October 26, 2002 while addressing a public rally in Kiambu district, Moi announced that he had disbanded the Constitution of Kenya Review Commission (CKRC) that was set to convene the National Constitutional Conference at the Bomas of Kenya in Nairobi on October 28, 2002. In his announcement, President Moi stated that a new constitution commission chaired by an African would be appointed the following year (2003) to start the review of the constitution afresh. In this case it is not clear where Moi got the powers to disband a commission established by an Act of Parliament. Moreover, it is difficult to comprehend how Moi was going to appoint a new constitution commission in 2003 when he was constitutionally expected to vacate the office after the December 27, 2002 general elections.

There are two main factors that contributed to the continued personal rule under a multiparty situation in Kenya. The first was the current gross constitutional weaknesses. The second was the ineffectiveness of opposition political parties. In the first place, when the government gave in to the restoration of multipartyism in the country in December 1991, what the one-party parliament did was to merely remove Section 2A of the constitution that had outlawed the system. All other constitutional amendments (about 32 in total) that had been made to the original constitution, and that were responsible for the emergence and maintenance of personal rule, were left intact. Thus, during the 1992 and 1997 general elections, President Moi found it possible to frustrate opposition political parties using powers granted constitutionally.

Immediately after the 1992 general elections, opposition political parties and civil society organizations began to agitate for a comprehensive review of the constitution. The ruling party successfully managed to resist any review of the constitution until 2001. From the mid-2001 a parliamentary instituted commission (CKRC) has been reviewing the country's constitution. In September 2002, it produced the first draft of the proposed new constitution. The draft constitution proposes to restore liberal democracy in the country. However, it is yet to be adopted.

Secondly, between 1991 when multipartyism was officially restored and 1997 when the second general elections were held under the system,





Kenya's opposition political parties did not play their expected roles effectively. When the ruling party decided merely to amend section 2A of the constitution, one would have expected opposition political parties to insist on the comprehensive review of the constitution; they didn't. In the absence of a reviewed constitution, it became obvious that the only way through which the opposition could beat KANU at the polls was by forming an alliance. Against all the indications for the need of such an alliance, the opposition failed to unite against KANU.

The persistent weakness of opposition political parties in the country could be attributed to ideological bankruptcy and lack of adequate resources. The weaknesses can most effectively be addressed under an environment that permits the practice of liberal democracy. In the Kenyan case, such an environment could only be created by first reforming the autocratic state. On October 22, 2002, opposition groups in the country eventually resolved to unite under one umbrella political party. The umbrella political party is known as the National Rainbow Coalition (NARC). It is NARC that faced KANU in the December 27, 2002 general elections and overwhelmingly defeated the ruling party.

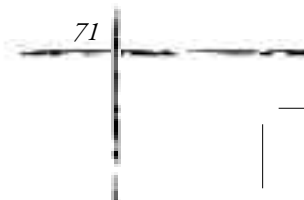
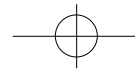
THE POLITICS OF TRANSITION: TOWARDS THE OVERTHROW OF THE AUTOCRATIC STATE IN KENYA

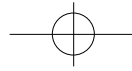
Although KANU won the 1997 general elections, it managed a mere majority of 4 seats over the combined opposition political parties in parliament. Due to this dismal performance, KANU leaders clearly understood that it was not going to be easy for the party to govern effectively. The ruling party was going to find it difficult to push through its bills or to defeat opposition bills in parliament. Thus, in order to address the problem, President Moi decided to send signals to the National Development Party (NDP) leader, Raila Odinga—a few days after the elections—to merge his party with KANU. This action by Moi marked the beginning of what turned out to be his political undoing. It was also the greatest blunder of his career. This is because when the NDP eventually merged with KANU, instead of strengthening the ruling party as Moi had hoped, KANU ended up being weakened to the point where for

the first time in its 42 years, it faced the real danger of losing the next general elections scheduled for December 27, 2002.

It is apparent that when KANU and NDP merged on March 18, 2002, the two key leaders to the deal—Moi and Raila Odinga—attached completely different and indeed contradictory meanings to the event. For President Moi, the merger provided him with the perfect opportunity to implement his succession plan. In his succession plan, Moi's intention all along had been to hand over power to a person who could guarantee his political security and whom he would continue to influence while in retirement. At the same time he wanted a government that would maintain the stability of the country.

Based on this plan, Moi figured that if he could craft a government that was managed by two leaders from the Kikuyu and Luo communities—the two communities that represent the two largest constituencies in the country – and whereby prominent leaders from the other larger communities, namely the Luhya, Kamba and Mijikenda also held key positions, then stability in the post-Moi era could be guaranteed. It is this vision that influenced KANU to support the creation of the post of Prime Minister, and two deputy prime ministers, in addition to the existing post of president and vice president, in their representations to the CKRC. Similarly, it was the same vision that influenced the creation of four positions of vice chairmen in addition to the existing posts of chairman and secretary general in KANU. At the same time, it is the same intentions that guided the KANU-NDP merger elections of March 18, 2002. At KANU-NDP merger elections, Raila Odinga was elected the Secretary General. Uhuru Kenyatta, Musalia Mudavadi, Kalonzo Musyoka and Noah Katana Ngala were elected into each of the four vice chairmen positions. Uhuru Kenyatta was supposed to represent the Kikuyu community; Mudavadi the Luhya community; Musyoka the Kamba community and Ngala the Mijikenda community. According to Moi's scheme of things, Raila was earmarked for the position of Prime Minister while one of the four vice chairmen was the presidential heir apparent. Another factor that guided the KANU-NDP elections was that each of the four elected vice chairmen had to be those that Moi could influence.





But for Raila Odinga, the KANU-NDP elections provided the best opportunity yet for him to achieve his ambition of becoming the president of Kenya. Raila first contested for the presidency during the 1997 general elections. He became third after Moi and Mwai Kibaki of the Democratic Party (DP). But in these elections most of the votes that Raila obtained came from his Luo community. At the same time, out of the 22 seats that his NDP won, twenty of them were in the Luo constituencies. The elections taught Raila a crucial lesson—that for him to become Kenya's president, he needed to widen his constituency; a merger with KANU provided the surest way to achieve this goal. According to Raila, in the process of using KANU as a vehicle for capturing the presidency, he also hoped to democratize the party. But he also had additional hidden intentions: if Moi could not permit him to use KANU as the vehicle for capturing the presidency, then he intended to weaken the party or destroy it altogether to enable the opposition to win the next general elections (*Daily Nation*, November 11, 2002).

Similarly, for the four vice chairmen of the Party and the vice president of the country, George Saitoti, each of them had the same ambition to succeed Moi as the president of Kenya. Indeed, for the four vice chairmen, the media had created the impression immediately after the KANU-NDP merger that KANU's presidential candidate would be elected by the party's national delegates' conference at a later date from among the four vice chairmen. And in the case of George Saitoti, he considered himself to be the most qualified among all the KANU contenders to succeed President Moi having served him as the Vice President for 13 years. Thus, given Moi's succession plan vis-à-vis the promises he had falsely made to various contenders and the constituencies they represented, the nomination of KANU's presidential candidate was bound to threaten the continued survival of KANU and, hence, Moi's personal rule.

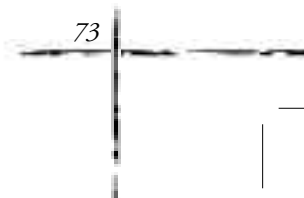
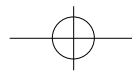
Soon after the KANU-NDP merger, a group of young politicians from Rift Valley and Western provinces, namely, William Ruto, Julius Sunkuli and Cyrus Jirongo began to campaign openly for one of the vice chairmen of the New KANU—Uhuru Kenyatta—to be nominated as the party's presidential candidate in order to eventually succeed President

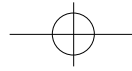
Moi. Initially, the other politicians both from the ruling party and the opposition and the majority of the ordinary public dismissed these campaigns as expressions of the young politicians' illusory ambition that they would take over power after Moi, or as the usual Moi gimmick at confusing the opposition, especially the Kikuyu voters. This was because apart from being the least experienced politician among the four vice chairmen, Kenyatta had failed to win even a parliamentary seat in his Gatundu North constituency during the 1997 general elections.

However, as it turned out later, this was Moi's strategy to test the mood and reaction of other possible contenders for the presidency as well as the ordinary public. As the youthful politicians continued with their campaigns for Uhuru, Moi also started to send open signals that he preferred the youthful politician as his successor over all the other contenders. For instance on two occasions, he accompanied Uhuru to Kiambu District and asked the local population to work with the young man. The signals began to alarm other politicians in KANU who did not think much of Uhuru's presidential candidacy.

On Friday June 28, 2002, the ruling party organized a function at a Nairobi hotel to celebrate its recent merger with NDP. At the function were the top KANU officials. The master of ceremonies was the Minister for Trade and Industry and a close confidant of President Moi, Nicholas Biwott. When Biwott stood to introduce the high table occupants, he intentionally ignored to introduce Uhuru. The audience and even the public who followed the function on national television got the message; the majority of the top officials of the ruling party, with the exception of the chairman, were not excited about Uhuru's candidacy.

The following day, the party held a huge rally at the historic Kamukunji grounds in Nairobi. The rally was part of the celebration of the KANU-NDP merger. At the rally, the President realized quite clearly that the huge crowd belonged to the Secretary General. This is because at one point when the crowd became too excited and a bit unruly, the President attempted to calm it down and failed. But when Raila Odinga stood to request the crowd to be calm, the crowd immediately became orderly and attentive. After the rally, Moi realized that if he had to pre-empt the





upstaging of his candidate, Uhuru Kenyatta, by other contenders he had to act fast.

Thus, on July 5, 2002 Moi summoned the four vice chairmen and the Secretary General to State House, and for the first time appealed to them to support Uhuru as the party's presidential candidate and eventually his successor. According to an informant at the meeting, the three vice chairmen—Mudavadi, Musyoka and Ngala—did not respond either way to Moi's appeal. Moi then assumed that they had accepted his request, but Raila Odinga advised the president that in order to avoid the impression that Uhuru was being imposed on the party he should be made to go through the normal nomination process at the party's national delegates' conference. President Moi read Raila's response accurately: he was not in support of Uhuru's candidacy. But at the meeting the President came out with the false impression that it was only Raila who was opposed to Uhuru's candidacy. It was this inaccurate reading of the situation that influenced Moi's handlers to adopt the strategy of isolating Raila from the rest of the Party top leadership if he failed to yield.

After the State House meeting, Raila went straight into a meeting with his close associates from the former NDP. He briefed them on the State House meeting. As was to be expected, the immediate reaction was that the former NDP leaders and by extension their constituency were simply not going to accept Moi's appeal that they support Uhuru's candidacy. Indeed, the former NDP leaders and their constituency felt that Moi's request was a slap in the face and the height of betrayal. But besides Raila, it is apparent that the other three vice chairmen also leaked the news of the State House meeting to their close confidants and supporters who similarly rejected Moi's appeal.

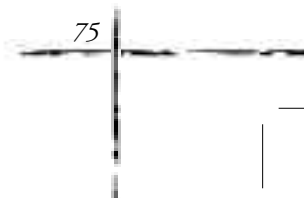
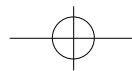
Thus, on Tuesday July 10, 2002, a group of 32 KANU MPs drawn from Western, Nyanza, Eastern and Coast provinces called a press conference at parliament buildings and for the first time reacted sharply to President Moi's attempt to impose the party's presidential candidate on the members. The MPs made it clear that they were not opposed to Uhuru's candidacy as such, but they wanted the nomination process for the party's presidential candidate to be conducted democratically according to the

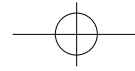
party's constitution. According to the MPs, this would accord every interested candidate an equal chance. From the press conference, it became clear that the division in KANU was going to pit those who cherished democracy against those who preferred the continuation of personal rule.

Following the MPs' press conference, President Moi must have realized that it was not going to be easy for him to successfully sell Uhuru's candidacy to the KANU members and the general public. But at the same time, he was not prepared to abandon Uhuru as his preferred candidate. He therefore decided to use the same strategies that had worked for him during the past 24 years of his leadership to implement the "Project". The strategies included divide and rule on the basis of ethnicity; rewards; pressure and blackmail; calculated retreat and attack; and dismissals. Between July 2002, when the KANU MPs challenged his attempts to impose Uhuru's candidacy on the party, and October 14, 2002, when Uhuru was officially endorsed as the Party's presidential candidate, Moi employed all these strategies one after another but all of them failed him for the first time in his long career.

As mentioned earlier, in Moi's scheme of things, the most likely candidate to rebel against Moi among the four possible contenders for the presidency in KANU against Uhuru Kenyatta was Raila Odinga. This was because besides having joined the ruling party only recently from the opposition where he led a political party—the NDP—and contested elections as a presidential candidate against Moi, Raila also had the distinguished qualifications of being one of the few politicians in the country that was self-made unlike the other four candidates—Musyoka, Mudavadi, Ngala and Saitoti. He was not "Moi-made". Due to this background, Moi's strategists simply planned to isolate him from the rest of the contenders and spread the propaganda that he was a Johnny-come-lately who was out to wreck the Party. Moreover, the strategists planned to paint him as a tribal chief who was merely opposed to Uhuru due to the old rivalry between the Luo and Kikuyu communities.

To demonstrate to his constituency that he was prepared to provide a stiff challenge to President Moi's Uhuru-for-president campaign, on





Thursday July 25, 2002, Raila for the first time responded to the President. Using rather blunt language calculated to demystify the person of the president such as no member of Moi's cabinet had ever used when responding to the President, Raila made it known that the KANU presidential candidate would be chosen by none other than the Presidential Nomination Council delegates of the Party, through a secret ballot. He further asserted that President Moi who preferred Uhuru as the party's presidential candidate had only one vote. And, as if to rub it in, he was quick to add that Moi's one vote as a delegate might not be useful to Uhuru, as the candidate would be thoroughly humiliated at the party's National Delegates Council (*Daily Nation*, Friday July 26, 2002).

Raila's reaction immediately sent shockwaves across the country as the other KANU politicians and ordinary Kenyans had not expected a member of Moi's cabinet (Raila was the Minister for Energy at the time) to respond to the President in such an 'insubordinate' manner. But following Raila's reaction, the mood of the country with regard to Moi's candidate suddenly changed; supporters of the various prospective candidates began to exert pressure on their leaders to publicly declare their positions with regard to KANU's presidential candidate. The prospective candidates happened to be the key leaders of the various ethnic groups in the country. And their supporters happened to be predominantly the members of their respective communities.

Thus, on Saturday July 27, 2002, Musalia Mudavadi became the first of the three vice chairmen to announce his intention to seek nomination as KANU's presidential candidate. The following day, Raila Odinga and Katana Ngala also announced their candidacies at separate rallies in Mombasa. And on Tuesday, July 30, Kalonzo Musyoka declared his candidacy. The last to declare his candidacy was the former vice president George Saitoti on Wednesday, August 14, 2002.

The announcement by the four of their intention to seek nomination as KANU's presidential candidate immediately deflated Moi's strategy of painting Raila as a leader moved by tribal motives to seek the presidency of the country on a KANU ticket. The move also undermined Moi's strategy of 'divide and rule' along ethnic lines. This is because it became

clear that KANU's nomination as the party's presidential candidate was now being sought by leaders from the major ethnic groups in the country. Indeed, it was President Moi who now risked being isolated through a rebellion against him by the majority of Kenyans. And this is exactly what began to be witnessed across the country.

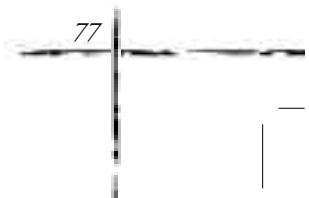
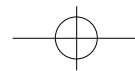
On Sunday July 28, 2002, Moi declared publicly for the first time that Uhuru Kenyatta was his preferred choice as KANU's presidential candidate. Addressing a delegation from Lugari constituency, the President said:

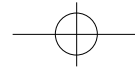
I have chosen Uhuru to take over leadership when I leave. This young man Uhuru has been consulting me on leadership matters. I have seen that he is a person who can be guided. If there are others who are chosen then it will depend on the people (*Daily Nation*, Monday, July 29, 2002).

With this declaration, Moi began a country-wide tour to popularize his candidate. But everywhere the President went he found hostile crowds that resorted to booing him consistently. The first place he was booed was in Kisumu City in Nyanza Province on August 1, 2002 when he attempted to promote Uhuru's candidacy while officiating at the opening of an agricultural show in the outskirts of the city.

Thereafter he was booed by the crowds in Kilgoris town in Trans-Mara District; in Sotik town in Bureti District; in Mombasa at the Coast; in Eldoret in Rift Valley province; in Nairobi, the capital city on a number of occasions; and in Kakamega in Western Province. Indeed, in Kakamega where the President held a rally accompanied by Uhuru, violence broke out and one person died and several people were injured.

The booing of the President wherever he went to market his candidate—Uhuru—demonstrated a number of things: first, it demystified the presidency and hence challenged personal rule in a manner that had never been seen before in the country. Second, it sent a strong signal to the president that Kenyans were thoroughly tired of his misrule and were therefore not ready to allow him to succeed himself. Third, it sent a strong message to all the prospective presidential candidates that the KANU members and by extension Kenyans wanted them to fight on





until Moi's scheme was defeated. The leaders became emboldened by the public mood; it now became cowardly and unpatriotic to side with Moi on anything.

Meanwhile, in an attempt to provide a unified front to the rebellion against Moi, and also to pre-empt Moi's other strategies of exerting pressure on some potential candidates on the one hand and extending rewards to others on the other, on Monday, August 5, 2002 Raila Odinga decided to hold a meeting with George Saitoti and Joseph Kamotho at a hotel in Nairobi. Before proceeding to the meeting, Raila alerted the media that the three intended to issue a statement after the meeting. The purpose of alerting the media was to box in both Saitoti and Kamotho to own up to what the three would decide. After the meeting that lasted for about 45 minutes, Raila emerged to announce that the three together with the other candidates had decided to form a new front in KANU to be known as the Rainbow Alliance. Raila explained that the objective of the Alliance was to ensure that KANU's presidential nomination was conducted democratically, freely and fairly according to the Party's constitution.

Following the formation of the Rainbow Alliance, the division in KANU became quite clear. And from that moment onwards, it became obvious that KANU was headed for a big split that was likely to hurt the party grievously. In order to sell their message to the public, Rainbow Alliance began countrywide rallies. Everywhere the Alliance members went crowds became bigger and bigger. The large crowds that the Rainbow Alliance drew demonstrated two things: one, that the KANU members, and by extension the majority of Kenyans, wanted the Party and the county democratized; two, that failure to democratize the party would force the party's followers to move with the Rainbow leaders to the opposition and to mount a challenge to President Moi.

Given the message, the Rainbow leaders decided to exert more pressure on the other faction of the Party to allow the democratisation of KANU, failure to which they were prepared to abandon the Party and join the opposition. However, despite the pressure, the faction of the party led by Moi refused to relent. Sensing that they were unlikely to force Moi to

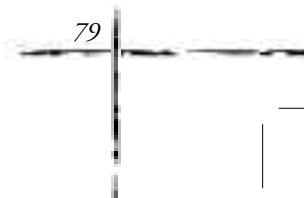
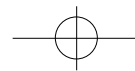
drop Uhuru's candidacy and conduct the party's presidential nomination democratically, Rainbow members began to hold discussions with the opposition for a possible alliance.

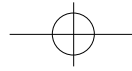
On Friday September 7, 2002 while addressing a rally in Ngong Town in Kajiado District, William Ole Ntimana, a member of the Rainbow Alliance, hinted that the members of the Alliance had started to talk with the opposition members. On Friday, September 14, the shape of things to come became even clearer when Noah Wekesa, one of the key figures in the opposition, also confirmed that there were attempts to create a super alliance against Moi's ruling party.

Meanwhile, as all these developments were taking place in KANU, the opposition political parties were also reviewing their positions and chances of winning the next general elections. In the first place, the original merger between KANU and NDP in March, 2002 had sent shock waves in the opposition ranks. The merger undoubtedly created such a formidable front that the opposition political parties, as disunited as they were, were unlikely to defeat the New KANU.

Consequently, in order to improve their chances of making an impact in the coming elections, opposition political parties began to negotiate an alliance among themselves more seriously. The negotiations eventually resulted in the creation of an opposition alliance known as the National Alliance (Party) of Kenya (NAK). NAK brought together three key personalities and political parties, namely, Mwai Kibaki of the Democratic Party (DP), Michael Wamalwa of FORD-Kenya and Charity Ngilu of National Party of Kenya (NPK); as well, 13 other obscure political parties joined NAK. It is NAK that the Rainbow Alliance members began to negotiate with for a possible super alliance to face the now depleted Moi's ruling party.

By October 6, 2002, Rainbow Alliance members had arrived at a decision that they would not participate in the KANU presidential nomination elections. As a result, its technical team began to shop for an opposition political party that they would use to negotiate with NAK or to contest the imminent general elections. The Rainbow Alliance members eventually managed to strike a deal with the little known party called





Liberal Democratic Party (LDP). The leaders of LDP permitted Rainbow members to take over the moribund party and use it as a vehicle for political competition.

Following the agreement with the LDP the continued stay of the Rainbow members in KANU was now aimed at achieving two objectives: one to cause further destruction to the party by ensuring that when they left, the party would be thoroughly bruised. Two, to buy time until the scheduled date for KANU's presidential nomination so that their leaving could have a dramatic impact.

Thus, on Friday October 11, 2002, just two days before KANU's presidential nomination, the Rainbow members announced that they would boycott the event. On the following day, they announced that the Rainbow Alliance would transform itself into an opposition political party. On Sunday, October 13, 2002 the four ministers belonging to the Rainbow Alliance, namely, Raila Odinga (Energy), William Ole Ntimana (Office of the President), Adhu Awiti (National Planning), and Education Assistant Minister, Moody Awori, announced their resignation from the government. The following day the Rainbow Alliance members held a huge rally attended by an estimated 100,000 people at Uhuru Park in Nairobi at which they unveiled their new party—LDP. At the rally, they were joined by the leaders of NAK. The leaders of both parties promised the huge crowd that they would unite. Indeed they no longer needed to inform the crowd that they would unite; the crowd demanded it. The NAK and LDP officially formed an alliance known as National Rainbow Coalition (NARC) on Monday, October 22, 2002.

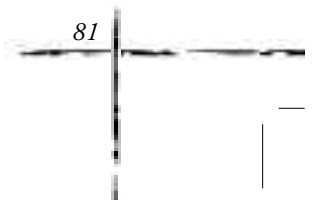
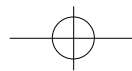
Following the formation of NARC, former KANU members began to defect to the new party in droves. This was obviously expected, considering the widespread opportunism among Kenyan politicians and the unpopularity of Moi's succession plan. However, what was intriguing about the defections was the fact that some of those defecting at this late hour comprised the former close confidants and relatives of the outgoing president. This category of defectors included the former head of the Kenyan army, Lieutenant General Augustine Cheruiyot; the MP for Aldai Constituency and a father to Moi's son-in-law, Kiptum Choge; the

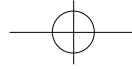
former MP for Eldoret North and a close relative to the immediate former president, Reuben Chesire; and a former nominated MP and Moi's roving ambassador on sensitive and delicate issues, both in the country and in the region, Mark Too, among others.

Partly in an attempt to stem the huge tide of defections that were rocking the party, and partly to bolster the slim chances of KANU in the December 27 elections, Moi decided to try the ethnic and patronage political strategies that he had perfected over the years once more. Thus, on November 4, 2002, he named the former minister for Transport, Musalia Mudavadi, the Vice President to fill the vacancy that had remained unfilled for several months since the removal of Professor George Saitoti. The following day he named John Harun Mwau one of the four vice chairmen of the party to replace Kalonzo Musyoka. Other appointments that were also made in the party to replace those who had rebelled earlier included those of Julius Sunkuli as Secretary General to replace Raila Odinga; Dalmas Otieno as Deputy Secretary General to replace Sunkuli; and Odongo Omamo as the Nyanza Province representative to replace Job Omino.

The appointment of Musalia Mudavadi—a Luhya by ethnicity—was clearly intended to woo back the Luhya community into KANU. However, this time round the trick simply failed to work. Instead the gesture infuriated the Luyhas who considered it too little too late. At the same time, the appointment also alienated the coastal peoples who felt that Katana Ngala, from the Mijikenda community from the region, deserved the vice presidency more than Mudavadi, given that unlike Mudavadi he had resisted the rebellion wave that Mudavadi had originally succumbed to before beating a retreat back to the party.

The anger of the Luhya community against the appointment of Mudavadi as Vice President was demonstrated when he returned to his home province for the first time in that position on November 12, 2002. On the following day when he began his campaign tour of the Province, his entourage was met by violent demonstrations as he tried to enter Kakamega town. The demonstrators burnt a bus and smashed shop windows in the town. On November 15, 2002, Mudavadi's motorcade was





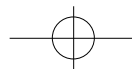
again pelted with stones by the rioters. The rioters also set up burning barricades and blocked the roads he intended to use during the tour. Thus, the defections of Moi's close confidants and relatives already mentioned above, coupled with the violent rejection of Mudavadi's appointment as Vice President by the Luhya community were obvious testimonies to the fact that the "Uhuru-for-President" project was headed for a complete failure.

Official campaigns to replace Moi's regime began in earnest on Monday, November 18, 2002 with the nominations of the presidential candidates. In total five presidential candidates got nominated on November 18 and 19, 2002. KANU's nominee was Uhuru Kenyatta; NARC nominated Mwai Kibaki; FORD-People's candidate was Simeon Nyachae; James Orenge represented the Social Democratic Party (SDP); and Waweru Ng'ethe stood on the Chama Cha Umma party ticket.

From the list of the presidential candidates, it was clear from the outset that the real battle was going to be between Uhuru Kenyatta and Mwai Kibaki. Both Nyachae and Orenge decided to present themselves as presidential candidates in protest after failing to be accommodated in NARC on their own terms. In the case of Waweru Ng'ethe, he was basically one of those fringe candidates whose presence in the contest was unlikely to have any significant impact on the outcome of the elections.

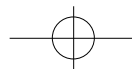
On his part, Nyachae's burning ambition was to become the next president of Kenya. He figured that he could achieve this goal by forming a coalition with the Rainbow Alliance, in exclusion of NAK, and thereby becoming the presidential candidate of the coalition between FORD-People and Rainbow Alliance. Thus, as the first step he insisted and eventually signed a Memorandum of Understanding (MoU) with the Rainbow Alliance led by Raila Odinga. But for Odinga, the signing of the MoU with Nyachae simply marked the first step towards building the "Super Alliance" of the opposition against KANU. Indeed, in the minds of Odinga and other political strategists at the time, the only sure way for the defeat of Moi's "Uhuru-for-President" project was a super alliance of all opposition political parties, including NAK.

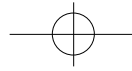
Consequently, after the MoU with Nyachae, the Rainbow Alliance



leaders continued to reach out to the NAK. At a huge public rally held on October 14, 2002 at Uhuru Park in Nairobi, Raila Odinga for the first time proposed Mwai Kibaki as the possible presidential candidate for the super opposition alliance that was fast coming into shape. The proposal by Odinga immediately received public approval at the rally. However, Nyachae considered the proposal a betrayal of himself by the Rainbow Alliance leaders, especially Odinga. Nevertheless, in pursuit of his presidential ambition, and nursing the hope that he could become the candidate for the super alliance between NAK, LDP and FORD-People, Nyachae now insisted that the presidential candidate for the coalition be "democratically" nominated through a "delegates system" by all the parties in the coalition. This proposal by Nyachae was rejected by other members of the coalition on two grounds. Firstly, the other members argued that the remaining period before the national nominations of the presidential candidates by the Electoral Commission of Kenya (ECK) for the December 27, 2002 elections was too short to allow for the organization of a delegates' conference to nominate the coalition's presidential candidate. Secondly, they pointed out that some of the political parties in the coalition, particularly the LDP, still did not have bona-fide delegates that could constitute such a conference. (The LDP had been one of those numerous moribund parties that had been registered in the country since the restoration of multipartyism.) Failing to have his demands met, Nyachae decided to abandon the super alliance and announced that he would contest the elections on the FORD-People party ticket.

In the case of Orenge, his problems were two-fold: firstly, he feared that if he joined the coalition there was a high likelihood that he could be locked out of the parliamentary nominations of the party to contest the Ugenya Constituency seat in Nyanza Province due to his perennial rivalry with Raila Odinga. Raila is widely acknowledged to have an almost fanatical following among the voters in the region. Secondly, Orenge wanted the assurance that he would be offered a key position in the future government formed by the coalition. When he failed to receive such an assurance, Orenge also decided to abandon the coalition and announced that he too would contest the presidency as the SDP candidate.





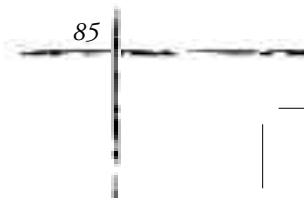
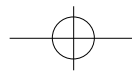
In deciding to abandon the coalition and contest the presidency separately and, therefore, against the opposition alliance, both Nyachae and Orengo misread the mood of the country's electorate. By mid-October 2002, it had become quite clear that the majority of Kenyans wanted change. To the majority of the electorate, this change meant voting out anything to do with President Moi. As such the majority of Kenyan voters were eager to ensure that there were no loopholes that Moi could use to slip back to power by proxy. This they believed could only be achieved through a united opposition front that could overwhelmingly and convincingly defeat KANU. Thus, when Nyachae and Orengo decided to go against this conviction and to contest for the presidency separately, the majority of the electorate simply saw them as spoilers who were unlikely to make a major difference in the elections.

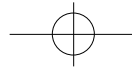
The presidential nominations were followed by the nominations by the political parties of their parliamentary and civic candidates from Wednesday 20 to Friday 22, 2002. The nominations, however, turned out to be extremely chaotic and grossly undemocratic throughout the country. Although all the major political parties involved in the exercise opted to use the primary elections method to nominate their respective candidates, it was quite apparent that none of them had put in place appropriate logistical arrangements for the exercise. Thus, throughout the country, several complaints were voiced by both the electorate and prospective candidates. The complaints ranged from missing or complete lack of ballot papers and boxes to late opening of polling centres. There were also complaints about several cases of rigging, vote buying and open bribery of returning officers. In some of the most extreme cases of irregularity, certain contestants were both candidates and returning officers at the same time. In such cases those contestants simply declared themselves the only nominated candidates for their parties.

But although the nominations were marred by logistical inefficiency and in some cases by undemocratic behaviour and malpractices, they resulted in the defeat of a large number of incumbent MPs and key personalities both from the government side and the opposition. Those defeated included two ministers and two assistant ministers of Moi's government and at least 10 prominent opposition MPs. The defeat of such a large

number of incumbent MPs and key personalities in the previous regime was a clear indication that the voters were unsatisfied with the performance of the government.

In the campaigns, the four key political parties—KANU, NARC, FORD-P, and SDP—adopted different strategies. Whereas the FORD-P, SDP and Chama Cha Umma campaigns were spearheaded solely by their respective presidential candidates, NARC opted for a team approach. At its launch in October 2002, NARC created a formal structure within the party called the Summit. Basically, the Summit brought together eight key leaders of the party who represented different large constituencies or ethnic blocks that have determined the pattern of voting in national elections since the re-introduction of multipartyism in 1991. In this case, the Summit comprised Mwai Kibaki who represented the Kikuyu community, Raila Odinga who represented the Luo community, Charity Ngilu and Kalonzo Musyoka for the Kamba, Moody Awori and Kijana Wamalwa for the Luhya, George Saitoti for the south Rift Valley communities and Kipruto arap Kirwa for the Kalenjin and the communities of north Rift Valley. The significance of the grouping was that it made the members of each of the major constituencies or ethnic communities feel that they would be a part of the future government that NARC was bound to form after the elections. Indeed at its launch the key positions in the future NARC government were also distributed on the basis of the ethnic blocks represented in the party. In the past national elections, the failure of the opposition political parties to defeat KANU was largely due to the fact that each of these ethnic blocks would field a presidential candidate who would be voted for mainly by the members of his or her ethnic community. It is the Summit of NARC, operating as a team, that spearheaded its campaigns. It crisscrossed the country often as a team; however, occasionally it would split into different groups and take on different parts of the country simultaneously. Given the fact that the future shape of the NARC government had almost been agreed upon by the members of the Summit during its launch, whichever part of the country the Summit leaders visited, they were always received by enthusiastic crowds. Indeed the majority of ordinary Kenyans accepted to vote for NARC's presidential candidate Mwai Kibaki not as an individual but as part of the Summit team, Kibaki being

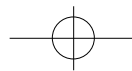




just the first among equals. It is primarily this belief among the majority of Kenyans that made NARC such an effective campaign machine.

In the case of KANU, initially its campaigns were spearheaded solely by Moi. Wherever he went accompanied by Uhuru, Moi would not permit Uhuru to address the crowds, except to greet them. This approach had a negative effect for the Uhuru campaign as it simply reinforced the perception that Uhuru was basically Moi's proxy through whom he intended to succeed himself. When Moi and his handlers realized this weakness, KANU resorted to the use of a group of its young officials dubbed the Young Turks to accompany Uhuru in his campaigns. The group comprised the former Minister for Home Affairs and MP for Eldoret North Constituency, William Ruto, the former Minister of State in the Office of the President and MP for Kilgoris Constituency, Julius Sunkuli, the former Minister for Rural Development and MP for Lugari Constituency, Cyrus Jirongo. But the group suffered from a serious character flaw; its members were associated with several corrupt deals and abuse of power. As a result Uhuru's association with the group similarly alienated the majority of the electorate from him. Eventually after his nomination as KANU's presidential candidate, Uhuru's advisors decided that he should lead his campaigns individually. Thus, from November 19, 2002, Uhuru began to criss-cross the country basically alone. Uhuru's individual efforts could simply not match the team work of NARC.

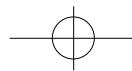
On December 9, 2002, a United States advocacy group—the International Republican Institute (IRI)—released an opinion poll on the elections. According to the opinion poll, NARC was headed for an overwhelming victory in the December 27 elections. In the presidential contest, the IRI forecast that NARC's candidate, Mwai Kibaki, was poised to win about 70 per cent of the votes compared with just 20 per cent for KANU's Uhuru Kenyatta. Simeon Nyachae of FORD-P was predicted to get 8.2 per cent of the votes while James Orengo of SDP would receive 1.5 per cent. The last candidate Waweru Ng'ethe of Chama Cha Umma would get 0.7 per cent. In the parliamentary contest, the opinion poll showed that NARC was likely to receive 65.8 per cent of total votes compared with 22.7 per cent for KANU. FORD-P was likely to receive 8.2 per cent while SDP would get 1.9 per cent.

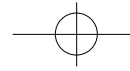


As would have been expected, all the political parties, except NARC, reacted very angrily against the opinion poll and claimed that it was biased. But partly in an attempt to close the gap that had been revealed by the opinion poll and partly to reinvigorate Uhuru's campaign, Moi announced on the same day that he was 'bouncing' back into the campaigns. He promised to make the opposition parties tremble. On the following day, December 10, 2002, Moi again began his tours of the country to campaign for Uhuru. But Moi again discovered that his campaign for Uhuru was not gaining much support. Indeed, by the time, anybody who watched the former president closely could notice that he had lost steam; he sounded half-hearted in support for his 'project'.

Thus, on December 12, 2002 while addressing the crowd assembled at the Nyayo stadium in Nairobi to celebrate the country's independence day, Moi finally acknowledged that the word 'sorry' actually existed in his vocabulary. Initially when Moi began his campaign for Uhuru Kenyatta, he stubbornly refused to entertain any divergent views. When the key KANU officials who were opposed to his imposition of Uhuru on the party ditched the party and formed the Rainbow Alliance, Moi declared that he would not abandon his scheme because he was not the type of leader who would admit his mistake and say 'sorry'. But on this day, in a highly emotional speech, Moi appealed to those whom he had hurt during his long time in office to forgive him. He also pledged to equally forgive those who had wronged him. He also promised a peaceful election and orderly transition. The reality had finally dawned on him.

What prompted Moi to promise a peaceful election and orderly transition was his awareness of the existence of wide-spread suspicion in the country that he still had some tricks up his sleeve—that Moi might resort to the rigging of elections in order to return KANU to power. The main reason why the majority of opposition leaders and other Kenyans were suspicious of Moi was the confidence that he and other key officials of his party continued to exude despite all the indications that KANU was going to lose the elections. The majority of Kenyans, therefore, came to believe that the only way through which KANU could win the elections was rigging. This belief was strengthened by the widespread reports countrywide that certain groups of people were involved in the rampant

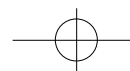




buying of votes, especially from among voters in the opposition strongholds.

In spite of Moi's assurances, in an attempt to pre-empt any plans by Moi and KANU to rig the elections, on December 17, 2002, one of the Summit members, Raila Odinga, while addressing one of the campaign rallies, threatened to mobilize more than one million people to storm State House in case KANU rigged the elections. Raila repeated the same threat on December 20 while addressing another campaign rally in Kisii town. On the same day representatives of twenty-five diplomatic missions in Kenya held a press conference at Holiday Inn in Nairobi at which they expressed concerns over possible rigging of the pending elections. At the press conference, the missions' representatives said that they had evidence that voters' cards were being bought countrywide. To substantiate the claims, the British High Commissioner, Edward Clay, said that he had voters' cards in his office tray. On December 25, NARC's presidential candidate Mwai Kibaki also stated categorically that the party would reject a manipulated poll. And finally on December 26, Raila, this time citing the case of Cote-d'Ivoire and Madagascar whose voters rejected manipulated polls, reiterated that NARC would not accept the results of the general elections if they were rigged. The significance of these protests by Raila, Kibaki and the missions' representatives is that they pre-empted any plans that any groups in KANU might have had to rig the elections.

Perhaps sensing that loopholes no longer existed for KANU to rig its way back to power, on December 19, 2002, Moi made his final plea to the Kenyan voters, especially to the members of his Kalenjin community, to support his candidate—Uhuru Kenyatta. Talking in his local language, Moi pleaded with the members of his Kalenjin community “not to show him their back at this time” (*Daily Nation*, Friday, December 20, 2002). The emotional plea by Moi obviously had an impact on the psyche of the members of the Kalenjin community; because as it turned out it was from among the Kalenjin community that KANU won most of its parliamentary seats. Be that as it may, it was on this note that the presidential candidates and political parties wound up their campaigns on the evening of December 26, 2002.

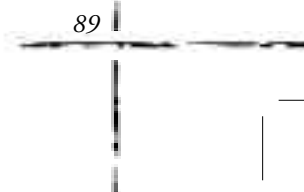


It is widely acknowledged that compared to the other two previous multiparty general elections held in 1992 and 1997, the December 27, 2002 elections were generally more peaceful. They were also freer and fairer than the two previous elections. The polls closed at about 6.00 p.m. countrywide, with the exception of a few constituencies in the Eastern and Coastal regions that had experienced floods. Just before midnight the same day, early results from the various constituencies began to trickle in. These early results were those that were being relayed to the opposition parties' headquarters and to the independent media houses by the parties' agents and other election monitors. This strategy was devised earlier by the opposition political parties and independent media houses. Its objective was to pre-empt any attempts by any groups, especially KANU, to rig the elections. As it later turned out, the results relayed in this way were consistent with the ones that the ECK was receiving from its district coordinators countrywide.

Based on these results, by 1.00 a.m. on December 29 it had become obvious that NARC and its presidential candidate were headed for a landslide victory. Out of the results already released, Mwai Kibaki was leading with 3,121,446 votes representing 65 per cent of the votes; Uhuru Kenyatta was trailing far behind with 1,379,901 or 29 per cent votes; Simeon Nyachae had 306,738 or 6 per cent votes; James Orengo had 21,514 or slightly over 0 per cent votes; and Waweru Ng'ethe trailed with 7,717 votes. In the Parliamentary contest NARC had already won 103 out of the 210 contested seats. KANU was trailing with 40 seats. Results from only 52 constituencies were still awaited. In the end, however, the final tally of the December 27, 2002 general elections were as indicated in the table below.

Table 5.1. The final results of the December 27, 2002 presidential elections

No.	Name of Candidate	Total Votes	Percentage (%)
1	Mwai Kibaki	3,646,227	62.2
2	Uhuru Kenyatta	1,835,890	31.3
3	Simeon Nyachae	345,141	5.9
4	James Orengo	24,524	0.4
5	Waweru Ngethe	10,061	0.2
TOTAL		5,861,844	100.0



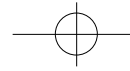


Table 5.2. The final tally of the December 27, 2002 parliamentary elections

No	Name of Party	Total Number of Seats		Total
		Contested	Nominated	
1	NARC	125	7	132
2	KANU	65	4	69
3	Ford-P	14	1	15
4	Safina	2	0	2
5	Sisi Kwa Sisi	2	0	2
6	Ford-A	1	0	1
7	Shirikisho	1	0	1
TOTALS		210	12	222

The most shocking aspect of the results, however, was the total number and calibre of KANU candidates that had been defeated at the polls. The list of those defeated read like “who is who” in KANU. It comprised the Vice President Musalia Mudavadi and 14 cabinet ministers. The list further included three national Vice-Chairmen, the Secretary-General and the Deputy Secretary-General of the Party. Also defeated were the secretaries and provincial representatives of the Party in Western and Nyanza Provinces. In all accounts, it was the future survival of KANU itself as a viable political party that was increasingly becoming an issue. A *Daily Nation* newspaper reporter who assessed the initial results remarked that “it would take a politician of charisma equal to British Prime Minister’s Tony Blair, who built the Labour Party from ashes, to return KANU to its former glory” (*Sunday Nation*, December 29, 2002).

Following these results, one of the NARC Summit members Raila Odinga called a press conference and indicated that his party wanted the presidential handing over ceremony to be held on Monday, December 30. Later that evening of December 29 the KANU candidate, Uhuru Kenyatta, conceded defeat at a press conference held at Serena Hotel, Nairobi. Thereafter, the ECK Chairman, Samuel Kivuitu, officially declared Mwai Kibaki and NARC the winners of the December 27, 2002 General Elections.

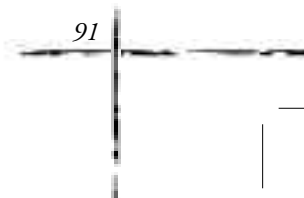
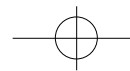
Mwai Kibaki was sworn in as Kenya’s third president at Uhuru Park,

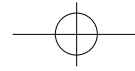
Nairobi at precisely 2.07 p.m. on Monday, December 30, 2002. The swearing in was witnessed by a mammoth crowd estimated at 500,000 people. Also in attendance were four regional leaders, namely, Presidents Levy Mwanawasa of Zambia; Benjamin Mkapa of Tanzania; Yoweri Museveni of Uganda; and the Prime Minister of Rwanda, Bernard Makuza; Mrs. Zanele Mbeki represented her husband, President Thabo Mbeki of South Africa.

At the swearing in ceremony, the crowd humiliated Moi by shouting him down and calling him all sorts of names. Similarly, Kibaki did not spare Moi. In his acceptance speech, Kibaki observed that he was inheriting a country that had suffered from a long period of misrule. Accordingly, he promised the crowd that his government would not be run on the whims of an individual and neither would it issue policies by the roadside (*Daily Nation*, Tuesday, December 31, 2002). Kenyans are waiting to see whether Kibaki will keep these promises.

According to the handing over programme, after the swearing-in ceremony, President Moi was expected to host a luncheon for the in-coming president and other regional leaders. However, following the rude reception he got at Uhuru Park, Moi apparently became dejected and cancelled the luncheon. When Kibaki arrived at State House that afternoon to take over, Moi spent with him only 10 minutes showing him the new office. At exactly 3.40 p.m., Moi accompanied by some of the close members of his family boarded a helicopter at the State House lawns that flew him to his Kabarak farm in the Rift Valley to begin his retirement. As he flew out of State House, the former employees of the President’s official residence and other cronies led by the head of the civil service, Dr. Sally Kosgei, and former nominated MP, Ms. Zippora Kittony literally wept. This symbolized the mourning of the death of an autocratic state.

On Friday January 3, 2003, President Kibaki announced his new cabinet at a function at State House, witnessed by the media. It was a leaner cabinet than the one that had been presided over by Moi. It comprised 24 Ministers and 24 Assistant Ministers. He named three women to full ministerial positions and four Assistant Ministers—the highest number of women ever appointed into the cabinet since Independence.





Despite a few murmurs, the cabinet was hailed as truly representative of the country. However, when it came to the second batch of appointments of permanent secretaries, widespread outrage was expressed. The appointments included people who are well past their official retirement ages and thus lack in energy, drive and creativity. Besides, the appointments reflected an attempt to recycle key officials from the Moi regime who had been responsible for the excesses of the regime in the first place. Due to this fact, the majority of Kenyans were already wondering whether the new government was serious about implementing the change for which they had voted. At the time of writing this chapter, Kibaki had yet to complete the crafting of his new government.

POSTSCRIPT

In a truly genuine liberal democracy, the government of the day is constantly supervised and made accountable to the people by opposition parties and the civil society. A vibrant opposition and civil society are thus essential pre-requisites for democratic governance. However, ironically, the December 27, 2002 general elections, although they supposedly resulted in the collapse of the autocratic state, they also prepared fertile ground for the germination of new seeds of autocracy in the country.

In the first place, although KANU won 69 seats in Parliament, making it the official opposition party, its future survival continues to look bleak by the day. Since the outcome of the general elections, several key officials of the party have either resigned or defected to NARC. The resignations have obviously weakened the party and may well undermine its performance in Parliament as an active watchdog against the government.

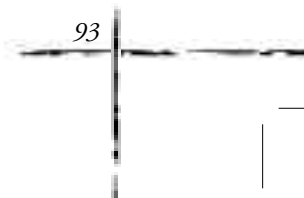
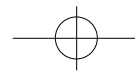
The second problem is the near paralysis of the country's civil society after the December 27, 2002 general elections. The emergence of an active and vigorous civil society in Kenya is closely associated with the re-introduction of multipartyism in 1990. It was mostly the leaders of the various opposition groups during the struggle for multipartyism that eventually started the majority of advocacy civil society organizations (CSOs) immediately political pluralism was re-introduced in the country. During the last ten years advocacy civil society organizations operat-

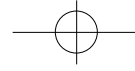
ed more or less as the other wings of the opposition parties against KANU. Thus, after the December 27 elections, the Kenyan civil society has become more or less moribund; it has yet to redefine its role vis-à-vis the new government. Moreover, in the December 27 elections, a number of CSO leaders and others key personalities who had been most active in the civil society sector contested parliamentary seats on the NARC ticket. This has resulted in a situation whereby the civil society has more or less merged with the new government. The two factors will obviously undermine the ability of civil society in Kenya to check the possible excesses of the government. In the absence of a vigorous engagement of the new government by both the opposition and civil society there are high risks that NARC's governance could retrogress to autocracy.

However, there is a small consolation. As mentioned earlier, NARC is a conglomeration of roughly 16 political parties. The parties do not necessarily see things the same way. As such there is no guarantee that the NARC MPs will always vote as a block for every government bill or policy position in parliament. This fact may well result in a situation whereby the NARC government is internally checked by its own backbench members in Parliament. Indeed, this political culture is already taking root in parliament. If it is institutionalised, then NARC will be saved from retrogressing to autocracy, at least before the next general elections in 2007.

At the time of submitting this chapter for publication, President Kibaki and NARC had been in power for slightly under three months. But during the period certain autocratic tendencies had begun to emerge in the Kibaki regime. Firstly, a cabal of shadowy behind-the-scenes operating self-seekers were already building around Kibaki to promote narrow ethnic and regional interests. The group was trying its best to replace the NARC Summit that had been instrumental in the overwhelming victory of the party. There is no doubt that if this group succeeds in 'owning' the presidency then it is likely to promote patronage and intrigue politics which are some of the key characteristics of an autocratic state.

The emergence of this cabal around the president is already creating intense power rivalry and division in the Kibaki government. If the bick-

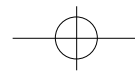




ering and divisions continue, the government will obviously fail to fulfil countless campaign pledges it made to the electorate and, therefore, the high expectations that the majority of Kenyans invested in the NARC government. This is bound to create discontent among the population who would react by challenging the government in various ways. To counter the challenges, the government may be tempted to result to repressive tendencies—another characteristic of an autocratic state. Nevertheless, whatever happens, Kenyans will definitely resist any attempts to return them to the era of autocracy, thanks to the vigorous civic education they have undergone during the last ten years of multi-partyism that has resulted in the creation of one of the most politically informed and active populations in the region.

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3

LIMITATIONS OF POLITICAL LIBERALIZATION: PARTIES AND ELECTORAL POLITICS IN KENYA, 1992-2002

Karuti Kanyinga

INTRODUCTION

On 18 March 2002, Kenya's ruling political party since independence in 1963, the Kenya African National Union (KANU), formally merged with one of the mainstream opposition political parties, the National Development Party (NDP), to form New KANU. In 1995, NDP's leader, Raila Odinga, had taken over and renovated the little known party after his disagreement with Kijana Wamalwa over the leadership of FORD-Kenya. After the defeat of opposition political parties in the 1997 general elections, NDP established a working relationship with KANU. Both parties began to strategise for the 2002 general elections. This resulted in the establishment of a firm working relationship between the two parties, beginning, firstly, with cessation of hostilities and, secondly, appointment of some NDP leaders into the cabinet. Both parties got into partnership on the expectation that they would work towards unity as a firm foundation for a bid to win the 2002 presidential, parliamentary and civic elections. However, as argued below, each party in the alliance had different interests and therefore a fragmented vision on the purpose of the merger.

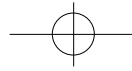
The merging of the two parties resulted in factionalism within KANU.

Some party officials remained opposed to the merger arguing that NDP officials could not be trusted. Nonetheless, at the insistence of the Party Chairman and President, Daniel arap Moi, the merger process was concluded. A new party constitution was put in place establishing new party structures. The party 'elections' that followed saw new and young ethnic elites occupy some of the prominent positions in the new party. Some of the experienced senior party officials such as the Vice President, George Saitoti, and the party Secretary General, Joseph Kamotho, were locked out of the new party structure.

This chapter discusses these and related events in Kenya's recent transitional experiences in relation to the perspectives of neo-liberal political ideology, particularly its emphasis on values of multiparty forms of democracy. In this regard, the main concern of this chapter is to find out the extent to which political liberalization has meant expanded political space and opportunities for citizen's participation in public affairs. The second important concern of the chapter is to understand the factors that shape political events in national level politics. Political parties, as institutions, are not the only factors that shape political competition. One has to look outside of the political institutions in order to gain a full understanding of the practice of politics under political liberalisation.

STUDYING STATE AND POLITICS IN AFRICA

Throughout the 1970s and 1980s, a state-centric view dominated studies of politics in Africa. This approach emphasised the state as the main variable in the political process in Africa. The approach, however, glossed over the significance of societal dynamics in shaping the context of politics and the institutional framework within which the state operates. The state was often described as neo-patrimonial, predatory, or prebendal (Mkandawire 1998) and was blamed for the continent's economic and political crisis. 'Statism', it was emphasised, was the primary force behind the continent's difficulties (Rosberg and Jackson 1982; Sandbrook 1985). This approach thus looked at unfolding events from the perspective of the centre. The state, its institutions and associated configuration of social-economic relations formed the focus of the study of national



politics. What was taking place at the local level was seen as a passive reflection of what was taking place at the national level.

A tendency to discuss unfolding events independent of high and central state politics evolved in the mid-1980s. More attention was given to processes of disengagement from the state. Discussions on the exclusionist tendencies by the 'neo-patrimonial' elite became a common discourse (see especially Bayart 1985; Chazen and Rothchild 1988; Azarya 1992). This discourse, however, reflected on African happenings in relation to the history of Western countries, particularly colonial powers, and Western traditions and values. It paid little attention to the historicity of the continent's political conditions. These were seen as given and therefore not necessarily informing the present and the future directions of the social transformation process that began in earnest during the colonial period through popular movements. This approach also placed primacy on the civil society. To several observers in this school, the patrimonial nature of the African state had attenuated civil society and stifled its potential for liberalisation. There was need therefore to support the growth of civil society organisations so as to enable them to check the 'future career' of the state in Africa.

By the early 1990s, both schools had conflated into a different variant, the 'governance' school, whose importance rose in tandem with increased involvement of the World Bank and the International Monetary Fund (IMF) in the institutional and managerial issues of governments in the African region. From then on, events in the continent began to be seen in governance perspectives. Governance here did not mean one single thing: it was subject to multiple interpretations depending on situation and context. Some confined its meaning to management of public affairs while others broadened the meaning to include management of state-society relations. As argued by Moyo (1999), the conceptual premise of governance remained problematic: it did not, for instance, address the question of power and relations thereof (Moyo 1999: 15).

This approach, like the previous ones, lacked the ability to achieve an articulate synthesised understanding of political events as they unfolded. It was reductionist in several ways: it reduced all events and their impor-

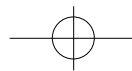
tance to resultant concentration of political power in personalised institutions and formal state institutions in particular. Nonetheless, it had one important consequence: it became the basis upon which the International Monetary Fund and the World Bank (and of course bilateral donors) designed economic and political conditionalities for aid negotiations in Africa.

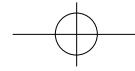
By the end of the first half of the early 1990s, the new thinking predicated the success of economic reforms in Africa on political liberalisation. This again had one interpretation. It meant introduction of multiple political parties and creation of autonomous civil society organisations. The fall of single political party regimes had to be engineered through either external or domestic pressure or both. Groups that constituted centres of dissent against single party rule had to transform into opposition political parties or provide a base for opposition politics. This thinking also linked both the political society and civil society. Both were seen as intertwined elements of the struggle against authoritarian single political party regimes. This new thinking reinforced the already widespread 'understanding' that a strong and free civil society would guarantee 'good governance' and ensure that the evolving political leadership was responsive and accountable to the society. Civil society organisations organised in the western tradition or autonomous and free associations were heralded as the institutions which would support the new wave of change and political transition in Africa.

This neo-liberal thinking, however, has certain shortcomings in explaining political events in Africa. Multi-party politics is equated with democracy and consolidation of democracy is judged on the basis of the nature of political competition. A multiplicity of autonomous political organisations is also seen as the basis of a strong civil society. How they relate to each other and the extent to which they insulate the society from the excesses of the state are issues which are rarely taken into consideration.

Mamdani on the Legacy of the Colonial State

Mamdani (1996) offers a better approach to the study of politics and political behaviour in Africa. He contends that to understand the nature





of relations between the state and society and politics therein, historical antecedents that go back as far as the colonial situation and in particular including how the colonial state was forged must be understood. In his argument, the colonial state was forged by use of force: it was founded on the coercion of indigenous peoples and central to its organisation and re-organisation was the 'native question'. The colonial state also created native reserves for occupation by different resident ethnic groups. The state established 'scheduled areas' for the settler community.

The post-colonial state did not reform the "bifurcated state". It adopted intact, without alterations, the colonial structures. Sometimes these were re-defined to suit the purpose, and to exercise the particular form of control favoured by the post-colonial elite in its bid to consolidate political leadership. A class question immediately evolved to shape and defined these relations. The poor came to develop a more enhanced sense of ethnic citizenship than did the rich. The poor depended on ethnic citizenship, for instance, to acquire land through customary law. The rich used their wealth.

In addition to the emergence of the class question, the civic sphere was de-racialized. Everyone whether native or settler was recognized as a citizen in the civic realm. However, "the distinction between the civic and the ethnic remained, since only the native was acknowledged as an ethnic citizen. Civic rights continued to be defined as individual rights in the civil and the political sphere" (Mamdani 1998:3). The main contradiction here again was that individual rights were acknowledged as universal while the native was supposed to enjoy group and customary rights.

The post-colonial state 'de-racialized without democratising' the state and its institutions. The state was de-racialized through "Africanization". The state was not transformed and therefore the boundaries between the citizen and the subject remained but without a substantive racial or colour character. The native or ethnic citizenship was not detribalised: the state only made an attempt to "re-organize decentralized power" in the name of nation building which resulted in increased centralization of authority. Rural Africa remained subjected

to the state, but with very little substantive connection to the state except participation in national elections that had no meaning to their problems of livelihood. Substantive citizens became the new African middle class and others residing in the urban areas where there existed a separation of powers (Mamdani 2000). The legacy of the colonial state therefore has remained, giving shape to the practice of politics; and political liberalisation is not adequate for transforming the state in Africa.

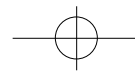
In Kenya, the colonial state maintained this domination of the society through several ways. One of these was ethnicization of the society through the creation of Native Reserves for different ethnic groups. This evolved a situation in which ethnicity became an important variable in association life, both in the countryside and in the urban areas.

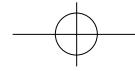
Ethnicization of the society took place in tandem with destruction of indigenous relations of production. This resulted in deep socio-economic inequalities as groups allied to the state sought to accumulate capital and wealth using the state framework. At the same time, the colonial state deepened ethnic divisions by encouraging the formation of ethno-political associations. Each numerically large group formed an association to articulate ethno-political grievances. On the whole, the associations that evolved to address colonial caused grievances were characterised by ethnic consciousness although they were socially differentiated. All had a base in ethnic settings. They could not open to wider or national constituencies owing to limitations imposed by the colonial state. The legacy of the colonial state passed intact to the post-colonial period.

POLITICS AND SOCIETY IN POST-COLONIAL KENYA

Consolidation of One-Party State

Kenya acceded to independence in 1963 with a multiparty political set up. At the time, there were two main political parties: Kenya African National Union (KANU) and Kenya African Democratic Union (KADU). KANU drew membership from the numerically large Kikuyu





and Luo ethnic groups. The party's main policy focus was on a unitary form of a government established on a liberal foundation. The party also preferred not to make radical changes such as would have undermined the economic stability that had been achieved through settler control of the economy. KADU, on the other hand, had membership from relatively smaller ethnic groups in the Rift Valley and at the Coast. These collocated around KADU for fear of domination by the large ethnic groups in KANU (Gertzel 1970). KADU preferred a federal or regional form of government (*Majimbo*) where each region had its regional assembly responsible for administration, local resource mobilisation and allocation as well as local governance. Central to KADU's policy platform was the land question. The party preferred that each region should be in charge of its land affairs as a way of preventing the large ethnic groups from encroaching on the land owned by the small ethnic groups who dominated the party's membership. The *Majimbo* form of government was adopted at independence in line with KADU's demands but was done away with in early 1965. There were other smaller parties representing smaller ethnic groups and others representing settler interests (for details see Gertzel 1970).

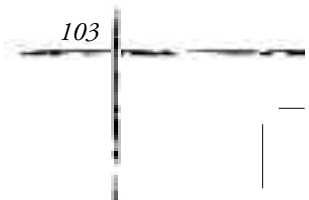
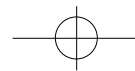
In 1964, KADU dissolved itself to 'enhance national unity'. Party leaders crossed the floor to join KANU. Consequently, some of them were appointed to cabinet positions. The winding up of KADU activated factionalism in KANU. Two factions evolved in response to the government's approach to the land question, among other issues (Kanyinga 1998). Oginga Odinga and Bildad Kaggia led one faction. They preferred a popular approach to the land question. The other faction had Kenyatta and other liberals. They preferred economic liberalism to guide development. This split the party into two and Oginga Odinga and Kaggia finally left the party to form the Kenya People's Union (KPU) in 1966. The government banned the party in 1969 following violent demonstrations in the wake of the assassination of the Luo politician, Tom Mboya, and a stand off between Oginga Odinga and Kenyatta. From then onwards, Kenya remained a *de facto* one-party state until 1982 when the government introduced an amendment to the constitution making Kenya a *de jure* one party state.

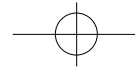
Throughout the 1970s, absence of an organised opposition provided Kenyatta with an uncontested political space. He transformed the Provincial Administration into an institution to mobilise public support and create channels of information on public policies. The Chiefs, District Officers and Commissioners came to play the role that political parties would play in ordinary circumstances. The absence of an organised opposition had another consequence as well. It created space for a cabal of politicians around the president. This grouping comprised political elite from the President's Kiambu district. They became his confidants and advised on political and other public affairs. The Kikuyu confidants acquired substantial political powers to the extent of influencing national political affairs (Throup 1987; Barkan, 1992).

The second post-independence period, the Moi regime, saw further demobilisation of the political and the social-economic sphere. Moi acceded to the presidency and began by proscribing national welfare organisations that articulated the ethnic interests of their member constituencies. Gikuyu, Embu and Meru Association (GEMA) became the target in this regard as did also the Luo Union and the Abaluhya Union.

Moi reinvigorated KANU, giving it administrative and political powers matching those of the Provincial Administration. This development resulted in a blurred line of distinction between the party and the government. Party officials became increasingly powerful to a point where some could give instructions to Provincial Administration officials and, rapidly, the Provincial Administration became subordinated to the party, as were other organs of the government. The party established a party disciplinary committee designed along communist party models. The Committee membership comprised some of the powerful cabinet ministers also known to be close to the President. The party disciplinary committee slowly assumed enormous powers. It could discipline MPs and cabinet ministers for what they said in parliament notwithstanding the parliamentary immunity they enjoyed.

De jure one-party rule had other consequences for governance in the country. The party and the government continually undermined the principle of separation of powers. In 1986 and 1989, for instance, con-





stitutional amendments took away the security of tenure of the Attorney General, the Solicitor General and Judges. Further, in 1987, KANU changed rules governing general elections. The party introduced a queue method of voting. The new rule required voters to stand behind a candidate or the appointed agent of the candidate. Election officials would then count the voters behind each candidate. The candidates who got over 70 per cent of the total votes cast would not be required to go to the next secret ballot round. The new rules applied to the 1988 general elections. The result was a relatively low voter turnout compared to the 1983 and the 1979 general elections. Individuals who were considered loyal to the state elites won in accordance with the 70 per cent rule. They did not go to the second round of the secret ballot. These included several cabinet ministers and others whom the state elites would have preferred to go into parliament unopposed.

Deconstruction of the Kenyatta hegemony did not end with disengagement of politicians from the activities of civil society but rather with the deeper penetration of the state into the civil society when Moi began to build a base to support his patron-client networks. A project to silence maverick politicians began in earnest. Through patronage and detentions, the state silenced the opposition groups located in the civil society. This gave rise to several underground 'social movements' especially created by intellectuals and the disengaged politicians. The state demobilised organisations opposed to Moi's practice of politics.

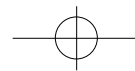
Political Liberalisation and Multi-Party Politics, 1990 - 1992

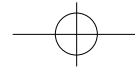
In Kenya demands for the introduction of a multi-party form of democracy began through the efforts of, among others, the Christian Churches and disengaged politicians. The early months of 1990 marked the clear beginning of this struggle. On the eve of the New Year in January 1990 a clergyman of the Presbyterian Church of East Africa called for the government to allow multiparty politics in line with what was happening elsewhere in Africa and Eastern Europe after the collapse of the Berlin Wall. Earlier, before 1990, there existed different and disparate groups pressing for political changes. Some of these groups such as *Mwakenya* operated underground after the detention and physical elimination of

members. Its leadership was drawn largely from the intellectual community within and outside of Kenya. *Mwakenya* could not operate in the open, given the constraints to organised opposition politics in a *de jure* one-party state. Continued repression and intimidation of the group and members saw many of the leaders go into exile. Those who remained continued to carry out discreet opposition activities. By the time the Churches were calling for introduction of multiple parties in January 1990, therefore, several underground groups had voiced the desire for change and reform. Many people had also been detained without trial, tortured and/or charged with treason.

The murder of Robert Ouko, the then Foreign Minister, early in 1990 intensified the domestic pressure for political change. The Minister was brutally murdered in his rural home after an official visit to the US where he had accompanied the President. The Minister was very influential in the international community while Moi's rating both at the local and international levels had considerably declined. On account of this, the murder aroused suspicion that the government had a hand in it. Continued demands for justice with regard to this murder were combined with pressure for political change. Two senior politicians who were also politically and economically influential added their voice to the demands for multiparty democracy. The two, Kenneth Matiba and Charles Rubia, were immediately detained without trial. This had the effect of strengthening the wave of protests against the regime.

The ruling party became increasingly vulnerable. In response to demands for change, the party appointed a Review Commission (the Saitoti Committee) to look into how the party should nominate its own candidates for elections and how the Party Disciplinary Committee should operate. The Committee was also supposed to look into electoral rules in general given that the change of election rules noted above was a major source of the political problems. Although the Committee was set up in response to wider demands, its mandate was restricted to the party affairs. Members of the public, nevertheless, gave views on wider constitutional issues and other wide-ranging issues. The final report, however, dealt with narrow party issues as defined in the mandate of the Committee.





During the same period, donors also withheld the much needed funding for government projects citing poor governance and increasing corruption on the part of the government as the main reason. Both bilateral and multilateral donors withdrew support to the government. At the same time, they increased their funding to human rights and good governance NGOs.

Without funds to support development projects and with increasing pressure for change from all areas of the country, the party convened a delegates' assembly to deliberate on the way forward. Delegate after delegate warned against multiparty democracy quoting the President's own warning that multi-party political competition would divide the country along ethnic lines. The delegates warned against the increasing pressure for change and observed that aid by donors could be foregone if it had to be taken on condition of introducing multi-partyism. The President, however, convinced the delegates that multi-party politics should be introduced if that would lead to accessing donor funds. However, he warned that he was still convinced that this would lead to divisions along ethnic lines. The delegates again changed their tone and began praising the President for this advice: they agreed to have the government repeal section 2A of the constitution to allow for multi-party democracy (Chege 1994; Kanyinga 1995).

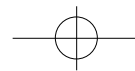
The Transition, Ethnic Conflicts and Party Politics

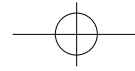
The transition from single party rule to multi-partyism had its own costs. The political elite from the President's Kalenjin community, and several others from the communities that constituted KADU in the 1960s, saw demands and pressure for transition to multi-party politics as implying the end of Moi's leadership. They were convinced that the numerically large ethnic groups, notably the Kikuyu and the Luo, were again using their numeric strength to hound the Kalenjin out of political power. These individuals exploited the land problems in the Rift Valley where the government had settled Kikuyu and other squatters in the 1960s. They consequently re-packaged the land question in the form of demands for federalism (*Majimbo*). They advocated the creation of federal states whose boundaries would be defined by territorial claims exist-

ing before colonial rule. This meant of course that the Kikuyu and the Luo squatters who had settled in the Rift Valley during the colonial period and much later through the government re-settlement efforts would have to be evicted back to Central and Nyanza regions respectively. The Kalenjin political elite hoped that this would deflect the debate and enable them to halt the multiparty political tide. It did not. They nonetheless locally reactivated demands for protected ethnic territory in the Rift Valley and at the Coast, as had been the case in the 1960s. This resulted in ethnic land clashes between members of former KADU communities and immigrant populations in the Rift Valley and much later at the Coast between the Mijikenda and upcountry Kikuyu and Luo immigrants.

Large groups of Kikuyu families were evicted from the Rift Valley, their titles to land notwithstanding. These clashes continue to simmer in areas where migrant ethnic groups settled during the colonial period: in the middle of the former white highlands or scheduled areas—Uasin Gishu, Trans Nzoia, and Olenguruoni among others. Elections were called and, as had been the case with elections prior to independence, the elites allied to former KADU mobilised the numerically smaller ethnic groups to counter, once more, the Kikuyu and the Luo in their different political parties.

Several political parties were formed after the opening up of the political space. The largest among the first ones was the Forum for the Restoration of Democracy (FORD) and the Democratic Party of Kenya (DP). FORD drew membership from across the country given its strong opposition to Moi and given that it had begun as a pressure group demanding political change. Its leadership comprised both experienced politicians who had been disengaged from the centre by Moi. It also comprised young professionals, business people, lawyers and youthful politicians who had led civic protests against the regime. The second important party at the time was the Democratic Party of Kenya (DP), which was founded by disengaged KANU politicians from especially the GEMA areas. There were other parties but so minor that they did not have a significant impact on party politics. These included the Kenya Social Congress (KSC), Kenya Democratic Alliance (KENDA), Party of





Independent Candidates of Kenya (PICK), and Kenya National Congress (KNC).

FORD later split into two parties, which were registered under the names FORD-Kenya and FORD-Asili. In later years, FORD-Asili split further into FORD-People and SabaSaba Asili. FORD-Kenya also ended up with two factions after the death of its leader Jaramogi Oginga Odinga in 1994. Kijana Wamalwa led one faction and Odinga's son, Raila Odinga, led the other faction. In 1995, Raila's faction moved out of FORD-Kenya and took over the little known National Development Party (NDP).

Divisions on the basis of ethnic and class interests, personality cults and the ethnic composition of party leaderships tore the opposition movement apart. What initially appeared to be a united opposition with a common cause became factions with varied interests. By December 1992 when elections were held, the opposition groups had fragmented along different lines and had already fielded several candidates for the Presidential election. Notable candidates included Mwai Kibaki of DP, Oginga Odinga of FORD-Kenya, and Kenneth Matiba of FORD-Asili. All the three lost the election to KANU and Moi; Moi was back in power after the elections (for details see Kanyinga 1994; 1996).

Shrinking political space, 1993-1997

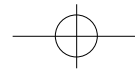
The defeat of opposition parties in the 1992 elections led to the opposition designing different strategies for making a bid to win political power. Youthful opposition activists (the Young Turks) in all the parties began to question the relevance of the 'elders' in their respective parties. They were worried about the absence of radical shifts in thought among the elders. They were also worried that the elders in DP were having consultations with KANU elites over, among other things, the ethnic land clashes in the Rift Valley. Increasingly questioned in this regard were the Gema-Kamatusa meetings in which the DP and KANU elites were involved (Cowen and Kanyinga 2002). The Young Turks argued that the solution to the country's problem would not be found in the talks but in comprehensive constitutional reforms to which KANU was not committed. Disagreements between the Young Turks and the Elders within DP

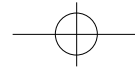
created huge divisions within the party thereby leading to fragmentation of its social basis of support.

The defeat of the opposition parties in 1992 brought them together immediately after the elections. They formed the umbrella United National Democratic Alliance (UNDA) between 1994 and 1995 to enable them make strategies to dislodge KANU from power. However, they differed on the issue of a reform strategy to the extent that the Alliance withered away before the 1997 elections. From early 1995, a new forum for reform started to emerge, the efforts for the change exerted by civil society organisations, ranging from NGOs to churches, who found common cause in the umbrella name of 'the civil society' (Mutunga 1999). This threatened the opposition political parties because it was now clear that the political initiative was being defined and directed by the civil society. Threatened by their loss of political initiative to civil society, opposition party leaderships found it necessary to reawaken their earlier cause for reform (see Cowen and Kanyinga 2002).

However, by the end of 1995, differences between parties and factions within those parties again reappeared. Two umbrellas now appeared: the National Opposition Alliance (NOA) and the National Solidarity Alliance (NSA). NOA comprised the 'moderate' secondary factions of the different opposition parties while the NSA alliance comprised the radical groups. Activists in the NOA alliance shunned the ostensibly belligerent profile adopted by 'the civil society'. The National Solidarity Alliance (NSA), which comprised the aggressive activists from Matiba's faction of FORD-A and Raila Odinga's radical wing of FORD-K were more radical in their approach. The group took on board like-minded politicians from the DP, and especially those who were opposed to Kibaki's 'middle of the road' and 'yellow belly' attitude towards the struggle for reform. Owing to this, the NSA rooted itself in 'the civil society'.

A little over a year later, during early 1997, the NSA had become part of the National Convention Executive Council (NCEC), founded by non-party, civil society organisations. To this group, elections in 1997 had to be held after a comprehensive constitutional review in order to reform the context of political competition. They were concerned about going





into elections using the same provisions that KANU had exploited to gain advantage over other groups. However, NOA and KANU backbenchers argued that the reform process was the responsibility of Parliament and not the civil society. They preferred a situation where parliament was in control of the reform agenda and its content rather than one controlled by the civil society groups. NOA and the KANU backbenchers effectively held back the reform crusade and crafted a new outfit to defeat the civil society groups. The new initiative was the Inter-Parties Parliamentary Group (IPPG) comprising all parliamentary parties and charged with the responsibility of negotiating a minimum reforms package before the 1997 elections. Certainly the IPPG disillusioned those who had aspired for comprehensive constitutional reforms before the elections. Among these were of course civil society actors and politicians in the Solidarity faction. This disillusionment informed the struggles for constitutional reforms immediately after the 1997 elections.

One important outcome of the IPPG reforms was the agreement to take the state apparatuses out of party politics and to facilitate fast registration of political parties. As a result several parties were registered just before the 1997 elections. Some of these were off-shoots of the mainstream opposition parties while others were formed by individuals who disagreed with the leadership of their parties over the IPPG reforms and the failure of their parties to push for adoption of the NCEC reform agenda—comprehensive constitutional review before the elections. Some of the parties formed at the time included FORD-People and Safina. Others, such as the Social Democratic Party (SDP) and the National Development Party (NDP), were renovated for purposes of the 1997 elections.

The opposition political parties did not unite for the 1997 elections. They fielded different Presidential candidates. They were again divided along ethnic lines. The notable opposition presidential candidates were Mwai Kibaki of DP; Raila Odinga of the NDP; Charity Ngilu of SDP; and Kijana Wamalwa of FORD Kenya. Moi and KANU won again with 41 per cent share of the votes while the opposition presidential candidates lost with a combined 59 per cent vote. Individually, however, the only significant challenger to Moi was Mwai Kibaki who scored 31 per cent of the votes. This score, however, was the result of the absence of

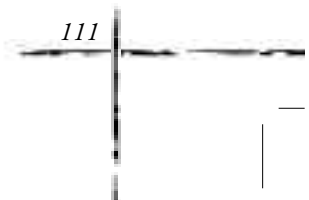
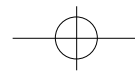
Kenneth Matiba with whom Kibaki would have shared the Kikuyu ethnic votes.

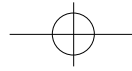
In the 1997 election, both KANU and the opposition had an almost equal share of parliamentary seats. This was a clear indication of the lack of an overwhelming majority for KANU and it meant that the party had to make new strategies if it was to dominate parliamentary politics. The party began to court support from some of the opposition parties by promising a share in political power and an advantaged position in the Moi succession equation. One party remained the target of KANU in this regard: the National Development Party (NDP) of Raila Odinga. The dominance of the party in Luo Nyanza especially in the 1997 elections, where the party won almost all parliamentary seats, was enough to convince KANU that that block of votes was mandatory if KANU wanted to retain political power. Moreover, KANU had become increasingly worried over the possibility of opposition unity and over the ability of Raila Odinga and Kenneth Matiba to mobilise the urban lumpen classes against KANU in the major towns. These factors convinced KANU that it was important to do business with NDP. NDP on the other hand, had managed to mobilise Luo support by citing the persistence of marginalisation of the Luo from the colonial period and later during both the Kenyatta and the Moi governments. For the NDP leadership, only a cohesive Luo political force would be able to compensate for their past marginalisation through a 're-distribution in arrears' (Cowen and Kanyinga 2002). Both groups (KANU and NDP) therefore perceived that they had something to gain from the merger that evolved between the two parties.

THE 'MOI SUCCESSION' AND THE 2002 ELECTIONS

Politics Around the Succession Question

Questions around the Moi succession shaped party politics immediately after the 1997 elections and specifically between 1998 and 2002. The constitution did not allow Moi to run for a third time: he had run for the maximum two terms of five years each as allowed by the constitution. Although he was not a candidate for the 2002 elections, both the opposition and KANU saw him as an important factor in shaping the final





outcome of the 2002 elections. Both had different worries. The opposition was worried about whether Moi would hand over power. They were worried about whether he would move aside and facilitate a fair competition between KANU and the opposition groups. KANU, on the other hand, was worried about whom Moi would hand over power to. Senior KANU officials therefore were jostling to catch Moi's eye for anointment as a successor. They faced one important challenge in this regard: Moi had publicly said that none of them had leadership skills – he was not certain that they could lead Kenya. This statement, which Moi repeated on several occasions, worried those who expected to be anointed. The courtship that had begun between Moi and Raila shook them more. Some were worried that Raila was being wooed into the party to take over from Moi.

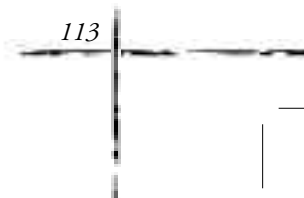
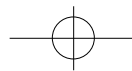
Who in KANU would take over from Moi and whether the opposition would defeat KANU in the absence of Moi became the main issues around which party politics revolved and shaped. These questions resulted in the construction of party and ethnic alliances and counter-alliances for most part of the period between 1998 and 2002. Leading in the search for formidable identities and alliances were KANU and NDP of Raila Odinga. Opposition groups, as argued later, were also making futile attempts at coalitions. Nonetheless, immediately after the elections, KANU and NDP began to cooperate within parliament. This cooperation required each party to support and defend the other's positions especially within parliament. This resulted in NDP supporting some of the KANU positions in the house. KANU reciprocated by supporting NDP's positions. By 2000, relations between the two parties had consolidated so well that other opposition political parties did not seek support of NDP as an opposition political party. They considered NDP as an unofficial appendage of KANU.

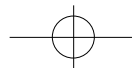
Hostilities that existed between Raila Odinga, on the one hand, and Moi and KANU, on the other hand, ceased to exist. Luo Nyanza began to accommodate Moi and KANU with relative ease. Both KANU and NDP began to collaborate in joint political activities even at the local level. Elites allied to both parties would officiate in fundraising events without the tension and mistrust that had characterised their relations in

the past. They would also address public rallies and discuss local development issues without acrimony. KANU and NDP youth groups became the watchdogs of the new efforts; they often disrupted meetings convened by other opposition groups. The Provincial Administration and the police would rarely interfere with meetings organised and addressed by NDP officials and politicians. There were of course a few instances where the police disrupted their meetings but these were generally seen as isolated incidents. On the whole, cooperation between the two parties enabled NDP to organise support at the local level with relatively more ease than other opposition political parties. This was the trend throughout the period between 1998 and 2001.

In 2001, cooperation between the two parties was further enhanced when President Moi appointed Raila Odinga and several other members of NDP to the cabinet. Raila was appointed to the position of Energy Minister while Adhu Awiti was appointed Minister in charge of Planning and Economic Development. Several other members of the party were appointed to the position of Assistant Ministers. The immediate interpretation of this was that Moi was grooming Raila Odinga to take over after his retirement since the constitution did not allow him to run for a third time. NDP's appointment to the government led to a series of preparations for the merger of the two parties. NDP structures merged into KANU structures even before the merger itself was formalised.

The hurry in which NDP expected to join the Moi succession race was noted early on when NDP pushed for a motion of no confidence in the Vice President, George Saitoti, in parliament. By virtue of his position, the Vice President stood a better chance than anyone else in the party to take over from Moi. NDP, however, filed a motion of no confidence in the Vice President citing his involvement in several corruption scams and therefore his inability to lead. The motion was defeated. The Vice President got support from a combined force of the opposition and KANU. The Vice President got support especially from the Democratic Party MPs. MPs from the Kikuyu ethnic community particularly argued that the Vice President was better placed to succeed President Moi and that NDP was behind the vote of no confidence so as to prepare ground for Raila Odinga to take over from Moi.





The merger between KANU and NDP

Appointment of NDP leaders to the cabinet fastened the pace of merger talks between the two parties. Both parties had different reasons for merging. Those in NDP expected the merger to place them—and their leader Raila Odinga—strategically next to Moi in preparation for the succession race. They thought that this would enable them to out-compete even the Vice President particularly given that the President had already dismissed those next to him as unable to lead. Given that Moi had agreed to work with Raila, this was equivalent to choosing him as his successor. Those in KANU had slightly different reasons for the merger. They expected the merger to give them numeric advantage over opposition political parties. In the absence of Moi who had led the party to victory on two occasions, they required a clear majority and preferably a bloc of ethnic votes in order to win the forthcoming elections. They were certain that the opposition would not unite against KANU. They were also certain that the opposition would not field a single presidential candidate. They generally expected a repeat of the past in the 2002 general elections.

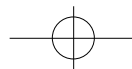
The process of the merger began by establishment of a team to study the constitutions of the two parties with a view to harmonising them. The process also required both parties to finalise delegates' lists in preparation for a national delegates' conference where the merger would be effected. Within KANU, however, there evolved a faction opposed to the merger. The party Secretary General, Joseph Kamotho, a political ally of the Vice President, George Saitoti, led those opposed to the merger. On his side were several other cabinet ministers and party branch leaders who had shown support for Saitoti. The Secretary General argued that KANU as a party had not been given the opportunity to debate the merger. Others observed that the rank and file of the party was opposed to the merger since they saw it as only serving the personal interests of Moi and Raila. Given that Moi was leading the merger process on the part of KANU, there were few within the party who could oppose him. The party slowly marginalized those who criticised the merger and their associates.

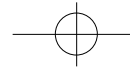
In the meantime, the team harmonizing the party constitutions finalised its work and national delegates' lists for the two parties were prepared.

KANU Secretary General, Joseph Kamotho, was apparently sidelined from the preparations that were taking place. Other new officials working closely with the President took over the preparations. They drew the agenda for the party's delegates' conference. How the delegates would vote for or against the merger and also how they would vote for new party officials soon became another issue dividing the KANU leadership. Those opposed to the merger preferred a secret ballot while those in NDP and Moi's faction preferred voting by acclamation. Each of the factions had its own reason for this. Those opposed to the merger argued that acclamation was undemocratic and that it would intimidate delegates opposed to the merger. They argued that if KANU delegates were allowed to speak freely, then they would go against the merger. But they would be intimidated because opposition of the merger was interpreted as opposition to the President. The Moi and NDP factions, on the other hand, argued for acclamation saying that it was the method of voting used in parliament and that it would take much less time than the secret ballot.

The team working on the party constitutions developed a new party structure and a new constitution altogether. The party established four new positions of Vice Chairmen, among others. This new approach aimed at winning over several ethnic groups into KANU and at accommodating the NDP interests. The party hoped that the positions of Vice Chairmen, if given to leaders from numerically large ethnic groups, would enable the party to win support from such groups. Ethnic groups and regions targeted in this regard included the Akamba from Ukambani area of Eastern Province, the Luhya in Western Kenya, and the Coastal groups. The party elites operated on the assumption that the merger with NDP was one important step towards winning over the Luo Nyanza onto the KANU side. The position of the party Secretary General was 'reserved' for NDP.

On 18 March 2002, the delegates met at Kasarani Sports Centre, Nairobi, and began the process of merging the two parties and filling the new party positions. Before that particular day, leaders from different ethnic constituencies had lobbied for different party positions using the number of delegates on their side as a bargaining tool. Alliances were

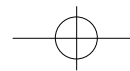




constructed and deconstructed. Different factions evolved distinguished by support or opposition to the merger as well as support or opposition of certain candidates for the different party positions. The pro-merger faction was closely related to Moi and Raila. Those interested in the different party positions sought to associate with this faction as much as possible. The faction also was the most solid among all the factions that evolved. The anti-merger faction led by the party Secretary General was less solid. It comprised some party leaders who simply sat on the fence awaiting the final outcome of the vote at the delegates' conference. The Vice President and several cabinet ministers appeared to be in the latter category. There were certainly other groups representing positions between these two.

Each district party leader began to lobby the delegates from his district to support certain candidates. Lobbying at the district level resulted in the national level political divisions spilling over into the districts. Many districts thus had delegates divided in relation to their support to candidates for the national party positions. On the eve of 18 March, lobbying intensified. Each party leader sought to fence off the delegates on his/her side from encroachment by opponents. This was done with the aim of ensuring that the delegates voted as a block in support of a particular candidate. The different candidates paid for the expenses relating to the upkeep of the delegates. In all cases, the candidates ensured that the delegates were paid well to prevent opponents from buying them to their camp. Different groups of leaders shuttled from one hotel to another to buy the delegates and/or to ensure that their support was still solid. By this time, it was also clear that the delegates would vote by acclamation during the meeting. This is the method that the inner cabal in KANU and NDP preferred. The cabal was able then to communicate this decision to their delegates well in advance.

The Moi-Raila faction was as active as any other faction in ensuring that the delegates were not 'interfered with' prior to the morning of the meeting. Having won the first round of the contest in ensuring that acclamation would be the preferred method of voting, they drew a list of party officials they preferred for different party positions. They distributed all the party positions on ethnic lines. On the eve of the meeting, some del-



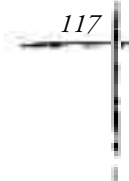
legates were rehearsed on how they would shout their acclamation and were informed about who would occupy which position. During the meeting, the Kamotho faction learnt of the party list and of the acclamation method that was to be used. They consulted among themselves and appreciated that they had no viable alternative but to withdraw their candidacies.

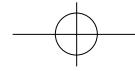
The names of the candidates nominated by the Moi-Raila faction were read one by one for each of the positions that each was vying for. The delegates acclaimed in approval and in the support of these candidates. Although there were other candidates who had shown interest in all the party positions, their names did not appear in the list that was read out. They were omitted. Those selected for the positions of the Vice Chairmen were: Uhuru Kenyatta from Central Kenya; Kalonzo Musyoka from Ukambani; Musalia Mudavadi from Western Kenya; and Katana Ngala from the Coast.

The name of Vice President, George Saitoti was glaringly missing in the party line up despite his having been validly nominated to vie for the position. The President sharply rebuked Saitoti when the latter sought to know why his name was missing from the list. The President shouted him down and told him to 'shut up'. Other party leaders such as the Secretary General, Joseph Kamotho, took this to mean that they would not be allowed to vie for any position. They became aware that delegates had already rehearsed what to do and how to apportion positions in the party. They consequently withdrew their candidacies. The position of the party Secretary General was given to NDP leader, Raila Odinga. Others in the Kamotho-Saitoti faction did not vie for the positions they had identified. The delegates simply approved by acclamation the names in the list prepared by the KANU and NDP inner court cabal.

Collapse of the Merger and Fall of New KANU

While anointment of the Vice Chairmen and the Secretary General of the New KANU went on without difficulties, the Moi succession question ripped the entire procedure of anointment into shreds. Appointment of equally strong party leaders to the positions of Vice Chairmen and Secretary General intensified the internal competition in





KANU to succeed Moi. Each of those occupying the Vice Chairmen positions had a clear ethnic constituency. They had the numbers that would count in giving KANU support. Raila Odinga, the party Secretary General, had a solid base. He had many former NDP MPs on his side and could count on block support from Luo Nyanza and the Luo in the diaspora. From 18 March 2002, former NDP supporters expected the President to name Raila as the party's Presidential flagbearer for the 2002 elections. Others were also in the queue for succession. They all showed keen interest in being nominated. Some began to mobilise ethno-regional support in advance. Moi remained silent, however.

Moi's silence about whom he preferred as his successor and/or his party's presidential candidate made party members restless. They were concerned that the possible date for the general election, December 2002, was approaching yet the party had not picked its candidate. From then on, the members and influential individuals in the party began to press the president to name the candidate. On 27 July 2002, the President named Uhuru Kenyatta, the son of the first President of the republic, Mzee Jomo Kenyatta, as his preferred successor and the party's presidential candidate. This surprised the former NDP leaders and the other Vice Chairmen who had expected to be named as successor. This became the beginning of the war and rifts within KANU. These leaders immediately protested against Moi's choice. They cited Uhuru's lack of political experience and the need to have the presidential nomination council nominate the presidential candidate as stipulated in the constitution of the party. Raila Odinga led the other leaders in protesting against Moi's choice. While protesting, each of them indicated his intention to vie for nomination as KANU presidential candidate. They requested the President, who was the Chairman of the party, to convene a delegates' conference where delegates would identify the party's presidential candidate. Each leader now began to mobilise support from his ethnic constituency. They hoped that another delegates' conference would be convened to identify the presidential candidate for the party. President Moi, however, stood his ground. He similarly started to tour the country mobilising support for Uhuru Kenyatta.

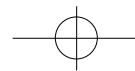
The new party Secretary General, Raila Odinga, led the other party offi-

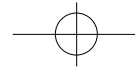
cial to form a 'Rainbow Coalition' to distinguish themselves from the Moi-Uhuru faction within KANU. After forming the Rainbow Coalition, the Moi-Uhuru faction continually warned them against forming 'another' party and requested them to await a delegates' conference to press their position. The national delegates' conference was rescheduled several times as each faction declined to compromise. Moi insisted on having Uhuru Kenyatta as the presidential candidate. The Rainbow Coalition led by Raila Odinga insisted on genuine elections for the party's presidential candidate. The Rainbow Coalition also insisted that several conditions had to be met before they could attend the delegates' conference. They insisted that the secret ballot be used in the nomination of the presidential candidate; that an independent body to supervise the nomination exercise be used; and that they be allowed to scrutinise the lists of delegates to the conference. The Moi-Uhuru group declined to meet any of these conditions.

The national delegates' conference was convened on 14 October 2002. The Rainbow Coalition declined to attend the meeting. On the same day, the Rainbow Coalition took over a minor party, the Liberal Democratic Party (LDP), and transformed it into a vehicle for their opposition politics. Through LDP, the former KANU leaders participated in a large public rally convened by 15 opposition parties (grouped under the National Alliance-[Party] of Kenya—NAK) to address the question of a single presidential candidate and a united opposition. Participation of the KANU faction, Rainbow Coalition in the name of LDP in an opposition rally marked the collapse of the merger between KANU and NDP. It marked the fall of New KANU.

Succession, Opposition Unity, and the 2002 Elections

The defeat of opposition political parties in the 1992 and the 1997 election continued to serve as an important lesson for opposition political parties. All the mainstream opposition parties, therefore, watched keenly the merger between KANU and NDP. Furthermore, immediately the two parties began to cooperate, opposition groups began to make attempts at unity. An issue that put them together, in addition to their worried about KANU and NDP merger and its implications for the suc-





cession question, was the need for a comprehensive review of the constitution. In early 1998, the mainstream opposition parties came together to renew demands for constitutional reforms. They teamed with civil society groups such as the National Convention Executive Council (NCEC). By 1999, however, the government had not agreed to restart the process. Opposition groups and religious organisations took the demands a step further by establishing a reform process on their own and independent of the government. This led to the formation of the People's Commission of Kenya or what came to be known as the Ufungamano Initiative (it was launched at the Ufungamano building).

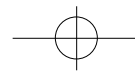
The birth of the Ufungamano Initiative led to several other attempts at opposition unity. Opposition parties joined to mobilise support for the Ufungamano Initiative. Groups of rebel MPs in NDP, KANU and members of DP and FORD-Kenya often travelled together to different parts of the country for the purpose. In most cases, KANU and NDP youths would disrupt their meetings warning that the areas they visited were KANU-NDP zones. In spite of this, large numbers of people often attended these meetings. In September 2000, James Orengo of FORD-Kenya and other opposition MPs formed the Movement for Change—*Muungano wa Mageuzi* in Kiswahili. The *Mageuzi* group visited different parts of the country mobilising support for a people-driven constitutional review process and calling for opposition unity. The support they received in the heartland of KANU areas such as the Rift Valley increasingly worried Moi and NDP leaders. In order to create a pretext for the repression of the group, Moi referred to the group as a 'revolutionary movement' that had the aim of taking over power by use of force and unconstitutional means. He banned the group's activities. NDP's Raila Odinga supported the ban and his supporters began to disrupt *Mageuzi* rallies in Luo Nyanza. *Mageuzi* was unable to organise political support thereafter.

In March 2001, opposition groups made another attempt to work together. By this time, the Ufungamano Initiative was making attempts to merge with the Commission appointed by the Parliamentary Select Committee, which represented KANU and NDP interests. NCEC and *Mageuzi* leaders became increasingly worried about this turn of events.

They agreed to constitute an outfit to monitor the review process and ensure it was people-driven. They formed a national unity group—*Umoja wa Wakenya (Ukenya)*. *Ukenya* was also meant to counter the NDP and KANU merger by providing the basis for opposition unity. The group failed to agree on which other parties to bring on board. A suggestion that the DP be invited into its membership widened the divisions amongst the *Ukenya* members. From then on, *Ukenya* remained inactive.

Civil society groups and religious groups in particular continued to demand opposition unity. In response to these demands, leaders of DP, FORD-Kenya and the National Party of Kenya met regularly to discuss possibilities of working towards a united opposition. In January 2002, they formally launched the National Alliance for Change (NAC). The National Alliance for Change now constituted the forum around which opposition unity could be discussed. Another alliance evolved soon after the formation of NAC. The new alliance, Kenya People's Coalition, comprised several parties that had initially distanced themselves from the three parties that had formed NAC. Leading this coalition was Simeon Nyachae of FORD-People and who led one of the rebel groups in KANU. NAC invited Nyachae's coalition but he declined to join them. NAC nonetheless appointed a committee to study and make recommendations on how to achieve opposition unity and how to field single opposition candidates for the 2002 elections. NAC developed a Memorandum of Understanding (MoU) which all participating parties had to sign. As a show of commitment to political change and with a view to demonstrating that it would not centralise powers around the presidency, the party developed a new organisational structure with the position of a Prime Minister. Again this was meant to show a commitment to accommodating the varied ethnic interests at the centre. The party finally established a secretariat and applied to change the name of Charity Ngilu's party - the National Party of Kenya (NPK) - to the National Alliance (Party) of Kenya (NAK) as its official name. This party later changed its name to National Rainbow Coalition (NARC) after the merger of the Liberal Democratic Party (LDP) and NAK.

The new party, NAK, became the umbrella for 13 political parties and



two pressure groups. In terms of regional spread, the parties in the alliance covered Central Kenya and the Mount Kenya region (DP); parts of Western Province (FORD-Kenya); and parts of Ukambani (National Party of Kenya). Other parties in the alliance did not have a solid regional base—they were minor parties. Similarly, in the Kenya People's Coalition, only FORD-People had a regional support in the Kisii Nyanza. Others were minor parties with little numeric and ethnic support strength.

The new national alliance, NAK, continued to hold joint rallies in different parts of the country to demonstrate the new unity among opposition parties. Following the fall out among New KANU leaders in July after Moi named Uhuru Kenyatta as his preferred choice, the Rainbow Alliance faction in KANU began to discuss how to work together with NAK. Because of this, if not in spite of it, NAK immediately announced its new leadership line up in the event that the party won the elections. The party also identified Mwai Kibaki as its single presidential candidate. The aim of this of course was to create a basis of minimum conditions for negotiations with the Rainbow Alliance because the faction also had individuals keen to be nominated as presidential candidates.

Membership to NAK was corporate; only political parties could sign up as members. After the failure of KANU to meet the Rainbow Alliance demands for the party delegates' conference, the Alliance reconstituted itself into a political party—the Liberal Democratic Party—and gained membership in NAK. Together they formed the National Rainbow Coalition (NARC). The parties signed a Memorandum of Understanding to govern the formation of the government upon winning the election. They also agreed to restart the process for a new constitution after winning the election. The birth of NARC marked the new end of KANU, Kenya's ruling party from independence in 1963.

NARC won the December 2002 elections with a big majority. The party's presidential candidate, Mwai Kibaki, won 62 per cent of the votes cast while Uhuru Kenyatta of KANU got 31 per cent. Simeon Nyachae of FORD People got 6 per cent. The party also won a big majority—

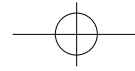
though not absolute—of parliamentary seats. The party won 125 seats out of 210 seats. KANU won only 64 seats and FORD-people 14 seats. 7 seats went to 4 smaller parties.

CONCLUSION: CHALLENGES TO POLITICAL LIBERALISATION

Kenya's political space is highly ethnicised. This phenomenon, however, is not the result of the re-introduction of multiparty politics in the early 1990s. It is a phenomenon that has historical antecedents that reach back into the colonial situation. The colonial state ethnicised the society by creating Native Reserves for most resident ethnic groups in Kenya. This in itself did not ethnicise the political space. The colonial state's practice of confining African politicians to their ethnic Native Reserves and preventing them from forming national alliances resulted in an increasingly ethnicised political society. Each social-political grouping therefore had an ethnic base and foundation. The struggle for independence again heightened ethnic consciousness. The main political parties formed around ethnic lines.

Decolonisation did not address the problem of ethnicity in the political space. It also did not transform the state institutions. Indeed all state apparatuses were adopted intact with little reform. The police and the Provincial Administration, which stood clearly as symbols of colonial authoritarianism, were handed over to the post-colonial government without major changes. Both Kenyatta and Moi effectively utilised these institutions in the same manner the colonial administration did. In other instances, these are the institutions that filled the lacuna that evolved with the demise of party politics under the Kenyatta administration. Under the Moi regime, it is these institutions that were used to buttress authoritarian governance.

The political space was liberalised in 1991 in the context of an unreformed constitution. This allowed the state party and the government to constrain the activities of the opposition parties. Opposition groups could not effectively mobilise support in both rural and urban areas. The ruling party, KANU, also used public resources to mobilise support against the opposition groups. The opposition groups also fragmented



along personality, class and ethnic lines. They lost both the 1992 and the 1997 general elections to KANU.

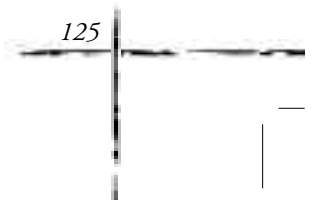
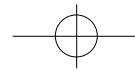
Although opposition groups made several attempts at opposition unity in the periods preceding both the 1992 and the 1997 general elections, it was the merger between KANU and NDP that inspired them to establish a firm basis of unity. The cooperation between KANU and NDP immediately after the 1997 elections appeared to cause panic and fear among the different opposition groups because of the pace and firmness in which both parties approached their partnership and eventual merger. Civil society groups were also fronting demands for unity among opposition groups. It is perhaps out of fear that KANU and NDP would win the elections that the mainstream groups agreed to unite. Indeed the initial stages of this unity experienced challenges including possible withdrawal by some of the key individuals leading different parties. But of ironical importance is the fact that it was Moi's 'mistake' of appointing the inexperienced Uhuru Kenyatta as well as absence of internal democracy within KANU that led to unity among the opposition groups. Convinced that Uhuru would be a President who would listen to and seek advice from Moi after the elections and at the same time ensure his security, Moi picked on Uhuru for a successor. Already he had made the Raila Odinga faction to believe that he would pick on him for the party candidacy. Each of the others including all the party Vice Chairmen and the Vice President also expected Moi to appoint them as the candidate. Appointing Uhuru laid the basis for protest in the party and the final walk out of the large faction that was opposed to Moi's choice.

Opposition unity was also driven by absence of democracy and poor governance within KANU. KANU had not reformed itself even with the opening of the political space. The party Chairman who was also the President was the centre around which everything else in the party revolved. Inviting a party such as NDP that had a strong orientation to opposition politics and a party that had experience in promoting dissent internally, therefore, laid the basis for KANU's fragmentation. NDP brought to KANU certain important ideals and values which KANU leaders failed to imbibe. NDP also introduced a tradition of making decisions through consensus which KANU leaders found difficult to adopt:

they had already established a tradition of unquestioning acquiescence to the President's wishes.

A third factor in forming opposition unity was a new approach to the issues of ethnicity and political power. Recognising that the political space was highly ethnicised, the political elites agreed to a new structure of power in which their interests (as ethnic communities) would be accommodated. They agreed to establish a new structure of government in which ethno-regional leaders would be represented. Although this was predicated on the eventual adoption of a new constitution, the political elite was convinced that it was a viable alternative. Within NARC, therefore, the elite represented ethnic interests and their constituencies saw them as representing their interests. With or without the presidency, ethnic regions saw representation of their aspirations as assured in the promise that one of their own would be in the team governing the country after the elections.

What this discussion exposes is the contradictions of political liberalization. While political reforms have enhanced the space for participation especially by pluralizing the political space, the reforms have failed to build a base for citizens to engage the state. The state remains an important agent in the political space. All actors seek to gain access to the state and its institutions. Secondly, political liberalization has not tamed negative tendencies—reproduction of ethnic divisions in the political arena has continued to inform practice of politics. The failure to evolve a constitutional framework capable of governing the struggle for control of state power may be identified as the main reason for this. Generally, although the political space opened up to multiple parties, the state has remained active in regulating activities in the space. It defines and shapes the conditions under which other actors would operate in the space. This has constrained effective participation by other actors including opposition groups.



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4

THE POLITICS OF ALLIANCE BUILDING IN KENYA: THE SEARCH FOR OPPOSITION UNITY

Peter Wanyande

INTRODUCTION

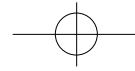
Kenya has had eight national elections since attaining a sovereign status in 1963. The ninth elections were held on December 27, 2002. For almost forty years—from June 1963 when Kenya achieved self-government to December 2002 when the National Rainbow Coalition won the elections—the country was ruled by the same party, namely, the Kenya African National Union (KANU). This is due to the fact that during most of this period, Kenya was either a *de facto* or a *de jure* one-party state.¹ As the ruling and only party, KANU, and its presidential candidate faced no challenge in the elections. The one-party election became a mere ritual conducted periodically to confirm politically correct individuals in power. But even during the brief periods when the country had more than one political party, as happened between 1966 and 1969, the ruling party was overwhelmingly dominant. This was so not necessarily because the ruling party was popular, but because the government in collaboration with the ruling party did not give the opposition parties a fair chance to compete for power. Analysing the 1966 elections that pitted the ruling party KANU against Kenya People's Union (KPU), the first opposition party after independence, Gertzel had this to say:

1 • Kenya was a *de facto* one-party state in the following periods: 1964-1966, 1969-1982. It became a *de jure* one-party state from 1982 to 1992. In 1992, the country became a multiparty state. Between 1966 and 1969 Kenya operated a multiparty system with KPU as the opposition party. (Gertzel 1970: 79-80).

Most of the advantages in the campaign lay with KANU. First, as the ruling party they had all the authority and prestige of the government behind them. This was most obviously demonstrated by the tacit association of the provincial administration with KANU campaign. Since civil service etiquette, if nothing more, required Administrative officers to attend upon ministers when in their province or district, they were present at a considerable number of KANU meetings, where their presence symbolised the association of KANU with government, and so with governmental power and authority. Second KANU leaders could and did combine their party campaign with normal ministerial activities and tours.... Ministerial visits to the districts were used in the following three weeks for preliminary campaigning, particularly in Kandara, where at a large rally on 14th May Party leaders launched their attack on Kaggia (the opposition candidate). The opposition was at that stage at a considerable disadvantage, since the delay in the registration for the new party (not announced until 21 May nomination day) meant they could neither hold public meetings, nor build up their national organisation.... Third, KANU had the advantage of government-controlled radio, which reported KANU affairs in full but gave no information on KPU (Gertzel: 1970).

Thus it was quite clear that the electoral playing field was not even. It needs to be pointed out that this kind of environment, which was tilted in favour of the ruling party, has characterised every election in which other parties competed with KANU. Commenting on the 1992 elections, for example, Ng'ethe and Barkan observe that although the voting itself was administered passably well, and although both the domestic and international observers stated that the outcomes reflected the preferences of the electorate, the entire period before the elections was one of the continual harassment of the opposition (Barkan and Ng'ethe 1999).

Political parties also complained that the 1997 elections were rigged by KANU. It is against the background of KANU's dominance that the recent attempts by the opposition parties to form an electoral pact or alliance involving several opposition parties ought to be understood. The electoral pact or grand alliance formed prior to the 27 December 2002 elections aimed at presenting one opposition presidential candidate against KANU. The opposition must have come to the conclusion that it was only through a united front that they could hope to dislodge KANU from power. The quest for opposition unity was driven by two



assumptions. First, it was perceived that it was possible to have one united opposition movement under which all opposition parties would agree to field one presidential candidate. Secondly, it was assumed that the one presidential candidate would defeat the KANU presidential candidate irrespective of who the candidates were.

It is to be noted however that the opposition tried to forge a united front in 1992 and 1997 but failed. The question that comes to mind with regard to the situation in 2002 is: why did the opposition think that they could forge unity this time round? Put differently what is it that had changed since 1992 that made the opposition parties believe that they would succeed in building a lasting alliance to defeat KANU? These are some of the central questions that this chapter will address. To obtain a proper perspective on the issue, the chapter will deal with questions such as the factors that undermined opposition unity in 1992 and 1997. Secondly, what challenges did the opposition need to overcome in order to make an opposition alliance a reality? Additional questions that people were asking include the question whether any pre-election opposition alliance or unity would be maintained after the elections. This particular question is significant because it requires that we interrogate the factors that may hinder the sustainability of opposition unity and the coalition government formed after the elections. Equally important is the question: what are the likely consequences of disintegration of the opposition after the elections? The chapter hopes to give insights into some of these issues.

It also needs to be noted that KANU had also tried to form an alliance with opposition parties notably the now defunct National Development Party (NDP). This too failed when leaders of the NDP pulled out along with some KANU leaders and formed the Rainbow Movement. Rainbow eventually merged with the National Alliance Party of Kenya (NAK), a coalition of about thirteen political parties. The major parties in NAK were the Democratic Party (DP), FORD-Kenya and the National Party of Kenya (NPK). The merger with the Rainbow Movement transformed the alliance into the National Rainbow Coalition (NARC).

KANU had also “persuaded” some of the MPs in the opposition, notably

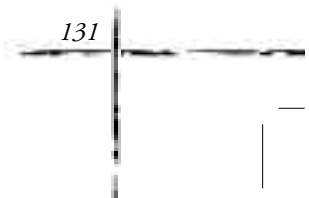
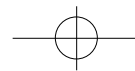
the MP of Shirikisho party, to join the ruling party. This must also be seen, as part of the strategy by politicians to associate with the party that they consider is likely to win. The type of political realignment that took place in the run-up to the 2002 elections was really an aspect of Kenya politics for a long time. For KANU, it was part of a strategy to weaken the opposition parties ahead of the general elections.

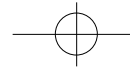
SOURCES OF DATA

In conducting research for this chapter we relied mainly on information obtained from newspapers. We also held discussions with some of the key players who sought to make opposition alliance a reality. It must be noted, however, that these individuals were reluctant to divulge details about the negotiations that went on and which aimed at forging a united opposition front. Their argument was that doing so might not be in the interest of the negotiations they were involved in. The absence of firm literature on the processes adopted by the parties trying to form alliances makes it hard to do more than hypothesise broadly about the issues at hand. We, however, are convinced that the available information, little as it is, is adequate for an initial interpretation and analysis of the problem being discussed. As more information becomes available, further studies, building on the hypotheses and findings of this chapter, will become possible.

THE SIGNIFICANCE OF THE 2002 ELECTIONS

Before discussing the issues of electoral pacts and alliances between political parties, it may be useful to explain the significance of the 2002 elections. In the first place these elections were about succession. By succession, in the context of the subject of this discussion, we mean the replacement of the serving president with another through the vote. This was significant precisely because it was the first time Kenyans were presented with a real opportunity to replace a serving president. The opportunity was real because according to the current constitution, the incumbent president could not seek re-election. The country had, therefore, to elect a new president whether from KANU or from another party. In the past and particularly during periods of one-party rule, the president of





the ruling party automatically became president, as he was not challenged. The party constitution did not allow the president of the party to be challenged for the presidency of the country.

The elections were also significant precisely because the overwhelming perception was that this time round prospects of a united opposition against KANU were quite high. The probability of opposition unity implied the possibility of KANU losing power after forty years of uninterrupted rule. The opposition had at least 49 parties which could negotiate with each other on the formation of an alliance or electoral pact. Eight of these parties were represented in parliament. They were: the Democratic Party of Kenya (DP), the Social Democratic Party (SDP), Safina, FORD-Kenya, FORD-Asili, FORD-People, Shirikisho Party and Kenya Social Congress. The rest did not enjoy strong enough public support to attract popular candidates for parliament. The formation of so many political parties at the advent of political pluralism in 1991-1992 is perhaps a manifestation of an explosion of political enthusiasm after many years of the repression of political expression. It certainly proved that Kenyans had been yearning for political freedom to express their political aspirations. Put differently, it was an indication of how oppressive the political system had been. The major parties had since 1992 challenged KANU's continued domination of Kenyan politics. KANU had, however, proved too strong or too smart for them to beat and had consequently retained power in the 1992 and 1997 elections.

The elections were also significant in that KANU seemed to be losing support throughout the country including areas that had been regarded as strong KANU zones since the re-introduction of multiparty politics in 1992. Particularly significant in this regard was the defection of KANU politicians from the Rift Valley province, Moi's home province. The pre-election period had also seen the defection of key cabinet ministers including the country's vice President from the ruling party to join the opposition. Indeed the Rainbow Alliance was made up of several politicians from KANU who had abandoned the party over disagreements over the method to be adopted in nominating the party presidential candidate.

The elections were also significant because they presented the country

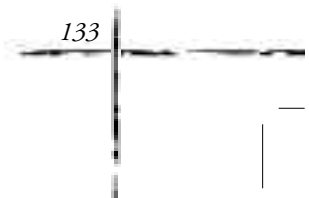
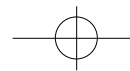
with the possibility of a genuine political transition. The possibility of new leaders and a new government coming to power created prospects for major changes in the system of governance. Particularly important in this regard were the prospects of transition from personal rule to a system of governance based on rules and institutions. There was also hope that the country would make a transition from the current economic slump to economic recovery. The general impression was that Kenyans wanted not just a change in leadership but also a change in the system of governance including a new constitutional dispensation. There seemed to be a general feeling that only a new government under a new party would be able to put a new constitutional dispensation in place. KANU could not be trusted to do this.

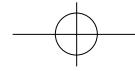
The possibility of a successful opposition alliance was also significant for at least two reasons. First it would prove that it was possible to downplay or de-emphasize negative ethnicity for the sake of the nation. As shown in this and another chapter in this book (Fred Jonyo's chapter entitled 'The Centrality of Ethnicity in Kenya's Political Transition'), ethnicity tends to be considered the greatest threat to national unity in Kenya. In fact, it is normally regarded as one of the major causes of opposition fragmentation.

Successful opposition unity would also be significant because it would hopefully lead to the elimination of small and weak parties. This would in turn lead to the emergence of two or three strong political parties that would compete for power and strengthen democracy in Kenya. Democracy requires a strong opposition to keep the ruling party on its toes. It is in view of this that KANU and FORD-People, the major opposition parties after the December 2002 elections, should strive to play an effective role in Kenya's democratic process.

OBJECTIVES OF POLITICAL ALLIANCES

The formation of political alliances is not unique to Kenya. It is a practice that is found even in the more developed democracies in Europe. African countries too have witnessed this practice from very early in their post-colonial history. The alliance between different political parties in





Uganda in the early years of that country's independence will suffice to demonstrate the point. Uganda became independent in 1962 under the government of the Uganda Peoples Congress (UPC), which had formed a coalition government with the conservative and monarchist party, Kabaka Yekka (Mujaju 1997:43). Milton Obote, the leader of the UPC and President of Uganda at the time, wished to eventually outmanoeuvre other parties to establish a one-party system of government (Mujaju 1997:43).

It is also quite possible for political parties to form alliances to achieve objectives other than to restrict political space for other parties, as was the case in Uganda. Political alliances may, for example, be formed purely with the objective of winning impending elections. The elections pact between the Green Party in Germany with the Social Democrats in the run up to the 2002 general elections in that country is an example of a political alliance between parties for the purpose of winning elections. Alliances of this kind are also intended to help form a coalition government after the elections. This happened, for example, in Sweden in 1988, when no party won a comfortable majority to enable it to form a government on its own (Steiner 1991: 126). Israel is another country where coalition governments are a common occurrence. Political alliances ought to be understood against the backdrop that in some countries political parties are too weak to win an outright majority to enable them to form a government if they went into elections as individual parties. Political parties can also form alliances to frustrate the chances of one or more of their opponents from winning an election.

Political alliances have also been formed for purposes of enabling the ruling party to obtain parliamentary support on some crucial issue before the House. Thus the political alliance between KANU and the National Development Party (NDP) was undertaken to prevent the political possibility that parliament could make the KANU government prisoner (Mutungi 2002:60). It is also quite possible for parties to form alliances for the purpose of defeating a bill or motion brought before the House by the ruling party.

From the foregoing discussion, it is quite clear that political alliances can take different forms. In other words, the form an alliance takes is dictated

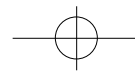
by the objectives the alliance wishes to advance. In political systems that practice proportional representation in which voters elect political parties rather than individual MPs, the parties forming an alliance would agree to have a common list of candidates. This list, which contains candidates from the parties in question, is presented to the electorate who then vote for the preferred parties. This arrangement is likely to be entered into by parties wishing to win an election and form a coalition government thereafter. It is also possible for parties in alliance to agree that one of them would withdraw its candidacy if it obtained the least number of votes in the first round of voting. The party that withdraws may then ask its supporters to back the party in the alliance in the next round of voting. Again, this form of alliance aimed at winning an election is possible in countries that practice proportional representation in their electoral system.

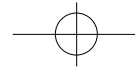
Political systems practicing the "first-past-the-post" system such as Kenya may enter into electoral pacts in which the political parties in the arrangement agree to support a single candidate in each constituency. The candidate must be from one of the parties in the alliance. This is what the National Rainbow Coalition (NARC) did in the 2002 general elections.

The idea is to avoid dividing votes between opposition parties or more specifically between the candidates of the alliance. The idea is to optimize the electoral chances of each opposition candidate in the alliance and thus lead to parliamentary victory for the alliance.

METHODS OF BUILDING ALLIANCES

Political parties may choose any one or a combination of the following ways of actualizing electoral pacts. They may sign a memorandum of understanding among the participating parties. The memorandum may spell out the terms of the alliance. It is also possible for the parties to simply enter into a gentleman's agreement without signing any documents that may purport to bind them. Intense and hard bargaining and negotiations usually characterise the process leading to the formation of an alliance. This was clearly exemplified by the process leading to the formation of the NARC alliance. This is partly so because no





party to the negotiations wished to lose out. Political parties normally wish to enter into negotiations from a position of strength. Smaller parties tend to be at a disadvantage in such negotiations. This is particularly so in alliances aimed at improving the chances for electoral victory of the alliance. Those parties with a large following are more likely to have a greater say in the negotiations. This came out very clearly during the negotiations that led to the formation of the National Alliance of Kenya (NAK) and later NARC. The major political parties and groupings such as the Democratic Party of Kenya (DP), FORD-Kenya and the Liberal Democratic Party that housed the Rainbow Alliance appeared to have had much more influence over the negotiation that led to the Coalition than was the case with the smaller parties.

It is important to note that political alliances are first and foremost political arrangements that are rarely legally binding. It is precisely because they are political rather than legal agreements that their sustainability becomes problematic. In other words, because they are not legally binding on the parties, they are susceptible to abuse and even to being ignored much more easily than if they were legal agreements. Political parties entering into political alliances tend to peg hopes of success on the political good will of the parties to the alliance. They also bank on the parties being realistic about their chances of success if they went into an election as single parties. Chances of success, however, seem to be higher between parties that share similar ideological positions on issues of greatest concern to the voters. Parties in alliance must therefore find innovative ways of sustaining the alliance they form. Ideology is also important in instilling discipline among party members. Discipline is very critical for the sustenance of a political alliance and indeed for the unity of any individual political party. The promise of a reward to parties by way of the award of cabinet posts is one way of giving incentives to parties and their members to stick to the alliance and sustain it. The alliance that produced NARC was no exception. It has now turned out that there were a number of promises of reward to the parties to the alliance during the negotiations. This is because one of the major objectives of a political party is to capture power. Political parties that have very little chance of winning an election may thus be willing to respect an electoral pact if

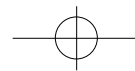
they stand a chance of being in government through an alliance with one or several other parties.

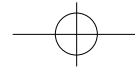
Against this background one would expect countries with many small and weak political parties such as Kenya to be characterised by many alliances and political realignments in the period preceding elections. This may include individual politicians shifting allegiance from one party to another without parties entering into formal electoral agreements.

PARTY ALLIANCES IN KENYA

As in many other countries, political parties in Kenya have found it necessary to form alliances for a variety of reasons or objectives. Most alliances tend to be formed in the period preceding an election and thus aim at improving the electoral chances of parties. The first major political alliance in the country occurred during the colonial period when different ethnic associations came together in 1960 to form the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU) respectively. Prior to this, the colonial government had confined political activity by Africans to the district level. This was a strategy by the colonial government to contain the development of nation-wide political affiliations and parties. The colonial government feared that such parties might raise political consciousness among the Africans to a level where the whole country would unite against the colonial system. When political organisation and activity beyond the district level was allowed, a number of ethnic associations which had also provided a political platform for the nationalists, came together to form the two major nationalist political parties just mentioned above.

The next major party alliance took place in 1964 when the ruling party KANU merged with the opposition party, KADU. This event, which was preceded by intense political lobbying and even threats (Gertzel 1970), had the unfortunate consequence of turning Kenya into a *de facto* one-party state. As was the case in Uganda in 1962, Kenyatta had wished to establish one-party rule hence the decision to persuade the opposition party to disband and join KANU. Kenya remained a *de facto* one-party





state until 1966 when the country's first Vice President resigned from government and formed an opposition party, the Kenya People's Union (KPU). This party was, however, outlawed in 1969. The next attempts at party alliances in Kenya did not occur until the reintroduction of multiparty politics in 1992. The first major attempt at opposition alliance during this period involved FORD-Kenya and FORD-Asili, the two parties that had split from the original Forum for the Restoration of Democracy (FORD). FORD had been formed as a political lobby group just before multiparty politics was reintroduced in 1992. FORD quickly transformed itself into a political party immediately political pluralism was reintroduced following the repeal of section 2A of the constitution, which had hitherto outlawed opposition parties. The initiative for unity between the two FORD parties, however, did not go beyond statements to the effect that the two should come together as one party to face KANU in the general elections.

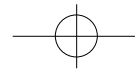
A number of factors account for this failed attempt at opposition alliance. These and other factors were to thwart future attempts by political parties in the opposition to unite. The first major challenge that the opposition faced in 1992 was that they underrated the ability of the ruling party to divide them. The major parties were also under the impression that they could single-handedly defeat KANU and therefore their opposition leaders could defeat President Moi. This was because by 1992 and particularly after the legalisation of opposition politics, KANU appeared to be so weak and unpopular that any major opposition party felt it could dislodge it from power.

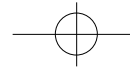
This was compounded by the personal ambitions and bloated ego of the major politicians. Each saw this as a golden opportunity to ascend to the highest political office in the land. Jaramogi Oginga Odinga as chairman of FORD, had assumed that he would be the party's automatic presidential candidate when the elections were called. This assumption was based on two factors. The first was that under one-party rule the leader of the party was also its automatic presidential candidate. Odinga must have been under the impression that this would apply to any party even under a multiparty system. Secondly, Odinga had been instrumental in the formation of the lobby group that eventually transformed itself into

the political party FORD. Kenyans were therefore expecting that the party leaders would let him lead the party in the general elections because he had played a leading role in its formation and, indeed, in opposition politics. Odinga had been associated with opposition politics since 1966 when, against all odds, he resigned his position as Vice President to found and lead the first major opposition political party in independent Kenya, the Kenya People's Union, (KPU). Indeed, he was detained in 1969 after his party was banned by the government following an ugly encounter between supporters of his party and the President in Kisumu town. Kenyatta had gone to Kisumu to officially open the New Nyanza General Hospital built by USSR assistance. In the process, a bitter exchange occurred between Kenyatta and Odinga. It is reported that some of the people in the crowd threw stones at the presidential motorcade after the rally. The President's security detail is reported to have responded by opening fire on the unarmed crowd, killing a large number of people. Odinga was subsequently placed under house arrest and later detained without trial. His party was also proscribed.

Alliance Building Since the 1997 Elections

The first major attempt at political alliance in the run up to the December 2002 elections was not between opposition parties but between the ruling party and one of the major opposition political parties—the National Development Party (NDP). This relationship, which began as 'cooperation' between the NDP and KANU and which later developed into a 'partnership' and eventually into a 'merger' caused concern because, first, its objectives were not clear. It was difficult for Kenyans to understand how an opposition party could cooperate with the ruling party. This was especially so considering that the same opposition party had accused the ruling party of mismanagement of the economy, bad governance and virtually of all ills the country was experiencing. Consequently, many people regarded it as a betrayal of the cause of opposition politics which was to dislodge KANU from power. It was seen as a major blow to opposition unity. The matter was not helped much by the failure of the two parties to convincingly explain the value of this relationship to the politics of the country.



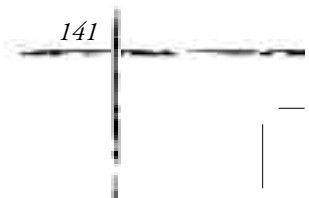
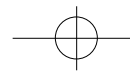


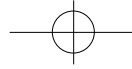
It is significant that there was no unanimity in the acceptance of the alliance/cooperation even among the members of the two parties. There were sharp divisions over the alliance, which the top leaders of the two political parties had intended to turn into a merger. The division was based on a number of arguments, which tell us a lot about Kenyan politics. Kenyan politics is characterised by a lot of mistrust and suspicion among political parties. The opposition and major political actors particularly distrusted the ruling party KANU and its president. The fear was that Moi was simply bent on discrediting NDP and its leader, Raila Odinga, who had proved to be a very shrewd and difficult politician to deal with. He had a very large following in Nyanza province. This was a problem for Moi for two reasons. First, Odinga's political influence would deny KANU the 25 per cent vote in Nyanza in the 2002 transitional elections. This had happened in the 1992 and 1997 elections. The constitution requires that a presidential candidate must obtain at least 25 per cent of the votes in five of the eight administrative provinces. Secondly, Moi had always loathed the idea of an alternative power base. He was especially wary of politicians such as Odinga with the ability to use such power base to challenge his authority. These two factors must have been at the back of Moi's mind when he decided to persuade (or is it to trick?) the NDP into cooperation. He must have planned to use this cooperation to serve at least two purposes. First, it would help him to get a majority in parliament that would enable the ruling party pass important bills, motions and constitutional amendments if any came before parliament. This majority would also enable the ruling party to defeat motions and bills introduced by the opposition. Although KANU had a majority in parliament, it was a very small majority. The party certainly did not have the required two-thirds majority to effect constitutional amendments. Moi must have thought that cooperation was the way to go in case it became necessary to amend a section of the constitution. It is imperative to note here that there were speculations at the time that Moi was contemplating changing the constitution to allow him to serve another term. As already noted, Kenyans did not trust Moi. The fear was given credibility by statements by KANU stalwarts on several occasions to the effect that Moi must rule beyond 2002.

Secondly, the cooperation and merger would be used to strengthen KANU ahead of the 2002 transition elections. With Nyanza firmly in KANU the ruling party would have only Central Province to deal with. One of the consequences of the cooperation, and, later, the merger was that a lot of speculation regarding the possible reasons for the relationship emerged. It was, for example, argued that KANU and Moi in particular might have promised to hand over power to the leader of NDP. Although Moi disputed this, Raila Odinga himself insisted that Moi had promised to support him for the presidency as part of the deal struck in the negotiations for a merger.

Challenges to Alliance Building

Attempts at political party alliance making and particularly those aimed at realising opposition unity have to deal with a number of challenges. One major challenge is the method to adopt in realising unity. This emerged as a major issue during the attempts to bring the FORD-People party and the Rainbow Alliance to join the original NAK. NAK had by this time identified Mwai Kibaki as its presidential candidate. It was clear that changing NAK's commitment to the Kibaki presidential candidacy was not going to be easy. FORD-People under Simeon Nyachae had apparently preferred a method in which delegates of the various parties in the alliance would elect the presidential candidate such that Kibaki would be but one of the candidates to face others. He was not in support of a method in which, in his words, a few people sat to select a candidate. While this position is quite defensible, it fails to take into account a number of factors. First, it must be noted that it is just one possible method. Second, the time factor should have been taken into account. The opposition had very limited time to organise themselves before the campaigns. It was thus important that they elect their candidate as soon as possible. The delegates system would obviously have taken quite some time. It is also noteworthy that some parties did not even have delegates, as they had not held their own elections. Such parties would have had to go through the process of electing delegates. This would not only have taken time but may have been too expensive for them in financial terms. In addition, the leading opposition politicians in NAK and Rainbow must have intended to find a candidate that could divide the Uhuru





Kenyatta votes substantially. It must have occurred to them that such a candidate could only be a fellow Kikuyu. In arguing in this manner, we do not intend in any way to suggest or imply that democracy should be sacrificed for political pragmatism. What we are saying is simply that there are different ways of conducting democratic nominations or elections and that the actual context in which such an exercise is conducted must be taken into account.

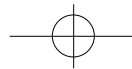
The other challenge that the parties attempting to form an alliance had to deal with had to do with the diversity of political orientations of the individual politicians in the parties. The National Alliance Party of Kenya, for example, is a conglomeration of about thirteen hitherto independent political parties. These parties are at different stages of development. Some of them are not represented in parliament. DP and FORD-Kenya and others had a substantial number of MPs in parliament. The DP leader was in fact the official leader of the opposition in parliament.

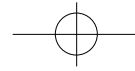
The NAK alliance had been complicated by the fact that some of the parties were unable to agree on whether or not to join the alliance. This had led to a situation in which some members of a particular party were members of the alliance while others were not. The Social Democratic Party, for example, was at the initial stage of the alliance negotiations divided over whether or not to join NAK. Eventually, it divided into two factions. One faction led by Professor Peter Anyang' Nyong'o, then a nominated member of parliament, was firmly in NAK while the faction led by James Orengo, the then MP for Ugenya, was initially apprehensive about joining any alliance. His initial argument was that any alliance must be based on principle. However, when on 14th October the possibility arose of a super opposition alliance, Orengo stated that he was ready to join the alliance and to serve in any capacity. This, however, did not happen because, according to him, he was locked out of NARC. The question that was in the minds of many and which required an explanation was why this was the case. No conclusive answers are available yet. However, our hypothesis is that one of the SDP factions already in NARC may have been responsible for blocking the inclusion of the Orengo faction into NARC. This faction may have done this on the fear that allowing the Orengo faction into NARC would be tantamount to

legitimising the Orengo faction. The issue is thus one of a struggle between two SDP factions for recognition as the genuine leaders of SDP—the Anyang' Nyong'o faction, which was already in NARC, and the Orengo faction. Each of the two factions claimed to be the legitimate leaders of the party. Our argument is lent credence by the fact that Orengo himself said that he was willing to join NARC in any capacity. He made this point at the now famous Uhuru Park rally held on 14th October, 2002 (*Daily Nation*, October 15, 2002). He has since said that he was shut out of NARC despite his having applied to join. It is instructive in this regard that nobody in NARC or in the Anyang' Nyong'o-led faction of SDP has advanced any convincing arguments or reasons why the Orengo-led faction of the party was not allowed into NARC. It is also instructive that the two SDP factions went to court to settle their leadership and by extension, legitimacy dispute. The court case reinforces our argument that the two factions were simply fighting for recognition and legitimacy.

If this line of argument is accepted, then the accusation that Orengo had been “bought” by KANU can be dismissed as mere campaign propaganda by those who were uncomfortable with Orengo and his presidential candidature. This discomfort was, of course, understandable especially at a time when the hitherto elusive and long sought opposition unity appeared close to becoming a reality. Whatever the reasons for the SDP wrangles, the effect was that the party was a potential obstacle to total or complete opposition unity.

It is to be noted that earlier on even before Orengo joined SDP, Charity Ngilu, the party's 1997 presidential candidate, abandoned the party to join and head the hitherto little known National Party of Kenya (NPK). The party has thus been characterised by internal party rivalry for a long time. One suspects that the party may have suffered from personality differences. It should be noted that internal party rivalry and squabbles characterise virtually all political parties in Kenya, KANU included. These rivalries stand out as a major potential obstacle to party alliances. However, as the ruling party, KANU, had one major advantage, which it has used to present itself as a trouble-free party. KANU had used the vast amount of resources at its disposal, including state resources, to reward





loyal members and to punish errant members. This kept the party apparently united. This is what is known as stick-and-carrot politics, which KANU has used effectively to maintain some semblance of party unity. The opposition parties on the other hand do not enjoy this important resource. This has made it hard for them to enforce party discipline or even to appear to be disciplined or united. It is significant that since its defeat in the 2002 elections, KANU has suffered many resignations by key party officials. The party no longer can bully its members to “toe” the party line as it did while it was in power.

Two problems arise from the situation in opposition parties just described that has relevance to alliance building. The first is that lack of internal discipline makes it difficult to get party members and officials to agree on a merger or an alliance with other parties. The perception existed in the run-up to the 2002 elections of the opposition parties as being incapable of posing a real challenge to KANU. For KANU had in the past indeed taken advantage of this disunity to discredit and to outmaneuver the opposition.

The other major problem that the opposition had to deal with was the differences in the quality and strength of parties. Most of the opposition parties were relatively new and poor. This meant that they had not had sufficient time to develop nation-wide support and structures or branches. The opposition political parties were at different levels of development. This posed a number of challenges to attempts to form political coalitions for the following reasons. Some parties were considered too junior and of no value to an alliance, and yet these parties wished to go into an alliance with the hope that joining the alliance would boost their image and the chances of fielding candidates. This caused problems. The statement by one official of NAK to the effect that the Rainbow movement would only join them on the terms set by NAK is a good example of what we are talking about. It almost caused Rainbow members to seek an alliance with FORD-People party, instead. The four top KANU officials who had wanted to present themselves for nomination as KANU presidential candidates and who were being frustrated by the KANU chairman's declared preference for KANU Vice-Chairman, Uhuru Kenyatta, had formed the Rainbow

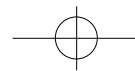
Alliance and had indicated they would join NAK if the KANU nominations was not free and fair.

Age of the presidential aspirants was also a major issue in the alliance between the opposition parties. Kibaki was about 71 years old while Nyachae was 80 years old. This meant that for the two, especially for Nyachae, this was the last opportunity they had for going for the presidency. It was thus quite understandable why Kibaki and Nyachae were reluctant to give up the fight for the presidency in favour of any other politician in the alliance. For Kibaki, the other relevant factor was that he had contested presidential elections twice, first in 1992 and then in 1997. He had failed in both attempts. Indeed some of his opponents in KANU and FORD-People were using this to discredit Kibaki's candidature. While Kibaki may not be hindered by age in the 2007 elections, unless the new constitution puts the age limit for presidential candidates at 70 years, Nyachae would definitely be time barred in the next election on account of his advanced age. It is thus no wonder that after Kibaki was endorsed as the single opposition presidential candidate, Nyache refused to join the grand alliance. He decided that he would go it alone.

It is also noteworthy that Nyachae promised to rule for only one five year term if elected. Whether or not he was genuine about this or whether it was just one of those campaign gimmicks is difficult to determine. However, it is quite possible that he made this pledge on account of his age.

Other Challenges to Opposition Unity

Kenya's political parties have several other characteristics that make alliance building a tall order. Two of these deserve mention here. First, almost all political parties in Kenya have an ethnic base. Most political parties in Kenya draw the bulk of their support from the communities from which the leader of the party hails. This was true of KANU as it was for the opposition. The voting patterns and party support in the 1992 and 1997 presidential and parliamentary elections best illustrate this. As is evident in the table below, each of the presidential candidates, including Moi, received the bulk of their support from their home provinces and districts.



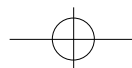


Table 1. Voting Patterns for the Presidential Candidates in the 1997 Elections

Candidate	Coast	Central	Eastern	Nyanza	Western	Rift Valley	North Eastern	Nairobi
C. Ngilu	38,089 (9.35%)	30,535 (3.04%)	349,754 (33.28%)	15,301 (1.67%)	3,429 (0.50%)	11,345 (0.69%)	440 (0.45%)	39,707 (10.85%)
D. Moi	257,056 (63.09%)	56,367 (5.60%)	370,954 (35.30%)	215,923 (23.52%)	314,669 (45.95%)	114,019 (69.37%)	70,506 (72.89%)	75,272 (20.56%)
Raila Odinga	24,844 (6.10%)	6,869 (0.68%)	7,787 (0.74%)	519,180 (56.56%)	13,458 (1.97%)	36,022 (2.19%)	311 (0.32%)	59,415 (16.23%)
Kibaki	51,909 (12.74%)	891,484 (88.64%)	296,335 (28.20%)	138,202 (15.05%)	9,755 (1.42%)	343,529 (20.90%)	20,404 (21.09%)	160,124 (43.74%)
Wamalwa	11,306 (2.77%)	3,058 (0.30%)	7,017 (0.67%)	14,623 (1.59%)	338,120 (49.37%)	102,178 (6.22%)	4,431 (4.58%)	24,971 (6.82%)

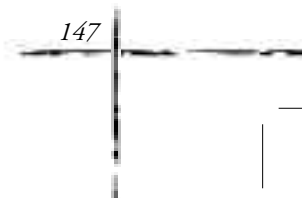
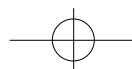
Thus Moi received greatest support from the Rift Valley province with Wamalwa getting most of his votes from Western province, Odinga from Nyanza province, Kibaki from Central province and Charity Ngilu, the only woman presidential candidate, from Eastern province.

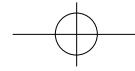
The ethnic base of Kenyan politics has its roots in the colonial period. It is certainly not a phenomenon associated with the introduction of multiparty politics in 1992, as some leaders, particularly Moi, would have liked Kenyans and the world to believe. The colonial government had encouraged the formation of district-based political associations. Districts were, on the whole, created to coincide with ethnic groups hence the ethnic nature of the district based political parties during the colonial period.

In fact, it may be more correct to say that the colonial government discouraged the formation of nation-wide political parties. This was done for two major reasons. First, there was the desire to divide the Africans so that they could be easily manipulated and ruled by the unpopular colonial government. Secondly, the colonial government feared that if the Africans formed nation-wide political parties it would heighten political consciousness and this would lead to rebellion or revolution against the regime. Such a revolution would not be easy to contain. This fear was later proved valid when the Mau Mau uprising proved difficult to contain. The relevance of this ethnic character of Kenyan

politics to alliance building is that each party leader had to take into account the pressures from his or her ethnic group. In other words, each party leader was under pressure from their ethnic constituency to go for the presidency and nothing less. This was underpinned by the fact that the community from which a president hails stands a better chance of getting access to public resources.

It is interesting to note that during the campaigns for the 2002 elections, Moi decided to play the ethnic game. He, for example, appointed Musalia Mudavadi the Vice President barely two months before the general elections. The objective of this appointment, whose timing was well calculated to coincide with the campaigns, was clearly to try and persuade the Abaluhya community to vote for the ruling party as a bloc. Mudavadi was one of the original five KANU politicians who had declared his interest in contesting the presidency on a KANU ticket. He was, however, prevailed upon by Moi, the party chairman, to step down for Uhuru Kenyatta, the president's preferred choice. The Luhya community urged Mudavadi to ignore the pressure to give up the race for the top post. Their position was taken in pursuit of the prospect of one of them becoming president and therefore making it possible for the community to benefit from advantaged access to state resources. When Mudavadi failed to listen, the community expressed disappointment. The sentiments were so strong that even Mudavadi's own brother asked him to quit politics altogether. It needs to be noted that the appointment, that was seen as a campaign strategy or gimmick, was also unconstitutional. Section 15 (2) of the current constitution states that "the president shall appoint the Vice-President from among the Ministers who are elected members of the National Assembly...". Mudavadi's appointment was unconstitutional precisely because by the time it was made, parliament had been dissolved and so the country did not have elected MPs from which a Vice-President could be appointed. That it was a political game by the President is underscored by the fact that the president failed to appoint the VP for over three months while parliament was in session despite the fact that the constitution says that the country must have a VP. It was widely believed that he was waiting to use the appointment to lure voters from whichever community he chose to give the vice-presidency.





Another major challenge to opposition unity was the personalisation of parties. In addition to being ethnic based, political parties in Kenya are more or less owned by individuals. President Moi put it succinctly when during the KANU presidential nomination exercise, he said that “*KANU ina wenyewe*”—meaning, KANU has its owners. Usually these individuals are also the major financiers of the parties they lead. For KANU, state resources are often used for party activities. This personalisation of parties has meant that the leader of the party in question has to agree to form an alliance or not. Put differently, if he/she does not agree it does not matter whether other party members and officials want an alliance. This problem was clearly demonstrated by the misunderstanding that emerged between members of the former NDP and its leader Raila Odinga over the merger between the party and KANU. Some members of KANU too disagreed with the party chairman over the merger but the issue was forced down the throats of the membership. It therefore came as no surprise that the merger failed to hold.

KANU’s determination to frustrate the development of a united opposition was yet another major constraint to opposition unity and therefore to the building of an opposition alliance. KANU was understandably wary of the potential impact of a united opposition. This is why Kenyans suspected that Nyachae was being used by KANU to divide the alliance (see *Daily Nation*, 4th November, 2002). This suspicion was based on the fact that Nyachae, who was in the opposition, had chosen during the election campaigns to confine and focus his attacks on Kibaki, a fellow opposition candidate, while being very soft on KANU, which was supposedly the common “enemy” of the opposition. This of course is an allegation about which one can hardly obtain evidence easily. It is, however, important because it shows that people believed that KANU was bent on and was indeed capable of dividing the opposition.

Our hypothesis is that Nyachae was under the impression that none of the two major parties, namely NARC and KANU, would win the elections with an outright majority to enable it to form a government on its own. This would have forced NARC or KANU, whichever of the two won the elections, to seek the support of other parties to enable it to form a government. Nyachae may have reasoned that should this happen, then

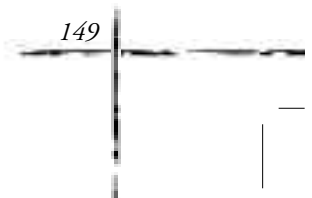
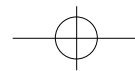
he stood a better chance of being included in the next government as part of a coalition government. This is perhaps what he meant when he said that his party would negotiate or talk with NARC after the elections. He probably thought that NARC would win but not with the majority required to form a government. Thus like Orengo, he may not necessarily have believed that he would win. He may even not have been deliberately spoiling for others, or working for KANU, but simply positioning himself and his party for a strong bargaining position after the elections.

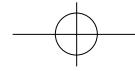
While Nyachae’s candidature may be seen to have been working in favour of KANU one can also argue that it may very well have worked against KANU. This can happen when his party eats into what may be KANU support in districts such as Kericho and Buret. This may be due to the influence of Kipkalya Kones, Nyachae’s running mate. Kones is considered as having considerable support in these districts. It turned out however that his influence was not a factor in the election in these districts as he even lost in his own constituency.

Finally Nyachae may have been hoping to lure some of the opposition politicians who would fail to get nomination on a NARC ticket, but who wished to contest on an opposition party ticket, to FORD-People. The absence of an alternative strong opposition party may have tempted such politicians to defect to KANU. The point being made then is that Nyachae’s candidature may have been a blessing in disguise for the opposition. His party provided sanctuary for some of those who lost nomination in KANU but wished to contest elections on an opposition ticket other than NARC.

IN LIEU OF A CONCLUSION

This chapter set out, among other things, to address the issue of what changed between 1992 and 1997 to make it possible for the opposition to unite. We also undertook to address the question of whether or not the opposition alliance would outlast the elections. This, as we indicated, is a question of interest to many Kenyans. The author of this chapter wishes to observe first that it is simplistic and even naive to imagine or





expect total or complete opposition unity. This is so precisely because some political parties in Kenya are formed by some people not so much to capture the presidency but as vehicles for securing nomination to contest parliamentary seats. Leaders of such parties would be reluctant to form an alliance with other parties in which their nomination as candidates for parliamentary seats is not guaranteed. Such leaders may thus stay out of party alliances to ensure that they can get sponsorship of their own parties. Parties such as Chama Cha Umma and the Anyona-led National Social Congress are examples. Orengo too may have chosen to go it alone because he feared losing nomination in NARC. It is also true that politics is a very dynamic game played by people most often driven by self-interest. For this reason it is difficult to get politicians to agree on issues that are central to an alliance. Against what has just been said above, It must be observed that the formation of NARC was a remarkable political achievement.

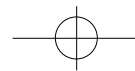
As to whether there has been any change(s) since 1992 to make opposition unity possible, our response is in the negative but with a qualification. It is in the negative precisely because virtually all the factors that were responsible for opposition fragmentation remain. Opposition parties continue to be personalised, ethnic-driven, and financially weak and vulnerable to manipulation by those forces that have the finances. These factors and the determination by KANU to weaken opposition parties have remained major challenges to opposition unity.

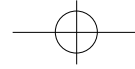
It must be noted that in 1992, the opposition parties and leaders were under intense pressure from the public to unite against KANU. This pressure from below is one that cannot be resisted or ignored by the political leaders in the opposition. Experience from other countries has shown that pressures for democratisation from below are more effective than those from above. This was the case in the process of democratisation in West Africa. This then is the qualification we said must be made in answer to the question The pressure from below for an opposition unity was just too strong this time round to be ignored by the parties and individual politicians. This must be attributed largely to the impact of civic education. It also needs to be noted that the players had changed.

The entry into opposition politics of leading KANU supporters such as

Joseph Kamotho, George Saitoti, Kalonzo Musyoka, William ole Ntimama and Moody Awori was also significant in bringing to the opposition new large constituencies. Then, we must note that Moi was no longer contesting the presidential elections. The fear that Moi had instilled in politicians and the general public was not a factor in the elections. This was demonstrated by the defection of many politicians from KANU.

There is no doubt that sustaining the NARC coalition will remain one of the biggest challenges to the party. Already there are signs of dissatisfaction among the members of the Liberal Democratic Party, a key member of the coalition, about the way the NARC leadership is handling public affairs. In particular, the LDP members are unhappy about the distribution of the ministerial posts between LDP and parties that formed the original NAK. LDP argues that the President violated the Memorandum of Understanding between NAK and LDP which they claim provided for a 50–50 sharing of cabinet posts between NAK and LDP. The MoU has however not been made public. So it is not possible to verify the claims made by LDP. Whatever the case, the point is that there is an issue that cannot be taken lightly as it touches on a fundamental principle of the alliance between the two major components of NARC, namely NAK and LDP. This, if not handled carefully, may be a source of a major political rift in NARC. Such rift could lead to the disintegration of the NARC coalition, with grave consequences for the stability of the country. At best, such a rift could result in a lot of political infighting within NARC to a level where the NARC government ceases to focus on issues of development and governance. This may lead to Kenya losing another five (5) years or even a decade of development. Secondly, with political instability within NARC the regime may become authoritarian and dictatorial as it seeks to control dissent. Kenyans would as a result lose some of the major gains they made with regard to democratisation. Internal discipline within NARC is an important factor that the coalition must pay attention to if it wishes to remain united. This not only requires internal democracy but also respect for agreements reached by various party organs including “The Summit”. The Summit is an informal grouping of the leading members of the coalition, namely Mwai Kibaki, George Saitoti, Raila Odinga, Moody Awori, Kijana Wamalwa,

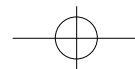




Charity Ngilu, Kalonzo Musyoka and Kipruto arap Kirwa. These are the top leaders of DP, FORD-Kenya, National Party of Kenya and the Liberal Democratic Party (LDP) or Rainbow Coalition. These were the major parties that formed NARC. These were also the parties, which signed the MoU referred to earlier. Apparently one of the provisions of the MoU was that The Summit would serve as the consultative body to assist the president make appointments and the important decisions affecting NARC and the country. These arrangements appear to have been overlooked in the latest appointments, especially those of permanent secretaries. Some people see this as an act of betrayal by Kibaki that may cause problems for the stability and unity of NARC. It is significant to note that NARC has recognised the potential danger to the stability of the coalition and held a major meeting of the party to solve ethnic problem of internal instability. The meeting was held on 4th and 5th April 2003 amidst major complaints that the party MoU had been violated by the President (See Daily Nation 5th April 2003).

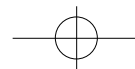
The third consequence of internal instability in NARC would be that the regime pays less attention to putting in place appropriate and effective systems of governance that rely on institutions to replace the system of personal rule that characterised the previous regime. This is likely because, as regimes focus on controlling dissent, especially internal dissent, they also tend not to use institutions to rule. It is also possible that as attention focuses on controlling internal dissent within NARC, and as less resources are provided for development, the public will lose faith in the government and NARC as a party. This may act as yet another reason for NARC and its top leadership to resort to dictatorial methods of governing. In other words, regimes that lose legitimacy in the eyes of the population tend to become dictatorial. This is exactly what happened to the Moi regime.

Another danger that instability in NARC may pose is that leaders in the party and the public generally may resort to ethnic explanations for anything done by NARC leaders and the government. Already some Kamba NARC MPs are claiming that their community has been marginalized in the appointment of ministers and permanent secretaries. Ethnic politics may once again take centre-stage in Kenyan politics.



The demand that the President should consult widely before making appointments to public positions has also been raised and is likely to remain a thorny issue with regard to NARC unity. In particular the failure by the President to consult members of The Summit has caused concern among some members of NARC.

Some observers have suggested that the way to save the coalition is to dissolve all the parties making up NARC and convert it into one party. This appears very appealing. However, it is likely to be strongly resisted by individual members of the various parties in the coalition. The KANU-NDP merger and the attendant dissolution of NDP provided a lesson that urges caution and wariness; many members of the constituent parties of NARC would not want their parties to suffer the fate of NDP. NARC must however realise that it is in its interest to maintain the unity that won them overwhelming popular electoral support in the 27 December 2002 elections. Kenyans want to see that unity maintained in the ruling party to undergird national unity, because they have been yearning for such a long time for national unity.



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5

THE CENTRALITY OF ETHNICITY IN
KENYA'S POLITICAL TRANSITION²*Fred Jonyo*

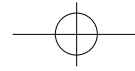
BACKGROUND

This chapter synthesizes the existing conceptual and theoretical perspectives on ethnic phenomena, and uses this synthesis as a guide for organising the discussion on ethnicity in Kenya's transition. This is not an idiosyncratic approach, but one rather that seeks to capture what others have said and uses their insights to present the dynamics of ethnicity in a consistent and coherent way.

Political transitions have long been recognised as one of the most fundamental threats to institutional stability, political order and state cohesion in the multi-ethnic societies of the Third World. This is largely as a result of lack of institutionalisation of key political organs, which are necessary in the management of regime change. Without the relevant and stable institutions smooth transition is threatened.

In the run-up to the 27 December 2000 General Elections, Kenya appeared not to have been spared from the prospects of uncertain transition if recent events were anything to go by. Local politics had heightened tensions through uncertainty, anxiety and apprehension among both the leaders and the people of Kenya. Myriad alliances had emerged with succinct political slogans and not left behind was the shifting of loy-

² The bulk of this chapter was written before the important elections of 27 December 2002, which saw NARC triumph over KANU. The subject matter—ethnicity—and perspective on it, in respect to the period prior to the elections, which are dealt with in the bulk of the chapter have not substantively changed to warrant major revision. However, the chapter at the end concludes with a brief evaluation of the implications of the outcome of the 27 December 2002 elections and the NARC government subsequently formed.



alties with previous bitter foes, embracing in new found political friendships and erstwhile friends turning foes.

Unlike in previous political competitions, Kenya for the first time since independence was facing an election in which the incumbent president was constitutionally barred from contesting. This development, among others, had added a new dimension to the current transitional politics.

This chapter aims at examining the critical role ethnicity played, and continues to play, in the current political events. Political competitions though disguised as party politics continue largely to be shaped and driven by ethnic interests.

Was ethnic equilibrium evident in the leadership structures in the party alliances? Were these alliances built around ethnic considerations? What were the ethnic fears with regard to the transition? The answers to these questions will explicitly expose and shed light on the ethnic dynamics in the transition.

The key point is that people who perceive the existence of “different” groups among themselves often have trouble developing harmonious relations. This chapter explores why this is so, and explores the fundamental reasons for the anxiety, tensions and uncertainties among Kenyans on the basis of ethnic differences. Unfortunately ethnic strife exists worldwide. Ever since early subpopulations of human beings first came into contact, strife has been an aspect of that contact. Ethnic concerns as a result of regime change with its attendant tensions are thus not only very volatile and widespread, but also very old. How, then, are we to understand and deal with this ubiquitous and long standing feature of human interaction and behaviour? Let us begin with some definitions and interpretations of the concept of ethnicity.

INTRODUCTION

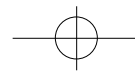
Ethnicity can be conceptualised in two ways: as an organisational form and a process. As an organisational form, an ethnic group is regarded generally as a social collectivity whose members not only share such

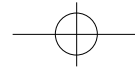
objective characteristics as language, core-territory, ancestral myths, culture, religion and/or political organisation, but also have some subjective consciousness or perception of common descent or identity (Subera 1996). On the other hand as a process, ethnicity can be seen at two levels: intra-group and inter-group relations. John Lonsdale refers to these two levels of ethnicity as “moral ethnicity” and “political tribalism”, respectively (Lonsdale 1994).

Moral ethnicity is where a distinct group applies its distinctiveness in mutual socio-economic obligation and support, whereas political tribalism entails rivalry and competition among different ethnic groups over access to state resources. The application of the subjective sense of common identity is, however, developed only in contexts involving relationships. In other words, ethnic identity is an outcome of contact rather than isolation. In this context, ethnicity suggests a dynamic situation of variable contact and mutual accommodation between groups (Berman 1998). As Worsley (1984: 249) argues, cultural traits are not absolutes or simply intellectual categories but are invoked to provide identities which legitimize claims to rights. They are strategies or weapons in competitions over scarce social goals.

The emergence of ethnicity is facilitated by group contacts, however minimal, in which cultural distinctiveness becomes the framework of that contact. Without the fulfilment of these conditions, there can be no ethnicity, for ethnicity is essentially an aspect of a relationship not a property of a single group (Glazers and Moynihan 1975). Only in so far as cultural differences are perceived as crucial and are made socially relevant do social links have ethnic undertones. Nnoli views ethnicity as a phenomenon associated with competition, exclusiveness and conflict (Nnoli 1998). Naomi Chazan argues that

. . . [it] was only at the centre, at the most dependent juncture, did ethnic boundaries achieve any degree of coherence, with ethnic differences surfacing as important distinguishing principles among groups closely associated with the state power nexus. As the distance from the state grew, so did the utility of ethnic differentiation as an instrument of social organisation and personal mobility. At the lower levels ethnicity became a framework, and not a means for social interaction (Chazan 1983:36).





Ethnic pluralism is a necessary, but not sufficient, condition for ethnicity. Ethnicity emerges from the mobilisation and politicisation of ethnic group identity in situations of competitive or conflictual ethnic pluralism.

Ethnic Stratification

Gurr (1993:123) identifies several conditions that have contributed to the animation or mobilisation of ethnic grievances. These conditions include:

- a) unequal treatment of groups of communities by dominant or mainstream groups;
- b) competition with other groups for access to power in states;
- c) the contagious effect of ethno-political activism elsewhere;
- d) patterns of state building, political power and economic development that channel communal energies into either protest or rebellion;
- e) the emergence of ethnic elites who are willing to, and are adept at, mobilising their constituents in response to changing political developments, opportunities and resources.

A key feature of Kenyan politics just as of the politics of other African countries is that communal political power contenders predominate, and the political scene is marked by shifting inter-group coalitions. These coalitions are built around a mix of concessions, co-optation and repression to maintain the *status quo*. The prevailing communal perception of power politics enhances the pervasiveness of ethnicity in Kenyan politics, and its manifestation remains both boldly visible and subtle. Ethnic identity has become a foremost political concern in all national debates since Kenya embraced a multiparty system in 1991.

However, in dealing with the problem of ethnicity in Kenya's political environment, one must not downplay the origins of this problem. Colonialism left behind a structured centralized government, which has endured over the years, and which thrusts ethnicity into the centre-stage of national politics. The colonial divide and rule policy was built around

manipulation of ethnic differences and it planted the seeds of inter-ethnic exploitation, suspicion and animosity.

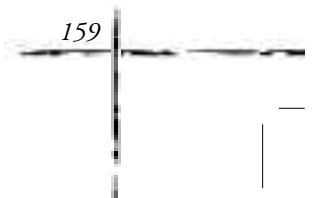
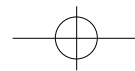
Districts were created along ethnic lines with the provincial administration controlling these ethnic districts. Governance based on ethnicity emerged, elevating ethnicity into the most dominant form of identity ignoring/subordinating other societal forms of identity.

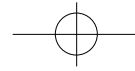
In post-independent Kenya, politicians employ ethnic identity to aggrandize themselves in terms of economic and political power while pretending to be acting on behalf and for the benefit of their respective ethnic communities. For example, in the run up to the 1992 multiparty elections, politicians in the Rift Valley Province construed multi-party politics to be a challenge to their domination of the political system in Kenya and thus became hostile to the new system and its proponents. They consequently advocated *Majimbo* as a form of federation that would guarantee ethnic rights. Kiraitu Murungi, then Democratic Party (DP) shadow Attorney General commented:

For a long time we have laboured under the delusion that we are nationalists who think as Kenyans. We pretend that we participate in politics purely on the basis of issues, principles and national interest. But we act on the basis of our tribal and personal interests (East African Standard, 22nd November 1998).

Political transitions therefore are periods that intensify competition for power, with political parties and their leaders strategizing how best to maximize their advantage. This consequently creates prejudice and discrimination between and among ethnic groups. Ethnic prejudices are beliefs and stereotypes about designated subpopulations who share certain identifying characteristics—biological, behavioural, organisational, or cultural—or at least are perceived to share these identifying characteristics.

By the end of the year 2002 and for a long time before then, it had become a commonplace contention in Kenya's politics that the Kalenjin and Kikuyu ethnic subpopulations have occupied the presidency and it is now the turn of another ethnic subpopulation. This contention was made on the basis that Jomo Kenyatta, the first President of Kenya, was





a Kikuyu and Daniel arap Moi, the second President, was a Kalenjin. It was therefore the perception that these two subpopulations during 'their' tenure enjoyed favourable and immense political and economic privileges. It was now, so it was argued, the turn of another subpopulation to 'eat', a colloquial term full of meaning, embracing the whole gamut of resource allocation and use. According to Hardin:

Probing the psychology of ethnicity is likely to be less helpful than trying to regulate the conditions that give incentive for it. Seen in this way, the problem . . . requires structural resolutions, resolutions that change incentives (Hardin 1995:22).

Those prejudices that lead to, and are used to justify, discrimination are negative, emphasizing the perceived undesirable features of a subpopulation. Even though prejudice does not always translate into discrimination, it is an important force in ethnic relations, for several reasons:

- a) Prejudicial beliefs and stereotypes highlight, usually unfairly and inaccurately, certain characteristics of an ethnic subpopulation. By spotlighting these characteristics, they make ethnic group members become more identifiable, alerting other groups to their existence, separating the members of that ethnic group from other ethnic groups and, potentially, making them easier targets for discrimination.
- b) Prejudices present a negative image of an ethnic group, legitimising discrimination against such "undesirable" persons.
- c) Prejudices arouse fears about, and anger toward, an ethnic group, placing members of the ethnic group in constant tension with those who are prejudiced and, often, making them vulnerable to unprovoked acts of discrimination.
- d) Prejudice creates a general climate of intolerance for differences.

Thus, prejudicial beliefs based on negative and stereotypical portrayals of an ethnic subpopulation stimulate and sustain ethnic tensions. Such beliefs do not always translate into direct discriminatory acts, but they claim to highlight the negative qualities of others and, therefore, they tend to arouse fear and anger, or to legitimate discriminatory and harm-

ful acts that may have been perpetrated in the past. Prejudices provide the rationale for discrimination, either before or after the fact, and are therefore of central importance for understanding discrimination and patterns of ethnic stratification (Aguirre and Turner 1995).

In any society where distinct ethnic subpopulations exist, the issue of ethnicity is a subject of debate and controversy. This is not surprising since ethnic antagonism and perceptions of ethnic differences are some of the oldest and most pervasive phenomena affecting patterns of human social organisation and behaviour.

THE ETHNIC FACTOR IN KENYA'S POLITICAL TRANSITION

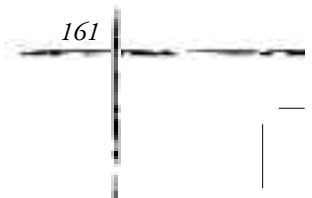
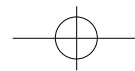
Having conceptualised ethnicity and its attendant dynamics, it now becomes easy to understand its manifestations in the current political situation.

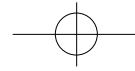
The major players:

1. The Kenya African National Union (KANU) as the governing party claimed to be a national party with support across the diverse Kenyan ethnic groups. But a quick glance at its top office bearers in the run up to the 2002 elections revealed a glaring disparity in representation. That a party of such national significance derived the top five national officials from the Rift Valley Province is indeed telling. These top officials were (are): the national chairman of the party Daniel arap Moi, the organising secretary Nicholas Biwott, acting secretary general Julius Sunkuli, director of elections William Ruto, and the deputy treasurer Kipng'eno Arap Ng'eny.

It is important to note that other provinces had only two representatives in the national executive council. The composition of the leadership of the governing party was tilted towards the Kalenjin ruling elites as opposed to other ethnic subpopulations. The group played a significant role in controlling the party at this particular period.

2. The Democratic Party (DP)—the official opposition party led by Mwai Kibaki—was perceived largely as a Kikuyu party drawing the





bulk of its members of parliament from the ethnic Kikuyu subpopulation.

3. The Social Democratic Party (SDP), had most of its parliamentary and civic seats in Eastern Province, specifically among the Akamba community. This was due to the fact that the Kamba hopes and aspirations rested with one of their own, who was also the party torchbearer, Charity Ngilu.
4. The National Development Party (NDP) before its merger with KANU in March 18th 2002, enjoyed support mainly in Luo land because Raila Odinga was perceived to represent the interests of the Luo.

The above parties represented the major players and it is clear that they revolved around the ethnic identities of their leaders more than any other consideration. All players set out to build alliances based on the above ethnic reality in a bid to compete nationally.

In the KANU and NDP merger of March 18th 2002, the so-called New KANU orchestrated how seats were to be distributed in a pre-determined manner. The delegates' conference only endorsed a framework cleverly worked around ethnic considerations. The large ethnic block of the Kalenjin of the Rift Valley Province took the chairmanship, while four vice chairman positions were created to cater for the Kikuyu, Luhya, Kamba and the Coastal subpopulations.

The four vice chairmen originally were Kalonzo Musyoka (Kamba), Musalia Mudavadi (Luhya), Uhuru Kenyatta (Kikuyu) and Katana Ngala (Mijikenda). The post of secretary general was given to Raila Odinga (Luo). The removal of the vice president, George Saitoti to facilitate the increase of the vice chairman positions became largely easy because Saitoti's ethnic support was fluid. He was seen neither to enjoy a definite ethnic constituency nor solid support making his role in the transition extremely vulnerable.

The National Alliance Party of Kenya (NAK), an amalgamation of several political parties, having observed the alliance building in KANU following the merger, quickly made assiduous counter-moves. The coming

together of Mwai Kibaki, Wamalwa Kijana and Charity Ngilu (the big three) was largely influenced by the need to unify the otherwise fragmented numerical strength of the support of each of these leaders. By bringing on board the populous Kikuyu through Kibaki, the Luhya through Wamalwa and the Kamba through Ngilu the national alliance had secured the support of a fairly large subpopulation.

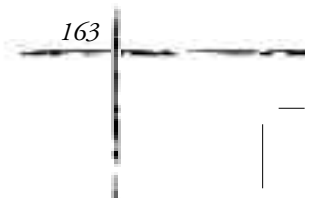
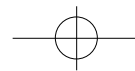
Moi, on the other hand, settled for a formula in which the support of all the Kikuyu subpopulation plus other subpopulations who were not rabidly anti-Kikuyu (encompassing traditional Kanu power enclaves and communities in the Rift valley) would equal victory for candidate Uhuru Kenyatta. This was a national equation using the algebra of ethnicity and regionalism.

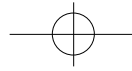
The formula assumed that when the push came to shove, the regular Kikuyu block walking down River Road would vote for Uhuru Kenyatta rather than Kibaki. Or, that Kibaki would not run as the NAK presidential candidate, leaving Uhuru Kenyatta instead to go it alone and deliver the prize to the "House of Mumbi".

The formula also was built on the notion that with a Kikuyu candidate then the important and pivotal Kikuyu vote was already in the box, an important head start. This substantive voting block controls Central Province and Nairobi, and the Kikuyu subpopulation has a strong presence in Eastern and Rift Valley provinces not to mention the impact of the Kikuyu diaspora elsewhere. This ethnic subpopulation becomes an added asset to any party come elections because of the number of both civic and parliamentary seats it delivers.

The National Alliance Party of Kenya (NAK) developed a simple formula, based on potential rejection for Uhuru Kenyatta. NAK's formula was as follows: Uhuru Kenyatta being rejected by the Kikuyu, Luhya, and the Kamba equalled victory for Kibaki, Wamalwa and Ngilu against the Uhuru candidature (*East African Standard* 6th August 2002).

The Uhuru choice sent shock waves among other ethnic subpopulations. There were moans and groans of disapproval across the land, but none so eloquent and conclusive as in Nyanza. Attempts by Moi to defend his choice met hostility even as he intimated that Raila Odinga could also





contest and that nobody would be prevented from participating in the KANU party presidential nominations.

Western Province and the Luhya showed their bitter resentment because their “*Mwana wa Mberi*”, Musalia Mudavadi, previously favoured and slotted as a vice chairman, had been publicly directed to step aside for Uhuru Kenyatta before his kith and kin. For the Luhya community, there could not be worse betrayal than this. A community that claimed to have supported and identified with KANU and Moi when other communities (read Kikuyu) rejected Moi to a man were now being asked to support a Kikuyu candidate. This was the last insult.

Matters were not helped when Uhuru Kenyatta’s salesmen, Cyrus Jirongo and Amukowa Anangwe attempted to offer an interpretation of the new political developments. According to Jirongo, the presidency as Uhuru’s and, by implication, the Kikuyu’s prize was a foregone conclusion and the Luhya must lobby for a Luhya vice-presidency. The salesmen were dismissed summarily as traitors of the “Ingo” cause. Their hope for the presidency and in the only potential Luhya candidate in KANU who had cultivated a national image crucial in wooing votes across the country, that is Musalia Mudavadi, was being betrayed.

Kenyan who saw Mudavadi as a compromise candidate among the conflicting interests in KANU were equally disappointed. Mudavadi aptly captured the mood when he finally threw in the towel and stated that many hearts would be broken and many hopes dashed at the end of the power transition process.

As events quickly unfolded in KANU, many people viewed the real contenders for the KANU nomination as Uhuru Kenyatta, thanks to the backing of the incumbent president, and Raila Odinga, a seasoned aggressive political operator. This seemed to promise a replay of the struggle for power between the Luo and the Kikuyu witnessed after independence, a struggle still fresh in people’s memories.

Although the Kikuyu had rejected the ruling party KANU for more than a decade, President Moi seemed to believe that they were the “true owners” of the party, the community from whom he inherited both the party

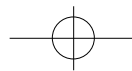
and the power and to whom both must return. Apart from wanting to repay this debt, through installing Uhuru Kenyatta in the presidency, Moi’s motives seem to have been intertwined with other threads, for example guaranteeing Moi’s security and that of his cronies in the post-Moi era.

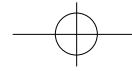
The insistence on Uhuru Kenyatta by Moi led to the emergence of a KANU faction named the Rainbow Alliance. This embraced all shades of political opinion revolving around the former Vice President George Saitoti, then party Secretary General Raila Odinga and former party Secretary General Joseph Kamotho among others. The objectives of this faction became much more clearer when Raila Odinga stated: “We aim to forge a multi-ethnic approach within KANU that aims to have a wider national appeal (*Daily Nation*, 6th August 2002).

Moi assembled more than 3,000 elders from his backyard in an effort to unite his own community behind Uhuru Kenyatta. It became clearly evident that the elders were cautious and explicitly demanded guarantees that Uhuru Kenyatta would protect the Kalenjin ethnic subpopulation’s interests. The meeting assumed a distinct ethnic identity when at Moi’s Kabarak home, the proceedings were exclusively conducted in the group’s Kalenjin language. Indeed, language is not only a medium of ethnocentrism but it is also the means of forging close links between ethnic intelligentsia and the ethnic masses.

The Westlands Member of Parliament, Fred Gumo, vividly illustrated the reality of the closing of ranks by an ethnic community when he publicly asserted that any Luhya who backtracked in the struggle for a Luhya presidency, including their presidential hopeful Musalia Mudavadi, would face the wrath of the community. “We will lynch Mudavadi if he quits”, he asserted. This message was appropriately perceived as the expression of a new resolve by an ethnic subpopulation to play for high national stakes. According to Gumo, the Luhya had given Moi the necessary support during his tenure and a time had come for the presidency to go to the community. (*Sunday Nation* 11th August 2002)

Equally bold was then Secretary General, Raila Odinga, who argued that





Kenya had 42 ethnic groups and each one of these entities must be allowed to lead the country. He intimated that the Rainbow Alliance was formed to bring democracy to KANU and safeguard the interests of all the ethnic subpopulations in Kenya (*Sunday Nation* 11th August 2002).

In countries like Kenya with a largely presidential political system, ethnic stakes become dangerously high during transition periods. The danger with presidentialism is the over-concentration of power in the hands of one person militating against the principle of separation of powers. Presidents with such powers can at times abuse and misuse them because the other branches are too weak to provide checks. Situations of a very powerful presidency therefore make the presidency the prize for ferocious ethnic competition/jostling.

Presidentialism also operates as a zero-sum game. The losers and winners are sharply polarised. The ethnic subpopulation that loses the elections will mostly be excluded from positions of power and from the control of the distribution of resources. The winners will discriminate against the losers and put in place processes that deny the losers access to valued resources. So in the context of ethnic relations, ethnic discrimination is the process by which the winning ethnic subpopulation denies the members of the losing ethnic subpopulation full access to valued resources, jobs, income, education, health, prestige, power or anything that the members of the society in question value.

In light of the above, ethnicity inflated the stakes of the transition culminating in the 2002 elections. This was part of the legacy and mindset bequeathed to the country by the regimes of Jomo Kenyatta and Daniel arap Moi.

The ethnic elites from the president's ethnic group are assured of plum jobs from which huge kickbacks are drawn and lucrative government contracts. Moreover, these elites can borrow big loans from state-owned banks and other friendly banks without the threat of penalties for defaulting on the repayment, since they enjoy protection against drastic recovery mechanisms.

Of course, selective inclusion will be done for other ethnic subpopula-

tions but on the basis of a policy of extending the carrot-and-stick. Loyal sycophants are rewarded while problematic ethnic rivals are punished, constantly harassed and isolated.

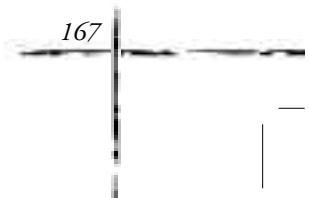
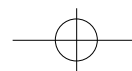
With Moi leaving the scene, an opportunity emerged for another ethnic community to "eat". In his usual 'meet the people' tours, Moi used the slogan, *siasa mbaya, maisha mbaya* (bad politics, bad life). The interpretation is that there would be rewards for the friendly communities and isolation or deprivation for unfriendly (read non-cooperative) communities. Unfriendly ethnic subpopulations faced neglect while the friendly ones witnessed increased opportunities to their advantage, like the creation of more districts and constituencies in their areas.

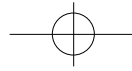
Jostling and jockeying for power in Kanu took a dramatic turn when Kalonzo Musyoka, one of the Vice Chairmen, realised that his presidential ambitions would be stillborn if he remained in KANU. This was occasioned by the statement of the local party supremo, Mulu Mutisya, viewed as Kalonzo Musyoka's political godfather, that the local branch would throw its support behind Moi's preferred presidential candidate.

Mutisya, who was allegedly the Kamba community's spokesman, insisted however that the Kamba had the right to demand a substantial position in the next government, having shown unswerving loyalty to the country's present and past leadership. "We have been loyal all through and it is our right to be rewarded accordingly for the honesty we have demonstrated," he asserted. The veteran politician warned the Kamba community that it risked being locked out of the next government if it ignored President Moi's choice (*Daily Nation*, 15th August 2002).

This statement did not go down well with the Akamba community who previously had ceremoniously anointed Musyoka as the community's presidential hope. He had been fitted with the traditional Kamba warrior dress complete with basket, bows and arrows as symbolic and defining ethnic regalia and attire.

As Kenyans were still trying to interpret Moi's choice of Uhuru Kenyatta, elders from his own Kalenjin subpopulation alluded to the community's traditions as being behind Moi's choice. The twenty elders, led by the 78





year old Mzee Elkana Langat claimed that Moi wanted to return the presidency to the son of the founding president, Mzee Jomo Kenyatta, because he was culturally bound to do so. They argued further that Mzee Kenyatta adorned Moi with a monkey skin as a sign of leadership. The spotted monkey skin, called *Sambut* in Kalenjin, must be returned to Mzee Kenyatta's son to avert a national catastrophe (*Daily Nation*, 19th August 2002).

What was happening is clearly explained by Worsley (1984: 249) when he states that cultural traits are not absolutes or simply intellectual categories, but are invoked to provide identities which legitimize claims to rights.

With the increasing opposition to Moi's choice, and growing disquiet within the party, the party chairman was forced to act. However, Moi mainly sacked people at the periphery of the onslaught. The key actors were left untouched. Sacking Raila Odinga would have meant pushing the Luo back to the political opposition and the collapse of the spirit of the merger. Likewise, sacking Mudavadi and Kalonzo Musyoka would have impacted negatively given their strong ethnic constituencies—the Luhya and Kamba respectively.

The president could not risk sacking them because it could deny KANU support from the important ethnic blocks. Neither could he sack William Ole Ntimama of the Maasai ethnic subpopulation for fear of losing Maasai support.

The Uhuru Kenyatta candidacy impacted on the National Alliance Party of Kenya when the DP's financier Njenga Karume decamped to Kanu. Not only was this a blow to the party but it also dented Kibaki's credibility. The view advanced by Kibaki was that Karume's sagging business position prompted his shift. It is true that a person of Karume's wide business entanglements could not have been left unscathed by the prolonged economic slump.

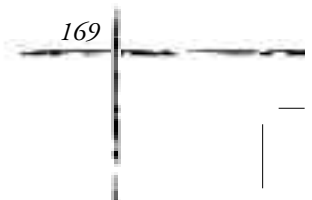
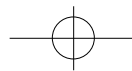
The truth of the matter is that Karume made his decision as much due to politics as anything else. Karume weighed his options, and was convinced that with Uhuru Kenyatta, the light was already clear at the end

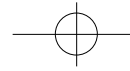
of the tunnel as opposed to the National Alliance Party of Kenya whose prospects of nominating an 'acceptable candidate' were still cloudy. Karume had also had a strong association with Uhuru Kenyatta's father and was the power behind the defunct Gikuyu, Embu and Meru Association (GEMA), a coalition with a strong ethnic base and interests. That Karume was nostalgic about a past era of political and economic power cannot be seriously doubted and he must have found the new developments very tempting. Equally the political mood in Kiambu, Thika, Maragua and Murang'a districts as well had undergone a dramatic change since 'project Uhuru' took off.

The political games in Kanu took an ugly turn when an ethnic Kikuyu outfit "Mungiki" attacked groups of people from other ethnic subpopulations enroute home from a successful rally organised by the Rainbow Alliance. They perceived the alliance as an obstacle to their preferred Kikuyu candidate (Uhuru Kenyatta). What puzzled observers was that the Mungiki sect had been outlawed and yet it could operate with impunity with no charges being preferred against the perpetrators of violence despite documented evidence. They largely identified their victims by extending an ethnic greeting "Thaa". Those who failed to respond accurately attracted their wrath. This group declared its support for Uhuru Kenyatta and vowed to field parliamentary and civic candidates through the Kanu party in the 2002 elections.

Kibaki once more revisited the Karume issue, this time attacking his long time friend as a tribal chief. Kibaki stressed that Kenyans had already seen through the cabal of disgruntled and disgraced elements that the Uhuru project had assembled. Kibaki argued that Karume was now part of this group and would have to live with this unenviable tag. "Karume has joined the ongoing campaign to shore up tribal and sectional sentiments in a country where the wounds of ethnic violence are still raw," Kibaki said.

Kibaki viewed the Uhuru Kenyatta campaign being bulldozed by Moi as built on tribal arithmetic as part of a grand scheme to divide and rule. Karume had been trapped by this scheme which harked back to the legacy of the creation of tribal chieftains (*Daily Nation* 8th, September 2002).





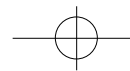
Meanwhile among the Luo, Peter Oloo Aringo blew the whistle against attempts by the state (read Moi) to sideline Raila (read Luo) to the periphery of national politics. Following in quick succession the former Nyakach Member of Parliament, Dennis Akumu urged Luo Nyanza to join the National Alliance Party of Kenya. Akumu stressed that it had become impossible to reform Kanu from within. Akumu pointed out that he was speaking on behalf of fifty politicians and professionals from Nyanza who constituted the Nyanza Consultative Forum.

A meeting organised by the Luo council of elders gave Raila Odinga the nod to ditch Kanu and take any position as he saw fit. The meeting scathingly criticized Moi, accusing him of reneging on a secret promise to hand over power to the community through Raila Odinga. In a show of anger and frustration the elders stopped short of ordering Raila Odinga out of Kanu, but tellingly mandated him to decide the destiny of the community.

The meeting was organised in the wake of anticipation that the Rainbow Alliance, which grouped Kanu leaders opposed to Moi's campaign for Uhuru Kenyatta, might finally leave Kanu. Indications were strong that secret talks were going on geared towards building a super-alliance against Moi's choice.

Moi on the other hand upped pressure for people unhappy with Kanu to leave and took every opportunity to denounce the opposition. Moi charged that Wamalwa was only a Bukusu tribal chief and that Nyachae's bid for the presidency was doomed to fail because half of the Kisii community was solidly in Kanu and backed Uhuru Kenyatta.

A key Rainbow Alliance member, William Ole Ntimama, delivered a salvo. He warned victims of the ethnic political clashes of 1992 and 1997 in Narok to forget dreams of re-occupying such land. The Maasai, he said, would resist such attempts by well-connected government officers and politicians which he claimed would be implemented in time for the general elections. He further appealed to non-Maasai who had acquired land to voluntarily surrender it before an operation to recover such land was launched.

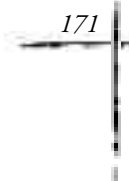


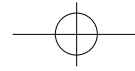
Ntimama, operating largely as a Maasai communal spokesman, emphasized that the Maasai did not benefit from the European colonial rulers and neither had they benefited from the governments of Mzee Kenyatta and Moi. "It is for this reason that I and other Maasai leaders joined the Rainbow Alliance where we will shop for a party that can lead our people to prosperity," he said. He saw the 'Uhuru Kenyatta for President' campaign as an attempt to achieve the continuation of Moi's rule whereby the Maasai would continue lagging behind other ethnic subpopulations in terms of development.

Ntimama's sentiments reflected the kind of fears that many ethnic subpopulations shared. Like the market, politics operates in an environment of scarce resources and uncertainty. Valued resources are never sufficient to go round the society to everyone's satisfaction. The problem is compounded if the same scarce resources are distributed along ethnic lines. Governments have the means of allocating these scarcities, distributing income, wealth and providing for the common welfare. Unfortunately, while markets have well-defined and defensible means of distribution and exchange of resources, political processes have certain properties that lessen efficiency and create disharmony among self-interested subpopulations on the basis of inequitable distribution.

At a rally in Masinga, Machakos District, Kamba KANU members of parliament dismissed the opposition line up as not capable of championing Kamba interests. They pointed out that one of their own, Charity Ngilu, was cheated by fellow opposition leaders when she was earmarked for the non-existent post of Prime Minister. They said this was a total joke. This was a deliberate attempt to whip ethnic emotions, an attempt to allege discrimination against the Akamba. Discrimination becomes the centre-piece of ideological and political debate over ethnic tensions (Kinder and Sanders 1990; Thomas 1990; Feagins 1990; and Ross 1990).

The draft constitution released by the Constitution of Kenya Review Commission clearly demonstrated the existence of ethnic fears in Kenya's political system. Of immense interest was the total agreement on the need to devolve governmental powers. The concentration of executive powers in one person was highly criticized as the cause of fundamental





problems bedeviling the country. Most people who gave views to the commission also advocated the creation of other executive positions, like those of prime minister and deputy prime ministers among others. This would be the only way to tame ethnic obsessions with the presidency and by extension the burning ethnic ambitions to secure the presidency. Take away the cause, and the effect ceases to be.

The reduction of the powers of the presidency would go a long way in preventing any ethnic subpopulation from feeling insecure if one of their own did not occupy the president's seat. The creation of more centres of power was also intended to accommodate the ethnic communal contenders for power, so that leadership rested on a broader multi-ethnic base and was representative of the ethnic diversity of the country.

Without an inclusive framework in a multi-ethnic polity, ethnic conflict would continue to persist in the body politic. Depending on the analytical inclinations of the observer and the specificities and dynamics of particular conflict situations, ethnic consciousness has been attributed variously to the emotional power of "primordial givens" or cultural ties, the struggle for relative group worth, mass-based resource competition, electoral mobilisation, elite manipulation, false consciousness and/or defective political institutions and inequitable state policies (Diamond 1987; Doornbos 1991). There is, however, a general acknowledgement of the inherent complexity, ubiquity, ambiguity, volatility and fluidity of the ethnic phenomenon.

The opposition coalition in the run-up to the 2002 elections showed an appreciation of the need to create more executive positions in the government. It is therefore not astonishing that the opposition leaders were prepared to negotiate, bargain and enter into power sharing arrangements. This reflected the desire not to exclude communal contenders in power politics. It can therefore be stressed that democracy would only thrive in a society like ours if we recognised ethnicity as a factor, addressed political and economic inequalities and dealt with imbalances in state power configuration.

As the constitutional draft proposal was generating debate, the Kanu splinter group Rainbow Alliance formally joined the National Alliance Party of Kenya to form a super alliance. Immediately, the National

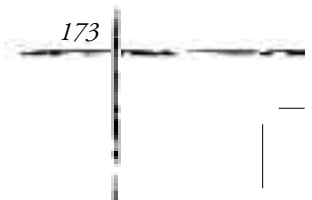
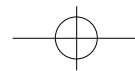
Alliance Rainbow Coalition as the new super alliance was named, promised a government of national unity, made up of representatives from all regions of Kenya, ethnic communities and religions and appealed to leaders to focus on reconciliation and peace.

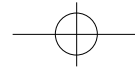
The coalition leadership team expanded from the original three—Mwai Kibaki, Kijana Wamalwa and Charity Ngilu—to incorporate, among others, George Saitoti, Kalonzo Musyoka, Moody Awori, Raila Odinga, Joseph Kamotho and William Ole Ntimama. A series of negotiations was to follow in an attempt to identify an acceptable distribution of seats. After much hype, the long awaited line-up was shelved at the last minute with the alliance only identifying Mwai Kibaki as its presidential candidate. It can be argued that the alliance was careful not to jeopardize the delicate ethnic balance that had been achieved by the coalition in a context of great diversity.

On the Kanu side, the director of elections, William Ruto, perhaps frustrated by the Kalenjin reluctance to accept their preferred candidate Uhuru Kenyatta, became more blunt. He warned his kith and kin that their wealth was in danger of being lost upon Moi's retirement and that it was Uhuru Kenyatta who could safeguard this wealth. Ruto further argued that the Kalenjin would require the protection of their land ownership, wealth, cattle, human resources (jobs) and also protection from the ethnic animosity of other communities. Such animosity could be fanned by revelations that the Kalenjin had perpetrated ethnic clashes in 1997 as per the Akiwumi report (*Daily Nation* 14th August 2002). Moi was to further clearly indicate to the Kalenjin that if they opposed Uhuru Kenyatta's candidacy then he would not be able to protect their interests. KANU's high command were selling the idea that, in pushing Uhuru Kenyatta's candidacy they had identified a communal strategy in the transition for preserving the *status quo*.

With the emergence of two clear candidates for the presidency—NARC's Mwai Kibaki and KANU's Uhuru Kenyatta—an interesting political battle was drawn. This scenario raised intriguing possibilities.

They are both from the same ethnic subpopulation (Kikuyu). Questions





of experience, generation gap, and each candidate's abilities should have taken centre stage as the candidates put together strong regional ethnic and political coalitions. The presentation of two candidates by the two parties from the most populous ethnic group in the country had the effect of throwing out of the window all previous assumptions of regional and ethnic power struggles in Kenya politics.

It is likely that in choosing Uhuru Kenyatta as his preferred successor, Moi's prime consideration was that it would stop another Kikuyu candidate contesting. Kibaki, bolstered by his near total domination of the Kikuyu vote in 1997, finished second with 1.9 million votes to Moi's 2.4 million, sending strong shock waves. Since then, Moi had been pre-occupied with how to counter the Kikuyu vote. With him out of contention, fear was that none of the leading contenders in KANU could effectively rally the rest of the country to resist Kibaki's onslaught, presumed to enjoy solid Kikuyu support. Moi was also conscious that the move in 1997 to lure the populous Kikuyu vote into KANU through the Central Province Development Group, allied to then Vice-President George Saitoti, had failed. Hence the decision to forestall a repeat of the 1997 scenario and present a candidate who could gain a sizeable Kikuyu vote.

The choice of a newcomer, Kenyatta, remained confounding but it is a fact that apart from Saitoti, with his dual Kikuyu-Maasai heritage, KANU surely lacked credible Kikuyu figures in its ranks. Kenyatta's backers also touted the coming of age of a new generation, the so-called Young Turks, which served to contrast him starkly with Kibaki and KANU rebel Member of Parliament and FORD-People's presidential candidate Simeon Nyachae.

A great problem Uhuru Kenyatta faced was the perception that he was a packaged candidate championed by an outgoing president determined to drive from the back seat. It did not help matters that Uhuru was being propped up by a core group of figures angling for key positions in the next government—Nicholas Biwott, William Ruto and Cyrus Jirongo—not to mention other behind-the-scenes operators. These were people who were largely seen as not representing prospects for any genuine change.

On the other side of the equation, the 'Kiambu mafia', hitherto staunch oppositionists, were now trooping to Kenyatta's side. With the key Kikuyu luminaries like Njenga Karume rejoining KANU, the strategy of containing Kibaki was in top gear. And despite the perception people had about Uhuru Kenyatta, it still seemed that he had taken away a sizeable portion of Kibaki's presumed secure vote.

As was widely expected, Moi named Musalia Mudavadi as Kenya's Vice-President after he had already dissolved parliament. This was a move which was calculated to contain the wave of NARC in Western Province. Mudavadi immediately targeted his home province for a campaign blitz with the message that a Luhya son was occupying the second most important seat in the land.

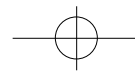
He appealed to his kin not to throw away a bird in hand for yet unknown power benefits from arrangements in NARC. Observers were quick to dismiss Mudavadi's appointment as Moi's usual political gimmick of manipulating ethnic support.

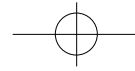
Nonetheless, the political parties' flagbearers despite the numerical strength of their own ethnic subpopulations were well aware, as they went to the 27 December 2002 polls, that they would only secure victory through their ability to court and integrate other ethnic subpopulations into coalitions that promised equitable sharing of power among the diverse ethnic communities of Kenya.

CONCLUSION

The 27 December 2002 polls brought a new dimension in the Kenyan political process. It was one in which ethnicity receded as other considerations were focused on. Presented with two leading contenders for the presidential seat i.e. Uhuru Kenyatta (KANU) and Mwai Kibaki (NARC), both Kikuyus, people scrutinized their backgrounds, track record and whether they represented true change.

However, one must hasten to add, that the conglomeration (summit) in NARC gave enough guarantees to the various ethnic communities of where best their interests would be served. With the NARC victory





Kenyan's sighted with relief that the old post tyranny was handed defeat. But alas no sooner had the government been assembled than dissatisfaction emerged regarding sharing of positions.

The disquiet in NARC, though presented as one in which a pre-election pact is not honoured, is emerging as a situation in which the Kikuyu, Embu, Meru or the Mount Kenya axis is monopolising resources while marginalising other ethnic sub populations.

Despite all these misgivings, the outcome of the 27 December 2002 elections has shown that Kenyans can rise above ethnicity in making their decisions. It also presents a good opportunity in which Kenyans can consolidate their gains and forge unity of purpose for the benefit of the country.

All these gains can be institutionalised through the Ghai Constitutional Review Commission. Kenya has the best opportunity of developing a system which will tackle the negative aspects of ethnicity in our body politic. Kenyans have the chance of institutionalising a multi-ethnic political order.

Institutionalised democracy facilitates non-violent communal protest and inhibits communal rebellion (Gurr 1993), while autocracy is a political condition distinctly associated with ethnic rebellion (Harff 1993). In essence, Gurr contends that:

... western democracies have devised strategies of accommodation that have contributed to a substantial decline in most kinds of ethnic conflict. Among the specific reforms are guarantees of full civil and political rights for ethno classes, programmes designed to alleviate their poverty, recognition and resources for minority cultures and languages and greater autonomy and state subsidies (Gurr 1993:290).

Democracy can thrive in an environment in which power is devolved since this provides opportunities for regional and local self-governance for all ethnic subpopulations, thereby transforming potentially destructive ethnic relations into positive inter-ethnic competition. Gurr (1993: 299) identifies five types of devolutionary arrangements on the basis of the extent of autonomy or authority of the communal group: cofederal-

ism, federalism, regional autonomism, regional administrative decentralisation and community autonomism.

The key goal of power-sharing, also known as consociational democracy, is to mitigate the disadvantageous effects of majoritarian democracy on vulnerable ethnic minority groups. As noted by Rupesinghe (1987:538):

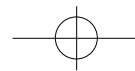
Consociated democracy represents an alternative to what may be called majority democracy where the individual citizen is the most important political unit, and political legitimacy is won on the basis of support from the majority of individual citizens. The starting point for a consociated model is groups, for example ethnic or religious ones. A consociated system of government means that political decisions are based on collaboration between representatives from these different groups.

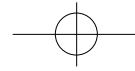
Arend Lijphart (1977, 1990), stressed that consociational democracy or the power sharing approach is characterised by two primary attributes:

- a) the participation of the representatives of all significant groups in the government of the country;
- b) a high degree of autonomy for these groups.

Rupesinghe and Lijphart's views are particularly relevant in the Kenyan transition context, where ethnic subpopulations through their communal power contenders have been mostly pre-occupied with obtaining equitable and favourable treatment. Kenya should thus create an institutional order that strikes a balance between the many variables.

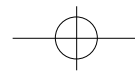
This could be done by providing guarantees against the harmful practices which result from inter-ethnic prejudices and suspicions and the guarantee of fair and equal chances/opportunities for all citizens on the basis of an acceptable framework in which no subpopulation is excluded. In this way, ethnicity will not be viewed as terrifying but as a normal and positive attribute of humanity.





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6

CIVIL SOCIETY IN THE KENYAN POLITICAL TRANSITION: 1992-2002

Maria Nzomo

INTRODUCTION

“Governments cannot lead, they are lost and almost completely helpless, they can only do crisis management at best. Corporations are resigned to fatalism because they are trapped in the hole of market fundamentalism. But we have the Civics with us to show us the way out.... Civics are a bunch of activist idealists in a great hurry. They are in a great hurry to put a stop to runaway, negative globalisation. Civics are a driving factor for the creative disintegration of the present system. They want to build smaller worlds—small defensible spaces where everyone will have a better chance to participate—and on this basis create a united world. Their shortcomings, their insolence, and impatience are of little consequence to what they want our world to be” (Serrano 1999: 164; emphasis added).

The high regard expressed in the above quotation about the capacity of civil society to provide leadership and promote ‘public good’, where other actors and global forces have failed, raises fundamental conceptual/theoretical and practical questions about both the nature and role of the social phenomena broadly termed “civil society”. It also raises the question as to whether any generalizations can be made about civil society and in what time and spatial contexts.

This chapter first examines the concept of “civil society” and highlights some of the parameters within which civil society should be understood and its performance measured. In order to do this, the chapter provides a conceptual framework for understanding the wide variety of actors and

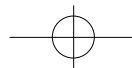
institutions that have emerged in Africa since the 1990s that perceive themselves as part of civil society. The chapter then examines and makes an assessment of the performance of some of the many organisations of Kenyan civil society during the country’s political transition period, 1992-2002.

CONCEPTUALISING CIVIL SOCIETY

The concept of civil society like that of ‘governance’ has gained broad currency, as interest in civil society intensified especially from the 1990s (Harbeson *et al.* 1994; Seligman 1995; Ndegwa 1996; Fatton 1992 and 1995; Cheaka 1998; Shaw and Smith 1996; Van Rooy 1998; Gibbon 1996 and 1999; CIVICUS 1999; Enemuio 1999; Nyang’oro 1999). As Van Rooy (1998) has noted:

Civil society has wandered its way through the academic world on a tortuous path. Ideas have been attached and detached, origins have been ascribed and divorced, social meanings have been generated and debunked.

Debates continue to range over a wide area of concerns including what forms of *associational life* qualify as *civil society* and the criteria for such qualification; the *factors* that define the limits of civil society, especially in its relation to the nation state and the rest of society; the overlapping mandates of state and civil society, etc. Some insist that a distinction needs to be made between *associational life* that includes *all types of voluntarily formed and autonomous organisations* on the one hand, and *civil society* in particular, which is narrowed conceptually to those autonomous and voluntary organisations that demonstrate civic norms (*tolerance, inclusion, non-violence and commitment to promoting public good*). In this connection, some have argued that while *associational life* includes all civic organisations, civil society does not include all organisations that manifest associational life (Naidoo and Tandon 1999). But even with this distinction between civil society and other civic organisations, the question still remains as to whether indeed the majority of civil society organisations demonstrate the said civic norms. It is noted in this connection that much associational life has very little to do with the cre-



ation of civic norms. Instead, some group interactions may lead to the development of norms that do not further the development of the public sphere, much less a civil, open, tolerant, and participatory one based on established rights, as commonly understood. (Callaghy and Ravenhill 1993: 23).

Neo-liberal scholars, such as Diamond, have defined civil society as “the realm of *organised social life that is voluntary self-generating, self-supporting and autonomous from the state* and bound by a legal order or set of shared rules”. Civil Society Organisations (hereafter termed CSOs), are thus distinct from society in general in that they involve particular groups of citizens acting collectively in a *public sphere* to express their interests, passions and ideas, exchange information, achieve mutual goals, make demands on the state and hold state officials accountable. (Diamond, et al, 1997:5).

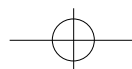
Some Africanist scholars reject the neo-liberal definition and argue that in Africa, the dynamism of the generally unstructured nature of African associational life cannot easily be captured within the formalistic, neo-liberal notions of a formally organised civil society; there is also the problem of the overlapping roles of the African state and civil society and the former’s restriction of civic autonomy. Furthermore, civil society in Africa is complex and highly heterogeneous and hence there is no single uniform phenomenon that can be termed “African civil society”. Indeed, there is no common understanding and/ or consensus about the role CSOs play or should be playing in Africa. There is also no consensus on the demarcation of the “space” that defines the limits of civil society, for example in regard to the overlapping linkages between the “private” and “public” spheres of gendered social activities (Tripp, 1994). There is also no consensus on what *types* of civil society institutions exist (e.g. are political parties, the private sector and government sponsored associations also part of civil society?) and whether the *type* of civil society depends on the *type* of political system. Is civil society necessarily a democratising force? What determines whether and under what conditions a given organisation is or is not involved in political transformation? What is the distinction between those CSOs that seek to *change policy* and those *seeking to appropriate power*? To further complicate the con-

ceptual scenario, some scholars suggest that definitions of civil society in Africa should move away from a focus on *formal* organisations and institutions, to an activity view of civil society, in order to include activities articulated by ethnic and kinship groups, such as families and clans, that would otherwise be dismissed as non-civic activity.

Some scholars also question the perceived *capacity* of the African civic sector and caution against the uncritical embracing of civil society as the alternative to the pervasive weakness and incompetence of the African state in an undemocratic context. They argue that, while it is more than apparent that African states have a long record of failure to fulfil the aspirations of the African people, it is problematic to assume that a viable alternative exists outside the state and that African civil society has the capacities and qualities the African state lacks for democratic governance (Beckman 1991; Mamdani 1996). Some gender scholars also caution that there are good grounds for rejecting any simple polarisation of “state” and “civil society”, as both are production sites with the capacity to generate undemocratic and gender insensitive discourses (Mama 1999: 32).

Adopting a neo-liberal view of African civil societies, Western donor agencies and countries have tantalisingly embraced civil society as an alternative to government; with the result that civil society became a key factor in donor politics of resource allocation from the late 1980s (Van Rooy 1999). The dominant thinking in international donor circles remained that an empowered civil society plays a major role in social change, including poverty alleviation and participation in governance—keeping in check the state’s excesses of political and economic misgovernance (World Bank 1989, 1994). Van Rooy (*Ibid.*) however takes the view that, due to short implementation calendars, donors sometimes put money into civil society without being clear about what impacts their investment should have:

Armed only with a menu of projects and tight timelines and accountability rules, what can donors reasonably do? The danger is that enthusiasm over civil society’s theoretical potential will push caution aside. Along with the promise of civil society, and the hope placed in the work towards social justice undertaken by fragile civil society organisations throughout the world, there are real perils. (Van Rooy 1999).



Many scholars therefore suggest cautious optimism, as there is not sufficient evidence to support the view that single-handedly, the mushrooming associational life in Africa and elsewhere has succeeded where governments and the private sector actors have failed in the following areas:

- ❑ installing democratic governance structures and processes;
- ❑ reversing the deteriorating poverty condition;
- ❑ effectively lobbying for favourable international trade and investment regimes;
- ❑ intervening effectively to promote peace and pre-empt conflicts; as well as
- ❑ responding effectively to the challenges posed by globalisation (Aina 1996; Rosenau 1997; Hirst and Thompson 1999; Nnoli 1999; Campbell 1999; Ninsin 2000).

Indeed, some argue that the expansion and dramatic participation of civil society in the enlarged public space has largely been a rent seeking industry, fuelled by the accelerating economic crisis and lack of alternative forms of livelihood in most African countries.

The diverse conceptualisations and perspectives on civil society suggest that there cannot be one standard conceptualisation of civil society, given the dynamic, heterogeneous and complex nature of this sector and the different forms it takes in different contexts. This is also a pointer to the need for caution in making any generalisations and/ or adopting a 'one size fits all' approach in assessing the role of this social sector, without supporting data.

In this chapter, therefore, we use the term civil society liberally and flexibly to refer to any of the diverse formal and informal associations: NGOs, CBOs, professional bodies, credit rotation groups, burial associations, etc, whose operations take place outside the arena of the state and its related constituent sectors and institutions of governance, including parastatal bodies. Furthermore, Kenya being a class society, civil society, by whatever definition, is not only heterogeneous in its nature and operational focus but also it invariably advances and represents divergent and specific class interests. Class cleavages, differentiated access to political

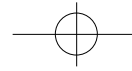
power as well as other resources, further define the way different groups relate to the state and political society and to the private sector. Indeed there is need to desist from romanticising CSOs. There is no idealised civil society out there waiting to be discovered. Civil society is contextual and the forces of class, ethnic, gender, religious and other social cleavages shape its capacity to act as a catalyst for democratic transformation.

TRENDS IN CIVIL SOCIETY: PRE-COLONIAL, COLONIAL AND POST-COLONIAL KENYA

A study conducted on pre-colonial and post-colonial evolution of Kenya's civil society (Wachira and Katumanga 1999) indicates that the governance structures of civil society basically facilitated internal conflict resolution, while remaining opposed to social class exclusivism. While the colonial and post-colonial states constricted the associational space through legal, administrative and constitutional measures, the pre-colonial social set-up is said to have allowed for the cultural expression, through dances, beer parties, festivities and sports, of civil society. Instead of formalised systems of control of civil society, traditional societies stressed personal discipline and accountability.

In *colonial Kenya*, upon the imposition of the western model of the state with its governance structures, controls over the operation of civil society were introduced in the form of identity cards, licences and policing, that constantly impeded citizens' free action and initiative. At the same time new civil society organisations were created. Some of the institutions established by the settlers included agricultural and professional associations, for example: Kenya Farmers Association (KFA); the Kenya Co-operative Creameries (KCC); and the Law Society of Kenya (LSK). *Maendeleo Ya Wanawake Organisation* (MYWO)—that has remained the largest national women's organisation, with the widest national spread—was a creation of the colonial state, although it was formed to also, presumably, serve the interests of local African women. And various Christian churches served as umbrellas over a substantial section of civil society.

Most of this civil society experienced some form of state control. A few



exceptions that escaped stringent controls in colonial Kenya included MYWO, which from the outset operated as a civic arm of the State, and the Christian Churches that remained somewhat unregulated throughout the colonial and post-colonial eras. Consequently, the churches became an important civic umbrella, sheltering and giving sanctuary to groups that even the post-colonial state, during the Kenyatta and Moi regimes, may otherwise have considered unauthorised and illegal. In so doing, the Church served as a refuge centre for nascent democratic forces that were regarded by government as “dissident” groups, until they were strong enough to confront the state.

The institutional exclusion of African associational forms that emerged in colonial times, and the failure of the colonial state to provide an institutional channel for Africans to express themselves and their grievances, motivated the formation of the informal groups within which many traditional social activities at the local level of community and clan took place. Much politicking in Kenya still takes place outside of formal institutions and structures: funerals, especially among the Luo and Luhya of Western Kenya, weddings, family and clan get-togethers are important associational fora. Informal associations are important because of their ability to act as and provide a social security system critical in times of need. Indeed, given the ritual and symbolic significance of some of the functions, which these associations perform, and the financial implications involved, especially in communal support of funerals, the state would hesitate to rush into ill-advised regulation. Informal social fora therefore easily provide unique opportunities for local political leaders to meet their constituents without the blessings of the administration.

The role of religious organisations also evolved in the post-colonial era. Unlike during the colonial times, when religious institutions mainly served a spiritual and educational function, most mainstream churches and other religious institutions replaced the state as the main provider of services ranging from health and food relief to provision of seeds to farmers. Having almost assumed the role of an alternative state, religious institutions became an effective lobby for citizens’ voices of protest and concern over the state’s undemocratic governance and its failure to respond to citizens’ basic socio-economic needs. Increasingly, therefore, especially

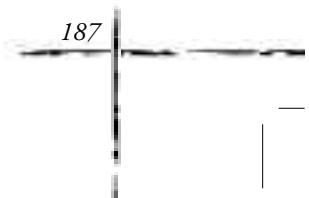
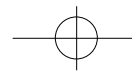
after the post-1992 multiparty general elections, the Moi regime became wary of the religious sector and began to regularly warn this sector to steer off what it viewed as unwarranted interference in the non-religious political territory.

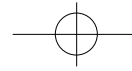
In future, the importance of the influence on the state of both formal and informal associations will vary according to the willingness of the formal state institutions to respond to societal demands. Most formal groups in Kenya must today still meet stringent registration requirements laid down in the NGO Co-ordination Act and the Societies Act, that are not only restrictive, but lead many people to prefer to associate with only the informal groups that they trust. The consequence, then, is not just the fact that for many people most important associational activities take place within the family, the clan and the tribe, but that their organisational capacity for economic and political development is constrained within those limits.

In the *post-colonial* era, some of the civic institutions established by the settlers such as agricultural and professional associations have evolved and become Africanised. These include the Kenya Farmers’ Association (KFA), and the Kenya Co-operative Creameries (KCC), both of which have had their fortunes ebbing and flowing depending on the political regime in power. Their effectiveness in future will depend on their margin of autonomy to advance the corporate interests of their members.

In the professional category, the Law Society of Kenya (LSK) has survived and grown, albeit with a chequered career. Up to the early 1970s, mainly Asians and Europeans dominated the LSK. It was not only patronized by the then President Kenyatta, but rarely spoke out on political issues, confining itself mainly to the welfare of its members. The increase in its African membership and change in orientation of its Council in the 1980s saw it increasingly take a critical stance on the repressive activities of the government and most importantly resisting the government’s unofficial policy of cooptation of all strategically placed NGOs during the 1980s.³ Having resisted cooptation, LSK from the mid-eighties became a key player in civil society, teaming up with the

3 • This policy was effectively applied to MYWO, which became KANU-MYWO, and to the Central Organisation of Trade Unions (COTU).





religious bodies, to emerge as an important pro-democracy actor. By 1990, the relationship with the state had been strained to the point of no return, as its key members increasingly took up representation of political actors agitating for return to political pluralism. LSK had finally succeeded in becoming a professional human rights NGO and a catalyst for democratic change.

Maendeleo Ya Wanawake Organisation (MYWO), in contrast, having been set up in 1952 as the only national gender based civic arm of the colonial state, and with an all white leadership, initially served to contain pro-Mau Mau women activists/sympathizers and promote passivity and subservience among African women (Nzomo 1996). Although this organisation has grown, become Africanised and evolved over time, it largely continued to be a civic arm for promoting the state interests of both the Kenyatta and Moi regimes. Despite several attempts in the 1990s to disengage itself from state control, it had not succeeded by 2002, when it declared its partisan support towards the then ruling party, KANU, in its political bid to retain power (EAS, 16 August 2002).

Thus, for much of the period up to 2002, the only CSOs that were allowed to freely operate without undue harassment or threats of deregistration were ethnic associations, the church-led organisations which were considered less confrontational and MYWO, which remained consistent in its support of the KANU government, especially in political mobilisation of the huge women constituency at election time. The KANU regime could see within the ranks of these two civic sectors certain fractions that could be mobilised in support of government when the need arose.

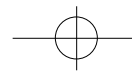
In contrast, attempts by previously proscribed unions such as the University Academic Staff Union (UASU) and the Kenya Medical Practitioners and Dentists Union (KMPDU) to seek registration by the government failed. Their attempts to use strikes to pressure the government did not succeed. The government reacted to these efforts by using the police to intimidate into silence or self-exile the leadership of these unions.

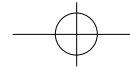
POST-COLD WAR LIBERALISATION AND MUSHROOMING OF ASSOCIATIONAL LIFE IN KENYA

The end of the Cold War had far reaching effects globally on the socio-economic and political life of many societies. In Kenya, as in many African countries, the immediate impact was felt in the political arena, with the ascendancy of a new ideological dispensation among Western donor countries that increasingly linked aid disbursement to good governance and economic and political liberalisation. Political liberalisation meant opening up the public political space for a multiplicity of social actors to participate freely. The West's preoccupations with the Cold War had previously hindered the expression of concern over political repression in African countries.

In Kenya, as in many African countries, civic associations and other agents of social change dramatically mushroomed and gained prominence as catalytic social actors, responding to the challenge of undemocratic governance, political instability, poverty, and social fragmentation, which had remained major features of African political and socio-economic conditions for most of the post-colonial era. (Chole 1999; Botchewy 1999; Mkandawire and Soludo 1999: 88). The persistence of these challenging problems and the failure of African governments and the private sectors to find solutions to them gave impetus and justification to the need for continuous search for catalytic social actors, of which civil societies became prominent agents, playing the roles of human rights pressure groups, lobbyists, civic educators and socio-economic service providers to the poor and marginalised groups of their respective countries.

The dramatic growth of the *associative movement* in Kenya, and Africa as a whole, from the beginning of the 1990s thus came to be viewed as both a result of the post Cold War economic and political liberalisation trends, and also a response to the shrinking capacity of African states to provide social welfare and security to their citizens and to govern democratically within their respective territories. These developments facilitated the opening and expansion of the public space for non-state actors to intervene in sectors that had previously been monopolised by the state (Ibrahim 1997; Mkandawire and Soludo 1999).





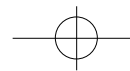
In Kenya, the 1990s thus inaugurated a new phase of resuscitation and renewal of old CSOs that had been demobilised; as well as dramatic upsurge and vibrancy of new social movements and diverse claimants to socio-economic and political rights. In the process, the very concepts of *entitlement* and *citizenship* began to attain profoundly new emphasis (Ndegwa 1995).

Political liberalisation in Kenya also coincided with a period of increased levels of insecurity, violence and crime, resulting from rising levels of poverty. Thus the post-Cold War era also witnessed new forms of associational life, organised around privatisation of security provision and extra-judicial administration of justice, as well as renewed struggles over property rights and resource entitlements. This trend not only set in motion the formation of multiple organised forces of social control, including local militia and vigilante groups, but also organised terror gangs and death squads, such as carjackers and the Mungiki sect. The latter can be said to represent the unconventional face of civil society but is, nonetheless, a non-state actor engaged in struggles over rights, entitlements, and access to scarce resources. (Ninsin 2000; Hirst 1999; Nzomo 2000).

A related but externally generated factor that further accelerated the mushrooming of Non-Governmental Organisations (NGOs), Community Based Organisations (CBOs) and myriad other formal and informal associations in Kenya, since the 1990s, has been international funding agencies' disillusionment with President Moi's misgovernance and especially rising levels of state managed corruption, to which development failures were attributed. This led to an overwhelming donor interest in civil society as the only available alternative vehicle for delivering development and democratic governance. The donor funding that accompanied this policy shift, brought into action a new set of CSOs, some of which came to be labelled "briefcase NGOs" alias "My Own NGO (MONGO)", alias "Non-Governmental Individuals (NGIs)", to denote their personalised nature and weak institutional base.

ROLE OF KENYAN CIVIL SOCIETY IN MULTI-PARTY POLITICAL TRANSITION

The term *political transition* is normally used to refer to the move

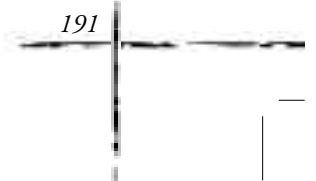


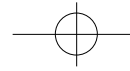
between different sets of rules governing the distribution of power that in some cases is accompanied by regime change (Holmquist and Ford 1998). Kenya went through one political transition in 1991 when the *de jure* single party political system was replaced with a multiparty political system that allowed greater freedom of association, assembly and expression, although at the same time it continued to provide a strong legal basis for the regime of President Daniel Moi to harass and constrain activities of the political opposition, CSOs, and other pressure groups and almost completely derail democratic development in Kenya. This, and the socio-economic crisis that has been on the upsurge for at least fifteen years, provided the catalyst for a growing social movement organised primarily around the following agenda: (a) constitutional reform; (b) upholding of human and women's rights; (c) civic education; (d) and the holding of free and fair multiparty elections as a first step towards the restoration of democratic governance in Kenya. These may be singled out as important political transitional as well as medium term goals, whose realisation CSOs would endeavour to ensure. Towards this end Kenyan CSOs have employed different strategies, including: (a) civic rights awareness education; (b) gender rights awareness education and women's empowerment programmes; and (c) pushing for comprehensive constitutional and governance reforms.

This chapter assesses the performance of the Kenyan CSOs within these three parameters.

Transition to Political Pluralism

Immediately after the end of the Cold War at the end of 1989, Kenyan CSOs led by the Law Society of Kenya (LSK) and the National Council of Churches of Kenya (NCCCK), felt emboldened enough to begin the clamour for governance reforms and expanded political space. Agitation for return to political pluralism began in earnest on 1st January 1990, spearheaded by a radical NCCCK clergyman, Rev. Timothy Njoya, who in his 1990 New Year church sermon, called for the introduction of political pluralism. This cue was soon taken by reform seeking clergymen and politicians—Bishop Henry Okullu, Charles Rubia and Kenneth Matiba, among others—and the clamour for a multi-party system culminated in the detentions without trial of Rubia, Matiba and Raila Odinga and the





subsequent illegal Kamukunji rally and protests of 7 July 1990 and the so-called Saba Saba riots that shook Nairobi and the surrounding areas. Many events later, including the sustained pressure from politicians like Jaramogi Oginga Odinga with active support from CSOs (e.g. the Law Society of Kenya, the Kenya Human Rights Commission and some religious bodies), the government made concessions in the form of the George Saitoti-led KANU Review Committee, and a pressure group, Forum for the Restoration of Democracy (FORD), was formed, being a coalition of old politicians, young lawyers and political activists that became a powerful force in pressurising the Moi regime to concede to the growing demands for political pluralism and constitutional reforms.

This civic-led pressure found support among Western governments based in Kenya, some of who froze further aid disbursement to Kenya, until the Moi government conceded to political pluralism. The combined pressure saw the KANU government in December 1991 amend the constitution to remove section 2A, thus allowing the formation of other political parties.

The reform movement gained momentum immediately after the return to multi-partyism in December 1991 but failed to effect fundamental constitutional changes before the December 1992 elections, clearly indicating the inability of the CSOs to push through to ultimate conclusion its reform agenda. Its allies in the form of political parties demonstrated that, in the final analysis, power considerations took precedence over the reform agenda.

Role of CSOs in Constitutional Reform

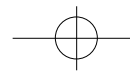
The stalled reform process was picked up again in 1993, now focussing on constitutional reform as a key prerequisite for building democratic governance in Kenya. United in this belief, several legal and human rights NGOs, namely, Kenya Human Rights Commission (KHRC), LSK, Citizens' Coalition for Constitutional Change (4C's) mobilised other like-minded sectors of CSOs and opposition parties, to deliberate over the realisation of constitutional reform, as the only basis for democratic development in Kenya. This second initiative at constitutional reform focussed on the *methodology* and *content* of the desired new con-

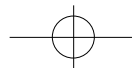
stitutional order. The initiative resulted in the widely publicised Model Constitution document entitled *Kenya Tuitakayo/The Kenya We Want*, which was endorsed by 28 civil society organisations and key opposition political parties. This initiative, though dismissed by the Moi regime, and which received only lukewarm support from the Kenyan public, in my view, highlighted the key issues that later dominated subsequent discourse on constitutional reform in Kenya.

As a follow up to the 1993 initiative, several coalitions led by opposition political party leaders and geared towards constitutional reforms were formed, including the United Democratic Alliance (UNDA), the National Opposition Alliance (NOA), and the Solidarity Alliance. All failed to pressure Moi and KANU to initiate reforms.

At the close of 1996, radical middle class elements from CSOs led by Citizens Coalition for Constitutional Change (4C's) came together around the question of constitutional reform, and successfully assumed the mandate of instituting constitutional reform in the absence of the cooperation of the incumbent regime, setting the political agenda for the rest of the year. This was a significant achievement, given the diversity of interests and the fragmented nature of the Kenyan CSOs and other pro-democracy forces that supported this initiative.

It is these CSOs that provided leadership and vision to the efforts that resulted in the formation of the 1996 Coalition, National Convention Preparatory Committee (NCPC), bringing together all political parties (except KANU), NGOs and churches. It is this umbrella body that was later transformed into the National Convention Executive Council (NCEC) which presided over a series of violent protest rallies and other forms of mass action and civil disobedience aimed at pressurising the government into conceding and initiating the process of comprehensive constitutional reforms before the December 1997 elections. Within this framework, NCEC organised the disruption of the reading and debating of the national Budget on 19th June 1997, as a way of sensitising, and mobilising support from, the Kenyan public and the entire world, for comprehensive constitutional reforms as the most urgent issue that had to be addressed before the elections. This was partially achieved by successfully disrupting the reading of the





budget through a well-orchestrated commotion in parliament witnessed by foreign envoys and ex-President Moi who were present in parliament.

As a follow up to this event, NCEC called for multiple public rallies on the 7th of July 1997 across the entire republic. Despite the ensuing Nairobi based demonstrations resulting in more than fourteen Kenyans dead, the government remained intransigent. Furthermore, by August 1997, only radical CSOs and a few radical politicians remained committed to the idea of *comprehensive* constitutional reforms as advocated by the NCEC.

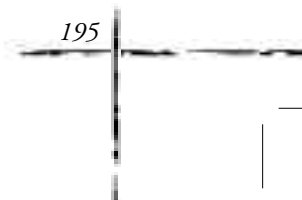
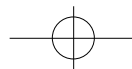
Most of the opposition parties joined their KANU political colleagues in a minimum reform initiative that would become known as the Inter-Parties Parliamentary Group (IPPG), under whose auspices Parliamentarians eventually passed the minimum reforms, which they believed were critical for holding free and fair elections. Most of the opposition leadership, blinded by power considerations, deluded themselves that KANU would live up to its promise of not only honouring the entire IPPG package but also instituting comprehensive constitutional reforms after the elections. The IPPG repealed, among others, the notorious Chiefs' Act; allowed for an expanded Electoral Commission (with the additional commissioners being nominated by the opposition). With the repeal of the Public Order Act, the opposition was allowed to hold meetings consequent upon notifying the police. In reality, KANU used the IPPG reform initiative to outmanoeuvre the opposition and derail the CSOs-led constitutional reform initiative. In so doing, it succeeded not only in fragmenting pro-reform forces, but also the opposition political parties, which subsequently lost the 1997 presidential elections. Though both KANU and the opposition parties found common ground in their pursuit of raw power, ordinary Kenyans perceived themselves as the losers and democratic change was once again denied.

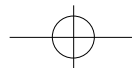
After the 1997 elections, the push for constitutional reforms pursued a similar pattern as previously observed, remaining primarily a middle class agenda (Mutunga 1999) featuring most prominently the NCEC and other like minded CSOs that hoped to mobilise support countrywide and, this time round, prevail on the Moi regime to concede to popular

demands for constitutional reforms. The *Safari Park* and *Bomas of Kenya* constitutional initiatives succeeded in getting the government's concession for the commencement of the constitutional review process, launched through the enactment of the Constitution of Kenya Review Act in 2000.

Despite the apparent revival of the reform process, the KANU government continued to procrastinate on the process, as wrangles over the state appointed Commissioners saw the religious sector and other CSOs organise a parallel process that became known as the *Ufungamano Review Process*, which was pitted against the government appointed *Constitutional Review Commission of Kenya* (CKRC), with Prof. Yash Pal Ghai as the Chairman. Attempts by CSOs to pressurize the KANU regime to agree to an all inclusive reform process were further undermined by the decision by one key opposition party, the National Development Party (NDP) of Raila Odinga, to merge with KANU in early 2001. Furthermore, a merger deal brokered between Chairman Ghai and *Ufungamano* leaders, saw CSOs once again fractured between the radicals opposed to the merger and the moderates in favour of the merger.

From mid 2001 up to October 2002, the merged and expanded CRCK team progressed with its mandate of collecting and collating views of Kenyans for a new draft constitution, amidst endless controversies within itself and between it and various political and CSO interest groups. Despite these setbacks, a draft constitution was completed by October 2002 and a Constitutional Conference organised for debating and agreeing on the final draft constitution that would then be tabled before parliament for approval. The Moi government pre-empted this by first dissolving parliament and by extension one third of the constitutional conference delegates, a week before the commencement of the constitutional conference and then stopped indefinitely the conference a day before its official opening. Protests from CSOs and Kenyans generally were ignored. Opposition parties were clearly half hearted in their protests and seemed to be more anxious to get on with their election campaign programmes. Instead they made an election pledge to Kenyans that if they won the elections, they would ensure a new constitution was in place within the first 100 days after taking office. It was on the basis of this





promise that many Kenyans voted for the main opposition coalition organised under the political label the National Rainbow Coalition (NARC). NARC indeed went ahead to win the election with a large majority. More than a month now since taking office, the NARC government, through its new minister of Justice and Constitutional Affairs, has pushed the re-convening of the constitutional conference to June 2003, and denied ever having promised a new constitution within 100 days of taking office. Others, some of them NARC MPs, disagree with the government position on this matter (*EAS* 6 February, pp. 1 & 2).

The Role of Civil Society in Civic Education

Some observers believe that NGO-led civic education efforts, first carried out in the process of voter education in 1992, and later elaborated through more broad constitutional, legal and civic rights education, must have had a positive impact as evidenced by the KANU regime's hostile reaction in the form of harassment and disruption of civil society-led civic education seminars, which in government circles were viewed as essentially anti-KANU rather than as a genuine pro-democracy effort that could be a catalyst for democratic development and peace in Kenya (Kibwana 1994). Civic education, in my view, has played an important role in the democratic political transition in Kenya—especially in raising public civic awareness of individual and collective rights and making citizens aware of their power as voters who are entitled to demand that their elected government rule democratically (Nzomo 2002).

In this regard, since 1992, numerous Kenyan NGOs and grassroot organisations countrywide have been engaged in work aimed at raising public awareness of their rights, entitlements and obligations, as well as on the methods of gaining access to and exercising such rights. Civic education has thus raised the capacity of the public to understand the manner and process of governance.

However, political pluralism over the last 10 years, whatever else it has failed to do, has facilitated the emergence and mushrooming of CSOs, most of which have embraced the mission of civic education as their main agenda, to the point where currently, Kenya is flooded with civic

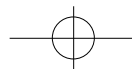
educators. There are many “briefcase” organisations and individuals, who in recent times have “discovered” that they have the capacity and commitment to educate Kenyans on rights. Indeed, the civic education project has become an industry with too many “experts” and opportunists and too little expertise and genuine commitment. In this connection, the civic education project runs the risk of becoming commercialised to the point of losing its original objective of empowering Kenyans with the civic knowledge that they require in order to gain greater control over their lives and the governance process. The challenge, however, is to sort out the genuine civic educators from the rest.

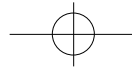
Engendering the Political and the Constitutional Reform Agenda

The gender-based civil society in Kenya has experienced some of the same constraints as other fractions of CSOs, including fragmentation and lack of a sustainable commonly accepted gender agenda.

Despite this, women NGOs and CBOs have played significant roles not only in the traditional socio-economic arena but also in engendering democratisation especially in the political arena (Nzomo 1993, 1994, 1995, 1996 and 1999). Since the onset of multipartyism, a few radical women's NGOs, notably the League of Kenya Women Voters (LKWV), the National Commission on the Status of Women (NCSW), the Education Centre for Women in Democracy (ECWD), the International Federation of Women Lawyers (FIDA-K), the National Council of Women of Kenya (NCWK) and the Collaborative Centre for Gender and Development (CCGD), among others, initiated civic education with the following components:- (i) gender sensitisation for men and women, (ii) training curriculums aimed at political empowerment and capacity building especially for women as candidates and voters for electoral politics.

Through the civic education initiatives of women's NGOs, working in collaboration with community based women's groups (CBOs), there has been increased gender and civic awareness, whose immediate impact has been observable in the increased numbers of women running for and being elected to political office since 1992; with six of them being elected to parliament in 1992—the highest number ever in post-colonial Kenya.





Though the figure of elected women MPs went down to 4 in 1997, there was an increase in women running for political office and their greater political visibility, with two of them vying for the presidency and one becoming a major presidential contender. The number of elected women MPs has risen to 9 in the 2002 elections, with 8 of them winning under the NARC party ticket. The choice of a large number of women candidates to run on the widely popular party (NARC) ticket certainly contributed to the relatively higher number of elected women MPs than had earlier been predicted.

Another significant achievement of the women's civic groups in Kenya was the formation in 1998 of the short-lived national umbrella body, made up of 43 women's organisations and accommodating 23 women leaders, including 6 MPs, under the label the Women's Political Caucus (WPC). This network contributed to the temporary strengthening of the organisational and delivery capacity of the women's movement.

Indeed, it was through this network that the women's movement effectively lobbied for the engendering of the constitutional reform process, and as a first step, insisted and obtained a fairly good representation in the constitutional review process which, as analysed above, has been through considerable twists and turns since its inception in 2001. The women's lobby groups succeeded in securing at least one-third membership in the drafting committee of the Constitutional Review Commission, as well as in the District and National Forums and as delegates for the Constitutional Conference now postponed to June 2003.

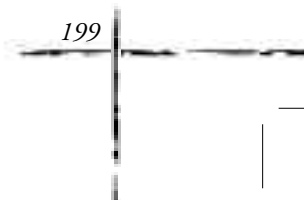
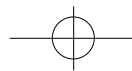
The potential of the WPC was immense, as demonstrated in the initial role it played in engendering the reform process by negotiating and obtaining acceptance of the women's agenda therein. WPC however failed to determine and get consensus on the minimum gender agenda that could glue together its diverse membership, with its conflicting and overlapping interests and alliances. The acrimony and the eventual split of the WPC in 2000 was a testimony of this failure. Indeed the funding agencies' realisation that the coalition of the women's lobby groups would not hold led them in 2000 to decide on splitting the funds allocated for the Engendering the Political Process Programme (EPPP) between the two key factions that emerged out of the original Women's

Caucus—the *Kenya Women's Political Alliance* and the *Kenya Women's Political Caucus*. The result of this decision was to reduce the bickering and acrimony, but also to weak the overall effectiveness of the women's movement in influencing the political process, especially during the crucial and historic transition year of 2002, when major political events that would shape the political landscape of the country in the post-Moi era were unfolding.

The 2002 elections were preceded by a two year period during which women's political NGOs were engaged in a well funded preparatory and empowerment period under the so called Engendering the Political Process Programme (EPPP). Despite a well-funded EPPP, for most of 2002, when the succession and constitutional review debates took centre stage in Kenya's political discourse, there was a notable absence of women's voices in those debates. This was noted by several media and gender analysts, who decried the fact that, with a few exceptions, women's voices and political visibility, were almost totally lacking:

It is disheartening to note that in Kenya, women seemed to have resigned to fate. They seem to want things to happen to them without taking the initiative to be part of the change they crave. They refuse to do as much as whisk off a fly on the tip of their noses ... women seem to be waiting for someone else to deliver them. But who will wake up women from their sleep, to do what they ought to do to improve their lot? Even the current jostling for power does not include women. Even the most vocal among them seem to be saying, by their eloquent silence, that the race is too hot for women ... we do not want women to complain later that they were left out. They have to be part of these power shows, and the time to get out is now. (EAS, 21 August 2002)

However, rather belatedly in early November 2002, a loose coalition of women's NGOs, including many of those affiliated to the Women's Political Alliance and Kenya Women's Political Caucus—FIDA-K, LKWV, CCGD, FRED A and NCSW—as well as individual activists and professionals, banded together to form a forum that was initially labelled *Women for NARC* but was transformed some three weeks later into the *NARC Women Congress* (NWC). This *ad hoc* women's coalition had a very *short-term political mandate* but a *more long-term political objective*. The short-term mandate was to employ every available means



to ensure the NARC party won the 2002 elections. For two months, NWC members volunteered their time and even financial resources to produce and disseminate presidential and party campaign materials; organised and conducted training for election party agents; participated in the presidential campaign; and monitored the election day polls. The key objective of this spirit of volunteerism was to obtain a guarantee from the male dominated NARC that if the party won the elections, it would incorporate women as equal partners in the post-election power sharing and would complete and engender the constitutional and governance process generally. A proposed memorandum of understanding to formalise the envisaged partnership was never tabled. Ultimately then, there were no guarantees, save for those contained in NARC's election Agenda document. The envisaged post-election power sharing arrangement has not been adhered to. Indeed, the only gain for women was the nomination of 5 women out of 7 NARC nominees as Members of Parliament.

As shown in Table 000, since Kenya's independence some 40 years ago, women's performance in the area of parliamentary electoral politics has only registered marginal improvement in the 2002 elections.

Table: Performance of women in parliamentary elective and appointive politics, 1963-2002

Year	No. nominated to contest polls	No. elected	No. Nominated to Parliament
1963	7	0	0
1969	13	1	1
1974	11	1	1
1979	15	5	1
1992	19	6	0
1997	48	4	5
2002	44	9	8

But in other decision-making structures, it is a mixed bag of gains and losses. For example, whereas for the first time women secured 6 ministerial positions, they lost out on some of the quantitative gains made under

the Moi regime, especially in the appointment of Permanent Secretaries (PSs). Whereas in the last Moi government the civil service was headed by a woman and an additional 6 women were PSs, the Kibaki administration civil service is headed by a man and has only 3 women PSs., as shown in the table below.

Table: Women in Key Positions in the NARC Government (by April 2003)

Ministries	Ministers (M) & Assistant Ministers (AM)	Permanent Secretaries	Ministerial Directors
Ministry of Health	Charity Kaluki Ngilu (M)		Florence Musau
Ministry of Water	Martha Karua (M)		
Office of the Vice-President and National Reconstruction:	Linah Jebii Kilimo (M)		
Tourism & Information	Beth Wambui Mugo (AM)	Rebecca Mwikali Nabutola	
Local Government	Beth Njeri Tett (AM)		
Environment, Natural Resources & Wildlife	Prof. Wangari Maathai (AM)	Rachael Arunga	
Labour and Human Resource Development		Deborah Ongewe	
Education, Science and Technology			Naomi W. Wangai
Justice and Constitutional Affairs			P. Uniter Kidullah (Public Prosecution)
Gender, Culture and Sports	Alicen Chelaite (AM)		

Thus in sum, although the gender sector of organised civil society has been an active and sometimes effective lobbyist in engendering democratic change in Kenya since the beginning of the political transition in 1992, this sector missed a strategic political moment in the 2002 politi-

cal transition. It failed to maximize its potential gain at this critical moment and hence become a major player, with adequate capacity to negotiate effectively on power sharing arrangements. This was in part a reflection of the socio-political fragmentation and lack of a common vision and consensus on a minimum gender agenda that is reasonably inclusive and articulates the interests and expectations of women across the board, but also enlists the support of non-gender social sectors.

Civil Society: Post 2002 Election Reform Agenda

The events of October 2002 to January 2003 seem to indicate that CSOs, once again, lost to politicians the power to control and give direction to the constitutional reform agenda. Following the indefinite postponement of the constitutional conference in October 2002, the major pre-occupation shifted towards electioneering, followed by a popularity euphoria around the new NARC government that seems to have rendered ineffective any criticism levelled at the new government. Furthermore NCEC, that was previously quite vocal in its push for constitutional reforms, seems to have lost momentum following the departure of one of its key leaders, who is now a NARC MP. In place of NCEC, Kenya Human Rights Commission (KHRC) has emerged to provide leadership in this regard. In this connection, its executive director in an interview conducted in September 2002 reminded CSOs to remain the custodians of the national interest, arguing that political parties do not see the national interest beyond their selfish pursuit of power. He also appealed to Kenyan voters to make concrete demands on the political leaders who were seeking office from both sides of the political divide, and not to allow anyone to ascend to power unconditionally (EAS, 28 September, 2002, p. 8).

Thus, while on October 2, 2002, the KHRC endorsed Mr. Mwai Kibaki and the National Alliance Party of Kenya for the presidential elections, the KHRC emphasized that the KHRC reserved its independent right to scrutinize and criticize state policies, laws and practices that are inimical to human rights and human dignity, and would accordingly hold the Kibaki Government accountable for its human rights record.

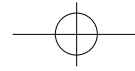
True to its promise the KHRC, in a lengthy press statement published by the local print media a week after the NARC government took office, reminded the government of its yet unfulfilled campaign pledges to Kenyans which required urgent and immediate action (*Daily Nation*, 9 January 2003). These were pledges on:

- ❑ a new Constitution;
- ❑ ending Corruption;
- ❑ establishment of a Truth Commission;
- ❑ formation of a Freedom Fighters committee;
- ❑ gender sensitivity and inclusiveness in governance;
- ❑ establishment of an Office for the First Lady.

It is perhaps too early to make conclusive statements on the likely effectiveness of CSOs in their push for the completion of the stalled constitutional reform process. However, some general assessment of the lessons from the reform process to-date can be made.

First, as already noted, the push for constitutional reforms during the multiparty era has been clearly engineered and led by an urban-based middle class composed of pro-democracy, human and legal rights NGOs, religious organisations and opposition forces. In this connection, constitution making in Kenya has tended to reflect class struggles within this political society, and hence the “national consensus” that is reached largely reflects the interests of some dominant social groups, admittedly with some concessions made to the other dominant groups in society (Mutunga 1999).

Secondly, for those in the opposition or in power, whether or not they supported constitutional reform, the ultimate position taken, was determined primarily by their calculation of the extent to which such reforms would advance or curtail their chances of getting or retaining power. For example, the then ruling party KANU continued to see the reform process as a means to defuse political tensions without any meaningful structural changes of the state and other institutions of governance.



Under such political logic, no constitutional reform initiative could be permitted that would threaten the political and economic interests of the political class. Thus, the numerous amendments to the constitution were aimed at entrenching vested regime interests, thus facilitating corruption and legitimising regime oppression in Kenya. The guided reform process then became the means either to retain *control for those within* or *capture the state for those outside* (Katumanga 1998).

Thirdly, the weakness of CSOs and their failure to mobilise mass support was largely due to their failure to link the legal reform agenda to the situation prevailing in the social and economic sectors, e.g. health and education, as well as to pertinent welfare concerns, including pervasive poverty, the inability of the majority Kenyans to access water, shelter, and credit facilities. Despite the fact that a number of CSOs including 4Cs, International Commission of Jurists (ICJ), Kenya Aids NGO Consortium, Kenya Alliance for Advancement of Children, Kenya Pastoralists Forum, Network for Water and Sanitation, Association for Physically Disabled, Shelter Forum and the National Council of NGOs belatedly set up a steering committee whose objective was to campaign for constitutional reforms that would commit the government to treat basic needs as a basic right, this campaign never took off. Little effort was made to mobilise non-middle class target groups, to lobby the government to mainstream reforms in social sectors such as land, education and health.

General Constraints to Civic Action in Kenya's Political Transition

Although Kenyan civil society organisations have for a decade now been at the forefront of agitation for constitutional reforms, civic and gender rights education and training and empowerment campaigns, the impacts of these initiatives in bringing about the desired changes has had mixed results and come short of what their neo-liberal donors and other supporters would have wished to see after a decade of activism. What does the performance examined above tell us?

During the on-going political transition, they remain a deeply divided sector, unable to muster an impact commensurate to their potential.

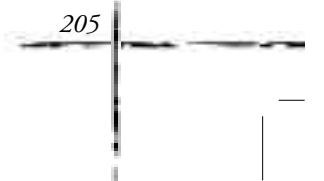
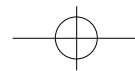
Broadly speaking, however, the Kenyan civic sector, like its counterpart

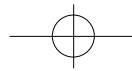
elsewhere in Africa, has in its operations displayed some strengths and some weaknesses. Some of the strengths noted include its *resilience, flexibility* and its capacity for employing *diverse approaches* in promoting its defined 'public good,' as well as its ability to mobilise resources to fund the promotion of a target programme. This has been especially notable in its delivery of civic education. In this regard, the participatory approaches used by civil society increase its effectiveness in programme delivery. The important role played by Kenyan human rights NGOs in the push for democratisation since 1990 cannot be overemphasized. These NGOs have taken on the lead role in raising civic awareness of the citizenry; lobbying and pushing for legal and political reforms and generally the democratisation of structures and processes of governance.

But how come then the political class has to-date succeeded in stalling constitutional reform and the transformation of governance structures, despite the noted strengths of CSOs? Studies on Kenya and sub-Saharan Africa generally (Nzomo 2000), indicate that CSOs possess inadequate capacity to intervene effectively in transformative agendas such as poverty eradication and/or radical democratic change. This incapacity derives from some structural shortcomings, which in turn mirror those of the larger society from which CSOs emerge. These include:

- ❑ *social fragmentation*, in some cases manifested as sharp vertical and horizontal divisions on the basis of urban-rural, class, ethnic, religious, gender and political-ideological divides, as well as, on the basis of policy and programmatic differences;
- ❑ *poor co-ordination of activities, with inadequate connectivity between and within various sectors of civil society;*
- ❑ *weak financial base, resulting in a high donor dependency syndrome;*
- ❑ *inadequate flow of information within and between civil society groups, resulting in high duplication of efforts, as well as unnecessary competition and rivalries;*
- ❑ *poor organisational and managerial skills; and*
- ❑ *weak civic and democratic culture.*

Some of the noted weaknesses of Kenyan CSOs are manifested in their general lack of adequate capacity to network and focus on certain com-





mon development goals in order to effectively influence the national political agenda, such as the political transition and legal reform underway in the country. Most of the high profile NGOs in Kenya tend to be urban focussed and single-subject organisations, that are often so pre-occupied with their single and highly localised agenda, that they may not have the interest to develop the necessary outreach capacity to address any other problems around them, and/or to respond to the key emerging challenges, such as the trends and impacts of regional integration and globalisation on the Kenyan political economy.

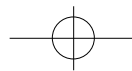
Some of the weaknesses of the Kenyan civic sector, however, also need to be understood within the larger institutional framework and forces that constrained its capacity to operate during the Kenyatta and Moi regimes. For example, the Moi government played a significant role in fragmenting and obstructing the civic groups it distrusted, constraining their capacity for autonomous action. The state manipulated the laws governing the registration of societies against groups it distrusted and forced NGOs into self-censorship in their advocacy work, for fear of de-registration.

Foreign donors too contributed to CSOs' self-censorship in programme design and implementation, due to the latter's tendency to fund only those CSO programmes that complied with donor priorities and procedures. There was a tendency therefore for CSOs to focus primarily on meeting deadlines for reporting and financial accounting and less on programme quality and impact.⁴ CSOs' dependency on donor funding further compels many to design their programmes in line with donor requirements rather than to reflect the CSO's mandate. In so doing, the project's impact and sustainability is compromised. On the other hand, some donors have also complained about a lack of financial probity and discipline on the part of some NGOs which, they claim, give fraudulent accounts and default on performance.

CONCLUSIONS: PROSPECTS FOR CIVIL SOCIETY IN KENYA

The above analysis suggests that there is a lack of conceptual and operational clarity about the phenomenon of civil society, the specificities

4 • According to a 1998 study, some donor favourite Kenyan NGOs received significant funds from the key civil society donors, with one 'favoured' NGO receiving more than 25% of a major donor's total funding to civil society over a two year period, while another received more than 50% of the total donor's support for capacity building advanced to civil society in the country (Maina 1998).

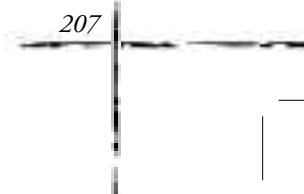


of the actors, as well as the activities and the space of their operation. The analysis also indicates that whichever way the phenomenon of civil society is understood, it is no panacea for changing all that is wrong in Kenya—bad governance, the poverty situation, etc. Civil society is not only highly diverse in its goals, orientations and outreach capacity, it also contains major internal contradictions, social fragmentation, pluralities and multiplicity of social identities, as well as management and institutional weaknesses. This, in addition to the generally unfavourable policy framework that was prevailing up to 2002, and the magnitude of the developmental problem in Kenya, leads me to conclude that we should not romanticise the role of civil society in respect to its capacity for transforming and democratizing the Kenyan political economy.

The above notwithstanding, it needs to be underscored that the role of civil society in Kenya remains crucial in civic education; in lobbying and mobilising popular participation for democratic governance and development, which in this chapter is well demonstrated in those cases where civil society organisations acted in solidarity in pursuit of a common agenda to advance their individual and collective rights and entitlements.

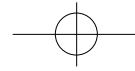
The challenge then is to formulate a strategy to strengthen the institutional, mobilisational, advocacy and service delivery skills of civil society, with the view of making this social sector a more effective and legitimate partner in governance and development matters, alongside the state and other non-state actors at the local level and beyond.

Changing socio-cultural attitudes and mindsets will remain for a long time an important area of civic action. In this connection, while it is absolutely important for now to focus on raising awareness about legal/constitutional issues in order to enlist citizens' participation in the review process, civil society has an even more challenging long term role, namely, to act as a catalyst for changing entrenched socio-cultural values and practices that are likely to hinder the realisation of even the most democratic legal and policy frameworks. A good constitutional order is an important starting point in the move towards democratic governance and development, but hardly an end in itself.

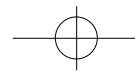


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7

GENDER INCLUSION IN TRANSITION POLITICS: A REVIEW AND CRITIQUE OF WOMEN'S ENGAGEMENT

Winnie Mitullah

INTRODUCTION

The era of globalisation and inclusive development calls for effective participation from all stakeholders. While this has begun in most areas of development, effective participation especially by women in areas of governance is in its initial stages. Inclusion of women in decision-making positions is more of a manifestation of rhetoric than reality in most countries. This is reflected in the glaring statistics, which show that only 14 per cent of the elected members of parliament (both upper and lower houses) in the world are women. The average percentage ranges from 16.8 per cent in European parliaments to 4.6 per cent in the Arab states' parliaments (UNESCO 2002). Women politicians are rare, not to mention female prime ministers or presidents.

A publication of the Commonwealth, *Women in Politics*, expresses the view that "the concept of democracy will only assume true and dynamic significance when political parties and national legislation are decided upon jointly by women and men with equitable regard for the interests and aptitude of both halves of the population (Commonwealth 1999). The publication argues that women are best placed to articulate their needs and concerns; and that the entry of women into parliament significantly broadens perspectives in debate and introduces a new style and new values into politics. Indeed, in cases where women have been includ-

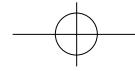
ed, more attention has been paid to social issues such as health, industrial reforms to include flexible times of work, provision of childcare facilities within the workplace and pre-natal leave (Kethusegile-Juru 2002).

Surveys in other parts of the world have also shown that women's presence in the corridors of power results in more participatory, less autocratic styles and models of government (Commonwealth 1999). In spite of this acknowledgement, women's participation in politics and decision-making has hardly achieved a quarter of the required level. A United Nations publication (United Nations 1991) has observed:

Women who try to succeed in the world of politics discover that the hurdles they face, whether based on tradition, finances, ethnicity or organisation, are compounded by the hurdle that is theirs by birth—that of gender. Thus, women's increased participation in mass politics over recent decades has been predominantly concentrated in the lower echelons of public administration, political parties and trade unions and has not been matched by the same presence at the higher levels of policy and decision-making.

Women are largely excluded in three areas: the military, religion and politics. Among these three areas, it is in politics where women have the least representation. In politics more than any other area, women have discovered that to reach the top, they often cannot just match men, but must outdo them (*The New York Times*, 16th May 1991).

Inclusion of women in politics and their advancement is a pre-requisite to realizing the human collective capacity to deal with global issues of sustainable development, human rights, the environment, peace and security. An examination of a number of countries shows gender inequalities in participation in public life and political processes. Decision-making, whether through politics or state organs, and control over development initiatives whether at community, national or regional level are dominated by men who occupy the vast majority of positions of power and authority (Jan Nico 2002). This is in spite of the concerted efforts by United Nations agencies, other international bodies and civil society organisations to put pressure for full inclusion of women in development and especially in decision-making.



After the publication of the Boserup Study of 1970 which questioned the lopsided perception and practice in development with regard to gender, the United Nations General Assembly proclaimed 1975 the International Women's Year. This resulted in the First World Conference on Women held in Mexico City in 1975. This was followed by 1976–1985 being declared as the United Nations Decade for women, a decade, which was concluded in 1985 by a women's conference, held in Nairobi. In this conference, United Nations agencies urged national governments to establish machineries for the advancement of women. Since the Nairobi conference two other key conferences have been held—the Social Development Summit in Copenhagen in 1995 and the Fourth World Conference on Women in Beijing, China in 1995.

Gender disparity remains a key issue in development in spite of the many commitments and programmes countries have effected in the interest of gender parity. Statistics show that in spite of various programmes put in place by national governments, two thirds of the 876 million illiterate people in the world are women and there is no country in the world where women earn more than men (UNESCO 2002). While gender disparity and lack of women's full inclusion and integration is a fact in Kenya as in many other countries, this chapter limits itself only to women's inclusion and participation in decision-making and governance in general in relation to Kenya's transition politics.

This chapter uses the politics of transition from the Moi to the NARC regime in Kenya as a test case on women's inclusion in politics and decision-making. The situation in Kenya prior to the exit of Moi and KANU was that of an ingrained dominant political party, which had ruled for about forty years, and was threatened with the loss of power. The party used all means at its disposal to ensure its survival and retention of power. The many opposition political parties, on the other hand, struggled to form strong alliances aimed at ensuring the defeat of the dominant ruling party. An internal power struggle in KANU was precipitated by the incumbent president's unilateral decision to market Uhuru Kenyatta, the young inexperienced son of a former president, Mzee Jomo Kenyatta, for the presidency. In this transition Kenyans, especially politicians, concentrated on the need to remove KANU from

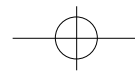
power and to ensure that the young Uhuru Kenyatta did not make it to state house.

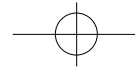
This chapter contends that the preoccupation with the need to remove KANU and ensure that Uhuru did not get to state house relegated issues relating to gender inclusion to the background. Kenya was on a path to a new era where good governance and participation should be given prominence. The issue of women's inclusion in the march to the new era is examined with regard to various parties' nomination of candidates for various seats, including the way they lined up a new team that would hopefully be charged with the management of national affairs. This chapter attempts to understand what went on by looking at the role women played in the transition process and the manner the male-dominated party hierarchies handled the issue of women's inclusion in the transition. The chapter begins by examining the Kenya context. This is followed by an analysis of Kenya's transition politics. The last section assesses the transition from Moi to the NARC administration, with special focus on the role women played as Kenya moved from fragmented parties to the formation of alliances aimed at winning the crucial 27 December 2002 transitional elections.

THE KENYAN CONTEXT

Overview

In Kenya, efforts to ensure gender inclusion began with the 1974-78 Development Plan. The Plan made specific reference to women as opposed to regarding them merely as a part of the population. Other plans and policy papers, which followed, including the National Food Policy (1981) and Population Policy (1984) emphasized the need to take gender into account—which essentially meant including both women and men in development activities. The gender concern further led to an increase in the national budget allocation for women's programmes. The government also established a number of institutional structures aimed at providing opportunities for women's involvement in development. Nevertheless, there was no institutional attempt to integrate women into mainstream politics and decision-making.





One of the institutions established was the Women's Bureau, created in 1976 after the Mexico Women's Conference of 1975. Before this, the government had established units within the Ministries of Health, Education, and Agriculture to handle women's issues. The Ministry of Education had the Home Economics Unit; the Ministry of Agriculture had Home Economics Section, while the Ministry of Health had Maternal and Child Health Section. The government's plan during this period was to have women's desks in all ministries handling gender (read women) issues. These institutions hardly changed the situation of women. Instead, they perpetuated patriarchal stereotypes about women; while women's umbrella organisations such as Maendeleo ya Wanawake and National Council of Women in Kenya (NCWK) continued to engage in internal wrangles in the context of manipulation by politicians and the KANU government. This left women with a single powerless unifying organ, in the name of women's groups.

Women's groups play a key role in the social life of women. Through the groups, women are able to mobilise required social capital for ensuring their basic livelihoods and those of their households. While this is an important contribution, the groups are not integrated into development policies and programmes. This has contributed to their disconnection from mainstream development. The only instance when they come close to the mainstream is when they interact with other development actors. However, some of these actors have their hidden agenda, for example the manipulation of women for votes and use of women's groups as a power base and as channels for implementing programmes, which women have not participated in developing. In a few isolated cases, individuals and groups support women's welfare activities and development programmes.

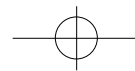
Most development approaches in Kenya have tended to support women within their traditional roles concentrated mainly within the household and involving homecare-based services. Although these areas are important in development, they limit women to their traditional roles, which are known to be problematic in respect to mainstreaming women in governance and overall development. Effective participation in governance and engagement in politics and decision-making are necessary if an enduring impact is to be made in all areas of development. Further, par-

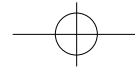
ticipation in governance remains a key point of entry and involvement in development. Indeed, the fact that Kenyan women are minimally involved in governance largely explains why they continue to lag behind in almost all areas of development.

The lack of serious commitment to women's inclusion by the government is evident in the current Development Plan (2002–2008). The Plan discusses gender issues under the theme "Focusing on Development Challenges and Opportunities" in hardly ten lines. The government acknowledges rightfully that the pace of development can best be accelerated and sustained if the full creative and productive potential of both women and men are mobilised. Nevertheless, the plan falls back on past practice by merely saying what has been said for decades. It expresses the expectation that the plan will reduce gender inequality within the plan period and enhance women's participation in economic activities. It goes further to use familiar phrases such as, "the plan will endeavour to 'engender' all programmes and policies, in a bid to enhance efficiency in utilisation of available resources for sustainable development."

The Development Plan needs to state clearly some of the policy positions on gender issues and how the government intends to actualise some of its policy positions during the plan period. Under the chapter on Human Resource Development, the government acknowledges the existing gender disparities, especially in the area of education. The plan notes that "low levels of education attainment by women coupled with retrogressive social cultural practices have resulted in low participation and representation of women in decision-making positions and lack of access to economic opportunities". The plan makes three proposals about what the government and other stakeholders should do:

- ❑ They should ensure operationalisation of the National Policy on Gender and Development.
- ❑ They should initiate and strengthen existing gender interventions with an explicit focus on poverty.
- ❑ They should offer gender training for key actors at all levels to enhance systematic gender mainstreaming in development policies, programmes and in budgeting.





The operationalisation of the National Policy on Gender and Development has the potential of shaping the course of women's advancement in Kenya. The document was conceptualized in 1992 but it is still yet to become government policy. Further, Parliamentary bills championing the cause of women failed to be passed by the male-dominated KANU parliament. One of such bills was the Affirmative Action for Increased Women's Participation in Parliament and Local Authorities, presented as the Constitution of Kenya (Amendment) Draft Bill 2000. The Bill was seeking to repeal section 33 of the Constitution.

A woman Member of Parliament, Phoebe Asiyo, first presented the Affirmative Action motion in Parliament in April 1997. This motion was defeated in the male-dominated KANU parliament. This resulted in the birth of Kenya Women's Political Caucus (KWPC), an organisation constituted to lobby for and influence issues relating to constitutional review, economic participation and legal rights of women among others.

During the year 2000, the Affirmative Action motion came up again through a female Member of Parliament, Beth Mugo, but was again defeated. The Bill proposed that at least 33 per cent of the total number of seats in Parliament and Local Authorities be reserved for women. It also proposed the creation of the office of district women representatives throughout the country. This was expected to be an addition to the already existing provision for 6 women out of the 12 nominated members of parliament as agreed upon by the Inter-Parties Parliamentary Group (IPPG). The Bill's target of a good women presence in Parliament and Local Authorities is based on the rationale that the two organs are the top governance and decision-making institutions, where the voices of both women and men have to be heard. The two organs make laws and are entry points for affirmative action. Once women occupy these organs, affirmative action can be extended to other sectors such as the provincial administration, managerial positions in the private sector and political parties, among others.

The bill sought the advantage of women from pastoral areas, women who are below 35 years as well as those who are physically challenged. It aimed at increasing the number of members appointed by parliament as nominated members. In its memorandum of objects and reasons, the

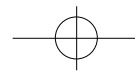
draft bill pointed out that "a greater proportion of women legislators will contribute to redefining political priorities, placing new items on the political agenda that reflect and address women's gender specific concerns". Although this bill would have been an important tool for enforcement of policies and implementation of programmes for actualising gender goals, it did not go through Parliament. The coming in of the NARC regime provides hope for those concerned about gender and development. The NARC manifesto provides for the inclusion of women at all levels of governance.

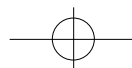
TRANSITION POLITICS

The opening up of the political space since the beginning of the 1990s has not provided any significant mileage for Kenyan women. Immediately after the multi-party elections in 1992, a task force for the Review of Laws Relating to Women was appointed by the Attorney-General in Gazette Notice No. 4820 of October, 1993. The mandate of the task force included the following:

- ❑ Review of current laws, regulations, practices, customs and policies that impose constraints on equal enjoyment of rights by women in civil, political, social, cultural or related matters;
- ❑ Proposing approaches to reform, and the removal of sources of inequality referred to above;
- ❑ Preparing a scheme of legislation designed to remove and limit the inequalities referred to above;
- ❑ Proposing any other appropriate reforms such as those of a policy and administrative kind, aimed at the removal and limitation of the inequalities referred to above.

The task force was seen as a landmark in terms of addressing gender inequalities. However, although the task force managed to come up with a Draft Report in December 1998, most of its recommendations have not been implemented. Some of the recommendations of the task force included affirmative action to increase the participation of women in the country's development institutions and the formation of a National





Council for Gender and Development to be housed within the Ministry of Planning and National Development. The Council was expected to take over the mandate of the Women’s Bureau on issues set out in the Cabinet Memorandum 78(b).

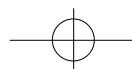
As indicated in the overview section, important motions and draft policy papers that can change the situation of women failed to go through the previous male-dominated KANU parliament and other decision-making organs. The National Gender Policy has not been operationalised, although the current Development Plan indicates that it will be operationalised during the plan period. Compared to its neighbours, Tanzania and Uganda, Kenya remains the least responsive to gender issues, especially in the areas of politics and key decision-making.

Experience in South Africa and other countries show that gender friendly policies are necessary if women are to be included in development. In Africa, both Mozambique and South Africa have the most gender-balanced parliaments, with South Africa having women occupying 119 of the 399 parliamentary seats. Women in South Africa hold a number of key cabinet posts—housing, foreign affairs, agriculture, defence, intelligence and enterprise (Kweyu 2002). Kweyu lamented prior to the coming in of the NARC government that Kenya, with no gender ministry, was a pale shadow of its South African counterpart. However, having a Ministry for Gender need not necessarily translate into gender responsive policies. There is need to have policy commitments in paper and among political leaders.

Kenya has had the least number of women in mainstream politics and decision-making since independence. Before the transition elections of 2002, only 32 women had been in parliament, with the Seventh Parliament (1992-97) having the highest number (6) of elected women as reflected on Table 1.

Table 1: Members of National Assembly by Year of Election

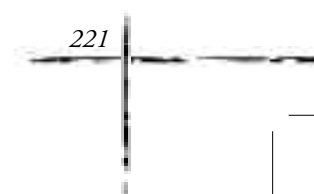
YEAR	ELECTED		NOMINATED	
	Women	Men	Women	Men
1969	1	154	1	11

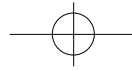


YEAR	ELECTED		NOMINATED	
	Women	Men	Women	Men
1974	5	152	2	10
1979	3	155	1	11
1983	1	157	2	10
1988	2	186	1	11
1992	6	182	-	12
1997	4	200	4	8
2002	9	201	6	6

Among the 32 women, 21 were elected, while 11 were nominated. Unfortunately, the Seventh Parliament had no nominated woman member, a clear demonstration of the lack of commitment to gender inclusion in politics and decision-making. A comparison of gender representation in the Kenya parliament with representation of women in the parliaments of thirty-six other African countries prior to the 2002 transition elections showed that Kenya lagged behind at number 32 with only 3.6 per cent of women in Parliament. South Africa was leading with 29.8 per cent of women in Parliament.

At the beginning of transition politics in 1992, there was no woman member nominated to Parliament. This partly demonstrated how issues relating to women cease to be a priority when there are other competing issues. The beginning of the 1990s was a time of euphoria generated by the restoration of pluralism. Men occupied the centre stage in the struggle for pluralism, with gender issues not being given the priority. The change in 1997 which resulted in four women being nominated as Members of Parliament was not by mere chance but a deliberate outcome of the IPPG reforms which resulted in the Constitution of Kenya (Amendment) Bill of 1997. This bill aimed at ensuring that the second multi-party elections would be conducted in a more democratic and inclusive manner. It shifted the powers for the nomination of 12 parliamentarians from the president and KANU to parliamentary parties according to the number of seats held by the par-





ties in the National Assembly, but also taking into account the principle of gender equity. The Electoral Commission was charged with ensuring the observance of the principle of gender equity in these nominations (ROK 1997).

As Kenya moved towards the December 2002 national elections, Kenya women's hope lay in the on-going Constitutional Review and the new emerging political alliances. However, the numbers of women who were directly participating in these two processes were minimal, although the Constitutional Review had better representation of women than the political alliances which were unfolding. Apart from these two processes several organisations were lobbying and conducting advocacy on gender related issues with specific reference to women. Needing particular mention were the Kenya Women Political Caucus, its splinter group Kenya Women's Political Alliance and League of Women Voters. The KWPC was constituted to "translate the numerical strength of the Kenyan women into a political voice for creating, nurturing and sustaining a democratic, prosperous and peaceful society where women, men and children regardless of social, economic and political divides can uphold and enjoy rights at all times and under all circumstances" (KWPC Draft Constitution, 2000).

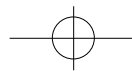
Before the split, the Kenya Women Political Caucus played a key role in the events leading to the establishment of the Constitution of Kenya Review Commission (CKRC). The period before the establishment of the CKRC witnessed a struggle between the faiths-led Ufungamano Initiative and the Parliamentary Select Committee (PSC) supported CKRC, both competing to take charge of the Constitution Review. The faiths-led Ufungamano Initiative, acting as an umbrella of civil society constitutional review initiatives, was constituted as the more credible alternative to the KANU government appointed, Yash Pal Ghai-led CKRC. While the government, including the president argued that the Ufungamano Initiative was 'an amorphous group' that had self-appointed leadership not elected by the very people whom they claimed to represent, the Ufungamano Initiative claimed legitimacy in representing the people of Kenya through what it called 'a people driven reform process' (Adhiambo Oduol 2001).

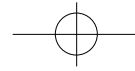
Taking the political situation in Kenya before the formation of the CKRC, one can argue that Kenya had weak political representatives who did not have the full mandate of the citizens. Most of the politicians held their offices through manipulation of the electorate either through their individual initiative or through the agency of KANU. Thus, the KANU argument that the Ufungamano Initiative was not legitimate was wrong. Most citizens had lost faith in the KANU government and did not believe that KANU could credibly lead the review of the constitution.

In spite of the struggle between the Ufungamano Initiative and the Ghai-led CKRC, the CKRC enjoyed statutory legitimacy and ended up negotiating for a merger with the Ufungamano Initiative. In the middle of this male-dominated struggle, KWPC through its leadership attempted to chart a way forward that would embrace negotiating a win-win situation for both parties. The caucus was partly able to influence the process because its membership base cut across political and ethnic divisions. The chairperson of the KWPC, Hon. Phoebe Asiyo, participated in the Ufungamano Initiative, appeared before the PSC (Adhiambo Oduol 2001) and ended up being part of the CKRC team. Hon. Asiyo and six other women (Nancy Makokha Baraza, Wanjiku Kabira, Kavetsa Adagala, Abida Ali-Aroni, Salome Wairimu Mungai and Alice Yano) made a difference during the CKRC process. The Draft Constitution has provisions for gender inclusion as discussed in the following section.

From Moi to Kibaki

President Moi began serving his last presidential term in 1997 under the IPPG reforms. At this point, most Kenyans, including the opposition parties, had no idea where the country was heading. Moi had autocratically ruled Kenya for 19 years under the dominant party, KANU. The opposition parties had tried in 1992 and 1997 to remove Moi and KANU from power without success. Partly it was the IPPG, and later the CKRC, which seemed to bear hope for women in Kenya. The IPPG proposed the enactment of provisions that would increase women's representation in politics; the CKRC accommodated a substantial number of women in the constitutional review process.





The initial effort by women's organisations to participate in mainstream political processes seem not to have been sustained, during a period when Kenyans were divided between focusing on the constitutional review and preoccupation with the leadership transition from Moi to the unknown. During this period, very few women were in the limelight. Apart from the CKRC, where six women were participating, women were hardly seen or heard in the many emerging political groupings and alliances. The gender responsiveness of the Draft Constitution of Kenya can be attributed to the inclusion of women in the CKRC team and the infusion of the original group with the Ufungamano group. The Draft Constitution provides under the Bill of Rights as follows: "Women have the right to equal treatment with men, including the right to equal opportunities in political, economic and social activities". It further provides that "women and men have equal right to inherit, have access to and control property, and any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women is prohibited". The Bill of Rights goes further and gives the state the responsibility of protecting women and their rights, taking into account their unique status and natural maternal role in society. It notes that the state shall provide reasonable facilities and opportunities to enhance the welfare of women to enable them to realise their full potential and advancement.

On elections, the Draft Constitution provides that a political party has to ensure that at least one-third of its candidates for direct elections are women, and that fifty per cent of its candidates for proportional representation at public elections are women. The Draft Constitution also provides special seats for women in the proposed two houses, the National Council and National Assembly. In each house, at least one-third of members shall be women. The Draft Constitution further provides that both men and women shall have the same citizen rights, which are equally transferred to children. Although the 8th Parliament was dissolved before the National Convention on the Draft Constitution took place, the Draft bears hope for inclusion of gender in Kenya politics. However, actual realisation of gender equity and equality will need a sensitive civil society, National Council and National Assembly.

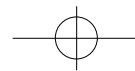
In Sweden, to give one good example, gender equality is the cornerstone of social policy and practice. The Swedish constitution safeguards

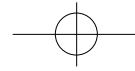
women's rights by outlawing discrimination. Its Equal Opportunities Act established the Ombudsman institution to monitor the observance of the equality of women in marital union. Swedish social policy has ensured women's participation on almost an equal basis with men in all spheres of policy and decision-making.

An examination of civil society movements in Kenya, especially those advocating gender inclusion in development, shows a wide range of activities with minimal coordination. Most activities of these organisations are isolated and not well documented. There is need to link these institutional activities with broad political issues relating to women. For example, the issue of women's representation in policy-making institutions of the state is a key political question which has to be resolved if women are to have equal opportunities in development. While this is a well known fact, the government, international organisations and civil society organisations have tended to put emphasis on programmes addressing gender issues on a pragmatic day-by-day basis with no emphasis on relevant long term policies which can mainstream women's involvement.

Civil society organisations receive donor funds to run such pragmatic-oriented programmes. At the same time, the government provides support to programmes focusing on women, but is quite reluctant to make radical policy changes relating to governance structures. It is the contention of this chapter that a committed and democratic government with the support of other stakeholders has to put in place relevant gender policy. Once this is done the government and other development agencies can ensure that the policies are implemented.

It is difficult to provide a fair assessment of the performance and contribution of the civil society organisations to the on-going political processes with regard to gender issues. Indeed, there is need to undertake research and document activities and outputs of the civil society organisations working in the area of gender inclusion in development. The lack of effective participation by women prior to the December 2002 national elections was reflected in the political alliances formed with the objective of lining up teams for Kenya's forthcoming new government. Apart from Hon. Charity Ngilu who was in the middle of events, and Hon.





Martha Karua who joined the race late by appearing in a rally organised by the National Rainbow Coalition in Kisumu, other women leaders were participating on the sidelines, largely supporting male leaders or being mere observers. This did not augur well for women's inclusion in the Ninth Parliament, although more women got electoral seats in the elections compared to other national elections.

In her article in the *Daily Nation*, Lucy Oriang observed that there were few women leaders on the horizon in any of the major political parties, let alone the obscure ones. Hon. Charity Ngilu had set the pace for Kenya women. She was the first woman presidential candidate in 1997, when a fellow woman and leader of the giant Maendeleo Ya Wanawake women's organisation deprecated her move, giving the opinion that women were not yet ready for the presidential seat. Charity Ngilu kept the fire burning and featured very prominently in the transition from Moi to NARC.

In the middle of competitive politics, Charity Ngilu made a number of deliberate political decisions and moves. She had to quit her political party, Social Democratic Party (SDP), and form another party, the National Party of Kenya (NPK). This was after the male politicians in her SDP, in a bid to eclipse her rising star, started questioning her academic credentials—a variable which is not important in terms of lobbying, negotiating and getting political seats, at least by Kenya's past experience. Kenya has had male politicians who have held key positions with comparatively very inferior academic qualifications. Ngilu's political prowess was never in doubt.

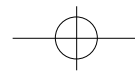
Ngilu went further to prove her capacity and negotiation prowess in the National Alliance of Kenya (NAK). She stood her ground and defeated an attempt by the men to relegate her to a nonentity post during the nomination for top posts in NAK. It is alleged that Ngilu had been slotted for the nebulous position of 'leader of government business' should NAK win the elections—a position Lucy Oriang's source describes as 'messenger in Parliament' (Oriang 2002). Backed by other women in her party, Ngilu refused the position directly insisting on the prime ministerial post, which she negotiated for and ended up getting.

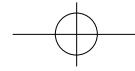
Ngilu's prowess did not stop at NAK. She continued to play a crucial role

when the Liberal Democratic Party (which had split from KANU) joined NAK to form the National Rainbow Coalition (NARC). She became the only woman in a band of 7 men called the 'leading lights' or NARC Summit—a team that was to deliver Kenya from KANU during the 27th December 2002 elections. Ngilu's experience illustrates the difficulties women face in the arena of politics, but also the prospects of success when women exert concerted efforts. She has had to change parties, lobby and negotiate with men in an environment which does not have any gender preference. She ended up being in charge of a key government ministry—Health.

The reluctance of the Moi regime to facilitate transitional reforms was demonstrated during the CKRC work. While the majority of civil society organisations and the general public have hailed the Draft Constitution, the government, led by the former president, continued to tear it apart, thereby making the future of the Draft Constitution uncertain. As Kenyans went for the December 2002 elections, the only hope for Kenyans, and especially for women, lay in the opposition parties, especially the National Rainbow Coalition which promised to ensure that the Draft Constitution would be debated and adopted as the Constitution of Kenya.

As transition politics unfolded, most Kenyans expected the CKRC to finish its work before the 2002 national elections. Alternatively, it was thought that the term of parliament would be extended to enable the CKRC to finalise its work. However, since this was not in the interest of the former KANU government, especially the president and those around him, parliament was dissolved and the election date announced. Our interest in the run up to the December 2002 national elections was how the various parties were going to treat gender, and how women were going to feature in electoral politics, especially at the nomination stage. Discussion with a number of women candidates showed serious concern over the issue. Some of the candidates argued that the major parties showed preference for those members who had played key roles during the formation of various coalitions. However, this view was not shared by some of the individuals who were involved in the formation of the various coalitions. They argued that nominations would be based on popu-





lar voting at the grassroots level. This fact was disputed by the electorate and election observers, and should be given special attention by both the Electoral Commission of Kenya and respective political parties.

Since the Draft Constitution was not adopted, it did not apply to the 2002 national elections. Instead, women had to be content with the Inter-Parties Parliamentary Group (IPPG) provisions of 1997, which had secured minimal gains for women. The provisions required political parties to take into account the principle of gender equity during the nomination of Nominated Members of the National Assembly and forwarding of names of the party nominees for civic seats in various constituencies. Adoption of the Draft Constitution with the provisions for two houses of parliament in which women members are represented on the basis of gender parity could bring more women to the main policy and decision-making organs. The Draft Constitution also guarantees gender-equitable representation of women members in the District Councils.

Accommodating Women on Unknown Path

A critical examination shows that there had been minimal engagement of women in the transition from Moi to Kibaki. Probably ordinary citizens know only Hon. Charity Ngilu as the woman who was directly engaged in the mainstream transition politics leading to the new NARC regime. Critical mass is very important in politics and yet women have not formed a critical mass in mainstream politics. Charity Ngilu (*Mama Rainbow*), a leading light, Martha Karua, Beth Mugo and a few other women surrounding them cannot make a major difference in changing the situation of women in policy and decision-making. Women need numbers in mainstream politics. However, the resilience of these three women who have retained their parliamentary seats has to be acknowledged and used as an example to other women politicians.

The political transition in Kenya is still unfolding, as the ruling party NARC continues to reform the old system. In the area of gender there are signs that NARC as a party has taken the issue of gender seriously. Compared to other political parties NARC fielded the highest number (12) of women candidates during the December 2002 elections and ended up as a party with the highest number (8) of women in Parliament.

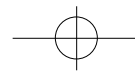
Among the women elected to parliament only one (Naomi Shaban) comes from a different party (KANU). This outcome was influenced by the nature of the electoral process. In total, more than 200 women sought parliamentary nominations but only 44 (22%) went through the nominations, as opposed to 1,037 (ratio of 4:96) men. Among them only 21 were nominated by major parties—NARC (12), FORD-People (7) and KANU (2) with the potential of winning the elections. Other parties such as FORD-Asili, Safina, United Agricultural Party, Economic Independent Party nominated 4, 3, 2, and 2 respectively.

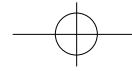
A total of 23 parties with minimal following did not nominate any women. However, a critical examination of the parties most women chose as vehicles to parliament shows that the parties were weak and did not command large voter following. This implies that women began their journey through the electoral process at a disadvantaged position.

In any case, gender was not key in influencing post-election nominations to parliament; the main consideration was the role various women played during the immediate transition process—formation of parties and building alliances and consensus. This is clearly demonstrated in the nomination of some women such as Njoki Ndung'u, and Cecilia Mbarire, who did not contest and who failed to go through the electoral process respectively.

Kenya has a total of fifteen women in Parliament with three having ministerial positions and another three being assistant ministers. While the expected one-third representation in Parliament of women is still far from being realised, the Ninth Parliament has accommodated a larger percentage of women than the previous parliaments. In a *Sunday Standard* feature titled "A Toast to the Heroines of Kenya", Dorothy Chebet and Mildred Ngesa expressed the opinion that "Kenya women have a reason to celebrate, since they will be more ably represented in the Ninth Parliament than ever before" (*Sunday Standard*, 5/01/03).

The NARC government has also a Ministry of Gender, Sports, Culture and Social Services. While this is appreciated, bunching women affairs with social and cultural aspects of life is problematic. Gender is a cross-





cutting issue which requires either integration into all ministries or being placed in a key ministry like Planning and National Development. Nonetheless, it should be appreciated that the government has since coming to power appointed three women as Permanent Secretaries.

Two key questions need to be addressed in relation to women's participation in politics: why women do not succeed through the vote, and whether an enabling electoral environment can be created for women in order to attract them into active political participation. In terms of Kenya's total population, there are more women than men. Kenyan women, especially potential candidates, should exploit this fact. Maria Nzomo argues: "Women must learn to exploit women's numerical strength combined with the larger political space occupied by the mushrooming women's associations and lobbies, to strategically and adequately translate the large potential into political power and influence" (*Daily Nation* 5/12/02). Women are not a homogeneous group, but they have to make gender an agenda and place emphasis on unity in diversity. This can be a useful mobilisation tool in the process of building political capital and an electoral constituency.

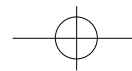
There are many factors which women need to overcome before they can exploit their numerical strength. A major drawback is the resources required for the whole electoral process especially for campaigns. However, in the previous elections it mattered more how much money was spent on the campaigns than during the 2002 elections. For purposes of gender inclusion, enhancing financial capacity and commitment is important. Although Kweyu (2002) pointed out that women cannot play by the campaign rules that obtain in Kenya, where huge amounts of money are used to finance the electioneering process, still access to reasonable amounts of financial resources is necessary.

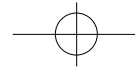
Other factors which pose obstacles include election violence, and weak negotiation and lobbying skills characteristic of women with inadequate exposure to political processes. It is these difficulties which have contributed to a number of countries adopting various Affirmative Action initiatives aimed at securing women's presence in Parliament and other governance institutions.

An awareness of the massive budgets of some candidates and for the campaign initiated by the former president for Project Uhuru drives home the challenges women face in electoral politics. The election budgets for parliamentary candidates involved substantial amounts of funds ranging from Kshs. 800,000 to over ten million Kenya shillings. An interview with two women who made it to Parliament indicated that they spent Ksh. 800,000 and 1.3 million respectively. These budgets include items such as nomination expenses, printing of flyers and handbills, public address systems, mobile phones, agents' fees, campaigners' expenses, hospitality expenses at candidate's house, payments to people providing accommodation and subsistence expenses for the candidate and team, transport expenses, maintenance of vehicles not to mention the cost of buying of votes and bribing of voters. The latter four take a large proportion of the budget.

The race to parliament has become quite competitive due to the improved terms of service for members of parliament. A number of candidates view the institution not only as a house of people's representatives but as a resource base, where both influence and real material benefits accrue and are accessed. The financial resources candidates need are quite out of reach for a large percentage of women. Many of them need support in mobilising funds. A visit to the KWPC and discussion with some of its members prior to 2002 national elections showed that women could hardly afford to pay the nomination fees, required by the various political parties. For example, to be nominated by the Liberal Democratic Party (LDP), a potential parliamentary candidate required Ksh. 30,000 to be paid to the party and an additional Ksh. 10,000 to be paid to the National Rainbow Coalition (NARC); while civic candidates had to pay Ksh. 5,000 to the LDP and Ksh. 5,000 to the NARC. These amounts are beyond the reach of average Kenyans who hardly have any savings. One can argue that in a certain sense, a number of Kenyans are disenfranchised by the requirements.

The funding situation is especially bad for rural women and slum dwellers who should have the right to seek at least civic seats. It is therefore necessary for political parties to devise support systems for those





ving for elections through their parties. At the same time, both the government and civil society organisations should support women in their struggle to access political positions. The Draft Constitution in its General Principles on devolution of power provides for the minimal number of women who should be included in locational, district and Provincial governments. Adopting the Draft Constitution will facilitate the increase of the number of women in key political decision-making organs.

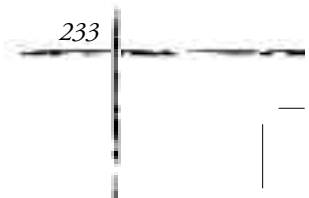
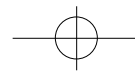
CONCLUDING REMARKS

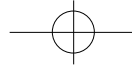
This chapter shows that there are currently a number of initiatives for integrating women in decision-making and economic development, but the large majority of women are yet to benefit from these processes. The Kenya government and other actors have to facilitate gender responsive policy processes as a way of ensuring women's participation in politics and decision-making. As discussed in this chapter, the National Gender Policy is still to be operationalised, and yet it should form the foundation for gender programmes and activities. Even if this policy is legislated by Parliament, the CKRC's proposals accepted, and relevant Acts of Parliament enacted, efforts will still have to be made on a long-term basis to attract women into politics by addressing obstacles to their participation. This is because the number of women offering themselves for electoral politics has generally been minimal although the party nominations have also taken a toll on those who offer themselves for electoral politics.

One challenging issue in women's inclusion in politics is the question of whether women should participate and access positions of power without support or privileges or whether they need special support and privileges. This is a contentious political question and there is no agreement over the issue. However, this chapter acknowledges the fact that political games require well-calculated strategies and ability to change gears whenever necessary. A player who does not have the right information and related resources is bound to be shut out of the game. Most women lack relevant information and resources for making strategic political moves. This is because political information is never available in one spot, but

spread across various networks, which one has to know about in order to access. Further, the majority of women lack immovable property to offer as security for loans, as well as adequate education required for upward mobility, networking and expanding political networks. This is to suggest that women require special support for enhanced political participation.

In conclusion, this chapter makes two major recommendations on the broad area of research, and short and long-term implementation of gender responsive policies, which should contribute to gender inclusion in governance. Research should focus on the role women have played in transition politics since 1990 in order to fill the information gap in this regard. The lack of adequate information limits objective gender analysis of political processes. Adequate information will contribute to the isolation of issues which need short and long-term solutions. Affirmative Action falls under one of the short-term options for addressing gender issues; while ensuring equal educational opportunities and dealing with biased attitudes on gender require long-term solutions.

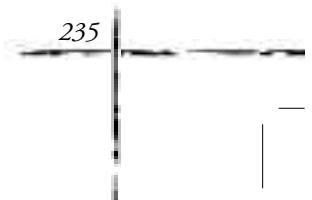
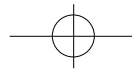




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8

HUMAN RIGHTS NGOs AND POLITICAL TRANSITION: GUATEMALAN LESSONS FOR KENYA

Dr. Scott Turner

INTRODUCTION

Recent decades have witnessed the proliferation of thousands of non-governmental organisations (NGOs) at both domestic and international levels. Such organisations vary widely in their functions and goals, and the scope of their activities. In some cases, NGOs prefer a confrontational relationship with state institutions, while in others they work closely both with states and international organisations (IOs). In some cases, NGOs have employed violence. But in general, the emerging global civil society of grassroots political activism is characterised by non-violent initiatives and progressive agendas, such as peace, ecology, and human rights.

This civil society represents a new sphere of action in the arena of world politics. It is neither part of the public sphere of the state nor part of the private sphere of the market. It is both broader in scope and, in some respects, revolves less around state institutions and processes than domestic pluralist systems—though needless to say there is considerable overlap between state institutions and NGOs. NGOs interact with states and IOs at diverse points of contact. They challenge the legitimacy of established institutions at certain points of contact, and in some cases they act independently of both states and international organisations. Global civil society reinforces the central role of state institutions by appealing for laws

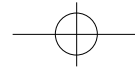
that protect human rights and regulations that restrict corporate behaviour, yet it ultimately may put into question the absolute sovereignty of states by constricting their range of legitimate action and extending the range of citizen action at both the national and global levels.

The case of Guatemala provides a valuable illustration of the dynamic relationship between the state and civil society. Until recently, the Guatemalan state displayed utter disregard for human rights. Yet a community of non-governmental organisations arose in the shadow of institutional terror to confront state violence and demand an end to impunity in the context of human rights abuses. This chapter assesses the role of human rights NGOs in the Guatemalan peace process and offers lessons for other countries, such as Kenya, that are undergoing dramatic political transition. The chapter concludes that the role of NGOs in Guatemala's political transition has been extensive, but the results have been mixed. Despite significant failures, however, the success of NGOs in promoting the peace process and human rights provides further evidence that the emerging global civil society is a politically significant sphere of human action. In as much as it also represents a stark contrast to state terror, this vital sphere holds the potential to further erode the legitimacy of state action whenever it does not conform to generally accepted norms of human rights.

HUMAN RIGHTS NGOS AND THE STATE

Human rights NGOs are distinct both from governmental institutions and political parties. They do not seek direct political power and typically are not directly affiliated with groups that do. Rather, they serve a watchdog function of monitoring the behaviour of governments and seeking to ensure governments' compliance with human rights standards. Such standards may include national laws and international agreements that prohibit torture, political imprisonment, forced disappearances, and extra-judicial executions.

In addition to NGOs devoted exclusively to human rights work, there is a plethora of political organisations that include human rights within a broader list of concerns. These include churches, development organisa-

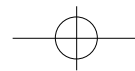


tions, environmental groups, indigenous peoples' organisations, trade unions, and women's groups. Such groups typically renounce the use of violence in pursuing their goals and refuse to ally themselves with groups that employ it, however noble their cause.

The unwillingness of human rights organisations to embrace ancillary political causes or to choose sides in a given conflict has invited criticism from some corners that human rights work remains marginal to effective political struggle. This criticism is particularly salient in the Third World context, where western NGOs that urge respect for the rule of law, but neglect the structural environment that permits human rights abuses to continue with impunity, have been charged with perpetuating a "paradigm of dependency".⁵ Western NGOs have focused mainly on civil and political rights rather than economic and social rights. They have pressed for legal protections through lawsuits, lobbying, publicity and, occasionally, demonstrations and civil disobedience. Yet the most egregious violators routinely ignore national laws and court orders, not to mention international agreements. The exclusive emphasis on revising and enforcing legal standards may appear fruitless if not cynical and suspect to those engaged in struggles for the radical restructuring of societies. Yet even where such struggles have raged there have been indigenous organisations that have refrained from violence and have maintained independence from both government and rebel groups. They have created new public spaces by pressing their demands through sometimes highly innovative strategies. Furthermore, some groups have taken initiatives to protect and promote human rights directly, acting independently of government altogether (Wiseberg 1992, pp. 372-380).

The most prominent tactic of human rights NGOs entails information gathering and dissemination for the purpose of exposing human rights violations. This strategy depends upon publicity to shame the main violators—states—into respecting and enforcing human rights standards. NGOs may relay their information and demands directly to states or international organisations, in some cases seeking to bring attention to a

5 • This charge was made in the keynote address delivered by Dr. Abdullahi Ahmed An-Na'im, former prisoner of conscience in Sudan and current Professor of Law at Emory University, at the Southern Regional Conference of Amnesty International in New Orleans, November 2, 1996.

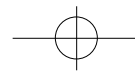


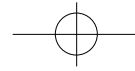
particular case of abuse, while in others seeking to revise human rights norms generally. Human rights groups are often engaged in proposing legislation and testifying before government committees. Such groups may also provide legal aid to victims of human rights abuses and promote human rights education, including training in public advocacy skills (Gaer 1996; Wiseberg 1992).

A noteworthy innovation in the field of information gathering entails the application of forensic science to cases of suspected disappearance and extra-judicial execution. Forensic scientists have assisted NGOs in identifying bodies buried in mass graves and performing autopsies on people who have died under suspicious circumstances or while in police custody. This approach originated in 1984 with the investigation into Argentina's "dirty wars" in the 1970s. The American Association for the Advancement of Science sent several forensic experts to Argentina to teach doctors, students and others how to identify suspected victims of disappearance. This approach has since spread to a variety of other locations, including the former Yugoslavia, where forensic science has provided the UN War Crimes Tribunal with vital information for prosecuting suspected war criminals (Collins 1995; Snow, Stover, and Hannibal 1992; Wiseberg 1992).

In addition to independent information gathering and educational functions, some human rights groups have engaged in public demonstrations to publicise their concerns. Jennifer Schirmer (1989, p. 23) has argued that such initiatives not only create public spaces for expression and publicity, but they also sharply juxtapose the NGOs' non-violent orientation with the state's reliance on force:

These public demonstrations represent more than the capture of political space and a statement of political purpose: they also represent a temporary suspension of any kind of institutional control. Within a repressive state, which brutally eliminates all political opposition and defines as subversive all public displays and ceremonies which are not directed or controlled by the state itself, these protests in public squares and at public buildings are displays of a defiantly different social order. Indeed, the 'public' takes and occupies national buildings, supreme courts, cathedrals, plazas and streets in order symbolically to regain the rule of law and justice, while the government represents the institutionalisation of death.





The widespread commitment to non-violent political action in the NGO community challenges a state's legitimacy to the extent that the state's power rests upon the application or threat of physical force. While NGOs frequently become the targets of state violence, such violence in itself serves to put to question the state's moral authority and to bolster the alternative claim to legitimacy that the victims represent.

Despite the considerable tension that exists between the NGO community and the state, however, global civil society is not a purely anarchist realm committed to the state's destruction. NGOs also interact cooperatively and institutionally with both states and international organisations. Indeed, Eide (1986, p. 369) insists that "only in the context of an organised society with public authorities does the notion of 'human rights' make sense. ... 'Human rights' refers to norms concerning the relationship between individuals (sometimes groups of individuals) and the state." Thus, in an important sense human rights NGOs seek not to dismantle but to *strengthen* state institutions as instruments for monitoring and enforcing human rights standards, while weakening illegitimate forms of state power.

Among the most important mechanisms through which this goal is pursued are international legal conventions. NGOs have participated actively from the outset in forging international human rights standards through the United Nations (UN). Forty-two U.S. organisations were invited to the founding conference of the UN in San Francisco as "consultants" to the American delegation, and they pressed to make the UN Charter an instrument for promoting respect for individual human rights. Furthermore, a coalition of NGOs pressed for the adoption of an "international bill of rights" even before the San Francisco Conference, which culminated in the adoption of the Universal Declaration of Human Rights in 1948. NGOs have continued to pursue the development of an international human rights system through formal consultative status with the Economic and Social Council as provided for by Article 71 of the UN Charter. In recent years human rights NGOs have even participated in the drafting of declarations and conventions at the level of working groups, as exemplified by their prominent role in the development of the UN Convention against Torture and the Convention

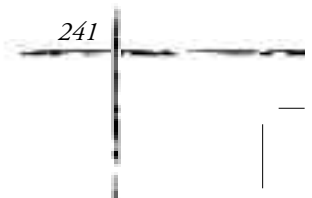
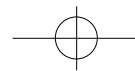
on the Rights of the Child (Boven 1989-1990; Clark 1996; Claude and Weston 1992; Ghils 1992; Gear 1996).

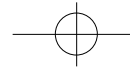
Additionally, NGO forums have routinely accompanied major UN conferences. At the 1993 World Conference on Human Rights in Vienna, thousands of NGO representatives participated in the official proceedings along with representatives of 171 governments. This has paved the way for institutional cooperation between the UN Commission on Human Rights and NGOs in human rights monitoring. The Commission has established a "human rights hot line" for reporting human rights violations. Amnesty International (AI) now reports thousands of cases through this mechanism every year (Gaer 1996).

Indeed, Amnesty International's relationship with the UN well illustrates the institutional and state-oriented character of much NGO human rights work, while at the same time highlighting the normative contrast between business as usual in the state system and the reform demands of the NGO human rights community. Clark (1996, p. 18) concludes that, in the movement to establish international standards and conventions against torture and disappearances, "AI was a leader rather than a follower of states on the normative front". It reported violations and established connections between domestic actors and the international human rights monitoring system. While AI's relationship with international organisations is defined by the rules made by states,

[W]hen normative issues are introduced that are represented by NGOs or other third party actors, largely through communicative mechanisms, they change the environment for action that states must anticipate in decision making. By advocating changing international human rights norms, NGOs have helped to mold expectations of international behaviour and to demand that states conform.

The institutional relationships that have emerged between NGOs and IOs possess a necessary tension and a degree of mutual apprehension. NGOs may exercise more effective influence over international standards and the behaviour of states by moving beyond a confrontational posture and participating directly in the institutional decision-making mechanisms established by states at the international level. Yet the very idea of





universal human rights militates against absolute state sovereignty and is likely to be met with hostility precisely from those states whose human rights practices are most subject to criticism. According to Sikkink (1993, p. 441):

Because sovereignty is a set of intersubjective understandings about the legitimate scope of state authority, reinforced by practices, the mundane activities of the human rights network can accumulate to question the idea that it is nobody else's business how a state treats its subjects. Every report, conference, or letter from the network underscores an alternative understanding: the basic rights of individuals are not the exclusive domain of the state but are a legitimate concern of the international community.

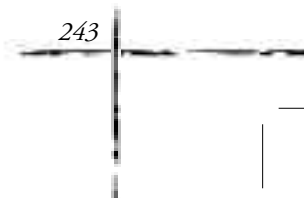
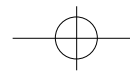
Likewise, Melucci (quoted in Lipschutz 1992, p. 399) believes that the proliferation of NGO networks and the normative alternative they represent are generating a "transsocietal order" that "challenges not only the cultural shape of international relations but the logic governing them". The nature of the relationship between the state and civil society can be effectively explored through the case of human rights NGOs in Guatemala. There, the decades-long civil war forged a state with one of the most nefarious human rights records in the world. But the 1980s also witnessed the emergence of an impressive human rights NGO community in Guatemala. The role that this community has played in the Guatemalan peace process is illustrative of the dilemma faced by human rights NGOs and civil society generally in interacting with the state while preserving the integrity of principles. It also highlights the dynamic relationship between human rights and the problem of peace. Before addressing these issues specifically, however, the following section provides a brief historical overview of the Guatemalan civil war and peace process.

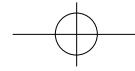
THE GUATEMALAN CIVIL WAR AND PEACE PROCESS: HISTORICAL OVERVIEW

In 1954, the CIA supported a rebellion against the popularly elected government of Jacobo Arbenz; the support included an extensive bombing campaign against Guatemala City. This was in response to the Arbenz

government's nationalisation of largely uncultivated land held by United Fruit Company, an American multinational, and the presence of Guatemalan communists in Arbenz's coalition government. Six years later, in 1960, the CIA again intervened to put down a coup attempt against the government of General Miguel Ydigoras Fuentes. Several leaders of this failed rebellion fled into the countryside and organised a guerrilla movement among Guatemalan peasants. Over the next 36 years this rebellion and the government's counter-insurgency campaign against it would cost the lives of some 200,000 unarmed civilians, mostly highland Indians. Guatemala would become the first of numerous countries in Latin America to experience death squads and "disappearances". The height of the counter-insurgency campaign was reached in the early 1980s, when Indian support for the guerrillas triggered a government "scorched-earth" strategy, whereby some 440 villages were destroyed and between 100,000 and 150,000 civilians were killed or "disappeared". Additionally, more than a million people were forcibly uprooted from their homes, many fleeing to Mexico. Beginning in 1983, the government set up forced resettlement camps in which the people's lives were tightly controlled by the army. Civilian self-defence patrols (PACs) were created by the military and as many as 1 million Indian peasants were forced to serve in them. These units would subsequently carry out numerous attacks against unarmed civilians (Amnesty International, AMR 34/03/97; Jonas 1996; Blum 1995, pp. 74-75; 229-230).

In the early 1990s, a series of events set in motion a process that culminated in the establishment of a successful peace accord between the government and guerrillas. The most important of these was the constitutional crisis of 1993. In an act of bravado modelled after President Fujimori's 1992 *autogulpe* (self-coup) in Peru, on May 25 Guatemalan President Jorge Serrano Elias dissolved the Congress, the Supreme Court, and the Court of Constitutionality, and suspended key parts of the Constitution. The Court of Constitutionality immediately ruled the action unconstitutional, and various sectors of civil society condemned it. On May 27 the Clinton administration announced sanctions against the Serrano regime. Various NGOs and activists, including Rigoberta Menchu, recipient of the 1992 Nobel Peace Prize, carried out protest demonstrations. On May 30 negotiations were held in the National





Palace that included business leaders, the Catholic church, the diplomatic corps, the government, the military high command, and NGOs. On June 1 Serrano resigned, and on June 5 the Congress voted to install Human Rights Ombudsman Ramiro de Leon Carpio as president (Human Rights Watch 1994, 126-129; McCleary 1996).

The Carpio presidency opened the door to a series of agreements that finally brought an end to Guatemala's long nightmare. The first of these agreements was the Global Human Rights Accord, signed by the government and the armed opposition, the Guatemalan National Revolutionary Unity (URNG), in March 1994. This accord provided for the establishment of the United Nations Mission for the Verification of Human Rights in Guatemala (MINUGUA), which set up shop in November of that year. In June 1994, accords were signed on the resettlement of displaced populations and the establishment of a Commission for Historical Clarification of the Past, or Truth Commission, which was charged with investigating and reporting on wartime human rights violations. In March 1995, an agreement was reached on the Identity and Rights of Indigenous Peoples. An additional agreement on the role of the army in a democracy led to the demobilization of civil defence patrols. These confidence-building measures led up to a final settlement with the signing of the Accord for a Firm and Lasting Peace on December 29, 1996 (Amnesty International, AMR 37/01/96; Amnesty International 1997; Cerigua, cwb01_97.html#Head2, "Peace..."; Jonas 1996; Peace Brigades International, pbi/guate.html).

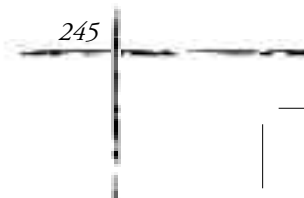
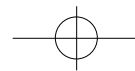
The final hurdle to the signing of the peace accord, however, was the passage of a controversial amnesty law on December 18. The Law of National Reconciliation granted a general amnesty for human rights violations that had occurred during the war. It excluded from immunity cases of forced disappearance, torture, and genocide, but there was no specific reference to extra-judicial execution. Thus human rights groups were concerned that persons responsible for such crimes may escape prosecution. The Truth Commission began its work in July 1997. Its mandate was limited to six months, with the possibility of a six-month extension. It had a caseload of more than 20,000 reported human rights violations to investigate during this time. While human rights NGOs

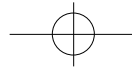
played an active role in shaping the character of the peace process at various pivotal stages, the persistence of impunity for human rights violations illustrates that NGO successes are significantly limited by institutional political constraints (Amnesty International 1997; Amnesty International; Cerigua, cwb09_97.html#Head4, "Truth...."; Cerigua, cwb09_97.html#Head2, "Amnesty";; Rohrer 1996).

HUMAN RIGHTS NGOS IN THE GUATEMALAN PEACE PROCESS

Human rights activists have a rich history of involvement in Guatemala. Among international NGOs this involvement has included responding to human rights violations with "urgent action" letter-writing campaigns and conveying the concerns of human rights victims and activists within Guatemala to political leaders in the North. (Baranyi 1996) During the 1980s solidarity networks were forged between Guatemalan progressives and international human rights organisations in the United States and Europe. This helped bring international attention to acts of violence committed by the Guatemalan military against the civilian population. (Wilkinson 1995/96). The proliferation of Guatemalan NGOs was itself spurred by the influx of international disaster relief in response to the 1977 earthquake (Sollis 1995). Additionally, the 500th anniversary of Columbus's voyage spurred the formation of many new Mayan organisations which declared "500 years of marginalisation enough". These groups became involved in human rights work on behalf of Mayans as well as the general population. When negotiations between the government and URNG began, Mayan NGOs came together to form the Coordination of Organisations of the Mayan Pueblo (COPMAGUA) to facilitate unified participation in the dialogue. (Peace Brigades International, cap95-03.html) MINUGUA (1996, p. 33) asserts that human rights NGOs have not only played a significant role in the evolution of Guatemalan society, but they have also participated directly in the work of the UN mission itself:

The role of human rights NGOs has been crucial in Guatemala's history. These organisations have managed to remain attuned to the expectations and concerns of Guatemalan society and have contributed to the process of social change in recent years. ... The Mission has carried out activities





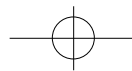
to support the strengthening of some NGOs through their direct participation in various research and consultancy projects on numerous themes of importance to human rights.

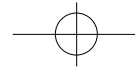
One of the oldest and most notable human rights groups in Guatemala is the Mutual Support Group for the Reappearance of Our Sons, Fathers, Husbands, and Brothers (GAM). It was founded by the mothers, daughters, wives, and sisters of people who were “disappeared” in the early 1980s. It is made up mainly of poor, indigenous women who had no previous political experience. The group emerged when women regularly met one another in morgues, cemeteries, police stations, and hospitals in search of their missing relatives. From there they began meeting at the local headquarters of an international NGO, Peace Brigades International (PBI). According to founding member, Nineth de Garcia, the women formed the group “because we could not find support in any institution” (Schirmer 1989, p. 14). GAM began to document cases of disappearance that its members provided. It also has worked to end impunity for human rights violations and to free political prisoners, and it has mobilised thousands of Guatemalans in support of these campaigns. As a result, a number of GAM members were themselves “disappeared” in the late 1980s, despite their lack of association with URNG or any political party. In the midst of the military’s counter-insurgency campaign, GAM pursued non-violent but aggressive and innovative strategies for pressuring the government to investigate the disappearances. President Mejia Victores ultimately established a Tri-Partite Commission for this purpose, but GAM considered the gesture disingenuous. In 1985, it began petitioning the Commission to permit members to present their testimonies directly. Every Friday the women protested outside the Public Ministry, blocking traffic, playing flutes and whistles, and beating drums. They also occupied the National Constituent Assembly and demanded that the new Constitution refer specifically to “political” prisoners. After President Cerezo was inaugurated in 1986, he reluctantly agreed to establish an independent commission to investigate disappearances. Yet in that same year the new Supreme Court assigned more than 2,000 *habeas corpus writs*, most of which were cases of disappearance supplied by GAM, to a single criminal court, and none of the findings held any security or military officials

responsible (Amnesty International, AMR 37/01/96; Schirmer 1989; Wilkinson 1995/96).

The failure to successfully prosecute those responsible for human rights violations illustrates what human rights groups consider to be the major shortcoming of the ongoing peace process: the persistence of impunity. Human rights groups have insisted that a lasting peace must be founded on justice for human rights victims. Another important group that has pressured the government to investigate and prosecute human rights violations is the National Coordination of Guatemalan Widows, (CONAVIGUA), which is made up of Mayan women whose husbands are victims of political violence. The organisation is funded by Community Aid Abroad, and it seeks to demilitarize Guatemalan society and end forced recruitment by the military. It has carried out a variety of initiatives, including a demonstration outside of Congress denouncing military repression, a mass media campaign on conscientious objection and non-violent resistance, and local human rights education workshops. The Council of Indigenous Communities, “We are all Equal,” or CERJ, has also been very active in protesting forced conscription into the civilian self-defence patrols (PACs), and in the late 1980s at least 17 of its members were killed in a manner that suggested government involvement. In response to the danger faced by domestic activists, Peace Brigades International (PBI) entered Guatemala in 1983 to provide unarmed protective accompaniment to individuals, organisations, and communities threatened by violence, under the theory that the Guatemalan army would be reluctant to risk the international exposure that would be invited by the murder of foreign nationals. Such international cooperative linkages among NGOs demonstrate the potential of innovative non-violent initiatives for bringing a unique kind of pressure to bear on even the most repressive of regimes (Amnesty International, AMR 37/01/96; Community Aid Abroad; Peace Brigades International, pbi/guate.html; Peace Brigades International, pbi/guatemala.html 1997).

Perhaps the international NGO that is most famous for such innovative initiatives is Amnesty International. The organisation has an impressive history of bringing international attention both to particular cases of human rights abuse and the general human rights climate within partic-



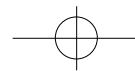


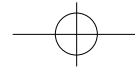
ular countries. In the case of Guatemala, the organisation has documented hundreds of cases of extra-judicial execution, torture, and disappearance. Though it has met with the Guatemalan government, it has been frustrated by the persistent record of impunity within the country. Even since the signing of the Global Human Rights Accord in 1994, Amnesty International believes that members of the Guatemalan security forces continue to be responsible for widespread abuses. It blames the persistence of human rights violations on the unwillingness of the government to investigate allegations of past abuses, in part because of personal connections between government officials and the accused. In one case, Amnesty International called for an investigation into the arrest and possible disappearance of Juan Jose Cabrera on October 19, 1996, in an operation carried out by Guatemalan security forces. Cabrera is believed to have been a member of the Revolutionary Organisation of the People in Arms, a branch of URNG. As of May 1997, the government had made no response to Amnesty's request, and it had rebuffed MINUGUA's request to interview the members of the security forces who participated in the operation (Amnesty International, AMR 34/15/97; Amnesty International, AMR 34/21/97).

In addition to documenting allegations of human rights abuse, other NGO initiatives have generated forensic evidence to be used in any future judicial proceedings against the perpetrators of human rights violations. Even the technical and scientific investigative functions that ordinarily would be performed by a government interested in justice have been partially assumed by the private sector in Guatemala. In 1994 the Association of Families of the Detained and Disappeared of Guatemala (FAMDEGUA) and the Archbishop's Human Rights Office of Guatemala (ODHAG) enlisted the assistance of the Argentinean Team of Forensic Anthropologists (EAAF) in excavating a mass grave where more than 350 people had been buried after they were massacred by the Guatemalan army in the village of Las Dos Erres in Peten in 1982. (Amnesty International, AMR 37/01/96) A similar excavation was conducted in the village of Los Josefinos. No effort on the part of the government was made to identify the victims or prosecute those responsible for the massacres. Thus while groups like AI and EAAF have helped to document violations and bring international attention to the persistence

of human rights abuses and impunity in Guatemala, that persistence itself demonstrates that the results of such NGO efforts have been quite limited. Amnesty's role in the peace process has been limited to information gathering, publicity and advocacy. It has very publicly argued that justice for the thousands of Guatemalan victims of human rights violations must be a cornerstone of any lasting peace for the country, but the government has done little more than pay lip service to this idea, and in many cases it has actively flouted it.

Some groups have taken other direct initiatives to respond to crises with little if any government involvement. NGO response to the refugee problem is a case in point. As a result of the scorched earth campaign in the early 1980s, thousands of Guatemalan peasants were displaced from their homes. Many fled to Mexico, while others were resettled in army-run "model villages", where they were subjected to economic exploitation and severe living conditions. In at least one case, forced relocation led to violent conflict between two separate groups of indigenous peoples, after the army brought in one group to occupy the land from which it had forcibly displaced another, and the displaced persons trying to reclaim their land were met with violence by those occupying it (Cerigua, [cwb09_97.html#Head4](#), : "Clash..."). Yet some groups have managed to defy this "divide and conquer" strategy. For example, the Communities of Population in Resistance of the Sierra (CPR-Sierra) and the Committee for the Re-occupation of Land in Chajul have entered into direct negotiations with one another and recognised their common condition as victims of government violence. The legal department of the Archbishop's Office of Human Rights (ODHA), the Legal Counsel Office of the Chajulense Association and Peace Brigades International assisted the negotiations. They developed a joint statement of demands for the government to provide land for the displaced communities of the CPR-S and an assistance programme for the people of Chajul until they are able to return to their own land, where the CPR-S are currently living. Their efforts caught the attention of President Arzu, who visited Chajul only five days after assuming office. (Peace Brigades International, [pbi/cap96-06.html](#)) In yet another case, the U.S. based NGO Witness for Peace accompanied displaced Guatemalans who returned home from exile in Mexico after an agreement on the terms of their return was





reached with the Guatemalan government in the early 1990s (Lloyd 1994).

Instancia

The role of human rights NGOs in the Guatemalan peace process was dramatically enhanced by the response of civil society to President Serrano's attempted *autogolpe* in 1993. Organised opposition to the coup was initiated by the business sector, but political parties, representatives of popular organisations, and trade unions soon joined this opposition movement and formed the Instancia Nacional de Consenso (Committee of National Consensus), or Instancia. McCleary (1996, p. 90) identifies five objectives of the Instancia:

- 1) promote the participation of different sectors of civil society in the decision-making process;
- 2) to demonstrate to the international community the Guatemalan people's commitment to democracy;
- 3) to strengthen democratic political institutions by restructuring, cleansing and reforming those institutions;
- 4) to consolidate the peace process;
- 5) to establish an intersectoral dialogue with the purpose of reaching consensus on the problems facing Guatemala and drawing up a national plan for the country.

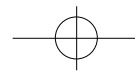
During the two-week constitutional crisis, the military and Constitutional Court gave the Instancia the responsibility of identifying presidential candidates to replace Serrano. Among those selected by the Instancia was Human Rights Ombudsman Ramiro de Leon Carpio, who was installed by the Congress on June 5. The Instancia called on political parties to identify and expel corrupt members. While some party representatives were willing to participate in this process of "self-cleansing", others such as the Christian Democrats refused, which brought them into confrontation with the Instancia. Instead of dismissing allegedly corrupt members of Congress, the parties worked out an agreement with the executive to elect a transitional Congress. But the Instancia continued to

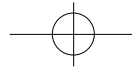
press for political reform and justice in the weeks following President Serrano's resignation, and it was able to force the government to replace two Ministers of Defence who had been involved in the coup. The Instancia had only mixed success in purging political institutions of corrupt officials. Furthermore, the willingness of certain elements of the military to permit such initiatives from civil society must not be discounted—without it Serrano would quite probably have remained in power to this day. But civil society's emergence and laying claim to "moral legitimacy" during this period of political crisis effectively illustrates its potential capacity to serve as an important check on the illegitimate exercise of political power. The role played by the Instancia in undermining President Serrano's attempted *autogolpe* and replacing him with Ramiro de Leon Carpio helped to establish the political conditions for the subsequent peace process. This role highlights not only the level of legitimacy enjoyed by civil society in contrast to the oppressive state, but also the importance of legitimacy both for the exercise of power and the forging of peace (Blackmore 1993; Human Rights Watch 1994; McCleary 1996).

Assembly of Civil Society

The role of civil society in the peace process was officially recognised with the establishment of the Assembly of Civil Society (ASC) in 1994. The ASC includes representatives of a variety of social sectors, including campesinos, women, labour, human rights groups, indigenous people, religious organisations and NGOs—but not the business sector. Its purpose is to give the various sectors of civil society an opportunity to develop and express consensus positions on all aspects of the peace accords negotiation agenda. The decision-making process within the ASC has been compared to the decentralised mode of public participation in New England town-hall meetings. First, separate position papers are developed by each sector, then common positions are developed through "give-and-take" debate. Accordingly, unions and grassroots organisations are said to have found this forum more receptive and effective than conventional electoral politics (Fruendt 1995).

The women's sector was initially excluded from the list of ASC partici-





pants developed by the government and rebels, but it has proven to be one of the most successful sectors in persuading the government to agree to its demands. These demands include:

- 1) the promotion of the classification of sexual harassment as a legally punishable offence, and in cases against indigenous women as an aggravated offence;
- 2) the promotion of compliance with the Convention on the Elimination of all Forms of Discrimination against Women;
- 3) the correction of educational materials that carry cultural or gender stereotypes;
- 4) the promotion of the incorporation of a gender focus in development programmes and strategies (Cerigua, cwb07_96.html#TOC, p. 4).

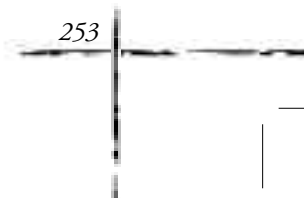
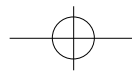
The ASC was also highly influential in securing recognition in the Agreement on Indigenous Peoples of the need to eliminate discrimination against women and secure their rights to land. Furthermore, in the Fall of 1997, a Women's Forum was established consisting both of government and civil society representatives. Its purpose was to oversee the implementation of those aspects of the peace accords that relate to women (Baranyi 1996; Bauduy 1997; Cerigua, cwb07_96.html#TOC; Cerigua, cwb01_97.html#Head2, "Ten Years..."; Frundt 1995; Holiday 1997; Jonas 1996; Peace Brigades International, pbi/guate.html).

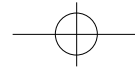
Yet overall, the ASC's influence over the negotiating process has been quite limited. The limited inclusion of civil society at the institutional level is likewise apparent in the make-up of the Commission to Accompany the Peace Process, charged with implementing the accords. The Commission's civil society representatives are limited to an economist, a businessman, a Mayan academic, and a member of the cooperative movement. In May 1997, the ASC issued a report on the first 90 days following the signing of the peace accords in December the previous year. The report criticized the government for ignoring the ASC's proposals and failing to promote the inclusion of civil society in the peace process. Though the report gained considerable international attention, the

Guatemalan government and URNG sent only low-level officials to receive it, and no UN representative was present. As in the 1980s when the government responded to GAM's demands for investigations of disappearances by establishing an impotent commission, its agreeing to an institutional role for civil society through the establishment of the ASC seems largely to have been an empty gesture (Cerigua, cwb06_97.html#Head5; Cerigua, cwb18_97.html#Head6).

Here again civil society is faced with the dilemma of institutional cooperation versus confrontation with government institutions. When the state offers little opportunity for institutional access and participation, NGOs find that a confrontational mode is the only means of expression. During periods of political crisis, such as Serrano's *autogulpe*, civil society may find considerable opportunity to influence the course of events through direct confrontation with the state, or through alliance with oppositional institutional agents, and the attendant taste of power may lure it into institutional cooperation with the government once the crisis has passed. Yet the emergence of opportunities for institutional cooperation associated with reform may obscure the virtues of confrontation. Even a democratically inclined government may accept the institutional inclusion of civil society in decision-making processes only when it can effectively manipulate the parameters of its participation. On the other hand, a persistent mode of confrontation with a reform-minded government could leave civil society on the sidelines when periods of crisis pass and the political process becomes more routinised.

Furthermore, Sollis (1995, p. 14) warns that Guatemalan NGOs "are not fully prepared to deal with the processes that are inevitably propelling them into collaborative situations with the government". He insists that they need greater technical capacity and more effective coordination or they may "be unable to realise their potential contribution to development and democratisation". Yet aside from technical issues, civil sectors, and especially human rights NGOs must evaluate what they can realistically expect to gain from institutional cooperation and what sorts of compromises it entails. It may be worthwhile to recall that NGOs have demonstrated considerable vitality in pursuing initiatives independently of government institutions. Where these initiatives have highlighted a fundamental contrast





between the moral position of civil society and the state, they have sustained a unique form of opposition and pressure for reform.

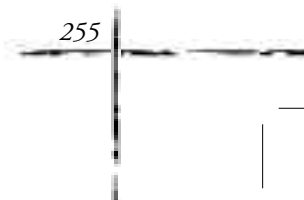
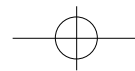
Such contrast is well illustrated by the differing positions of the government and human rights sector toward the issue of impunity. Recall that the Law of National Reconciliation passed in December 1996 granted immunity from prosecution to individual perpetrators of human rights abuses during the war. After protests from Amnesty International and other human rights groups, the original draft was amended to exclude from immunity acts of forced disappearance, torture, and genocide, but there was no specific reference to extra-judicial executions. Human rights groups were sceptical that the inclusion of genocide was sufficient, since it would be difficult to prove that Mayans were targeted because of their ethnicity (Amnesty International 1997; Cerigua, cwb09_97.html#Head4, "Truth..."; Cerigua, cwb17_97.html#Head5, "Empty..."; Cerigua, cwb25_97.html#Head2; Rohter 1996).

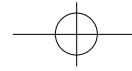
NGOs continue to document persistent human rights violations carried out by security forces and PACs, which they blame for the culture of impunity. While some prosecutions have moved forward, others have collapsed. Despite strong evidence that one former military commissioner carried out as many as 35 killings, 44 kidnappings, and 14 rapes in the department of El Quiche in the early 1980s, he was absolved of responsibility. In a highly publicized case, charges brought by American Jennifer Harbury against 11 military personnel for the murder of her husband, rebel leader Efraim Bamaca Velasquez and U.S. citizen Michael Devine were dropped in 1997. Colonel Julio Roberto Alpirez, one of the accused, was subsequently reinstated in the military. Despite a reported decrease in politically motivated human rights abuses in 1996, GAM pointed to the Law of National Reconciliation as evidence that institutionalised terror had been replaced by a policy of impunity. Before such a charge is dismissed as rhetorical, one should consider the government's reaction to the publication of a story in 1995 concerning CIA ties to Guatemalan military personnel responsible for human rights violations. The Minister of Defence hired a Washington-based public-relations firm, R. Thompson & Co., at a monthly rate of \$70,000, in an effort to block human rights legislation

in the U.S. Congress (Amnesty International, AMR 34/25/97; Amnesty International, aipub/1997/AMR/ 23400897.htm; Cerigua, cwb05_97.html#Head7; The Foundation for Human Rights in Guatemala, dlinstr/071497.htm; Najarro and Monroy 1997; Jonas 1996).

In response to the perceived policy of impunity and the Truth Commission's limited mandate, resources and time for processing its overwhelming caseload, a number of NGOs took it upon themselves to investigate and publicize the truth about human rights abuses in Guatemala. A coalition of NGOs called the Convergence for Truth independently documented more than 25,000 cases to send to the Truth Commission. The Human Rights Office of the Catholic Archbishop trained community leaders to record the testimony of victims of military violence as part of its Project to Recover Historical Memory. The project's aim was to "identify the victimizers in order to dignify their victims". (Rohter 1997, p. A8) Approximately 800 volunteers interviewed more than 5,000 people in small Indian villages. The interviews were taped, and most were conducted in Mayan languages and then transcribed into Spanish. They were scheduled to be published in a two-volume document in the summer of 1997. The project documented almost 500 mass killings and gathered information on the locations of more than 300 clandestine cemeteries. As mentioned before, other NGO initiatives led to excavations of graves at the sites of mass killings (Cerigua, cwb38_96.html#Head8; Guatemala Human Rights, 1997; Rohter 1997; Wilkinson 95/96).

While Guatemalan NGOs persist in highlighting the illegitimacy of impunity and creating alternative public spaces through independent initiatives, Sollis (1995, p. 12-13) argues that the presence of a large number of NGOs may actually deter much needed institution building on the part of the state, as "government responsibilities are jettisoned in favour of the NGO sector". While NGO activities "eroded repressive state authority" during the war years, "[i]n postwar conditions ... NGO fragmentation is a liability when it prevents the organisation of strong representative bodies to promote their collective interests". He also insists that NGOs have been ineffective in influencing the distribution of resources toward poverty reduction and development.





Yet human rights groups in particular not only helped to focus the attention of the international community on the government's terrible record of abuses during the war years, thus enhancing the pressure for peace negotiations and political reform, but they continue to highlight the relationship between human rights and the peace process. Not only does the struggle against impunity identify justice for victims and respect for human rights as a necessary foundation of lasting peace, but the work of human rights groups during the war and throughout the peace process can be understood in terms of a broader struggle to identify peace itself as a fundamental human right. As Alston (1992, p. 202-207) argues:

From a human rights perspective, the struggle to achieve peace, and thus for realisation of the right to peace, is very closely associated with the struggle against all forms of oppression, discrimination, and exploitation and other mass and flagrant violations of human rights of peoples and persons since such violations pose a direct threat to peace and constitute the negation of the spirit in which respect for human rights, including the right to peace, must be sought.

The right to peace has likewise been recognised by the UN as "an indispensable condition of advancement of all nations, large and small, in all fields". Furthermore, UNESCO has declared that "no international settlement secured at the cost of the freedom and dignity of peoples and respect for individuals can claim to be a truly peaceful settlement, either in its spirit or in terms of its durability".

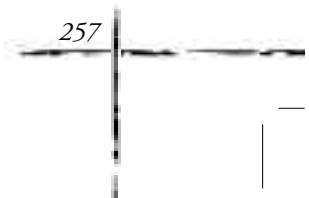
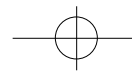
Thus, there exists formal international recognition not only of the fundamental right to peace, but also that genuine peace requires respect for the broad array of other recognised human rights. NGOs in Guatemala have persistently highlighted the integral connection between a climate of respect for human rights and a culture of peace.

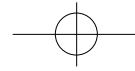
CONCLUSION: LESSONS FOR KENYA FROM THE GUATEMALAN EXPERIENCE

The Guatemalan case offers a useful lesson to other countries undergoing dramatic political transition. One such country is Kenya. Though Kenya has not experienced a decades-long civil war, it appears to be mov-

ing toward a more democratic political system. Just as Guatemalan civil society highlighted the integral relationship between human rights and peace, Kenyan civil society has highlighted an equally integral relationship between democracy and human rights. Indeed, there are some stunning similarities between the two countries' experiences. For example, just as women in Guatemala forged new political space by challenging a repressive regime on its responsibility for their disappeared loved ones, in Kenya, mothers of political prisoners formed Release Political Prisoners and succeeded not only in revealing a highlighting their government's brutality, but ultimately in securing the release of their sons. Their bold public protest corresponded with Kenya's shift to multiparty elections in 1992 in response to both domestic and international pressure. However, the Moi government was able to remain in power by manipulating the electoral system and fomenting ethnic division in the opposition and violence against communities which sympathized with the opposition. Consequently, Kenya became a multiparty democracy in name only. With the election of Mwai Kibaki in December 2002, Kenya completed a peaceful transition of power. Applying the lessons from Guatemala to Kenya's current transition, the following conclusions may be drawn:

- 1) There exists an integral relationship between democracy, human rights, and peace. Any genuine transition to democracy must be accompanied by respect for human rights and justice for the victims of past human rights violations. Indeed, human rights are not secure in the absence of democracy, and democracy is increasingly recognised as a human right within the international community.
- 2) In order for a government to protect human rights and prevent abuses, it must not allow impunity. Rather, it must prosecute and punish those responsible for human rights violations. Guatemala's Truth Commission, despite its limited mandate, was a step in the right direction.
- 3) Civil society must form a united front in support of democratic reform and human rights. Guatemala succeeded in this regard first through the *Instancia* and subsequently the Assembly of Civil Society. Kenya has taken fledgling steps in this direction, but tribal division remains a substantial obstacle to unity.





- 4) Civil society has the capacity and responsibility to guarantee the integrity of democratic reform. When President Serrano attempted to halt reform with his *autogulpe* in 1993, it was Guatemalan civil society that forced his resignation and ensured that the reform process continued.

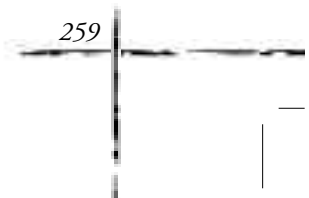
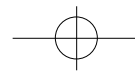
Kenya clearly possesses the institutions required for a strong and effective civil society, including the business sector, activist churches, NGOs, opposition political parties, and a lively press. In the wake of the successful elections of 2002, these institutions, like Guatemala's *Instancia*, must be prepared not only to guarantee the integrity of the transition process, but also to ensure the new government's commitment to both democracy and human rights. At a minimum, this will require constitutional reform that creates genuine checks and balances among the institutions of government to limit the potential for authoritarian rule.

The Guatemalan case likewise suggests certain conclusions concerning the broader relationship between global civil society and the state. When the state in Guatemala was most repressive during the civil war years, its relationship to human rights groups was decidedly adversarial. Human rights activists highlighted the illegitimate activities of the army and PACs, and as a result many became targets of military violence themselves. They were targeted in part because, through their links with other activists outside of Guatemala, the government was subjected to considerable international scrutiny and criticism. By the time of Serrano's attempted self-coup, civil society in the form of the *Instancia* would serve as an alternative source of legitimacy against which the government's actions were evaluated both by Guatemalan society and the international community. The illegitimate regime was unable to stand against such scrutiny. Yet the role of civil society, especially human rights groups, has in some respects become more complicated and problematic with the progress of the peace process. Through institutional cooperation NGOs seek to have a voice within a more inclusive political establishment. By exploring the possibilities of cooperation with a reforming state, however, human rights groups and other NGOs must contend with the reality of political compromise, including the compromising of principles.

Despite the dilemmas of interacting with institutions that, at least in

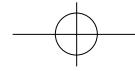
their more perverse manifestations, are the source of the evils that many NGOs seek to correct, the potential for reforming the institutional environment within which civil society must operate may justify the risk. By and large, global civil society is not anarchistic. Most human rights activists and similar crusaders do not seek to abolish the state. But they do seek radical reform of the state system's *modus operandi*. They seek not to destroy the sovereignty of states, but rather to transform sovereignty from a destructive and oppressive reality into an instrument for promoting broad human interests and protecting universal human rights. It is in this respect that civil society represents an alternative measure of legitimacy against which the behaviour of states may be evaluated in the arena of global public opinion. As Guatemalan NGOs negotiate their evolving relationship with state institutions, they effectively highlight the dilemmas of the broader relationship between the turbulent state system and global civil society.⁶

6 • The reference to a 'turbulent' state system is derived from James Rosenau, 1990, *Turbulence in World Politics: A Theory of Change and Continuity*, New Jersey, Princeton University Press.



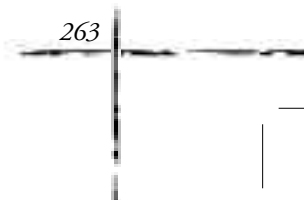
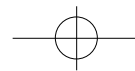
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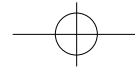
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MANAGING ELECTIONS IN KENYA*H. J. Nyamu***INTRODUCTION**

The electoral process, like any other human administrative undertaking, needs some degree of management. Just as businesses are organised and managed primarily for profit, elections have been managed in Kenya for different purposes at different times. Since 1964 when Kenyans participated in their first post-independence single party elections, upto the last one-party elections in 1988, the goal was simply to remove unpopular KANU MPs from parliament while leaving the presidency and certain stalwart supporters of the ruling party and the president secure in their positions. If one equated the presidency with the government, then the objective of elections between 1964 and 1988 had nothing to do with a change of government—but only with the removal of "wayward" MPs. This was the unavoidable legacy of the one-party dictatorship that Kenya imposed upon herself in 1964 and which endured until the restoration of a multi-party dispensation in 1991/1992.

THE MULTI-PARTY ERA

Enter 1991 and Section 2A of the constitution was repealed allowing Kenya to become a multi-party Republic, thereby opening the gates for competitive multi-party elections and the tantalizing possibility of a change of government, namely the presidency and the replacement of KANU by another ruling party. Until this historic change, Kenya had not heard of the need for free, fair and transparent elections. These terms



entered Kenyan political discourse because the repealing of Section 2A of the Constitution committed Kenya to a form of democracy completely different from that previously sung about and peddled by the previous one-party governments.

Up until then, there was an Electoral Commission whose duties centred around delineating constituency boundaries. The much more important electoral processes, including voter registration, were entrusted to the Supervisor of Elections who was domiciled in the Attorney General's office. The Supervisor of Elections, in turn, freely used the Provincial Administration—the most powerful arm of the Executive—to conduct the pre-1992 electoral processes. In 1988, for instance, the infamous employment of the open queuing method of voting was declared to be highly democratic, even though candidates with shorter queues of voters were, at times, shamelessly declared winners against those with longer ones by some District Commissioners. One candidate aptly declared in disgust: “even rigging requires some degree of intelligence”.

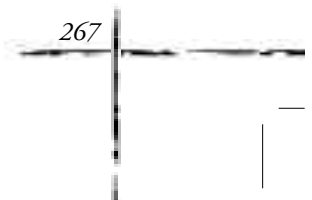
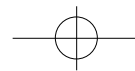
The installation of the current electoral authority, the Electoral Commission of Kenya (ECK), was accompanied by the vesting in the ECK with all the electoral powers previously vested in both the Electoral Commission and the Supervisor of Elections, including directing and supervising the electoral process and registration of voters. In addition the commission was mandated with the promotion of voter education, promotion of free and fair elections and such other functions as may be prescribed by law. These developments also saw the demise of the post of Supervisor of Elections as well as the electoral role of its traditional appendage—the Provincial Administration. Indeed, it is today a criminal offence for a public officer “to engage in the activities of any political party, or act as an agent of any such party, or publicly indicate support for or opposition against any party or candidate participating in an election” under Section 7B of the Presidential Elections Act, Cap. 7.

ECK's Mission Impossible

The heavy demands placed upon the ECK to conduct, direct and supervise free and fair elections should be viewed against several cultural, polit-

ical and economic circumstances created by past Kenyan administrations since 1963, namely:

- (a) Post-independence widespread development of politics of patronage, including total politicization of the entire web of the civil and public services. This process took the nature of rewarding certain holders of key public service positions with cash gifts, usually in the form of easy bank loans, allocation of public lands in the rural areas and plots in urban and peri-urban areas, and offers of appointments to high offices to those who promised to “sing the tune” of the Executive, no matter whether they were in academia or in public service professions. Beneficiaries of patronage have little or no capacity for free, fair, or transparent initiative when it comes to the application of reason and the law, because they know only too well which side of their bread is buttered. They are political commodities to be used for political gain to benefit the system against the established ethical and legal systems.
- (b) Underdevelopment, accompanied by very low levels of per capita incomes, and massive unemployment presented the ECK with a body of electors ready to trade their voters' cards for cash or food. Such electors are also rendered incapable of making free or rational decisions or choices with regard to who to vote for, beyond settling for those who have money to dish out to them for the next meal. Pre-election “famine relief” for certain communities has demonstrated this fact since 1992.
- (c) A widespread culture of violence at elections, spearheaded by politicians who care little, or not at all, about the electoral law or human rights, either because they enjoy some kind of political protection, or, if they do not, can buy their way out of prosecution, courtesy of run-away corruption among law enforcers and the law courts. In this connection, one recalls private armies and militia owned, financed and directed by well-known politicians, none of whom has ever been apprehended.
- (d) Highly ethnicised communities or ‘tribal’ groups deliberately conditioned to hatred, one against the other, by politicians, purely to



destabilize voting patterns which might lead to the defeat of favoured or highly valued ruling party candidates. All the tribal clashes Kenyans read about arise out of such political manipulation of tribes and ethnic groups by ethnocentric political leaders who sow seeds of distrust and hatred among tribal groups citing “stolen” tribal lands or herds of cattle by “unwanted” tribes. Tribal clashes are obviously outdated colonial-style administrative strategies of divide and rule, called upon today to assist in the perpetuation of styles of governance wholly incapable of embracing modern democratic thinking and practices.

- (e) Distortion of common language to suit the user to malign the opponent and falsify the situation. Thus the undemocratic ruling party alters common meanings of words to malign the opposition as per the following examples:
- ❑ Unfavourable criticism becomes “dissidence” and is treated as such. The opposition is defined as the source of all evil including tribal clashes and, most surprisingly, the El niño!
 - ❑ Multi-party politics is equated with “tribalism”.
 - ❑ “Zone” becomes a uniformly politicized ethnic locality unvisitable by a different political (read tribal) organisation.
 - ❑ “The future” merely means the net balance, in years, of a leader’s political life.
 - ❑ “Service” is some official benefit purchasable with some money or what we call in Kiswahili *kitu kidoga*
 - ❑ “Peace” means the state of frightened mass silence and inhibition accompanied by little inactive but non-acquiescent public noise and grumbling.
 - ❑ “Policy” becomes a ruling party management skill used to chart out the politicized and ethnicised channelling and distribution of services, money and wealth.
 - ❑ “Democracy” is drummed up to mean one-man rule for life in the context of all the above falsifications and distortions, and public acquiescence to what in reality is governance with impunity.

When these and many more distorted terms enter the national vocabulary, communication ceases to take place. The end result is certainly not in the interest of democracy and its demand for free, fair and transparent elections.

- (f) Most importantly, it should be appreciated that once governments in non-democratic countries get into power, they never intend to quit and are ready to do whatever it takes to consolidate incumbency and political inertia. This is the worst obstacle to free and fair elections for which an electoral authority has little or no solutions. I refer to such practices as the free and unthwarted use of unlimited state resources for campaigning for the entire ruling party, to the utter disadvantage of other parties. State-owned media are likewise indicated as the worst hourly/daily offenders in this regard and one hopes that those concerned will listen to the voice of reason. Of no less importance is the fact that democracy itself is a concept of as many interpretations as there are parties. For some, selecting leaders by acclamation is democracy. For others, selecting leaders by consensus at the coalition level is also democratic, while yet for others, nothing is democratic unless the grassroots have participated directly. Fortunately, in this regard, the electoral authority’s nomination of competing candidates is done in accordance with strict directions of the law. In that connection, it is worthwhile to appreciate that the entire electoral process is so entirely law-directed that there is very little room for ECK to bend the law deliberately and openly.
- (g) The existence, since 1964, of a voting population, the majority of which possesses little or no voter education is another problem. Since the writer became a Commissioner of the ECK in 1991, inadequacy of voter education has continued to be the most painful thorn in the management of the electoral process. ECK’s persistent demands for funds to carry out voter education have been turned down with consistent persistence by the state’s financial authorities. This is despite the fact that the Constitution grants the mandate of providing voter education to ECK. One has little proof for the contention that the downplaying of funding for voter education has been politically motivated. But the global tendency by undemocratic regimes to suppress any initiative that would open the eyes of the

masses to the truth relating to injustices meted to them would indicate that voter or any other kind of information has been subjected to severe repression by such regimes. The 2002 elections in Kenya differed from all previous elections in that several donors provided considerable funds towards a very well-planned and executed voter education programme by ECK and its recognised stakeholders.

This now brings me to the point of addressing some of the managerial strategies and mechanisms available and desirable for use in order to deliver to Kenyans free and fair elections against the backdrop of the problems outlined above.

Managerial Strategies

More than ever before, the ECK realizes that it does not entirely own the electoral process. It is mainly a facilitator, supervisor and director of elections. If this is indeed the case, who then owns elections? The electors do. Below the electors are very important stakeholders who must be diplomatically brought into the electoral play. First and foremost are the police (whatever one thinks of the Kenyan Police). Although the law has now widened the definition of the term “policeman”, the regular police remain the core contingent for providing security for election materials and for the voters. During the last two years, the Commission has built strong bridges with the police in an attempt to achieve elections without violence. The police have been extremely receptive to this call for goodwill.

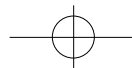
The appointment of electoral staff and their training is crucial to successful elections. Over the years the great majority of the Commission’s District Election Co-ordinators, Returning Officers and Deputies, Presiding and Deputy Presiding Officers have acquitted themselves most creditably, judging from the very low incidence of complaints directed against individual officers. Commission officials on the whole have been trained to create rapport with all political party competitors without compromising the authority of the law. Qualifications of electoral officers are pegged very high. For example, experienced retired public service and private sector workers qualify for the positions of Returning Officers and their Deputies. This year, higher qualifications for Presiding

Officers and their deputies have been called for, to accommodate the higher responsibility of counting votes at the polling stations within a Registration Centre.

Other stakeholders recognised by the ECK are Non-Governmental Organisations (NGOs) with training capabilities, e.g. Institute for Education in Democracy (IED), and local and international electoral observers. The ECK also needs the Attorney General’s goodwill to facilitate the quick editing and passage of the new regulations through Parliament, as well as the goodwill of the Judiciary for the approval of rules to operationalise the Code of Conduct for political parties. The ECK has appreciated the importance of involving these and other stakeholders fully, all in the hope that full participation by as many organisations and individuals as possible in their different capacities will contribute significantly towards peaceful, free and fair elections. Of special significance, this time round, is the setting up of constituency Peace Committees, or Conflict Management Committees capable of relaying early warning information on “danger” spots to an ECK Standing Committee at the Headquarters for necessary action. These will comprise a local opinion leader, two religious representatives, a woman representative, the Returning Officer as Chair and the District Elections Co-ordinator as an ex-officio. A leader of the Youth may be considered for inclusion in the peace committee shortly. The ECK Headquarters will maintain an inter-parties liaison committee in Nairobi, and, funds allowing, decentralise to the constituency level.

The ECK has also set up a press centre in Nairobi to facilitate press conferences and briefings. Unlike in previous years, the ECK will this year intensify voter education; this has been made possible by certain donor well-wishers. This education will mostly be conducted through posters and video cassettes, the latter intended to reach as many electors as provision of power will allow.

In an effort to improve speed, accuracy and efficiency in the flow of communication with its field staff (i.e. District Election Co-ordinators, Returning Officers, Presiding Officers and their deputies), the ECK is in the process of introducing a computerized communication network sys-



tem operational through fax, e-mail, remote computing and satellite communication in the case of remote areas. This will help boost the existing communication system, i.e. by telephone, telefax, police signal, conventional mail and courier services, which have proved inadequate to handle major national exercises like registration of voters and elections. The purchase of the new equipment will be possible through a generous USAID Commodity Grant for which the ECK is most grateful. Improved communication will make a lot of difference in this year's elections.

Managing Free and Fair Democratic Elections

To accomplish the difficult task of managing free and fair democratic elections in the face of the above described problems requires more powers than the ECK enjoys at present. The starting point, however, is the setting up of an independent electoral authority comprising men and women of high qualifications and character and beyond reproach in relation to their past public life. Their public or private sector track record should be exemplary whether nominations to the commission are party-based or not. Political patronage is utterly incongruous with the envisaged authority's status, dignity and mission.

It is supremely important that the ECK should be financially independent subject only to Parliamentary audit. As of now, certain legal and administrative ties to the Treasury make the work of the ECK quite untidy.

Since the primary political organisation of electors rests with the political parties, the ECK should become the registering body for political parties in the interest of ensuring the maintenance of party discipline at all times. Party registration with the ECK would ensure that the parties live up to the stipulations of their constitutions and manifestos, adhere to their financial management and related organisational rules and regulations. As well, there is the need to supervise the growth, commitment to and internal practice of democratic tenets within the parties themselves.

An independent authority should enjoy, at least deterrent powers enabling it to resolve political conflicts between parties during elections.

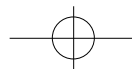
Although the Code of Conduct for political parties goes some way towards satisfying this end, it falls short of empowering the ECK to exclude clear cases of perpetrators of violence from participating at the elections without recourse to the courts in the first instance. In the interest of peace, and in order to minimize cases of violence, either electoral courts should be set up to deal speedily and summarily with such cases, or the Commission should develop mechanisms for taking speedy action to resolve matters especially on the election day, pending any aggrieved party's decision to go to court or not. There just is no time on the election day to fulfill all litigation procedures, and, so far, a lot of candidates have been wrongly returned to Parliament because the alternative of petitioning is too costly for most wronged candidates. Petitions, furthermore, may take up to over four years, which means that the wronged candidate would suffer double loss if he or she were to petition. The first loss is the petition fee (currently Kshs. 250,000), while the second is exclusion from attending parliament if indeed he/she was unelected by default.

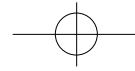
Preparation for the 2002 General Elections

Soon after the conclusion of the 1997 General Elections, the ECK began planning for the 2002 elections. The plan was strategic in that the ECK used all the past experience at hand to plan "today" for what should happen "tomorrow", so to speak. What was to happen tomorrow had to conform to ECK's vision and mission, namely to have free and fair elections, to exclude, to the best of its ability, any kind of rigging and violence and to ensure that voters exercised their choice freely.

Global Involvement

Between 1997 and 2002, ECK Commissioners were involved in observing elections, the carrying out of referenda or attending conferences in other countries to learn of any practices which might assist in the implementation of free, fair and transparent elections. Thus the ECK observed the Mozambican elections in 1994 and learnt important lessons there; ECK also observed the elections in South Africa on June 2, 1999. ECK was also involved in observing the electoral process in the USA in the year 2000 and in the province of Alberta in Canada in November 1998.





It was also involved in the observation of elections in the Republic of Tanzania on October 29, 2000, the referendum in Uganda on June 29, 2000 and the elections in that country on March 12, 2001. The ECK also attended a conference of the Association of Central and Eastern European Electoral Officials held in Moscow in September 2002.

Out of all these involvements, the Commission was most impressed by the fact that Mozambique and Alberta (Canada) had already gained experience in the counting of votes at the polling station. The ECK resolved to have the Kenyan law changed to enable counting to take place at the polling station. From Uganda, the ECK decided to emulate and support the idea of “affirmative action” so as to widen the representation of women, the disabled and other disadvantaged voters. The idea of affirmative action is taking root in this country. While in Canada, ECK representatives learnt that the whole city of Edmonton was most ably governed by a small group of 6 councillors plus a Mayor. The reader may recall that during 2001/2002, while realigning electoral areas in this country, the ECK reduced them from 3000 plus to just over 2000. Some town councils now have between 3 and 4 councillors just because the ECK has no powers to abolish, but only to reduce, electoral areas. This way, a lot of local government patronage was done away with and the process has not ended.

Locally, the ECK resolved to co-opt into the electoral process as many stakeholders and interested international organisations as it possibly could. Thus the ECK took on board:

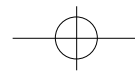
- ❑ the National Democratic Institute of the USA (NDI) and the Swedish Council for Democracy and Development (CDD) who organised provincial workshops for political parties tailored for training in party democracy;
- ❑ the Centre for the Study of Violence and Reconciliation (CSV) and the Institute for Democracy in South Africa (IDASA) were especially called in as consultants by ECK;
- ❑ the frequent use of the permanent and legally recognised Liaison Committee between the ECK and representatives of registered political parties;

- ❑ the Canadian International Development Agency (CIDA) to fund an ECK conference on the eradication of political and electoral violence. This conference took place on 12th and 13th July 2002;
- ❑ the Friedrich Ebert Stiftung (FES) for the same purpose of funding a conference for registered political parties, NGOs and religious groups;
- ❑ the Commissioner of Police and the Attorney General;
- ❑ the Institute for Education in Democracy (IED) for training of ECK officials and registered political party agents by districts through the Agency for Development Education and Communication (ADEC); and
- ❑ the Coalition for Peaceful Elections (COPE) to organise a workshop.

These and other involvements by local and international agencies represented the ECK’s wish to defend and uphold the principles of free and fair elections demonstrable through:

- ❑ participation;
- ❑ consensus building;
- ❑ transparency;
- ❑ adherence to the rule of law;
- ❑ human rights watch;
- ❑ truthfulness;
- ❑ civilized culture of competition;
- ❑ civic competence;
- ❑ personal and organisational integrity; and
- ❑ the facilitation of equal opportunity.

The ECK was determined, with the assistance and participation of stakeholders, observers, and, above all, the voters to eradicate:



- ❑ the culture of political impunity;
- ❑ ethnic and clan violence;
- ❑ drumming up of majimboism;
- ❑ rigging;
- ❑ complacency;
- ❑ provincial administration participation;
- ❑ political-cum-tribal “no-go” zones;
- ❑ total control of state by one-party hegemony.

By the eve of the elections, the following mechanisms were in place to usher in the age of free and fair elections:

- ❑ co-operating and disciplined registered political parties;
- ❑ trained election officials;
- ❑ highly motivated civil society;
- ❑ highly motivated religious groups;
- ❑ a co-operating police force;
- ❑ a “disabled” provincial administration;
- ❑ a greater faith in the Code of Conduct with its enforceable sanctions, e.g. the imposition of fines;
- ❑ Peace Committees, or Conflict Resolution Committees per constituency;
- ❑ an ECK call centre at Anniversary Towers to mediate and/or take decisions;
- ❑ official banning of militias and vigilante groups, e.g. Mungiki;
- ❑ better educated voters;
- ❑ highly educated party candidates;
- ❑ more observers than ever before with a new mandate to call the ECK in case of electoral offences;

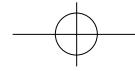
- ❑ professionally sensitised and converted media;
- ❑ a law legalising counting of votes at the polling stations;
- ❑ authorization to the media to air results from each polling station/registration centre to the world;
- ❑ an efficient Programmes Committee and an effective Planning and Logistics Committee;
- ❑ a relaxed Electoral Commission; and
- ❑ a workhorse in the ECK Chairman.

By discerning that elections belonged to the voters and all stakeholders, the ECK went out of its way to invite them to participate fully and tell the world what they truly wanted—peacefully.

CONCLUSION

This chapter started by outlining the undemocratic nature of post-independence and pre-1992 elections, by virtue of the then weak constitutional position of the Electoral Commission, the control of the electoral process by the Provincial Administration and the politicization of many aspects of public life in Kenya.

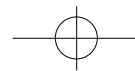
The chapter then went on to outline some of the strategies in use by the Electoral Commission to fight against such undemocratic electoral practices, including a few suggestions on statutory provisions, which might improve further the performance of the ECK. The last section gave a brief summary of the actual preparations for the 2002 general elections including the adopted lessons learned from elsewhere. Of all these suggestions and plan strategies, none is as crucial as the most promising realisation by the ECK that the greater the number of stakeholders involved in participating in the process, the greater the chance of making the people of Kenya feel confident that the electoral process belongs to themselves, and is, therefore, worth their respect and protection. It is ECK's earnest hope that the future general elections will be peaceful, free and fair as we make some progress towards a more humane, friendly and



mature mode of political competition. It was a great day for Kenya, after the end of the 2002 elections, to hear losing candidates graciously conceding defeat and offering to co-operate with the winners, and another loser offering to make a party for the winning opponent. Democracy is made of such little but brave, unselfish, peaceful, friendly and educated gestures which are indeed expressions of the better side of our character, which all of us are endowed with.

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10

THE CHALLENGES TO AND EFFICACY OF ELECTION MONITORING

Gichira Kibara

INTRODUCTION

“Elections are essential to democracy, and public confidence in the institutions and processes surrounding elections is essential to establishing the basis of authority for any democratic government”. (Klein and Merlobe 2001)

This chapter seeks to address the subject of election monitoring/observation with a view to assessing the value added by election monitoring to the electoral process and making recommendations on how election monitoring can be improved. We begin by examining the nature of election monitoring, proceed to explore how it has been carried out in Kenya and end with proposals on how it can be improved.

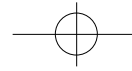
As we approach the December 27 general elections there is a lot of anxiety as to whether the elections will produce the results that the majority of Kenyans desire. The anxiety arises from the perception that the previous two multi-party elections have produced flawed results. The perceived flawed results have been attributed to flawed elections. The question in the minds of many Kenyans is: will the wishes of the people be defeated this time? How do we ensure that elections are not subverted this time round? The need for effective election monitoring is therefore self-evident.

What is Election Monitoring?

A distinction is often made between election monitoring and election observation. Election monitoring is considered more serious and involving because the monitor is entitled to point out errors in the process and demand their correction by election officials, while the observer is regarded as a bystander who cannot intervene when errors or malpractices occur. Kenyan law only provides for the accreditation of observers but not monitors (ECK 1997). In practice, the observers have behaved more or less like monitors and we do not intend to make any distinction in this discussion. The two terms will therefore be used interchangeably.

Election monitoring may be described as the process of observing the various stages of the electoral process with a view to ensuring that it has integrity. It involves close scrutiny of the various activities and processes in the elections, documentation of the findings, analysis and dissemination. Advocacy for reforms to improve the electoral process is also considered a part of election monitoring. Election observation is generally seen as a certification process—a process through which the electoral process is witnessed by independent observers who are then able to inform the larger society and/or the international community whether or not the process met the standards expected of a democratic election. Election monitoring is done in three main stages: (a) there is the long term observation throughout the pre-election period including the campaign; (b) this is followed by short term observation on the election day; (c) and finally analysis and presentation of the results are carried out (Bukachi 205). Monitoring therefore involves the observation, analyses and documentation of the following: the delineation of constituencies, registration of voters, nomination of candidates, political campaigns, the conduct of the media, the role of security personnel, behaviour of the electoral commission, polling, counting of votes, the general layout of the polling stations, the secrecy of the voting, and the overall administration of the polling sites and the announcement of results (ECK 1997).

Election monitoring is not the preserve of non-partisan groups although their reports are regarded as the most reliable. Political parties conduct



their own monitoring and so do the election officials and the media. The objectives of non-partisan monitors include:

- ❑ promoting public confidence in legitimate electoral processes;
- ❑ assisting in the development of adequate election laws and procedures;
- ❑ encouraging public understanding of the electoral process;
- ❑ helping to mediate and resolve disputes, reduce levels of violence, intimidation and fear and deterring election violations and reporting them (NDI 1995).

RATIONALE FOR ELECTION MONITORING

Election monitoring is justified on a number of grounds including the following:

- ❑ The need to create transparency and accountability in the electoral process. There is general consensus that public processes should be subjected to scrutiny to ensure they are carried out as provided for in the relevant laws and policies. Monitoring provides for an independent audit of the electoral process with a view to passing judgement on the appropriateness or otherwise of the process.
- ❑ The need to deter electoral fraud and malpractices. The presence of election observers, to some extent, serves to deter those who would be inclined to engage in fraudulent conduct by shaming them, exposing them to the threat of their conduct being reported to relevant authorities and exposing them to public condemnation or international scorn.
- ❑ It provides reliable information on the problems encountered at various stages of the electoral process; on the basis of this information improvements of the process can be made in future elections.
- ❑ It provides reliable information, which can be used in advocacy

campaigns geared towards addressing problems in the ongoing electoral process.

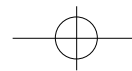
- ❑ Monitoring gives the voters confidence in the electoral process by assuring them that somebody is watching the behaviour of those in authority. Monitoring may thus reduce voter apathy by encouraging them to vote in the belief that electoral malpractices which often render their voting irrelevant will be reduced by the presence of observers.
- ❑ Monitoring provides alternative tabulation of election results through Parallel Voter Tabulation (PVT). Figures in the PVT can be used to crosscheck those provided by the electoral authority.
- ❑ It gives the international community an opportunity to obtain firsthand accounts of the electoral process in practice.

The domestic observation group in the 1997 elections described its mission in these terms: “To contribute to free and fair elections and to serve not only as a deterrent to any attempt to derail the electoral process but also as a source of assurance and confidence to the electorate”, (IED, CJPC, NCKK 1997: 5). And it described its basic mandate as that of “judging whether the conditions of the entire electoral environment allowed for the free expression of the will of the voters” (IED, CJPC, NCKK 1997: 14).

Election observers are expected to certify the election as democratic or otherwise.

There seems to be general consensus that for an election to be certified as democratic, it should be free and fair. Some attempts have been made to define what constitutes free and fair elections. Some of the conditions that must be met for an election to be certified as free and fair are:

- ❑ The entire electorate should have the right to vote for candidates for office.
- ❑ Elections should take place regularly at prescribed periods.
- ❑ No substantial group should be denied the right to form a political party and field candidates.



- ❑ Campaigns must be conducted with reasonable fairness in that neither law nor violence or intimidation bars candidates from presenting their views and qualifications or prevents voters from learning about the candidates and discussing them.
- ❑ Votes should be cast freely and secretly, counted and reported honestly and the candidates who receive the proportions required by law must be duly installed in office (ECK 2000: 3).

The fairness of the election depends on several factors including: (a) the proper application of criteria for qualification and disqualification of voters; (b) the fair delimitation of constituencies; (c) prevention of corruption and intimidation of voters; (d) the equitable use of public media; (e) respect for the freedoms of assembly, association and speech; (f) refraining from the use of public resources by the party in power; and (g) independence of the public service. All these determinants are crucial in assessing whether a free and fair election is possible in a given context. They are interrelated and mutually reinforcing or undermining as the case may be. An election expert notes:

A very wide and equal suffrage loses its value if political bosses are able to gerrymander constituencies so as to suit their own interests; there is no point in having an elaborate system of proportional representation if the electors are all driven in one direction by a preponderance of bribes or threats; legal provisions mean nothing if enforcement of the law is left wholly in the hands of those who profit by breaking it (Ibid.).

CONSTRAINTS TO FREE AND FAIR ELECTIONS IN KENYA

In Kenya, many of the conditions that universally qualify an election as free and fair are missing or wanting. Let us examine some of these conditions.

An Independent Electoral Commission

It is now generally agreed worldwide that elections should be organised in a neutral and impartial way and that for this to be possible the responsibility for organising elections must be vested in a body that is independent and neutral. For the electoral management body to be regarded as independent, it must be immunized from the control (especially of its

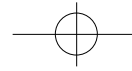
policies and activities) by partisan interests. Many people have expressed doubts regarding the independence and impartiality of the Electoral Commission of Kenya (ECK). The appointment of the majority of commissioners at the President's sole discretion and lack of financial autonomy are some of the factors that make it difficult for it to qualify as independent.

Constituency Delimitation

For the outcome of elections to be determined by the will of the people, the constituencies upon which the elections are based must reflect the principle of equality of the citizenship through the manifestation of what is popularly known as one-person-one-vote. Though the Constitution of Kenya has provisions that require this principle to be applied, with reasonable exceptions, political expediency has over the years led to complete disregard of the principle. The result is that some constituencies now have more than ten times the number of voters of certain other constituencies. As a general trend, areas that have been strongholds of the ruling party have been favoured in the creation of low population constituencies (Maina 1997: 94).

Registration of Voters

Under section 43 of the constitution of Kenya, every person who has attained the age of 18 years is qualified to be registered as a voter. Unfortunately, to exercise this constitutional right, the person must have an identity card, which is not issued by ECK but by the Registrar of Persons. The process of acquiring an identity card is quite cumbersome, slow, expensive (largely due to corruption) and executive-controlled. Many people are therefore unable to exercise their right to vote due to inability to obtain identity cards. About 3 million youths whose age qualified them to vote were unable to vote in the 1992 elections (NEMU 1993: 46). Both domestic and international observers documented the problem of identity cards as a serious obstacle to voting (IED, CJPC, NCCK 1997:48). International observers estimated those who failed to register for the 1997 elections due to lack of identity cards at between 1.5 million and 2.5 million (Tosten et al, 1998:78).



Constraints on Opposition Parties

All parties should have equal access to voters in order to inform them about their policies. During the past two elections there were many instances when opposition parties were denied access to some areas which were zoned off as KANU strongholds. Opposition parties were also denied permits to hold meetings and, even after the requirement for permits was removed by the IPPG reforms, their rallies were still being disrupted. Security forces were still disrupting opposition parties' meetings in the run up to the 2002 elections.

Use of Public Resources

The use of public resources by the ruling party is a major problem in the conduct of fair elections. The ruling party continues to take undue advantage of its control over public resources to finance its activities. These include: the Kenyatta International Conference Centre (KICC) which was constructed using public funds but which was appropriated by KANU for its own partisan use; use of public vehicles to transport KANU delegates; and housing of KANU delegates in public institutions, etc. The use of public resources also includes using government officials to run the ruling party's errands—chiefs, DOs, DCs and even PCs involve themselves in partisan politics with impunity, despite clear provisions in the IPPG reforms outlawing such involvement. Obviously, this unlawful use of public resources gives the ruling party enormous advantage over the opposition that negates the concept of fair elections (IED 2001a: 1).

Media Control

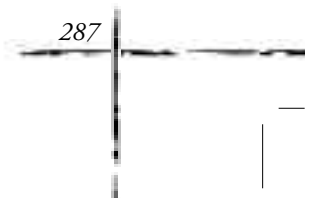
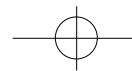
Democracy demands a free and independent media. The media in Kenya until recently remained firmly under control of the government and, given the fusion between the ruling party and the government, under the control of the ruling party. Since the end of the 1990s considerable liberalisation has taken place in the media, including the electronic media, but the only electronic media that reaches the entire country is the government-owned Kenya Broadcasting Corporation (KBC) radio and television. KBC has distinguished itself in unbalanced coverage of the political parties despite statutory requirements under the IPPG amendments that

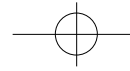
it provide equal coverage to all parties. It regularly gives more than 80 per cent of favourable coverage to KANU and the president and often slants news to portray the opposition in a bad light. (KHRC/Article 19 1997).

Recently, it went a step further and gave live coverage to the KANU presidential candidate. Independent media with adequate capacity to operate nationally such as the Nation Media Group get frustrated through denial of licence/frequencies by the government in their efforts to establish nationwide coverage. The judiciary, which many consider as subordinate to the executive, has also contributed to the stifling of press freedom by awarding huge defamation awards to public figures who allege defamation in matters that would ordinarily be privileged under the doctrines of fair comment and public interest. The effect of this judicial intervention is self-censorship by the media resulting in biased coverage.

Electoral Violence

Electoral violence seriously undermines the electoral process by dislocating voters from places of residence, scaring voters away from polling stations and intimidating them to vote for particular candidates or parties. In both the 1992 and 1997 elections, there were many cases of electoral violence in both the pre- and post-election periods. In October 1991, about a year before the 1992 elections, ethnic clashes erupted in the Rift Valley Province and along its borders with Nyanza and Western provinces. The clashes resulted in the deaths of over 1,500 people and the displacement of about 300,000. They affected three out of the eight provinces and about 20 of the 62 districts (KHRC 1998: 14). Immediately after the 1997 elections there was serious post-election violence in Laikipia, Njoro and Baringo. This violence appears to have been intended to punish people for voting in a particular manner judging from the warnings issued by political leaders and reported in the media before the attacks (IED, CJPC, NCKK 1997: 64, 123). As we prepare for this year's elections, there are clear indications that violence will be resorted to by both political parties and individuals to influence the outcome of the elections (CDU 2002). The government through its various spokespersons claims it is committed to a non-violent election but there is little evidence to support this claim.





Campaign Financing and Corruption

In both the 1992 and 1997 elections, vote buying had a major influence on the election. Billions of shillings were spent on buying votes and buying of political opponents. There is no law governing campaign financing in Kenya. Prior to 1992, there was a legal limit on the amount of money a candidate could spend in his or her election campaign. This absence of campaign financial regulation mechanisms has allowed political parties to use all kinds of methods to raise as much money as possible to influence voters. The ruling party has not hesitated to raid the treasury to finance its campaigns with disastrous consequences for the election and the economy. Electoral corruption is widely practised by almost all parties and many of the politicians across the political divide. The ECK and the police appear helpless in the face of this serious threat to the electoral process (IED 2001b: ii). Corruption makes it difficult for those without adequate resources to effectively compete for office.

CHALLENGES FACING ELECTION MONITORING

Election monitoring by both domestic and international monitors suffers from several weaknesses. These include the following:

Questionable Credibility of Monitors

Domestic monitors may be accused of partisanship. Since domestic observers are normally citizens of the country and therefore bound to be affected by the results of the elections in one way or another, the contestants often regard them with suspicion: so do the government, the election administrators and even sections of the general public. In general the founders, members and staff of monitoring groups tend to be people with a background of human rights advocacy/activism. In many cases they will have advocated for reforms alongside other change agents including opposition parties and can easily be accused of being opposition sympathisers. The international observers on the other hand are regarded with suspicion as to what their real interest is. Many developing countries have a colonial past and are very sensitive to foreign interventions in political matters. Governments in these countries detest any for-

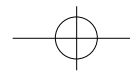
ign input into the political process, considering it a violation of their sovereignty.

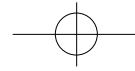
Lack of Capacity

Many of the independent monitoring groups are young and inexperienced. Competitive politics is a recent phenomenon in many developing countries. Domestic monitoring groups are therefore still struggling with such matters as setting clear and realistic objectives for effective monitoring, having enough well-trained monitors to cover all parts of the country, voter education, etc. International monitors also have limitations including lack of adequate numbers of personnel to cover the country, lack of sufficient knowledge of the country including the local languages, cultural practices and historical background. Many monitors fly in a few days before elections and leave immediately after the elections. Some have been referred to as 'election tourists' who are motivated more by the chance of foreign travel than monitoring the election (Geisler 1993: 615).

Defective Electoral Framework

In many democratising countries, the electoral framework is a product of the single party political dispensation and is a serious obstacle to democratic elections. It undermines the work of election monitors in the sense that it creates a situation in which free and fair elections are impossible and election outcomes are almost predetermined. Monitoring of such elections makes little improvement due to systematic handicaps that cannot be addressed through the activities of monitors. Sceptics argue that election monitoring in the developing countries is an exercise in futility because it is impossible to have 'free and fair' elections under the electoral environment prevailing in the country and therefore the monitors merely legitimize flawed elections by giving them the semblance of a fair contest and in many cases a clean bill of health (Ayiemba-Omolo 1996: 607). The question that is often asked is: why monitor elections that are fatally flawed from the beginning? If one already knows that a free and fair election is impossible under the circumstances, why go through the motions of cataloguing fraudulent acts, tabulating rigged results and writing a report by way of a post-mortem?





Acceptable Standards for Judging the Electoral Process

A major weakness of election monitoring is the lack of clarity on what standards to be applied in assessing whether elections can be regarded as acceptable. Do elections have to be free and fair to be acceptable? What are “free and fair” elections? Some argue that free and fair is a relative term and that what can be regarded as free and fair in the democratic countries is not the same as what ought to be regarded as free and fair in democratising countries (IED, CJPC, NCCK 1997: 6-7). Others dismiss this relativist argument as demeaning to democratising countries and argue that if these countries wish to be respected in the community of nations, they must be willing to be judged by the same standards as the developed world (Grignon, Rutten and Mazrui 2001:12).

The 2002 Elections domestic monitoring group—Kenya Domestic Observation Group (K-DOP)—has adopted what it refers to as a “common set of standards” to assess the fairness and freedom of the elections. These standards are that:

- ❑ All Kenyans should enjoy the right to participate in elections free from violence, intimidation and administrative or political interference.
- ❑ All Kenyans should enjoy the right to freedom of expression, association and assembly within reasonable limits.
- ❑ The state and public servants should remain neutral.
- ❑ All Kenyans should enjoy equal rights to vote and stand as candidates under the law, free from administrative or political hindrance.
- ❑ There should be equal access to and impartial reporting by the media.
- ❑ Elections should be free from bribery and corruption.
- ❑ The law should be applied fairly and rigorously.
- ❑ The elections should be administered impartially and openly.
- ❑ Electoral boundaries should be fair.

K-DOP notes that the standards are drawn from the international stan-

dards but adds that it will factor in the progress made since the advent of multi-party democracy in 1992 when making its evaluation of the elections (K-DOP 2002: 4-7). Clearly no attempt was made to develop realistic domestic standards for evaluating the elections. Without practical and clearly measurable standards it is difficult to avoid vagueness and clichés in the evaluation of the ultimate results.

Lack of Clarity about the Role of Monitors

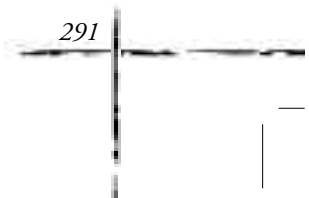
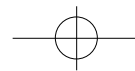
After the monitors have finalised their observation and have reached a verdict that the elections were either free and fair or not, what do they do? Do they just announce their findings without any regard to the consequences of their statement? Do monitors have a duty to urge the public to accept or reject the outcome of an election?

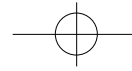
NDI notes that a post-election evaluation by an independent monitoring group can also influence the positions adopted by the contestants with regard to the results. A positive evaluation can encourage all parties to accept the results while a negative one can encourage rejection of the results. It gives the example of the Philippines where the work of monitors exposed the electoral fraud committed by Ferdinand Marcos in the 1986 presidential elections leading to a rejection of the results and the eventual removal of the dictator from power (NDI, 1995: 8).

Below, we give some case studies on the responses of both domestic and international election monitors to flawed elections.

i) Reaction of Domestic Monitors to Flawed Elections

With regard to the 1992 elections, the domestic monitors declared that the elections were not free and fair but went on to urge the leaders of the main opposition parties to accept the results. The main concern of the domestic monitors was that rejection of the results would lead to uncertainty and violence. They based their concern on the fact that there had been many predictions of election violence and actual post-election violence. They were heavily criticized for appearing to endorse seriously flawed elections. Some critics even accused them of being agents of the ruling party whose sole objective had all along been to legitimize the elections. It is worth noting that the monitors had been very critical of the





preparations leading to the elections and had taken fairly strong stands against electoral malpractices (NEMU, 1993: 236-246). Their activities may have led the public to expect leadership from them in rejecting flawed elections. It is doubtful whether they had prepared themselves to react appropriately in the event of a KANU victory in flawed elections.

In 1997, the domestic monitors after cataloguing the various shortcomings of the elections and noting the institutional bias in favour of KANU concluded that the elections on the whole reflected the wishes of Kenyan voters. Many Kenyans received the statement with dismay. Party leaders including Raila Odinga of NDP and Mwai Kibaki of DP had no doubts that the elections had been rigged. They toyed with the idea of rejecting the results but were unable to form a united front against KANU, with Raila Odinga eventually entering into a co-operative arrangement with Moi, while Kibaki filed an unsuccessful petition challenging the elections.

ii) Reaction of International Monitors to Flawed Elections

International monitors have not fared any better in dealing with the results of flawed elections. During the Parliamentary elections in Zimbabwe in June 2000, the Commonwealth Observer Team was given the following mandate by the Secretary-General:

To observe relevant aspects of the organisation and conduct of the parliamentary elections in accordance with the laws of Zimbabwe. ... consider the various factors impinging on the credibility of the electoral process as a whole and determine in its own judgement whether conditions exist for free expression of will by the electors and if the results of the elections reflect the wishes of the people (Commonwealth Secretariat 2000:1).

The team observed the various stages in the election and noted widespread violence, intimidation of voters and candidates, biased media coverage by the state-owned Zimbabwe Broadcasting Corporation (ZBC), inconsistencies in polling day procedures, last minute changes in the law and other malpractices but reached the following interesting conclusion:

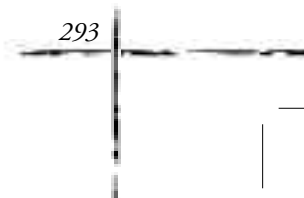
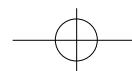
In short we consider that while there were some positive factors in these elections, there were also serious shortcomings. We believe most importantly, democracy in Zimbabwe has taken a major step forward, with a process which has enabled parties and individuals of differing political

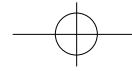
persuasions to win elections to the legislature, one of the fundamental pillars of government (Commonwealth Secretariat, 2000: 34).

The team went on to lament about the politically motivated violence which had “characterised the period leading to the polling days”. They then wished the Zimbabweans well in their pursuit of further democratisation. At no point did the team deliver an actual, definite and clear judgement on the elections as demanded by its express mandate.

In Kenya, after the 1997 election, the international observers under the Election Observation Centre (EOC), after cataloguing the various malpractices, irregularities and deliberate attempts to manipulate the electoral process, had this to say: “the Election Observation Centre considers under the given circumstances that the outcome of the election can in the main be accepted as a credible expression of the political will of Kenyan people, despite the logistical shortcomings and irregularities witnessed by the international observers” (Tostensen, Andressen and Trovonvoll 1997: 90). It is important to note that this conclusion was reached after the team had observed that at least five per cent of the seats were won by the ruling party through malpractices, that there were deliberate attempts to manipulate elections in favour of KANU in at least 7 constituencies and that following these attempts, they had no confidence in the Electoral Commission’s results that were yet to be released in 10 constituencies located in areas that were difficult to access.

What emerges is a scenario where both domestic and international observers are constrained to condemn the irregularities in elections but cannot, even in the face of blatant rigging, declare the elections results unacceptable. This puts their efficacy in preventing election rigging to question. If observers are bound, irrespective of the practices on the ground, to declare elections as “reflecting the wishes of the people”, “acceptable in the circumstances” and “a step forward in the democratisation process”, what will stop autocrats from rigging elections knowing fully well that in the end, the election will be upheld due to fear of the consequences that would ensue should they be rejected? I hope this issue will be the subject of some discussion.





ELECTION MONITORING IN KENYA

In Kenya, election monitoring is a fairly recent phenomenon that has only occurred in the last two elections. Though election monitoring is not new, it gained importance with the democratisation wave that affected many parts of the Third World following the collapse of communism. It is particularly regarded as essential in countries that are deemed to be in transition from an autocratic order to a more democratic order or from civil strife or military government to civilian rule. In Kenya, election monitoring may be traced to the political and economic liberalisation of the late 1980s and the 1990s. Some writers have attributed it to the need by the international community to keep track of political liberalisation as a precondition to donor support. They observe:

In addition to economic liberalisation and performance, therefore, the political performance of countries receiving aid from the west now became a condition for continued support. And, as a result, international monitoring and observation of elections in these countries assumed new importance in evaluating the degree of compliance by recipient nations with the political conditionality that was demanded by international donors for the disbursement of aid. International observation and monitoring thus became part of the new agenda of globalisation of western forms of democratic electoral practice (G rignon, Mazrui, Rutten 2001: 596).

It was soon recognised that international observer teams had limited capacity to carry out effective monitoring due to several factors including the fact that international governments could only send a limited number of observers for short periods of time. The observers were unable to cover most of electoral areas or closely observe the process. Apart from their small numbers, they were also limited by lack of proficiency in local languages and unfamiliarity with local cultures. The observers were also unable to contextualise the election within the wider political environment in which it was taking place. To overcome these handicaps, international organisations supported and encouraged the establishment and development of domestic observation through NGOs.

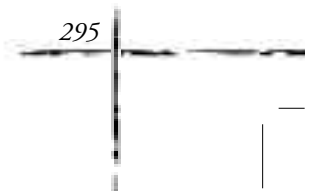
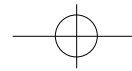
The 1992 Experience

The first serious election monitoring in Kenya took place in 1992. The elections were monitored by the National Election Monitoring

Unit (NEMU) which was an umbrella body consisting of four groups: the National Ecumenical Civic Education Programme (NECEP), the International Federation of Women Lawyers (FIDA), the International Commission of Jurists (ICJ) and the Professional Committee for Democratic Change (PCDC). NEMU trained and deployed 8,000 observers countrywide. About 200 international observers also participated in the observation effort. They comprised of delegations from the Commonwealth, International Republican Institute (IRI) and national delegations from Denmark, Egypt, Germany, Japan and Switzerland.

The effectiveness of the observation in 1992 elections has been seriously questioned due to the *ad hoc* and hurried manner in which it was organised. The local observation groups were participating in election observation for the first time and had difficulties in organising and co-ordinating the exercise. The foreign observers on the other hand flew into the country from all over the world a few days before the elections and flew out almost immediately after the elections. They were therefore unable to sufficiently observe the events leading to the Election Day. Many of the irregularities that biased the outcome of the elections took place in the run up to the elections and were not observed by the international observers. They included: disruption of opposition parties' meetings, obstruction of voter registration in opposition strongholds, involvement of civil servants in the ruling party campaign, use of public resources such as vehicles in the KANU campaign, police brutality, and the restriction of opposition parties' access to KANU strongholds. All these malpractices tilted the playing field heavily in favour of the ruling party (Braakhuis, 2001: 225). The foreign observer team was also constrained by their numbers. There were only 200 observers for the 7,000 polling stations. Many of the polling stations were therefore not monitored. It has also been noted that many of the observer groups tended to make hasty comments without a collective overall assessment and without factoring in the electoral process manipulations that had taken place through the whole electoral period. This watered down their credibility (Braackhuis 2001: 226).

At the end of its observation, NEMU analysed the findings of its observation of the various stages of the electoral process, to wit: the election



day polling, electoral laws, registration of parties, registration of voters, party nominations, official nomination, use of the media, voter education, the campaign process, the conduct of ECK and the counting of the votes and declaration of results. In all these areas, it found serious malpractices and concluded that the elections were not free and fair, noting that: "The manner in which the elections were administered and therefore conducted fell far short of meeting the parameters for free and fair elections. . . . Given the irregularities that we have unearthed in relation to the electoral process, it would be a contradiction to pronounce the elections as having met the standard of "free and fair" (NEMU 1993: 90).

It is important to mention that NEMU had set the parameters for free and fair elections before it commenced the observation exercise. The parameters included a comprehensive review of the constitution to establish a framework conducive to pluralism, establishment of an independent electoral body, creation of an enabling environment for political organisation and campaigning by all parties, effective registration of voters and an efficiently managed polling day.

The 1997 Experience

In 1997, the main domestic observation group was a coalition comprising of the Institute for Education in Democracy (IED), Catholic Justice and Peace Commission (CJPC) and the National Council of Churches of Kenya (NCCCK). This coalition trained and deployed almost 30,000 local observers. The monitoring groups encouraged people to vote and to avoid violence during the various stages of the election. They also provided voter education on good electoral practices. The coalition monitored all the key stages of the elections and gave reports of its findings to the media. It also made efforts to influence both the ECK and the government through consultative meetings and press releases deprecating irregular conduct and urging remedial action (*Daily Nation*, December, 1997).

After the elections, the coalition issued a statement noting the various irregularities in the process but urging Kenyans to accept the results. It concluded that the results on the whole reflected the wishes of Kenyans

and underscored the fact that what constitutes free and fair elections is a matter of value judgement.

The international observation was conducted by diplomats stationed in the embassies of various missions and guided by a team of election specialists in an election observation centre set up through the co-operative efforts of the missions. 150 observers participated. The group observed most of the stages in the electoral process and made a report of its findings noting the irregularities but eventually concluding that the election was acceptable in the circumstances.

Preparations for Monitoring the 2002 Elections

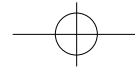
Preparations for monitoring this year's elections are at an advanced stage. A group of organisations comprised of the NCCCK, CJPC, Hindu Council, SUPKEM and Media Institute, and under the name Kenya Domestic Observation Programme (K-DOP), is making elaborate preparations to monitor the elections. They intend to deploy monitors in all the 19,500 polling stations. Recruitment of constituency monitors and organisers have already been made and their training has commenced. Poll watchers are yet to be recruited. There are discussions between donors and domestic observers on how to implement an effective voter tabulation process (VTP). International observers from the European Union, the Commonwealth and various Embassies are also expected to monitor the polls. United Nations Volunteers (UNV) with assistance from IED will also monitor the polls.

PROPOSALS FOR ENHANCING EFFECTIVE MONITORING

As we have seen in the foregoing discussion, election monitoring faces many challenges. Several measures can be implemented to enhance its effectiveness, including:

Effective Planning of the Monitoring Process

Monitoring should start much earlier than has been the case in the last two general elections. This would allow for effective input by the monitoring groups into the preparatory stages of the elections. There is also



need for more efficient and timely access to the funds meant to support the election monitoring. Valuable time is usually spent in long periods of discussions of the funding proposals and very little time in implementing the funding. Election monitoring should be institutionalised in terms of project planning and funding.

Clear Definition of the Objectives of the Monitoring Process

Monitoring groups should set for themselves practical and realistic goals that are consistent with their mandates and achievable with the resources at their disposal. There is no sense in expecting “free and fair” elections during the polling day when all the events leading to the elections clearly indicate that the ruling party enjoys enormous advantages and the opposition faces many obstacles in its campaigns. Neither should observers expect free and fair elections where the constitutional and legal environments also do not provide a fair playing field for all contestants. Election monitors should therefore clearly define what they expect to achieve by monitoring the poll. The 1992 election monitoring group had informed Kenyans that it would be responsible for deciding whether the polls were free and fair and that following its decision, Kenyan would then accept or reject the results (NEMU, 1993:237). This was an unrealistic goal. The decision to reject or accept the results of an election is not for the monitors to make, their role being that of providing information on the conduct of the election. Even if they took it upon themselves to make such a decision, it is doubtful whether they would have the capacity or the courage to deal with the consequences.

Setting Clear Standards for Measuring What an Acceptable Election is or is not

Before commencement of the monitoring process the monitoring groups should set clear standards against which they will determine whether an election has met their expectations or not. Clichés such as “the will of the people”, “free and fair elections”, “the wishes of the people” should be avoided—they do not add much value to the evaluation of the election. Clear standards that are based on general demo-

cratic principles and yet are context sensitive would be more useful. The standards should clearly spell out what is acceptable or unacceptable within the context of a particular election. Tolerable limits should be spelt out in such standards.

More Effective Communication with the Public

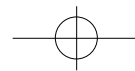
There is need for more effective communication with the public. Though there were attempts to inform the public about the existence and role of monitors during the last two elections, the information was provided very close to the election date and may not have reached enough people. If monitors are to act as a deterrent to malpractices, their existence must be known to the public in good time. Last minute appearance of monitors is unlikely to deter those who have already put rigging mechanisms in motion.

Need for More Advocacy against Malpractices

In the run up to the elections, the monitoring groups should do more in sensitising the public about the dangers of electoral fraud and malpractices. They should also enlist the public in their monitoring efforts by publicly informing *wananchi* what practices to watch out for, how to detect fraudulent behaviour and what to do to prevent it. It is encouraging to note that the Catholic Church, which is one of the monitors, is already holding prayers and urging political actors to avoid violence.

Parallel Voter Tabulation (PVT)

Now that votes will be counted at the polling stations, the monitoring groups should put in place an effective PVT process that will ensure that there is an alternative independent aggregation of the votes from the various polling stations to be used to countercheck ECK figures for every constituency and also for the presidential poll. This would give a lot of credibility to the electoral process by assuring the public that results will not be manipulated as happened in the 1988 *Mlolongo* elections. It would also reduce pressure on the ECK to doctor figures especially in the event of a loss by the ruling party's presidential candidate.



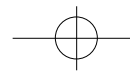
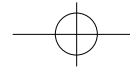
CONCLUSION

Election monitoring is now accepted as part and parcel of the electoral process in Kenya. It however suffers from a number of problems due to inadequate institutionalisation. Monitoring is still not institutionalised in terms of funding and timely project planning and implementation. There is also no sufficient research proving its efficacy in preventing electoral fraud and malpractices though anecdotal evidence suggests that it does add value to the electoral process. During this year's elections monitoring can improve the chances for an acceptable election by encouraging voters to turn up in large numbers and to vote responsibly, giving voters confidence that the elections will not be rigged in such a way as to negate their wishes, advocating against electoral violence and carrying out voter education/awareness campaigns. Election monitors can also pressurize the government and the ECK to take measures to promote a better electoral process.

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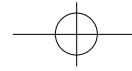
TRANSITION AND THE POLITICS OF CONSTITUTION MAKING: A COMPARATIVE STUDY OF UGANDA, SOUTH AFRICA AND KENYA

Njuguna Ng'ethe and M. Katumanga

INTRODUCTION

This chapter attempts a comparative analysis of the constitution-making process in Uganda, South Africa and Kenya. It is specifically interested in understanding the impact of transitional politics on constitution-making processes. The chapter perceives the transition process to include actor, regime and institutional change. It seeks to understand the constitution-making process by testing the following propositions:

- That the political elite will back constitutional changes that facilitate transition if they perceive them to be not only in their interest but also feasible.
- That the constitution-making process has succeeded where incumbent governments have initiated and blessed the process as a means of legitimising their regimes and the transitional institutions (as was the case in Uganda and Ethiopia); or where the outgoing elite have seen the process as the only realistic option for safeguarding their interests (for example by guaranteeing themselves an amnesty) in the post regime era. The latter situation was the case in South Africa.



- Where the ruling elite has remained reluctant to take up the process, it is due to the fact that ripe conditions under which the constitution-making process can be perceived as rational, desirable and thus politically motivating have not been attained.

The chapter is organised around five core parts. Part one conceptualises the constitution-making process in the context of transitions. The second part examines attempts by the Ugandan ruling elite to legitimize the state using a constitutional process. The third part analyses the deconstruction of the Apartheid State in obedience to constitutional norms. Part four discusses the stunted constitution-making process in Kenya. The last part is a comparative recapitulation of the constitution-making processes in the three states.

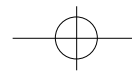
CONSTITUTION MAKING PROCESS IN TRANSITIONAL SETTINGS

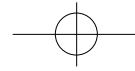
As a fundamental law of the state, the constitution is supposed to set out the principles upon which the government is founded and organised. It is also supposed, at one level, to set out a framework for the government's relations with social formations; at another level it sets the framework for relations among social formations and how the relations are mediated. Constitutions equally regulate the exercise of sovereign power by clearly assigning specified bodies or persons particular powers and functions as well as defining the manner in which the same should be exercised. The constitution's real value can only be realised to the extent that it is treated with utmost seriousness. In other words, it tends to work in the context where all members of the society operationalise its supremacy except in very exceptional cases (Duchacek 1973). Hence, the reason why the constitution should specify the duties and rights of citizens as well as setting the limits of government action (Hyden and Venter 2001: 3). More important constitutionalism is under-girded by the kinds of laws existing in a given state and the state's political infrastructure. The latter includes the type of political institutions and the orientation of the political leadership.

The survival of a constitutional order or constitutionalism presupposes the operationalisation of national interest. Laws must not only be

respected by all but that also no single group or individual should seek to have them changed with the express purpose of seeking to entrench particularistic interests. The tendency by the political elite holding state power to use the constitution, and the law, as instruments for legitimising their misappropriation of state resources, as well as an instrument of repression and violence against their opponents has been responsible for the crisis in the state system. This crisis is manifested by the crisis of identity (the tendency by people to identify themselves more as members of their ethnic group as opposed to the nation state), the crisis of legitimacy (the effective feeling that the government has no moral right to rule), the crisis of penetration (manifested by the diminishing capacity of the state to implement rule throughout its own territory), the crisis of participation (inability to provide channels through which citizens can influence state decisions) and the crisis of resource distribution and allocation (manifested by the inability of the state to provide legitimate mechanisms through which resources can be accessed by all social sectors in the society). This crisis in the state system has plagued many African states.

Calls for constitutional reforms at the beginning of the 1990s were basically attempts by certain social forces to arrest the drift towards state collapse (Zartman 1995). An examination of these efforts points to three orientations. The first model perceives the constitution-making process as a means for state reconstruction. This process has been geared towards legitimising the state, its institutions and leadership. In most cases, this has been initiated by former resistance leaders consequent to capturing state power. Constitution-making in this case has been used as a means to facilitate dialogue between the state and the society. The processes undertaken in Uganda and Ethiopia fall in this category. The second model can best be described as the zero option constitution-making process. Under this process the ruling elite opt to engage in constitution-making as a means of saving the state from collapse. Under this model, the ruling elite opt to negotiate with their opponents in lieu of extending an unwinnable conflict. The South African constitutional process falls in this category. The third model is characterised by the situation under which the ruling elite sees the constitution-making process as a means through which it can entrench itself in power. While its engagement in the process is contingent upon pressure, its continued interest is



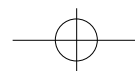


a function of its ability to control and manipulate the process in its interest. The Kenyan constitution-making process since the mid 1990s falls in this category.

To the extent that the constitution-making process is not driven by national interest, it remains captured by vested interests. The success of an enduring process, on the other hand, is a function of the extent to which the actors seek to facilitate an all-inclusive constitution-making process by encouraging consensus building. This is unlikely to be the case where core formations involved in the process retain and indeed use their leverage to derail the process as a pressure tool against the main proponents. Where one actor is not only dominant but also willing to use his hegemony against others, then the process is likely to result in a document that is at best perceived as an imposition from above. While the South African process achieved consensus building and ultimately an all-inclusive and enduring constitution, the Ugandan process created a perception that a dominant actor was imposing his will.

The constitution-making processes in Africa in the 1990s differs from those undertaken prior to independence. The latter were basically cease-fire manoeuvres engaged in between the out-going colonial rulers and their selected successors. The current processes have to a significant extent included the general public in the debates. A major factor contributing to this development is the deepening crisis in the state system and the subsequent elite mobilisation to counter the excesses of the state. Notably, the modes of elite participation have ranged from collection of public views, participation in seminars, submissions of findings for debate prior to the making of a draft constitution and having the draft constitution eventually approved by a constituent assembly, as was the case in Uganda (Hyden and Venter 2001: 11).⁷ In the case of South Africa, however, the process did not involve the establishment of a commission. Nonetheless, it benefited from submissions by the public. Although, the chosen path to constitution-making is an important variable, what matters in the end however is whether the chosen path is ultimately regarded as being legitimate.

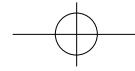
⁷ The Ugandan Constitutional Commission received 25,547 memoranda, reports and oral submissions. 40% of these were from villages and parishes.



Legitimacy is salient in under-girding constitutionalism. It entails the normative basis upon which authority can be exercised. It is about how to make a constitution command loyalty, obedience and confidence of the people. Out of legitimacy emerges the spirit of vigilance, necessary for safeguarding the constitution, on the part of the citizens. Vigilance in turn emboldens the citizenry to acquire the requisite orientation and will to curb the excesses of state actors. Legitimacy encompasses both the processes of formulation and enactment of the constitution. It extends into issues such as use of and actual limitation of constitutionalism and civil liberties. The legitimization process is enhanced through the construction of inclusive institutions. The necessity of such institutions lies in their role as bases for resource distribution, conflict mediation and resolution and consensus building. The citizens' feeling of a sense of belonging and perception of fairness in the state's dealings with its citizens enhance not only the state's institutional penetration in the society but also its capacity for effective resource management and distribution.

Sustained public discussion of the constitution prior to its enactment is critical to evolving legitimacy. If a consensus is evolved on contentious issues in economic, political and social realms, then the constitution-making process can be used to facilitate national healing and reproduction of political consciousness. Public discussions facilitate the popularisation of the constitutional issues and the evolution of a common public interest and shared social values. This creates conditions for consensus building on the basic principles upon which the state needs to be predicated. These principles are the bare minimum against which no emergent government can legislate. Public participation in principle facilitates a sense of identification with and attachment to the constitution without which it would remain an abstract construct. Consensus on principles, popularisation and legitimisation processes are salient to ensuring that the emergent constitution is taken as the supreme law of the land.

The constitution's supremacy is expressed through the practice of a body superior to an ordinary legislature enacting it. Yet the existing legislature can enact a constitution once it has constituted itself into a constituent assembly for that very purpose as a consummation of events following participation of the people through national conferences. Uganda and



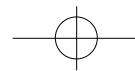
Ethiopia opted for an elected constituent assembly. In South Africa, it was the national assembly which enacted the constitution. However, to guard against the imposition of the majority's will, provisions for a Referendum were put in place. The elaborate processes involved in the midwifing of a new constitution are critical in entrenching that sense of legitimacy that the constitution acquires (Nwabueze 1981: 26).

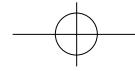
The process notwithstanding, how an enacted constitution grows to acquire veneration has its roots not in inherent popular will, but rather in the fact that it embodies essential and unchanging principles of justice. The constitution must therefore be predicated on certain universal principles of rights and justice. These ought to prevail on the basis of their own intrinsic value (Corwin 1957: 4-5). All the same, a constitution finds expression within a matrix of the social values, norms and traditions of a people. Social tradition contains normative values for the process of power transfer from one social group to another. The strength of the American constitution, for instance, lies in the fact that the constitution is both embodiment of American traditional values and a universal principle of fairness and justice. It also retains an inherent evolutionary capacity to accommodate changing social values and changing demands on governance. Over time, it has come to be perceived as an instrument of impartiality in arbitrating between competing ideas and principles. The constitution should strive to be as inclusive as possible of the aspirations of all social groups that exist in the nation. It must also evolve the capacity to respond innovatively to subsequent challenges trusted to it by variegated social formations. This is what gives a constitution its elastic capacity. The constitution's elasticity is operationalised by the presence of a requisite leadership and institutional framework. These variables operate effectively in social settings where the core elite factions are agreed on the existing form and substance of the state.

African states have lacked both the kind of leadership and institutional capacity that would facilitate constitutionalism. With the state's development projects derailed by ethnicisation and personalisation of power, the rulers responded to resistance from below with violence. This response merely engendered societal withdrawal of the necessary support the state needed. Before long, the rulers opted to circumvent the constitutional

process. Instead of striving to make constitutions inclusive, amendments and amputations were executed with a view to entrenching the elite in power, a process that was consummated with the connivance of international forces with political, economic and geo-strategic interests. The emergent state just like the Apartheid State in South Africa has for all practical purposes been alienated from society and from the people. Constitutions ceased to evolve. They became stunted documents that the ruling elite used in a bid to rationalise their illegitimate and unpopular legal provisions. They were documents confined in the corridors of power. Few ordinary people had read them. They seemed to sustain the colonial logic of administration which shunned dialogue with the society. Yet constitutionalism presupposes engagement by the state of society, for whose interest the constitutions are set up, in a constant dialogue. Whereas African constitutions emerged out of rubrics of western liberalism, African countries lacked the requisite independent capitalist class that could anchor them before they fell into the disabling spell of what Ng'ethe (Zartman 1995) calls the "strongman logic". The consequence of this is the emergence of a class that is least motivated by the value of secularism, rule of law, nationalism, checks and balances or separation of powers. This class is made up of state elements that basically bid their time to hijack the state and use it for accumulative activities.

The crisis of the state referred to earlier was compounded by the deteriorating economic situation aggravated by policies of the Bretton Woods Institutions. Left with few economic options, most African states opted to implement the structural adjustment programmes. In the 1980s, the necessity for institutional and leadership change was not appreciated. Underlying this was the suffocating bipolar system which saw either camps accord "protection" to client states. A combination of these factors necessarily generated a sense on the part of the citizens of being excluded by the state. Material exclusion and the interpretation of this exclusion in ethnic terms ensured that contestations for political change would equally assume the shape of ethnic, racial and class polarization. In some states like South Africa and Uganda, where the state's predatory activities and violence could no longer be tolerated, the ruling elite were confronted with active armed resistance whose logic was to de-motivate the ruling elite from using violence against unarmed citizens.





The collapse of the bipolar system had a liberating effect to the extent to which most of these African states found their authoritarianism threatened with the lifting of protection by the West or the East. This allowed the coincidental convergence of internal and external pressure for political reforms at the beginning of the 1990s. Many states found themselves heading towards collapse. Those that collapsed completely included Somalia, Rwanda, Liberia and Ethiopia. It is also salient to note the paradigm shift of the Bretton Woods institutions from their 1980 emphasis on macro-economic reforms to the 90s position that began to call for political and institutional reforms as well. While in Uganda and Ethiopia the state was deconstructed, in South Africa, the African National Congress (ANC) forced the regime into a military stalemate thus creating the ripe conditions for reform talks to begin. In Kenya, neither the ruling elite nor the excluded elite was seriously committed to constitutional reform outside its instrumental role of facilitating either entrenchment or acquisition of power.

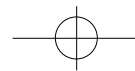
All these cases point to an environment of mistrust among the various social forces. A successful constitution-making process here is, therefore, a *sine qua non* for putting the state back on its rails. A successful constitution-making process calls for the putting into place of a committed leadership and appropriate institutional infrastructure that can midwife the new dispensation. The process of a successful transition entails confidence building measures, evolution of shared values and principles on how the state should be governed at one level and its resources shared at another, and the putting into place of the critical structures that will guard against a drift back to a state in crisis and chaos.

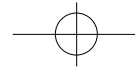
Where the elite in power took the initiative for constitution-making, as was the case in Uganda, they set up commissions to collect and collate views from citizens on the type of constitution and by inference the society they would like to have. Even though highly managed from above, these processes facilitated broad social participation at the stage of enactment. The need to stem catastrophic consequences of state collapse engendered the South African model. Here actors opted to negotiate amongst themselves in a bid to create a new constitutional order. Where

social pressure engendered regime collapse, for instance in Somalia, and it was not possible to address institutional questions and normative issues in a spirit of give and take, a democratic transition became elusive. Where there exists a crisis of the state, and a reluctance by the ruling elite to bless a constitutional reform process, then there will be a transitional crisis.

The reluctance of the Kenyan elite to carry out a meaningful constitution-making process has resulted in vertical and horizontal polarisation in the society. Given the lack of the perception of an all embracing collective threat or collective interests at one level and the pursuit of self-serving interests at another the process has become handicapped. It is usually constrained by fragmentation and sometimes by unprincipled coalition formations. Yet for the process to advance, those who genuinely desire reforms must create conditions under which the process will be perceived as the rational choice, given the other option of achieving change by forcible means. As has already been pointed out, the ruling elite tends to enter into the constitutional reengineering process if the process is perceived as rational, feasible and inclusive. The implication here is that the concern of the elite must be triggered either by the perception of the imminent loss of power, influence and privileges should they remain recalcitrant, or by the perception of the end benefits they are likely to enjoy in the event that there is a new dispensation.

To sum up, the case studies which follow will illustrate three constitution-making scenarios: one, where an elite which has seized power by forcible means against the background of a long history of state misuse of power and state illegitimacy seeks to legitimize the state and secure social and popular acceptance of the state; two, where formerly contending forces are stalemated and come to see negotiations in the context of constitution-making as the best option of averting the destruction of the state; and, three, where excluded elites pressurize the elite-holding state power to facilitate democratic transition through constitution-making and where the state-controlling elite resists, resulting in protracted stalemate and unfulfilled transition. These three scenarios are illustrated by the cases of Uganda, South Africa and Kenya respectively.





LEGITIMISING THE STATE THROUGH CONSTITUTION MAKING PROCESS: THE CASE OF UGANDA

The constitution-making process in Uganda was an exercise in political engineering geared towards engendering legitimacy for the state. After years of constitutional disorder, the process aimed at introducing a form of constitutionalism. For twenty-six years, Uganda had been ruled without any adherence to constitutional norms. The constitution which ushered Uganda into independence in 1962 was first suspended and subsequently abrogated by Milton Obote in 1967. The Idi Amin and subsequent regimes simply suspended or ignored the constitution thereafter, preferring instead to rule by decree. Museveni's attempts to institute the spirit of constitutionalism and his promises to establish a constitutional order must notably be viewed within this context of the past militarism that characterised the state.

In its bid to reconstruct the state, Museveni's National Resistance Movement (NRM) was confronted with the task of rejuvenating the state's institutional mechanisms that could facilitate consistency and rationality in the functioning of the state while providing it with legitimate authority. To regain the society's trust in the state, the state had to be returned to the centre stage of political life (Khadiagala 1995: 38). In this attempt, NRM had to reckon with people's diminished faith in the capacity of the state to protect their interests. As Mutibwa (1992: 122-124) observes, the overwhelming tendency was that of institutional immobility that had engendered uncertainty, loss of commitment to the general good, devaluation of human life and the glorification of the gun. Thus, the NRM saw its task as being that of reversing the predatory instincts of the state in its relation to the society by curbing its violent tendencies and, in the process, restoring the state's credibility. This entailed pacifying various armed groups that had over time taken control over some areas of Uganda while persisting in terrorizing the population. This process was woven around the NRM's 10 point programme. Museveni aimed at reconstructing a social order that encompassed democracy, security, national unity and economic recovery. To this end, he engineered a coalition that went beyond the initial NRM power base in Buganda and western Uganda. It was a form of consociational struc-

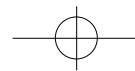
ture that also encompassed elements of the past regimes. This inclusive consociational arrangement generated and later evolved a form of a national consensus that enabled Museveni to convince his opponents on the need to suspend political party activities subsequent to the drafting of a new constitution.

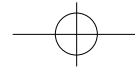
Having shot itself into power, the NRM saw constitution-making as a way through which it could legitimize its rule. The NRM realised only too well that having won power through armed struggle, it could lose the same through similar means, if necessary structures that facilitate regime sustainability were not put in place. constitution-making was a means through which transition from militarism to constitutionalism could be effected. The need to involve people in this process was premised on the understanding that for any constitution to stand the test of time, it had to be rooted in the culture of the citizenry. The constitution should as much as possible reflect the will, wishes and aspirations of the people. It had to be as inclusive as possible.

However, by 1992, the broad alliance Museveni had succeeded in tailoring had begun to get stressed. To Khadiagala, the reason for this dissension was that, Museveni, the state-maker, was increasingly becoming a victim of his own success. The success of the state in restoring security destroyed its principal reason for sustaining the essentially soft authoritarian pact with all political parties. The further he removed the country from the civil wars of past decades, the greater the support for the resumption of multiparty politics became (Khadiagala 1995: 40). In the view of the opposition elite, a more secure environment justified the restoration of a vibrant political life through the return to plural politics. The NRM saw threats to national stability in these calls. It thus sought to use a constitutional process to put an end to the same.

The Constitutional Process

This process began with the presentation to the National Resistance Council (NRC) of legislative proposals to create a Constitutional Commission of 21 members on 10th October 1988. This commission was to be mandated to collect views from Ugandan citizens and on the premise of these views to draft a new constitution. Its mandate was to run for





two years. The approval of this process by NRC through a statute (No. 5 of 1988) in December was predicated on two main objectives: to put to an end the political and constitutional instability that had plagued Uganda for 26 years; and to afford the people of Uganda the first opportunity to freely participate in the promulgation of a national constitution that would arbitrate their political relations. The people's involvement in the process of promulgating a new constitution would also help to re-socialize Ugandans and assist them to evolve a new political culture. Specifically, the commission was expected to assist the evolution of a national consensus on the most suitable arrangement, at political institutional level, for the country, while entrenching constitutionalism. The commission was seen as being involved more in a political process than a legal one.

Whereas there was no doubt about the need for a new constitutional dispensation, the dynamics inherent in the Ugandan process raised doubts about the sincerity of Museveni and the NRM. These doubts were raised by four issues: (a) the mode of the appointment of the Commission; (b) the issue of *Ebyaffe*, that is, the restoration of traditional rulers; (c) and within this, the question of whether Uganda should go federal or remain a unitary state; and (d) the existential context under which the constitutional commission would collect views. In the first instance, the cabinet appointed the chairman and members of the commission out of an extended list of candidates. The candidates had been short-listed taking into consideration ethnic, religious, expertise, party affiliation and gender factors. It was argued in some quarters that enough consultation and consensus building had not been carried out, thus raising doubts about the neutrality of the commission. Despite calls by the opposition groups that they be represented on the commission, the government refused to accede to this request. This then explains why the opposition continued to view the commission as an appendage of NRM—with the chief agenda of legitimizing NRM rule.

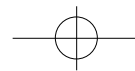
The chairman of the commission, Justice Ben Odok, however tried to discount these fears by arguing that criticisms about the commission's appointment process were based on mistaken notions of the role of the commission. In Odok's view, the commission was a committee of experts and specialists whose role was merely to collate views, analyse them and

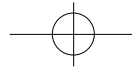
draw proposals for a new constitution. Odok argued further that "the commission's prepared draft constitution would be merely a proposal to government and the country. It is the people themselves who will write the final version of the constitution" (Odok 1993: 242-3).

With respect to the issue of *Ebyaffe* and traditional rulers, the NRM showed clearly that it intended to use the restoration of traditional rulers, and restitution of their properties confiscated in 1966 by Obote, in its scheme of popularizing itself and its political ideas. When it became obvious that coronation of these traditional monarchs would be a contravention of articles 8 and 118 of the 1967 constitution, President Museveni contended that these constitutional provisions were of no consequence and would be amended by the National Resistance Council (NRC). In a closed session of this council, with the president in the chair, NRC passed amendments notwithstanding protests from the Uganda Law Society (Onyango 1996: 195-96).

The Constitutional (Amendments) Statute No. 7 of 1993 and the Traditional Rulers (Restitution of Assets and Properties) Statute No. 8 of 1993 were passed on July 23rd 1993 and provided for two things. First, the statutes made it constitutional and lawful for people to practise their culture and to maintain the cultural institutions of their traditional communities. Secondly, the constitutional amendments repealed Article 118 of the 1967 constitution. However, Statute No. 7 stipulated that such restored rulers would not take part in partisan politics nor would they exercise administrative, legislative, executive or judicial powers. When it came to the restoration of traditional kingdoms, Museveni would not allow the restoration of the Omugabe of the Banyankole, arguing that the Omugabe institution had been divisive and that its restoration would regenerate divisiveness.

Equally impacting negatively on the constitution-making process was the ongoing war situation in the north and eastern parts of Uganda, which had necessitated the declaration of a state of emergency in these areas. This state of affairs constrained debate and access. It is worth noting that as the debate raged, political parties remained banned. On the question of pluralism, Museveni and the NRM made it known a priori that they





were fervently opposed to it. These debates were carried forward into the Constituent Assembly. The members of the commission were appointed by Museveni and mandated to work for a period of two years. When this time frame turned out to be inadequate, the tenure of the interim NRM government was extended by 5 years.

Stages of the Process

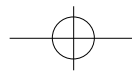
Following the submission of a Bill establishing the Constitutional Commission in 1988, the Commission commenced the process through sensitisation of people about constitutionalism and the core constitutional issues at stake. The commission received public memoranda totalling 15,693 over a period of 21 months from a wide spectrum of Ugandans (Uganda Constitutional Commission 1992: 348).⁸ Seminars were also carried out at sub-county and district levels. It is worth mentioning that NGOs equally played a complementary role to the constitutional commission, by facilitating civic education and workshops in which they sensitised people on pertinent issues such as human rights, decentralisation, modes of governance, separation of powers NRM won 114 of these seats. In addition, 39 women, 10 members from the National Resistance Army (NRA), 2 delegates from the National Organisation of Trade Unions, 4 delegates from political parties, 4 from the youth, 1 delegate from the disabled and 10 presidential nominees were nominated to the Constituent Assembly.

The twin issues of federalism and pluralism remained contentious. While the NRM, as Mamdani notes,

. . . strove to reduce the right of organisations to the right to participate in the resistance councils at the expense of all other forms of political and civil organisations . . . [and] to define rights in an extremely individualistic manner, and thereby divorce the discussion on the rights from that of power . . . the parties on the other hand focused on the question of power exclusively.

NRM wanted political parties to have no independent existence outside

8 • The memoranda ranged from those received from resistance councils (RC1-9, 525, RC2 - 2,170, RC3 - 575, RC4 - 13, RC5 - 36), to those received from individuals (2,539) and groups (835).

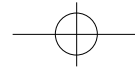


the umbrella of the NRM until 1999, five years down the road after the enactment of the constitution. The draft constitution recommended a non-party political system. It called for the presidential and parliamentary elections to be held without participation of political parties. The president, it noted, would govern through a national council of state (AC 22/1/93: 2). At the expiry of five years after the enactment of the constitution, a referendum to decide whether the movement system should continue or not, would be held. Under Article 94(2), of the constitution, every Ugandan was entitled to be a member of the NRM. Equally, all posts were to be accessible to all citizens via elections.

The Democratic Party under Ssemogerere had, during the presentation of views to the commission, favoured proportional representation, arguing that this would facilitate a broad-based representation in the legislatures of the local and central governments. Ssemogerere had observed that this could more or less correspond to the relative strength of various political platforms, corresponding to the political parties, in the country. In his view it was a moral obligation to strive to remove any barriers to political participation (Barya 1993: 7).

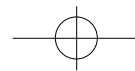
A survey carried out by the Constitutional Commission found that most Ugandans supported the movement system. Accordingly, the movement system garnered 1299 points compared to 625 garnered by pro-pluralism forces (*New Vision*, 27th August 1996). On the question of federalism, the NRM negotiated an alliance of sorts with monarchists that saw them break ranks with the UPC and the DP, who preferred greater centralisation of government, in favour of a decentralised form of government. Prior to the Constituent Assembly process, the government had through a Statute (S. 17 CA Statute 6/93) restored the monarchies after amending Article 118 (2) of the 1967 constitution. This decision fell short of popular acceptance given the fact that no referendum was used to determine the people's views on the restoration of these traditional institutions. What seemed to encourage the NRM to take these measures was its past record, which had seen it restore security and prosperity to Uganda and thereby secure legitimacy for the state. The authority of the NRM's position rested on its solid pro-people activities and achievements in contrast to the proponents of party politics who, in the context





of Uganda's history, were on shaky grounds. The latter lacked a vision and social programme around which they could rally Ugandans. Parties were seen as mere avenues for the old forces, that had previously played a predatory role in relation to the society and which had plunged Uganda into chaos, to reenter the political stage. To Ugandans, they were mere vessels through which élites mobilised, aggregated, articulated, negotiated and contested power. Pluralists and federalists equally seemed to lay greater emphasis on first generation rights of association, expression and freedom of the press while the Movementists, seemed to articulate positions on the primacy of the second generation rights of access to means of production for peasants, and the right to representation in decision making fora at the grassroots. The victory of pro-NRM forces in the Constituent Assembly elections seemed to vindicate constitutional commission findings on the question of pluralism. Eventually, this position carried the day in the Constituent Assembly when it defeated a combined assault by pluralists and federalists.

It was assumed that the Constituent Assembly, having been elected by the people, represented their will and could thus debate and amend the draft constitution on the people's behalf. However, despite attempts to make the assembly as representative as possible, it remained predominantly Movementist and seemed to push the dominant Movement views rather than building a national consensus. Having begun by involving the people through seminars, conferences, and material publications, the process seemed to have reverted back to its elitist roots by confining the process of enactment subsequent to amendments to an elected Constituent Assembly. No attempt was eventually made to test the people's views on the enacted constitution through a referendum. In a bid to legitimize this process, the constituent assembly, having been elected and nominated by a cross-section of interest groups, discussed, amended and compiled the constitution over a period of 16 months. The entire constitution-making process had taken seven years. The constitution was promulgated on October 8th 1995, on the eve of Uganda's 33rd birthday as an independent republic. The launching of the new constitution paved way for a new constitutional order. It equally translated the status of the NRM regime to that of an interim regime necessitating a new election of both the president and parliament by July 1996.

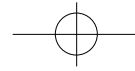


The Uganda process tended to be undermined by the inability of the actors to reach out for a consensus. Most actors seemed to pursue the logic of either having their way or nothing. The Uganda People's Congress, for instance, boycotted the Constituent Assembly elections even though some politicians aligned to it went ahead to participate. Its main interest was the restoration of multi-party politics. Some of its members were part of the 63 members who walked out when the clause on the Movement system which would effectively banish parties for a limited period was being discussed. On its part, the government did not seem so bothered about the UPC. It was driven by a strong perception that it had both the critical majority and the high moral ground over the former. It could thus afford to ignore the UPC and other voices opposed to it. The end result was the solidification of the feeling that the NRM was bulldozing its position through the process. The net result was the perception that the constitution was an NRM constitution.

It is thus imperative that efforts are made to try as much as possible to have a consensus in the constitution-making process. Where the building of consensus fails in the course of the process, efforts must be made in the post-constitution-making process to build consensus if the critical sense of collective ownership of the constitution is to evolve.

A NEGOTIATED DECONSTRUCTION OF THE APARTHEID STATE AND THE CONSTITUTION MAKING PROCESS IN SOUTH AFRICA

True to its commitment to the principle of 'separate development', South Africa had by the late 1980s put a tricameral constitution approved by so called 'white citizens' in a referendum in November 1983. This constitution gave representation to Coloured people and Indians albeit in separate chambers. Those people classified as Black did not have a chamber of their own since they were supposedly catered for by the existing Bantustans—semi-autonomous so called independent 'homelands' that had been built around certain ethnic groups, such as Kwazulu, Siskei, Transkei and Bophuthatswana (Chazan et al 1999: 474). This situation of marginalisation merely spurred protests against the apartheid system that had spawned poverty and violence among non-white South Africans. Gross deprivation, economic and political exclusion animated



township revolts, in the process, pushing the state to a point of near collapse. Faced with international sanctions and internal revolt that had seen work stoppages increase by 200 per cent between 1983 and 1984, by 80 per cent in 1985 and by 93 per cent in 1986 during the war in Angola, the regime desperately turned to more violence, detaining more than 29,000 people by the end of 1986 (Chazan et al 1999: 474). Not convinced about the appropriateness of the state's methods of containing the situation, South African businessmen began initiating talks with the African National Congress (ANC) in Zambia.

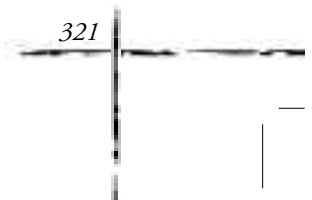
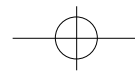
The drift towards a negotiated settlement was enhanced further by the coming to power of F.W. De Klerk and the end of the Cold War (Katumanga 1995: 144-178). De Klerk would speed up the process of negotiation through the release of Nelson Mandela and the un-banning of both the ANC and the South African Communist party in February 1990. It is important to note that the ANC had always favoured negotiations; it was a fact that Mandela had proposed that Prime Minister P. W. Botha facilitate a process of negotiations (Kgositsile 2001: 25). Yet the commencement of political reforms in South Africa took place in the context of extreme ethnic, racial and economic polarization. Thus, much as these existential factors brought about the necessity for constitutional reforms, they also posed grave dangers to the said process. The challenges of the situation demanded the presence of statesmen like Mandela and De Klerk, as well as an enabling environment and conducive institutional framework.

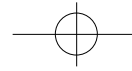
South Africa created this enabling environment for negotiations, which were undertaken over a period of two years, within which organisations were un-banned, jailed leaders released and others allowed to return from exile (*Pretoria News* 1990, *Sunday Tribune*, 15 July 1990). While the ANC demanded and was awarded these concessions, the government demanded from the ANC the renouncement of the armed struggle (*Pretoria News*, 5th July 1990). All these confidence-building measures were undertaken under the auspices of negotiations about negotiations. Prominent in these were the two formal summits between the ANC and the South African government. Indeed out of these summits two crucial protocols—the Groote Schuur and Pretoria Minutes—produced basic-

ly elite pacts that outlined rules of political engagement and negotiations between the ANC and the Government (Sisk. *TD* 1995). This is not to argue that there were no groups determined to arrest this process. Indeed organised violence by the government and its allies against the pro-reform groups saw the death of more than 13,000 South Africans.

In April 1991, the ANC published its desired constitutional principles and structures. The ANC called for a democratic, non-racial, unitary South Africa. It also called for universal suffrage, a Bill of Rights and guarantee of minimum decent and living conditions for all South Africans, including basic rights to proper nutrition, shelter, education, health, employment and welfare. The ANC wanted a bicameral parliamentary system—one for the regions and another for national representation. Despite their disagreements, the ANC and the government were agreed on the principle of bringing on board all political parties and interest groups as the way forward for South Africa. It is this factor that facilitated the evolution of the Convention for a Democratic South Africa (CODESA) talks. Even though the ANC and the Nationalist Party were the main parties, they sought to have as many groups as possible represented in CODESA. These groups included delegations from the Conservative Party and the Bantustans, representatives of the Traditional Leaders (under the Congress of Traditional Leaders of South Africa—Contralesa) and the Congress of South African Trade Unions, and delegations from the Inkatha Freedom Party, the Pan African Congress (PAC) and the United Democratic Front. The inclusion and representation of as many shades of opinion as possible was meant to give legitimacy to the process. In all, a total of 19 social formations were represented.

Notably the ANC and the South African ruling elite in principle agreed to a negotiated deconstruction of the apartheid state. State deconstruction here entails a systematic re-organisation of the political, economic and social framework within which the political processes of the state are organised. It also entails the dismantling of the organising ideology of the state. In South Africa, deconstruction was to take place through the constitutional path. The challenge to the constitutional process was that of offering hope and empowerment to vast numbers of people who had previously been dispossessed and underprivileged while allaying the fears of





the privileged. This was the critical task of the transition process. Transition in this sense could be perceived as a critical interface between the process of abandoning the apartheid state, through the deconstruction of the state to the reconstruction of a new state on the basis of a new constitutional dispensation. Transition here can also be understood in terms of institutional and actor change at one level, and the change of value systems and the normative order at another.

Demands

Transitions, as we have already seen, are about a change to an alternative dispensation or in the way of doing things. Constitutional reforms engender transitions to the extent that they facilitate institutional change which is a prerequisite for responding effectively to state crisis. Constitutional reform is akin to a political revolution from above given the fact that both the institutional structures and the normative values that undergird them are replaced. In the case of South Africa, while the majority African population was driven by the desire to end “white” domination and to enter a new socio-economic and political dispensation, the “whites” were driven by a sense of fear and wish to retain their socio-economic privileges. On both sides of the divide were extremists who did not want to compromise. There equally existed particularistic interests pushed by Bantustan states like Kwazulu and Siskei. These Bantustans sought special status, with Kwazulu specifically seeking a federal status.

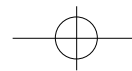
For the ANC, the Apartheid State was the cause of the South African state decay and thus had to go. It sought an end to the Bantustan ‘states’ and the existing racially defined legislature; it championed the setting up of an interim transitional government of national unity to manage the transition process⁹ and a Constituent Assembly elected on the basis of proportional representation to draw up and adopt the new constitution. It rejected the Nationalist Party’s demand to control the transition process. NP would later propose the idea of consent of at least some of the minority parties prior to the passing of any legislation. This stemmed from the accusation that the Constituent Assembly process would be

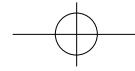
⁹ Transition in this sense was perceived as the interface facilitating a shift from one era of statehood to another.

dominated by the ANC, with the effect that the ANC would have its way. The ANC rejected this proposal too, arguing that it sought to perpetuate the *status qua*. Those opposed to the ANC contended that the ANC sought to impose an un-elected government on South Africa that would rule by decree.

The initial principle of consensus adopted in the first CODESA talks ensured consensus and advancement only on the issue of a constituent assembly and the constitutional principles. Later in CODESA II, the ANC and the National Party began to make compromises. The process of concessions was initiated by Joe Slovo who asked the ANC to address the fears of bureaucrats and security personnel on the issue of job security, retrenchment packages and a general amnesty. He called for ‘sunset’ clauses that would operate for a certain period to protect the ‘White privileged position’ (Slovo 1992: 36-40). While rejecting the idea of a collective presidency, the ANC accepted devolution of powers to regional and local governments. The Nationalist Party acceded to the principle that the new constitution would be ratified by a two-thirds vote of the Constituent Assembly and that where this was not possible a referendum would have to be held to pass the same.

Once the ANC and the Nationalist Party had agreed on the CODESA accords on the interim constitution, they went out of the way to popularize them to their core constituencies. The next concern was about how to bring on board the other actors like the Inkatha Party, which together with the Ciskei and Bophuthatswana Bantustans, the Afrikaner militants and the Conservative Party, had joined to form the Concerned South Africa Group (COSAG). This Group had rejected the ANC-Nationalist Party accord. The ANC rejected outright the Inkatha demand for a confederal South Africa and the idea of a white homeland as demanded by the right wing groups. Even then together with the NP, they convened the new multi-party negotiating forum on the 5th of March 1993. Despite disagreements expressed by COSAG, a committee of constitutional experts released a draft constitution. COSAG threatened a boycott, but after further revision of the draft constitution COSAG agreed to participate in the anticipated elections and accepted the draft constitution, which was passed in November 1993.





The Transitional Constitution

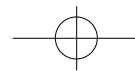
With an election date agreed upon and set for 27th April 1994, along with the establishment of new transitional structures, the constitution was submitted to the 'white' parliament for legislation in December 1993 and it was formally enacted into law. A Bill of Rights was promulgated to ensure equality of persons of all races and equal protection before the law. Institution of justice, economic activity, labour relations, property rights, the environment, children, language and cultural rights to prevent the abuse of rights by the state. A constraining limitation was entrenched in the constitution to curb excesses in the exercise of power by the state. Any limitations of rights had to be reasonable and justifiable in an open and democratic society that respected freedom and equality. The transitional constitution also contained provisions controlling the declaration of a state of emergency, and making certain of the rights non-derogable, while empowering the courts to inquire into the validity of any declarations of emergency and where necessary to order the release of detainees especially if their detention was not pursuant to the restoration of peace and order (Slovo 1992).

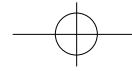
Provisions were also inserted into the constitution calling for compensation for any expropriated property. Such compensation was to be predicated on the principle of justice and equity while taking cognisance of factors such as the use to which the property would be put, market value, history of its acquisition, value of investment on it and the interests of those affected. For the purpose of providing interpretation, protection and enforcement of all provisions of the constitution, including fundamental rights, a constitutional court of eleven judges was set up. To protect them from exogenous influences, six of them were appointed from a list drawn up by a judicial service commission based on the objective of constituting an independent, competent and representative court that would take into consideration inclusiveness with regard to racial and gender factors, while guarding against the possibility of compromising equality. The constitution equally established the office of an ombudsman and a human rights commission for provision of access to protection of fundamental rights. A commission on restitution of land rights to address the claims by persons who were deprived of their land under

racial laws was also to be set up. A bicameral parliament vested with all legislative authority was to be set up parallel to a provincial one. It would have 400 members, 200 drawn from the national list and the others from the provincial lists. Ordinary legislation had to be passed by both houses of parliament.

The executive authority was to be vested in a president elected by parliament. The constitution also made a provision for 2 executive deputy presidents, one of whom should come from a party other than that of the president, to assist the president in running the government of national unity in conjunction with a multi-party cabinet. Every party that won more than 5 per cent of the national vote was entitled to cabinet positions proportional to seats held by it in the national assembly. The cabinet was to operate on the principle of consensus, while emphasizing the spirit of reconciliation. On the question of distribution of resources, every province was to be entitled to an equitable share of revenue collected by the state nationally, at rates determined by parliament and based on recommendations of a financial and fiscal commission (consisting of representatives appointed by all provinces and the national government, which would also advise the national government on fiscal matters and financial allocations). The constitution would be enforced by an independent judiciary assisted by a constitutional court. A two-thirds majority would be needed in the Constituent Assembly for adoption of the final constitution. The same could be approved through a referendum by 60 per cent of the electorate in the event that it was not approved by the Constituent Assembly. In the event that it was rejected, then fresh elections of the Constituent Assembly were to be called under the transitional constitution.

The new orientation of give and take was a total departure from the apartheid political logic which harped on the irreconcilable differences between races and other political categories. The Bantustan states were to be dissolved and replaced with nine new provinces. Recognition was also given to eleven different languages. National and provincial legislation were to determine which of these could be used as media for conducting government business.





The Final Process of Constitution Making

The final process of constitution writing was to be completed by the Constituent Assembly within two years. Essentially, the assembly was mandated to review and where appropriate revise the provisions of the transitional constitution within the spirit and parameters of the constitutional principles enshrined in the transitional constitution. It is worth noting that this compromise was worked out by the leaders of the majority parties—that is the ANC and the National Party—and was later accepted by other parties. It is also worth noting that not all contentious issues were resolved to the satisfaction of all interested groups in South Africa. For instance, the extent of powers that should be devolved to the provinces was debated at length. Eventually, the transitional constitution introduced a decentralised framework involving nine provinces. The transitional constitution gave provincial legislatures concurrent powers with the national government in realms such as agriculture, control of gambling, consumer protection, education, cultural affairs, environment, health, housing and urban and rural development. In the event of a conflict, however, national laws were to prevail. The constitution guaranteed the collective right of self-determination and the right to join and maintain membership in civic organisations. It prohibited discrimination while guaranteeing fundamental freedoms. The demand for secession by the Afrikaner Conservative Party was rejected on the grounds that it had failed to demonstrate the existence of an exclusive Afrikaner majority area upon which such a state could be founded. Secondly, the establishment of the Afrikaner state would in effect deny the blacks in such a territory their fundamental rights by necessitating their removal.

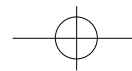
In the final analysis the adoption of this constitution underscored the aspiration and yearning for reconciliation, for national unity and reconstruction that have given vision to the South African Rainbow Nation. Essentially, it pointed to the collective will of the South African elite to build a new state based on a national consensus. One factor that facilitated this process was the realisation that the apartheid state was unsustainable and that any meaningful development lay in the dismantling of the failed exclusive Afrikaner project. Notably then, a new inclusive con-

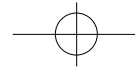
stitutional process was the most rational option left to the Nationalist Party. On the other hand, having failed to conquer the “white” state, a negotiated settlement that would usher in a democratic dispensation was seen as the most realistic option by the ANC. Hence, the collective and inclusive attempts at reaching a settlement by South Africans.

An examination of the South African process points to several factors as a *sine qua non* for the advancement of a viable constitution-making process in a transitional context. First and foremost is the presence of the ripe conditions for constitution-making. In the case of South Africa, the main protagonists, the ANC and the Nationalist Party, had pushed themselves into a stalemate, whose ultimate consequence would have been a costly mutual self-destruction. The deconstruction of the apartheid system was, therefore, perceived as an absolute necessity; it also happened to be tenable. In addition, this realisation presupposed the presence of statesmen who understood the limits and ultimate dangers of political and military brinkmanship and therefore the need to control their partisans while channelling their participation within a mutually beneficial and acceptable framework. There was the general agreement on the route map towards a new state. The construction of this new state demanded deal-making based on some element of trust and within a framework of sunset clauses negotiated *a priori*. These included the protection of certain economic privileges for white South Africans for a certain period, guarantees of job security for certain apartheid era bureaucrats. The Nationalist Party also understood the mistrust the ANC constituency had for the system and thus accepted the ANC demand for an alternative structure to manage the transition process. Both the ANC and the Nationalist Party elite shared perceptions about a new post-apartheid state and a mutually inclusive South Africa.

THE KENYAN ELITE AND THE STUNTED CONSTITUTION MAKING PROCESS

Demands for constitutional reform in Kenya were initiated by some members of the civil society. This was perceived as the best way to





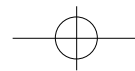
respond to and to contain the crisis afflicting the Kenyan state. This crisis was manifested in the areas of institutional penetration of the society, social participation, conflict management and resolution and resource distribution. On its part, the ruling elite had since independence used the constitution as an instrument for ensuring its political survival. Whenever it was faced with a political opposition that threatened its control over the economic levers of the state, it would respond by a constitutional amendment. One such amendment was passed in 1982 to forestall the formation of an alternative political party by Jaramogi Oginga Odinga and George Anyona. When faced by both internal and external pressure for democratisation, the regime initiated limited reforms whose main objective was to ensure that the incumbent president and the ruling party retained power. The objectives of the nascent opposition elite were not different. Its main drive was to supplant the ruling elite. Thus it showed little enthusiasm for the reform agitation in the early 1990s. It strongly believed that it would dislodge KANU from power. The general orientation of the political class in Kenya is that of capturing the state. State power is perceived as the key issue, essentially because it facilitates wealth and capital accumulation given the salient role the state plays in the economic realm. The capture of the state is perceived by the elite as the *sine qua non* for political and economic survival. This underlies the delicate nature of contemporary transitional politics.

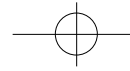
The defeat of the opposition in the 1992 elections saw it embrace the cause of constitutional reform and participate in agitation for such reform in 1997. This change of orientation was informed by their feeling that the constitution as it existed tilted the political field in favour of the ruling party. Constitutional reform, they believed, would give them the best shot at the presidency. Even then, they remained plagued with disunity and thus it was not until May 1997 that the entire opposition elite united with the civil society under the National Convention Executive Council (NCEC) to engage in mass action geared towards forcing the state to initiate meaningful constitutional reforms. The uniting programme was the minimum constitutional reform demands agreed upon in April 1997 at Limuru. These included calls for the repeal of the Public Order Act, Preservation of Public Security Act, Chief's Authority

Act, Films and Stage Plays Act, Penal Code Sections 56 and 57, Public Collections Act and the Elections Code. In addition, the opposition called for the resettlement of victims of ethnic clashes, prohibition of illegal presidential decrees, preventing the Provincial Administration from interfering with the electoral process, registration of unregistered political parties, release of all political prisoners, amendments of sections 7, 15, 16 and 19 of the constitution to allow for a coalition government, the setting up of an independent Electoral Commission, and a constitutional provision to allow independent candidates to stand for elections (NCEC 1996).

It is imperative to note that the minimum reform programme was election-oriented. Thus, while it seemed to satisfy the needs of the political sector, it was seen as of limited value by radical sections in the civil society and youth representatives who favoured total overhaul of the constitution. These variegated perceptions would later constitute the basis for the disintegration of the political opposition-civil society coalition for constitutional reforms. Later a middle ground was achieved under which the facilitative reforms and second-generation rights issues were negotiated and adopted by the Inter-Parties Parliamentary Group (IPPG). These included commitment to provision of water, infrastructure and enhanced security in North Eastern Province (the former Northern Frontier District), reclamation of Lake Victoria to contain the infestation by the hyacinth weed, depoliticisation of food distribution, repeal of the Outlying Districts and Vagrancy Acts, creation of job opportunities to contain unemployment, resettlement of all ethnic clashes victims, an end to harassment of squatters and hawkers and end to land grabbing.

Prior to the IPPG accord, the National Convention Executive Council (NCEC), which had been established by the National Convention Planning Committee (NCPC), called for the first civil disobedience rally on 3rd of May, 1997 at the Kamukunji grounds. Violence visited on protesters by state security forces did not deter the NCEC from calling another rally, the next time at the Central Park on the 31st of May, 1997. This rally was equally broken up by police and the paramilitary General Service Unit (GSU). It resulted in the death of two Kenyans.

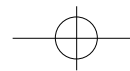




NCEC called for mass action on the 7th of July 1997 across the entire republic. In the ensuing demonstrations, more than fourteen Kenyans lost their lives including four university and one secondary school students. These riots were also accompanied by intensive looting and destruction of property by both the police and members of the public. Coinciding with the Head of States' conference of the Inter-Government Authority on Drought and Desertification (IGAD), the demonstrations were a diplomatic embarrassment to the government. More than anything they eroded the government's prestige and moral standing both at the local and international levels. This was the central objective of the NCEC—to de-legitimize the government. As far as the NCEC was concerned, to the extent that the Government was perceived as legitimate, demands for constitutional change would remain illegitimate in the eyes of the public.¹⁰ One of the side effects of the *Saba Saba* mass action was the fall in the value of the shilling. The Central Bank had to inject US\$ 29 million into the market to stabilize the currency at Ksh 58.00 for the Dollar. Against the Sterling Pound, the Shilling slipped to Ksh 97.26 down from 93.39 for the Sterling Pound the week prior to the *Saba Saba* riots. Worse still for the government, the riots similarly affected performance at the Nairobi Stock Exchange whose trade volume decreased by two thirds, thus forcing the business sector to call on the government to enter into a dialogue with the opposition. This was the context within which Moi promised to call the ruling party's National Executive Council to consider reforms.

The NCEC, on the other hand, threatened more mass action geared towards disrupting any attempts at staging the 1997 elections prior to reforms. It also called on the business community to come out onto the reform train since the latter stood to gain (*East African Standard*, July 14-20, 1997). KANU subsequently published a list of the reforms it considered acceptable. Additional pressure on the government came from the multilateral development partners who also accused the state of renegeing on her commitment to weed out corruption. The International Monetary Fund (IMF) declined to present Kenya's loan request to the directors for US\$ 37 million, being the second installment of the Enhanced Structural Adjustment Facility (ESAF). Failure to meet the requirements of the IMF threatened to deny the government additional

¹⁰ • The Authors of this paper were privy to NCEC central planning and strategies.

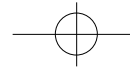


US\$ 72 million structural adjustment credit from the World Bank and US\$ 125 million loan for the energy sector reform and power development project which had been approved on 19th June 1997 (*The East African*, 28 July-3 August, 1997). This IMF action saw the shilling slump to Ksh 72.20 for the US dollar and Ksh 115 for the British Pound. These factors seem to have forced Moi to initiate some form of political dialogue with the opposition with a view to regaining control over the political situation. It was becoming increasingly clear that things could get out of hand. Moi, for instance, announced that he had lifted the requirement for permits to hold public rallies. He also instituted further discussions with the religious leaders who impressed upon him the need to initiate dialogue with the NCEC.

It was in the context of these increased pressures that the Attorney General published a new bill seeking to establish a commission to review the constitution. The bill was to facilitate collection of views from Kenyans on proposals to amend the constitution. The commission was to subsequently make recommendations to the National Assembly. It was to be appointed by the president in consultation with other interested parties. It was to have a 24-month term of office with the possibility of a maximum of 12 months extension approved by parliament. However, these concessions by the government were rejected by the NCEC which felt that the only language the regime understood was that of pressure. Notably the NCEC went ahead to call for a national strike on 8th of August 1997. In the ensuing melee, four people lost lives, among them two policemen, while activity in Nairobi city, Central Province, Nakuru town and district and Nyanza Province remained paralysed as a result of the strike.

Probably the pro-reform movement's broad reform agenda, as opposed to the adoption of a mere anti-Moi crusade, nudged the regime into appropriating the reform language in a bid to forestall the possibility of an election boycott. The government started to act in total contrast to its initial uncompromising stand. Police violence and mass action had generated conditions that had increasingly de-legitimised the regimem, making the public to increasingly view the reform process as widely legitimate. Additional pressures from outside Kenya, and threats to the economic



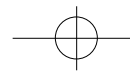


interests of the ruling elite seemed to catalyse it into accepting the role of the religious sector as mediators in the reform process. Yet this is not to argue that pro-reform lobbies had indeed succeeded in finally bringing the state to the reform table. What it had merely achieved was to legitimize the reform agenda while remaining unsuccessful in motivating the regime to see reform as a zero option. As if to confirm this fact, the regime initiated violence at the Coast which ended up with over 100 people dead and another 100,000 rendered homeless. Clearly the strategy of the regime was to disorganise the reform movement by seeking to blame the violence on some of the coalition members of the NCEC, in this case, the Islamic Party of Kenya. Displacements also had the political objective of 'sanitizing' the Mombasa area about the presence of communities from up country which sympathised with the opposition in the run up to the 1997 elections.

But as the NCEC increasingly adopted the platform of comprehensive reforms, its conservative coalition partners from the political class began to look out for an exit option. They increasingly began to see NCEC human rights activists as a threat not only to their political careers but also their political standing. Worse still for the NCEC, it lost the critical support of the donors who became uneasy about the increasingly radical demands of the NCEC and began pressurising some of its members to initiate dialogue with the regime. Most ambassadors of Western countries in Nairobi were increasingly getting concerned about the possibility of an election boycott and its potential effects on both the stability of Kenya and the interests of their countries. Foremost among these pro-dialogue envoys were the German and British ambassadors. Thus by August 1997 and subsequent to the second national convention organised by the NCEC, only radical civil society organisations (CSO) and a few radical politicians remained committed to the idea of comprehensive constitutional reforms advocated by the NCEC.¹¹ The rest of the opposition politicians in parliament joined their KANU colleagues in initiating what would become known as the Inter-Parties Parliamentary Group (IPPG) discussions.

This split between the political class and CSO factions in the NCEC can be better understood if we examine the issues the NCEC sought to bring

11 • Among those who stayed in the NCEC were Hons James Orengo, Paul Muite, and Raila Odinga. Prof Anyang' Nyong'o returned to the NCEC fold after confirming his misgivings of the IPPG.



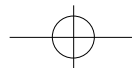
to the table. To NCEC any reforms that did not strive to re-configure the state with a view to transforming economic, political and legal structures could not facilitate constitutional stability. In giving voice to this vision its Second National Convention plenary session at Ufungamano House from 26th to 28th August, 1997 passed resolutions whose basic aim was to stem the arbitrary misuse of power by giving the voice to marginalised groups while protecting minorities. Essentially, it also demanded that the state declare that education, health and access to land are rights which all Kenyans must access. In one of its far reaching recommendations, the National Convention Assembly called for the addressing of the land question, nationalisation of land occupied by multinationals (with compensation) and redistribution of the same to the landless. It also called for provision of security and infrastructure to the former Northern Frontier District of the country. The National Convention Assembly (NCA) also adopted a resolution calling for the criminalisation of economic sabotage (wanton importation of products that wreck the existing local industries) and calling for legislation providing a life sentence for such crime.¹² No wonder some elements of the political class found some of these ideas too radical.

Parliamentarians eventually passed legislation for the minimum reforms which they believed were critical for holding free and fair elections. Most of the opposition leadership were persuaded into believing that KANU would live up to its promise of not only honouring the IPPG package but that it would sincerely initiate the comprehensive constitutional reforms subsequent to the elections—if it won those elections. The IPPG package repealed among other laws, the Chief's Authority Act, and allowed for an expanded electoral commission (with the additional commissioners coming from the opposition). The opposition were allowed to hold meetings consequent to notifying the police with the repeal of the Public Order Act.

In reality, KANU sought to use the IPPG talks to outmanoeuvre both the opposition and the NCEC. In this, it succeeded beyond its expectations. Once this was achieved, it went back to its old tricks. The opposition had been duped once again. Disunited, it went into the elections which it lost. Both KANU and the opposition had been motivated by the pursuit

12 • From the field notes of these proceedings attended by one of the authors of this paper who was also a member of the NCEC.





of raw power. Convinced that KANU would honour her commitment to the minimum reforms and subsequent to the elections facilitate comprehensive reforms, the opposition parties in the IPPG went in for the elections of 1997. The opposition not only lost the elections but in addition KANU would later renege on the letter and spirit of the reform process.

The Bomas Talks about Reforms

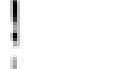
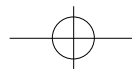
Subsequent to the elections the state half-heartedly engaged the opposition and CSOs in talks on constitutional reform. These culminated in what came to be known as the Bomas of Kenya and Safari Park talks. With a fragmented CSO sector and opposition, attempts at pressurising KANU were further undermined by the decision of the National Development Party (NDP) of Raila Odinga to cooperate with KANU. Despite the initiation of the process, subsequent enactment of the Constitution of Kenya Review Act, the formation of the Constitution of Kenya Review Commission and the appointment of Prof. Yash Pal Ghai as Chairman of the Commission, the ruling elite continued to procrastinate on the process. Time was wasted on wrangles over the appointment of commissioners. KANU categorically refused to consider the idea of entrenching the Act in the constitution despite calls for it to do so by the radical civil society. Mistrust of KANU saw the religious sector and other CSOs organise what became known as the Ufungamano Review Process. The KANU-dominated parliamentary constitutional review committee went ahead to appoint Professor Yash Pal Ghai as the chairman of the commission, most of whose members had been appointed by and were aligned to the ruling party. Dr. Ooki Ombaka, on the other hand, chaired the Ufungamano constitution review process.

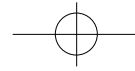
The review process spent ten months of its two years mandated tenure seeking to unite both initiatives. In a bid to unite the two initiatives, Yash Pal Ghai refused to take his oath of office and entered into negotiations with the Ufungamano group. These ended with the unification of the two initiatives, with Dr Ooki Ombaka emerging as Ghai's deputy. In the end, parliament passed the Constitution of Kenya Review Act facilitating the commencement of the process of collecting views from *wananchi* prior to writing a draft constitution. Section 4(1) (c) of the

Review Act called for a national conference to deliberate on the draft before taking it to parliament for enactment. The Ghai commission was to be independent and immune from any judicial processes initiated against it. It was not to be subordinate to the judiciary. It was an organ of the legislative arm of the state charged with the responsibility of facilitating a comprehensive review of the constitution and was only accountable to the Kenyan people under the supervision of the parliamentary select committee.

Attempts by the NCEC to have the process divorced from parliament failed, as the rest of the parliamentary opposition and most CSOs wished to get on with the process. Even then, the regime continued to put obstacles before the commission. It sought to use state-friendly commissioners to derail the process. Even though the commission strove to give the impression that all was well, internal battles continued to rage. Ghai while in the process of handing in the first draft to the parliamentary committee on constitutional review in September would later accuse some of the commissioners as "dishonest and despicable characters". Most of the disagreements between a section of the commissioners and Ghai stemmed from his commitment to having the review process done in time and his strictness to financial probity. Yet most of the commissioners seem to have been interested in dragging the process over a long period to guarantee themselves continual financial remuneration. It is such elements who found themselves serving the regime's objective of sabotaging the process. When this failed, two lawyers filed court cases against the commission claiming that the latter had overstepped its mandate by making far-reaching recommendations for the reform of the judiciary. The commission ignored these interruptions and went ahead to complete the draft.

The success by the Ghai commission to release a draft constitution in September 2002 saw two judges of the High Court go to court in an attempt to scuttle the process (*Daily Nation*, 20th September 2002). The process suffered an added additional blow when the President pronounced the commission dissolved on 17th October 2002 accusing it of being a tool of the opposition. He followed this declaration with the dissolution of parliament on 25th October 2002. This was, despite the fact





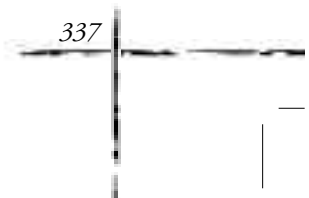
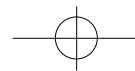
that the delegates for the constitutional conference had arrived for the same at the Bomas of Kenya ready to debate the draft constitution and despite the fact that the commission had expended Ksh. 1 billion since its inauguration (*Daily Nation*, 15th January 2003, p. 4). Afraid that the National Conference delegates would defy the order to disperse and proceed with the conference, the regime sent the police to seal off the venue of the conference at the Bomas of Kenya. The acrimony between Ghai and the rest of the commissioners would get reanimated when he suggested that they should not be paid salaries after the 3rd of January 2003. Led by Prof Okoth Ogendo, the chairman of the research and drafting committee, the commissioners accused Ghai of failing to work with the commission and instead handing its work to an informal group working under the auspices of an NGO think tank—the Institute of Economic Affairs—(*ExpressionToday*, February 2003, p. 7). He also alleged that the review process had been rushed and thus needed to be redone. On its part, the new NARC government—which as a campaigning opposition coalition had committed itself to having a new constitution within its first 100 days in office—postponed the date for a new constitution to June 2003. The new minister for constitutional affairs announced that commissioners would not be paid their salaries until parliament amended the Act to renew their terms. Those opposed to Ghai also vowed to lobby parliament against the idea of reducing the number of commissioners. Some members of the NARC coalition have also expressed concern that the government is no longer interested in the process.

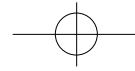
The foregoing review of the route map of the process leads to the following observations: (a) that the constitution-making process has had no support from the ruling elite; (b) that the opposition political elite's support and interest in the process was not driven by commitment to genuine reform, but rather by the need to facilitate the evolution of a coalition that could be used to defeat Kanu; and (c) that elite political interests continue to block the advancement of the process. Underlying the ruling elite's lack of support for constitutional reform is its fear of the institutionalisation of politics and the likely emergent social order. Institutionalisation brings in its wake the need for the evolution of an inclusive process and also the mechanisms for bringing in the excluded. Institutionalisation of politics threatens the hegemonic exercise of polit-

ical power by the elite. Constitution-making is about institutionalising politics. It is about regulating politics. Lack of institutionalisation of politics impacts negatively on the transition process.

It has to be borne in mind that a constitution should express the values and principles which are fundamental to a people's national identity and character. Consequently, then, any attempts to develop an enduring constitution must of necessity eschew political expedience and horizontally fragmented sectional interests. The Moi regime's virtual sabotage of the review process was executed with arrogance informed by the feeling that it had the capacity to ignore the views of the population and impose its will. The NARC government on the other hand rode into power on the back of reform promises. It still enjoys a lot of good will and support from the majority of Kenyans, if the 70.5 per cent vote given to President Kibaki and the more than 130 parliamentary seats won by NARC are anything to go by. If this popular support is harnessed, the constitutional reform process can be given a new birth and a new orientation, such that it helps to forge greater national unity on the basis of the example of the pan-ethnic coalition that the opposition mustered for NARC's electoral victory. People in Kenya might then learn to aspire towards a Kenyan national identity. Constitutions that seek to reconcile societies must seek inclusiveness if they seek to endure the test of time.

The constitution reform process has so far failed to advance due to the failure of those in favour of its success to engender the ripe conditions for its enactment. They have not been able to find a solution for the fragmentation of the social forces and unprincipled alliance-making by the political class. More important is the unwillingness of the social forces involved in the reform process to consider drastic alternatives that can go beyond elite interests in order to anchor enduring political and social values. The constitution review process has also failed to advance due to the perceived threat the proposed constitutional changes portend for power wielders. It could not be used to facilitate renegotiation of the national contract due to the fact that the operational and dominant logic in the state is still that of exclusion and has a predatory character. Moi in the run-up to the 2002 elections was clearly unwilling to facilitate a nation-building reconciliatory constitution-making process. Instead Moi





launched the so-called Uhuru Kenyatta “project” whereby he meant, by all intents and purposes, to safeguard the interests of the ruling elite in the hope of maintaining the status quo.

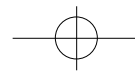
There is no doubt that there is need for a new social order on the basis of the renegotiation of the contract among Kenyans, and between them and a reformed state. Such negotiations should strive to engender commitment towards certain shared values and programmes aimed at transforming the lives of citizens. No constitution would be expected to evolve values of mutual respect among citizens if it is woven around the ideology of exclusivism. The prevailing politico-economic culture remains exclusivist and, as a result, has allowed a situation where a small elite dominates state power and consequently state resources, while the majority of Kenyans wallow in poverty. This state of affairs may engender further national crisis. It will continue to generate feelings of alienation among many Kenyan communities, some of which feel they have been denied economic citizenship mainly because of their socio-cultural identity. This feeling is prevalent in North Eastern and Coastal Provinces, among ethnic groups excluded by both the Kenyatta and Moi regimes. No reform process will advance in a context where elites feel they can continue to use state power to undermine others while continuing to hold onto levers of power. To the extent that there exists no trust and confidence building measures, the process will stagnate in elite nested games; yet, without resolving the issues of power relations and resource allocation, the crisis currently experienced by the state will persist and there will be no meaningful transition.

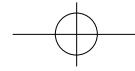
It is apparent that the elite are agreed on the need of power sharing. The sticking point is the formula for that distribution. Yet pre-election coalition was about this factor whose objective was to prevent the emergence of post-election ethnic domination. What is also clear is that they remain reluctant to discuss issues relating to the distribution of state resources. Yet, it is necessary to discuss this in order to address the current crisis in the state. So far, the new NARC government continues to express support for the reform process. Indeed its on-going reforms in the judiciary and the recent enactment of anti-corruption and public ethics laws are cases in point. However, the latter two have yet to be implemented.

For sometimes after the elections it appeared as if the revival of the constitutional review process would take a back seat. However, with sustained pressure from sections of the NARC ‘family’, the process was revived on 28th of April 2003 and was still in its first month of business when this work went into press. However, it should be pointed out that the way forward in the constitution-making process remains fragile. There are already disagreements over many provisions in the Draft Bill prepared by the Constitution Review Commission of Kenya (CRCK), and which form the agenda of the National Constitutional Conference (NCC). Some of the contentious issues include: the proposed dual-executive made up of the president and the prime minister, appointment of ministers who are not elected representatives, the recall of MPs, scope of devolution of powers, age limit for a president, etc. What happens in the end will depend on the spirit of accommodation and commitment to the national interest on the part of the delegates to the conference (which incidentally include all the 222 MPs, three delegates from each of the seventy districts [210] and 197 made up of other indigenous stakeholders).

A COMPARATIVE RECAPITULATION OF THE THREE CASE STUDIES

Several observations can be made out of the three case studies. In the three situations, the constitution-making process has been perceived as a means through which the state crisis can be resolved. In South Africa, it was perceived as a means through which a transition to a new dispensation could be engendered. In Uganda, it was perceived as a means through which the state could renegotiate a fresh social contract with the society. In Kenya, however, the future of the process hangs in the balance, as various groups continue to pursue conflicting interests. While those in the opposition during the KANU regime continued to invoke constitutional review as a populist gimmick to de-legitimize the government of the day without being seriously committed to the objective of genuine reform, CSOs saw and still do see the reform of the constitution as a means through which the governance crisis can be resolved and the state put back on its rails. Unlike KANU which saw the process as a means through which political tensions could be defused without the undertak-





ing of any meaningful surgical operations on the state's institutional framework, the current regime is already divided over the substance of the changes to be effected in the current constitution.

In those countries where the process has been completed, it is because the ruling elite were in favour of the process. Indeed, in Uganda and South Africa the ruling elite initiated the process. They perceived the process as rational, desirable and viable. In these two situations, the elites saw reforms as essential for their survival and for a new beginning for the state. They had the national interest at heart, besides their own nested elite interests. They were thus willing to negotiate with others on the basic minimum reforms necessary for state survival. Once they embarked on the process, they committed themselves to it and sought to popularise it. The same cannot be said of Kenya's process. The KANU elite, while in power, remained enmeshed in its logic of exclusions. This was driven by fear of losing out on its economic interests. Historically, the KANU elite had amended the constitution repeatedly to entrench its interests. The state and constitutional crisis in Kenya is a consequence of constant use of the constitution to entrench vested interests to the exclusion of national interests. Notably, there existed under KANU, a correlation between constitutional amendments, increased levels of corruption and regime repression in Kenya (Katumanga 1998).

The trajectory the process takes is informed by the dynamics in each state. While the Ugandan process began with a Government-appointed commission, the South African process was facilitated mainly by negotiation between the ANC and the Nationalist Party elites. The Ugandan process descended down to the ground for popularisation before being taken up for final enactment by parliament. The Kenyan process, like the South African process, has been punctuated by protracted negotiations, but unlike the South African process, which was undergirded by trust, the Kenyan process has been plagued by manipulation, pursuit of self-interest and mistrust. Unlike the Ugandan process that was undermined by the hegemonic roles played by the dominant actor, the South African process was enhanced by the balance of forces between two core actors—the ANC and the NP. The negotiations between these two major players sought to evolve neutral structures to supervise the reform process and to

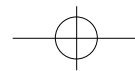
institute a new republic of equals. In the South African situation, transition refers to the interface between the old system and the new democratic society. This points to the fact that legitimisation is not a function of the extent of public participation but rather of the extent to which attempts are made to build a consensus on divisive issues.

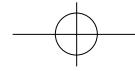
One important lesson of experience from the South African process is the way efforts were made prior to the elections to satisfy the interests of the majority while assuaging the fears, and protecting the interests, of the minority. The winner-takes-all principle was rejected, at least in the immediate post-election period. From a theoretical point of view, it can be argued that constitutional reform in a polarised society can only advance if a balance is struck between the interests and fears of social formations; when “sunset” clauses that hedge and undergird these are negotiated *a priori*; when the transition process engenders confidence in all the core social forces; and when the resultant constitution creates a win-win situation for all social actors relative to their position before the negotiations as well as to their position after the accord even if they lose elections or political power.

The South African Bill of Rights, while protecting minority rights, set a framework within which the previously marginalised Black South African majority could seek economic inclusion. Underlying the Bill of Rights' inclusion of economic issues is the recognition of the salience of addressing the issue of the distribution of economic resources in order to overcome state crisis. Any political accord that does not address economic and resource issues cannot endure.

It is notable that except in Kenya, there was in the countries covered in this review an attempt to undergird the electoral process constitutionally by making it the subject of reformed constitutional provisions. The Kenyan process has sought to de-link the two thus exposing the electoral process to elite manipulation and mistrust. The success of the process in Uganda and South Africa should be seen in the fact that meaningful electoral practices were tied to a successful constitution-making process.

The two studies with regard to Uganda and South Africa point to the fact that success of the process is a function of the perceived existence of the



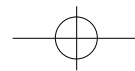


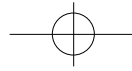
zero option. The elites must perceive themselves to be threatened to the extent that the process is seen as the best means of removing the threat to their survival and well-being. Where this condition has not been met, then those seeking reform must generate the perception of the elite being under threat by illegitimising the state. The higher the sense of the illegitimacy of the state, the higher the chance of society rallying behind the reform process. The converse is also a given. The advancement of the process demands that it is made inclusive of all social formations. It also presupposes that those seeking this advancement will be willing to mobilise outside existing state institutions. They must revolt against the existing institutional framework and dare the state in the streets, as a prelude to de-legitimising it. To the extent to which they allow themselves to organise against the state within its institutions and its dominant logic they are unlikely to advance.

In South Africa, the constitution-making process was perceived as part and parcel of the transition process. It helped to evolve a framework for organising a new democratic and inclusive society. In Uganda, the process was used to negotiate a framework on the basis of which a new Republic could be constructed. In Kenya, the process remains polarised thus generating political tensions. Kenya will need to learn from the South African example and, on the basis of broad national consensus, push through constitutional reform that will give Kenya an enduring democratic constitutional order.

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12

THE POLITICS OF TRANSITION IN KENYA, 1992-2003: DEMOCRATIC CONSOLIDATION OR DECONSOLIDATION?

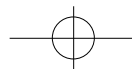
Walter O. Oyugi

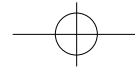
INTRODUCTION

This chapter discusses the political developments which have taken place in Kenya since the late 1980s with special focus on the forces that combined to bring about change, leading to the resurrection of a multi-party political dispensation in 1991; the subsequent developments following therefrom are assessed in terms of whether they have contributed to the consolidation of the democratic achievements made. In addition, an assessment is made of the factors which have been responsible for the 'reversals' where that has been the case.

In his seminal essay on "Democracy's Third Wave", Huntington (1993) identifies the factors contributing to the occurrence and the timing of what he calls the third wave transition to democracy beginning from the period 1974/75 to date. These are:

1. The deepening legitimacy problems of authoritarian regimes in a world where democratic values were widely accepted, the consequent dependence of these regimes on successful performance, and their inability to maintain 'performing legitimacy' due to economic (and sometimes military) failure.





2. The unprecedented global economic growth of the 1960s, which raised living standards, improved education, and greatly expanded the urban living class.
3. A striking shift in the doctrines and activities of the Catholic Church, manifested in the Second Vatican Council of 1963-65 and the transformation of national Catholic churches from defenders of the status quo to opponents of authoritarianism.
4. Changes in the policies of external actors, most notably the European Community, the United States, and the Soviet Union.
5. 'Snowballing', or the demonstration effect, of transition earlier in the third wave in stimulating and providing models for subsequent efforts at democratisation.

Of course, Huntington's list is globally focused. However, a closer look at the list suggests that some of the factors in the list are quite relevant to the African experience as the Kenyan case presented below demonstrates.

Indeed, the movement for democracy in Africa during its inception in the late 1980s was an urban middle-class *revolt* against the excesses of the post-colonial state and its concomitant inability to address the socio-economic needs of the governed. It is the radicalised segment of the urban middle-class that has, since the mid-1980s, mobilised popular support for what is today referred to as the pro-democracy movement. This chapter addresses the changes which have been introduced in Kenya in response to this movement as well as the extent to which the changes have been accepted and consolidated.

In the last decade or so a lot of literature (see the references) has been put out that attempts to assess the extent to which the democratic revival in the Third World has or has not been consolidated. As discussed below these writers have attempted to identify what they consider to be the ingredients of democratic consolidation. But the concept of democratic consolidation still remains contentious if not elusive. This point has been well captured by Bruce Baker (1999), Di Palma (1999a) and Gunther et al. (1995). Baker, for example, observes that so far political scientists do not agree as to which states if any are the 'real' democracies, because the cut-off points for 'democracies' and 'consolidated'. Di Palma is even

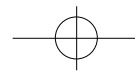
more dismissive in his reaction to the debate on the concept of democratic consolidation: for he finds the term 'consolidation' to be 'loaded and ambiguous' and doubts whether it is either analytically pertinent or politically relevant (Di Palma 1999a: 137-44). But Gunther et al., who have done a lot of work in this area, also agree that "no clear consensus has emerged" as to the meaning of democratic consolidation (Gunther et al. 1995: 5). And what Schedler says of democratic consolidation sums it all: Quite to the contrary, the conceptual fog that covers the term has apparently become even thicker and denser.

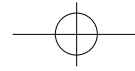
It should be noted at this point that originally the idea of democratic 'consolidation' was introduced as a 'thin' concept to address the challenges of regime stabilisation (Schedler 1998a). Schedler observes further that it was thought to provide answers to the vital question: when are democracies reasonably secured from breakdown?

Notwithstanding the misgivings expressed in the literature about the utility of the concept democratic consolidation, the writer still finds it a useful concept to inform the assessment of the transformation which has been taking place in Kenya since the resurrection of multi-partyism.

On the notion of democratic consolidation, Samuel Huntington suggests that democratic transition can be considered consolidated following two democratic and peaceful transitions of power subsequent to the creation of initial democratic government (Huntington 1993). And in their response to a critique by O'Donnell of their earlier work, Gunther *et al.* contend that consolidation involves a dimension relating to *stabilisation, routinisation, institutionalisation* and *legitimisation* of patterns of politically relevant behaviour, and they add: "we consider a democratic regime to be consolidated when all politically significant groups regard its key political institutions as the only legitimate framework for political contestation and adhere to democratic rules of the game" (Gunther et al. 1996: 151-59). Larry Diamond's position is similar. He avers that consolidation involves not only agreement on the rules for competing for power, but also fundamental and self-enforcing restraint on the exercise of power.

The question though is, at what point in time can a regime be regarded





as sufficiently democratic thereby necessitating the consolidation of the gains? Juan Linz answers this when he writes that a regime can be regarded as democratic “when it allows for the free formation of political preferences, through the use of the basic freedom of association, information and communication for the purpose of free competition between leaders to validate at regular intervals, by non-violent means, their claim to rule ... without excluding any effective political office from that competition or prohibiting any members of the political community from expressing their preferences” (Linz 1975: 182-3). It is evident that Linz is referring to what democracy is, in its most ideal form, which is in many respects a reformulation of Dahl’s *polyarchy* (Dahl 1971).

In fact, earlier on, Joseph Schumpeter had recognised the relativity of the notion of democracy when he distinguished between *minimalist* and *maximalist* democracy (Bova 1997). The maximalist variant would approximate, it appears, what is generally referred to as the ideal democracy, which approximates Linz’s formulation. On the other hand, minimalist democracy satisfies the following two criteria: *participation* in the political process by all normal adults, and *contestation*, namely, open competition in the political process by individuals and parties (*Ibid.*). This is what Diamond refers to elsewhere as electoral democracy (Diamond 1999: 8-10).

Indeed, the criterion of *minimalist* democracy is a tacit recognition that *full* democracy is impossible to achieve. All democracies are democracies somewhere, sometime (Seward 1997). But to meet *minimalist* or *maximalist* criteria, it appears critical that the ingredient of liberty be present, i.e. the freedom to hold and express views and to engage in certain behaviour without government interference (Bova 1997); and, I should add, views and behaviour that do not infringe on others’ rights.

A cursory review of the performance of various regimes in Africa since the advent of the revival of multi-party politics from the late 1980s suggests that there have been more signs of democratic deconsolidation than consolidation. Examining the current situation in Africa, Thomas Carothers (1997) observes that although there have been regimes where some consolidation has taken root in his view e.g. South Africa, Mali,

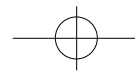
Namibia and Benin, at the same time many of the more than 30 countries that experienced political openings early in the decade of the 1990s have gone seriously off course. Some have descended into civil conflict, e.g. Rwanda and Burundi; and in others, coups have halted liberalisation, e.g. Nigeria, the Gambia and Niger. Elsewhere—in Cameroon, Gabon, Chad, Burkina Faso, and Togo—entrenched strong men have manipulated or co-opted supposedly transitional elections so as to reconsolidate their power. Still in some countries, fraud and severe administrative disorders have marred many elections, as was the case in the recent elections in Zimbabwe, Cote de Ivoire, Tanzania, and in Kenya during the first two multi-party elections in 1992 and 1997. Even where legitimate balloting has taken place, some of the newly elected leaders have been a disappointment, for example, Fredrick Chiluba of Zambia who when his regime lasted, wallowed in the authoritarian habits of his predecessor. And the current situation in Malawi also suggests that Bakili Muluzi is closely following in the ‘footsteps’ of Kamuzu Banda.

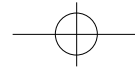
What emerges, therefore, is the fact that democratic consolidation everywhere in Africa, where the experiment is still on, seems to be under jeopardy. The experiences cited above suggest that the opposition politicians that found themselves in power following the resurrection of multi-partyism later turned out to be after all ‘reluctant democrats’ who have never hesitated to use every trick of the political game to ‘rollback’ the little democratic space that has been created since the early 1990s.

The concern of the rest of the chapter is to examine the extent to which the democratic space opened up with the resurrection of multi-partyism in Kenya in 1991 has led to further expansion and consolidation and/or whether it has been characterised by ‘roll backs’ and deconsolidation.

TRANSITION FROM AUTHORITARIANISM TO NEO-LIBERALISM

It is being suggested here that the five factors identified by Huntington did present themselves in different combinations to influence the transition process in Kenya from 1986-1992 when the first multi-party general elections were held for the first time since 1963 (that is, excepting the so-called little general elections of 1966 held to fill vacancies created by





the resignation of the members of the then newly formed Kenya People's Union, later to be proscribed before the 1969 one-party general elections).

The deepening legitimacy problem of authoritarianism that Huntington referred to was well-entrenched in Kenya by the late 1980s. Throughout the Kenyatta and the Moi regimes in Kenya, the state was characterised by steady and systematic consolidation of personal rule à la Jackson and Rosberg (1982). Governance under Moi and Kenyatta was through centralised and personalised institutions. Political participation in the governance process became a preserve of a select few. During the highly controlled electoral processes, the masses were denied the right to freely choose their leaders and were only allowed to legitimise the continuation of the regime in power through the fixing of election results. In five successive elections between 1969-1988, no presidential contests were allowed.

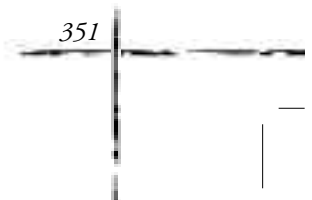
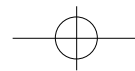
The assault on authoritarianism in Kenya from the mid-1980s coincided with similar developments elsewhere in Africa. Most commentators on this subject tend to agree that the momentum for democratic political renewal was influenced by both domestic (i.e. country-specific) factors and developments in the international environment (Decalo 1991; Ihonvbere 1996). By domestic factors is meant the infrastructure of authoritarian rule which negatively impacted on the people and therefore gave rise to mass movements which challenged the authoritarian order. It is at this point that religious NGOs and middle-class led civil society organisations saw the need to join forces to rid the country of the hitherto well-entrenched excesses of the state. With regard to the international environment, reference has often been made to the demonstration effect which the liberalisation movement started by Gorbachev in the former Soviet Union had on the African states which had hitherto been managed as personal fiefdoms. More important, in relation to the Soviet Union, was the resultant collapse of the Soviet empire and the associated end of the Cold War era, which brought to an end the support which many African authoritarian regimes had been enjoying from the West (especially the USA, France and to a lesser extent Britain). Indeed, the developments in Eastern Europe had a lot of demonstration effect on

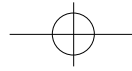
Africa along the lines suggested by Huntington in his formulation. And within Africa itself, the lead taken by Zambia in 1990/91 whereby the incumbent 'strong man' president lost power in multi-party elections, sent shock waves throughout the rest of Africa as a result of which the anti-authoritarian movements would emerge in many African countries on the basis of different lessons of experience as hinted above.

And in the context of Kenya, and with regard to the internal forces, the emergence of the civil society movements led by the urban middle-class including intellectuals and religious leaders (notably the Catholic and Anglican bishops as well as some Presbyterian church leaders) would provide the momentum and the push that ultimately and sufficiently challenged the hegemony of the state in political life and brought about the change that began to be experienced from the beginning of the 1990s.

Thus, the movement for democratic change led by 'opposition' activists in combination with strong support from the religious leaders would force the state to begin the process of accommodation, while at the same time trying to steal the initiative from pro-reform forces in order to manipulate and control the transition process. This effort manifested itself when in June 1990 the ruling party KANU established a review committee to address, in a constitutional context, the emergent polarization within the party and the state. The committee which worked for only sixteen days produced a report that failed to address the key constitutional issues that the proponents of change had been advocating for. Even the belated attempt by President Moi to restore the security of tenure to some of the constitutional positions (i.e. the offices of the attorney general, judges and controller and auditor general) from which it had earlier been removed was not enough to mollify the pro-change groups.

The civic bodies and opposition politicians and activists continued to demand more concessions from the regime as new political formations were taking shape. However, the state was not willing to register any such formations. By mid-1991, a formidable organisation, Justice and Peace Commission-Kenya, had been formed jointly by the Law Society of Kenya and the Anglican Church of Kenya. This organisation would join hands with the newly formed Forum for the Restoration of Democracy





(FORD)—an umbrella opposition movement—to launch a final assault on the regime from June 1991. They would soon be joined by leading donor countries and the Bretton Woods Institutions in pressing for political reform. The latter accused Kenya of human rights abuses and failure to practise democracy. It was this combined pressure from within and from without which finally compelled the KANU National Governing Council to recommend that Section 2A of the Constitution of Kenya, according to which Kenya had become a *de jure* one-party state in 1982, should be repealed. And on 10th December 1991, Section 2A of the Constitution was repealed, paving way for the formation of opposition parties before the 1992 general elections.

WHAT IS TO BE CONSOLIDATED?

Kenya's democratisation path since the resurrection of multi-partyism in 1991 has been of the *minimalist* variant. Therefore, the changes that have been effected between 1991-2002 have mainly concerned the democratisation of the electoral system, even though some changes have also been effected in the area of civil liberties as will be pointed out below.

Three streams of changes were respectively introduced in the run up to the multi-party elections of 1992, 1997 and 2002. It is the extent to which these changes have been accepted and internalised in the body politic that is the subject of discussion in this section. We shall examine to what extent the changes have been *institutionalised*, *routinised* and have become the *legitimate* basis for stable political management (see Juan Linz's formulation above).

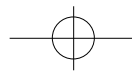
The first set of changes focused on the *opening up of the political system for electoral competition*. This is what the repeal of section 2A of the Kenyan constitution was intended to achieve. A number of associated changes in the electoral system were also introduced:

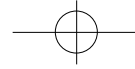
1. Election Laws Amendment Act of 1992 endeavoured to provide for, inter alia, the following:
 - enhancement of the powers of the Electoral Commission in the supervision of elections;

- political parties' nominations to be financed by the parties themselves;
 - with regard to presidential election the Act introduced an additional requirement that the winning presidential candidate besides garnering the highest number of votes cast as well as winning a parliamentary seat must also receive a minimum of 25% of all votes cast in at least five of the provinces; a run off between the two top contenders in the event that the first round did not provide a clear winner was also provided for;
 - the presidential tenure was limited to two five-year terms.
2. The ceiling on campaign funds—earlier on the ceiling had been a token sum of Ksh. 40,000 for parliamentary elections—was removed.

The second stream of changes was introduced in the run-up to the 1997 elections and entailed reforms which were of a constitutional, statutory, penal and administrative nature. These were intended to have the effect of levelling the political playing ground while also removing some aspects of law that had hitherto denied Kenyans their liberty. Between 1993-1997 there was a lot of concerted effort on the part of the civil society organisations and sections of the political opposition to have more changes introduced in the electoral system to reduce, if not remove, the undue advantage which the ruling party continued to enjoy in electoral politics. The movement for change in the electoral laws was a reaction to the experience which the political opposition had gone through during the first multi-party elections in 1992 and which had demonstrated that unless changes were introduced before the 1997 general elections 'to level the playing field', there would be no meaningful contest between the opposition and the ruling party during the second multi-party general elections.

However, largely due to lack of consensus on key issues among the civil society organisations and the opposition parties, no changes had been effected four months to the general elections. And when the said changes did come, they would turn out to be compromises reached between members of parliament and the less radical civil society organisations.





Therefore, as would be expected, the changes were not as comprehensive as the radical elements in the civil society movement had been pushing for. Some of the provisions enacted into law ahead of the 1997 elections are summarised below. This is the package that has come to be known as the Inter-Parties Parliamentary Group (IPPG) Accord.

Minimum Constitutional Reforms

- ❑ A new section (1b) was inserted in the constitution stating that Kenya shall be a multiparty democracy.
- ❑ Membership of the Electoral Commission increased from 11 to 21; the president was to fill the 10 vacancies from a list submitted to him by political parties in proportion to their parliamentary strength.
- ❑ The 12 nominated MPs hitherto appointed by the president were to be appointed by him from a list submitted by parliamentary parties in proportion to their relative strength.
- ❑ The constitution was amended to outlaw sexual discrimination.

Statutory Law Reform

- ❑ With regard to the Public Order Act Cap 56 the following changes were effected:
 1. All political rallies and processions in public places would henceforth require only prior notification to the local police.
 2. Those meetings of political party organs called exclusively to discuss party matters would not require notification.
 3. "Meet- the- people" tours would not require notification.
 4. The police may only stop a meeting or a procession where there was clear, present or imminent danger of breach of peace or public order.

The Penal Code

- ❑ Constitutional and statutory provisions pertaining to the preservation of public security were amended as follows:

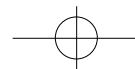
1. The section of the constitution dealing with detention without trial was scrapped.
 2. The section of the Public Security Act dealing with sedition was repealed.
- ❑ The Chief's Authority Act was amended as follows:
 1. Employment of youth wingers by the chiefs was prohibited.
 2. Persons arrested by the chiefs would be handed over to the police for due process of the law and not locked up in the chiefs' camps.
 3. To limit the powers of the chief to collect money or seize property from individuals.
 4. To limit chiefs' powers to require people to undertake work that might be construed as forced labour.
 5. To bar chiefs from engaging in the activities of any political party or canvassing for any party.
 6. To make it an offence for chiefs to torture or subject any person to inhuman treatment.
 7. To restrict chiefs from entering and searching private premises unless with a warrant signed by a magistrate.
 8. To bar chiefs from soliciting Harambee contributions where it can be construed that contributions must be made before public service is rendered.

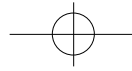
Kenya Broadcasting Corporation Act

- ❑ The Act was amended by inserting a new sub-section requiring that "The Corporation shall keep a fair balance in all respects in allocation of broadcasting hours as between different political viewpoints".

Administrative reforms

- ❑ The Attorney General was required to move expeditiously and put in motion the process leading to the release of any remaining political detainees.





The last series of changes linked to the liberalisation of the electoral process was carried out a few months before the 2002 general elections held on the 27th of December 2002. This time round, there was only one major change introduced, namely, *provision for the counting of votes at the polling stations*, a move which was intended to remove the perennial problem of tampering with ballot boxes *en route* to the sub-district counting centres. Perhaps more changes might have been introduced were it not for the fact that the opposition was focussed on the probability of the achievement of comprehensive constitutional reforms before the elections. It had been earlier hoped that the constitutional review process would be completed in time for the 2002 elections to be staged under a new constitution, but this was never to be, as Moi sprang a surprise by announcing the date of elections, thereby bringing the constitution-making process to an abrupt halt. The review was not reconvened until 28th April 2003 (with the life of the Commission being extended to 30th November 2003).

Below, we assess the extent to which the changes introduced since the resurrection of multi-partyism have been accepted and consolidated. The extent of acceptance or consolidation of the changes in question is assessed under the following headings:

- a) The performance of multi-partyism;
- b) Democratising the electoral process;
- c) On civil liberties.

The Performance of Multi-Partyism

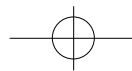
Since the return of multi-party politics, the government has been very liberal with the registration of new political parties. Liberal party registration especially under the previous regime served the interest of the ruling party, KANU in that the proliferation of opposition parties in essence meant the weakening of what would have otherwise been a united opposition front. It is important to note in this respect that the only case when an application for registration by a proposed political party (United Democratic Front [UDM]) was denied was when the regime considered the registration of the party not to be in the interest of the ruling party,

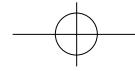
KANU. The interim leader of the proposed party happened to have been a Kalenjin politician (Kipruto arap Kirwa, MP for Cherangani in Trans Nzoia district). And since for Moi the Kalenjin communities were supposed to be supporters of KANU, the registration of a party with the potential to divide the community's loyalty was a proposition that Moi could not live with. UDM had to wait until after the 2002 elections when under a changed political scenario the new regime opted to grant it registration.

It should be noted, however, that most of the political parties which have been registered since 1991 have in the majority of cases been 'briefcase' parties with no fixed abode. On the eve of the 2002 general elections, the number of registered parties stood at 51 (as per letter from Registrar of Societies to the Electoral Commission of Kenya dated 29th Oct. 2002). Of these parties only five were able to contest the presidential elections; another 37 managed to sponsor candidates for the parliamentary contest though the majority of them only managed to do so in very few constituencies, with 31 fielding candidates in less than 10 per cent of the constituencies (with the actual number varying from 1-19 for the said individual parties [Donor Information Centre on Elections in Kenya]).

The agitation for the return of multi-partyism was aimed at providing the electorate with the opportunity to identify with political parties which stood for the values, policies and programmes that appealed to them. The idea was to free the people of Kenya from being captives of the old *monolithic* order of the one-party system. It should be noted, however, that the existence of opposition parties *per se* does not necessarily provide a setting for competing values, policies and programmes especially in developing polities where the basis of political affiliation is more often than not ethnic and regional loyalties. The parties formed since 1991 have all been victims of this situation.

Indeed, it is the ethnic character of political parties that has contributed to the mounting polarisation in the Kenyan body politic even in a situation where a grand coalition has won power, as is the case today. The infighting that is going on within the ruling coalition—National Rainbow Coalition (NARC)—reveals a lot. Indeed, Larry Diamond contends that





one of the greatest threats to democracy in Africa has been the intense politicisation of social life, primarily because the state has traditionally dominated the distribution of what people want and every group has wanted desperately to obtain access to or control over resources (Diamond 1999). Thus, virtually all major groups both political and civil have been oriented to what they could get from the political system rather than to making it work fairly. Put differently, the founders of political parties which have ethnic bases see their parties as instruments for group struggle at the centre for access to scarce national resources and for the struggle for the control of the state itself.

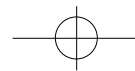
This sort of situation has had adverse effects on competitive politics and concomitantly on the consolidation of *minimalist* democracy. Apart from parochial tendencies in political party formation and power contestation, the performance of multi-party politics in Kenya since 1991 has, in addition, been influenced by the attitude of the regime and the ruling party towards the opposition parties. Between 1991-2002, the ruling party, KANU, did all that was practically possible to circumscribe the operational areas of the opposition parties especially of those parties which were strong enough to pose a threat to its monopolisation of power and privilege. The posture of both the Moi regime and the ruling party had the effect of weakening the operationalisation of multi-party democracy in the country. The behaviour of the KANU regime, for instance, during election time especially during the 1992 and 1997 elections was to deny the opposition parties the freedom to reach out to the voters in order to sell their programmes. In the run-up to the 1992 elections, for example, the efforts by the opposition parties to meet the government and the ruling party with the view to agreeing on the kinds of changes necessary to ensure free and fair elections were successfully resisted. As a result, elections were held according to the procedures and mechanisms that had been in operation under the one-party system.

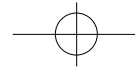
The critical ingredients of electoral democracy or *minimalist* democracy are *free participation* and *contestation*. The resurrection of multi-partyism was not accompanied by relevant legislation to enhance the participation of the new parties in the political process. As a result, the elections of 1992 were conducted under what the politicians referred to as an 'unlev-

elled playing field'. KANU declared certain parts of the country 'closed' regions with regard to competitive party politics. The Rift Valley, for example, was declared a KANU zone and opposition parties were denied the freedom to organise and participate meaningfully in electoral politics in such 'closed' zones. This was also the case in the so-called security districts, i.e. districts in North Eastern Province and parts of Coast Province, especially Tana River district. The electoral process in those areas was flawed right from the beginning. There were problems of those who had reached the majority age being denied the right to register for and receive ID cards, which is a requirement for one to register as a voter and to vote.

Political rallies and meet-the-people tours organised by the opposition especially in the so-called KANU zones were either denied or disrupted, if at all allowed. And even in areas where the opposition had strong following, the security forces were more often than not under the instruction to find an excuse to disrupt opposition gatherings. This kind of behaviour suggests that the ruling party, while accepting the resurrection of multi-partyism under duress, was unwilling to live up to the letter and spirit of multi-partyism and, therefore, consequently denied the opposition groups the freedom to participate meaningfully in the electoral process.

After the 1992 elections, which were won by KANU under very controversial circumstances, the demand for the removal of what the opposition regarded as obstacles to free political participation intensified and involved not only the politicians but also a good segment of civil society as well. Indeed, it is the newly formed National Convention Assembly (NCA) and its implementing organ, the National Convention Executive Council (NCEC), which managed to galvanize popular support for constitutional reforms; initially bringing on board the civil society organisations and the political opposition. But bent on not allowing the political opposition to seize the initiative, Moi working in cahoots with some of the opposition leaders, succeeded in stealing the initiative from the NCEC when his manoeuvres succeeded in halting the negotiations being spearheaded by the clergy to bring KANU and the opposition to work together under the umbrella of NCEC. He was behind the manoeuvres





to create the IPPG. The emergence of the IPPG immediately saw mass exodus of the opposition political leaders, some of whom were already feeling marginalised and threatened under the leadership of NCEC, which was then controlled by non-elected political activists from the NGO sector. For more on the role of NCEC, *see* Mutunga (1999).

The behaviour of KANU towards the opposition did not change even after the IPPG package of reforms had been put in place (see above). KANU and the regime continued to behave as if the opposition parties had no right to free political participation. Indeed, throughout 1992-2002, Moi displayed a stubborn resistance to accept the legitimate existence of opposition parties. He kept referring to multi-partyism as a foreign imposition and opposition parties as agents of tribal conflict. In the run-up to the 1997 elections, communities associated with opposition parties became the object of sustained harassment especially in the Rift Valley and parts of Mombasa Island, a situation reminiscent of the ethnic clashes in the run up to the 1992 elections, being created (Oyugi 1997; NEMU 1993[a]; Kiliku 1992). This would culminate in the ethnic clashes in Likoni constituency in Mombasa, which targeted up-country ethnic groups perceived to be supporters of the opposition (i.e. Kamba, Kikuyu, Luhya, Luo, etc.).

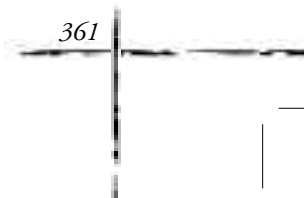
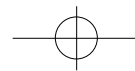
What is more, the regime ensured that the aspects of the IPPG package, which had the effect of levelling the playing field, were ignored at will. A case in point relates to the role of KBC, the leading medium of communication, with the capacity to reach all corners of the Republic, as envisaged under the IPPG reforms. Under the IPPG accord, the Corporation was required to keep “a fair balance in all aspects in allocation of broadcasting hours as between different political viewpoints”. None of this was to be realised as both during the 1997 and 2002 elections, KBC continued to operate as the mouthpiece of the ruling party and even denied the opposition the freedom to air paid advertisements. Ironically, however, the Corporation was always prepared to air those views about the opposition parties that portrayed them in a negative light. Thus, the existence of a multi-party political dispensation did not make any difference in the way the ruling party related to the institutions of government in the furtherance of its partisan interests. It is this kind of attitude that Sandbrook

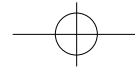
must have had in mind when he observed that although multi-party elections in Africa institute a change in the form of government (from ‘authoritarian’ to ‘democratic’) they cannot guarantee a transformation of the political regime (Sandbrook 1996).

But the divisions within the political opposition itself also played into the hands of the regime and the ruling party between 1992-1997. Since the restoration of multi-party politics, the opposition parties have been at war with one another, in addition to being involved in internal factionalism. Between 1992-1997, the major opposition parties were FORD-A, FORD-K, and the Democratic Party (DP) and later in the run-up to the 1997 elections two existing minor political parties were taken over by rebels from the three main opposition parties. These were the National Development Party (NDP) and the Social Democratic Party (SDP). All these parties experienced deep factional in-fighting as a result of the struggle for leadership. The loss of the struggle for the control of FORD-K is what resulted in the exit of Raila Odinga to NDP, which then enabled Raila to find a party on whose ticket to contest the 1997 elections. The exit of Charity Ngilu from DP to SDP also enabled her to find a base from which to seek to satisfy her presidential ambitions.

The behaviour of political leaders in Kenya, whether in government or in opposition, is such that they never contemplate being replaced as leaders while they are still ‘politically alive’. The party is always perceived as the possession of the leader whose leadership can only be surrendered, if at all, to a selected heir. Any contest as a way of deciding leadership is regarded as unthinkable. Indeed, the failure to cultivate a democratic culture within the individual parties is the basic undoing of the democratic efforts that have been underway since 1991. Today’s political leaders, whether in government or in opposition, have not fully freed themselves from the authoritarian political culture of yesteryears. This has had the effect of denying party members meaningful participation in decision-making in the relevant party organs. It has also denied them the right to free contestation when there is an election within the party.

Indeed, the chaotic pre-election nominations of candidates by the political parties since 1992 is suggestive. All political parties have, in theory,





the laid down procedures for identifying candidates for the various elective positions. These procedures and the rules governing them are rarely adhered to. All the pre-election nominations by political parties since 1992 have been dogged by the interference of the party leadership at every level of the contest, especially nominations for parliamentary and local council elections. There have been cases where a contest produces a winner only for the loser to be declared the winner and ultimately the party candidate. There have also been cases where the winners have been ignored and direct nominations made by the party leadership. In some cases figures are tampered with and the winner's votes are given to the losing contestant. The problem has been getting worse from one election to another. A group of local election observers (National Council of Churches of Kenya [NCCCK]-Catholic, Justice and Peace Commission and the Institute for Education on Democracy [IED]) in a joint report after the 1997 elections had this to say about the situation:

The recently concluded party nominations were marred by malpractices including autocratic behaviour of the party bosses in imposing leaders, massive bribery, violence, and administrative and structural hiccups of the electoral process. The nominations showed that democratic practices have not yet taken root and that the 'big man' syndrome continues to beleaguer Kenya's political system. (*Daily Nation*, Dec. 11, 1997, p.3)

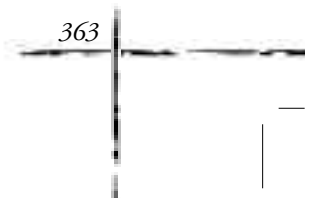
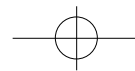
And in the 2002 elections the situation was similar. Widespread violence was reported as aspirants sought party clearance. Violence was especially intense on the days of party nominations and the days between party nominations and the day of the electoral commission parliamentary nominations. The situation was so messy that in some cases more than two candidates would claim to have been nominated, some directly by the party's headquarters, others by provincial/district coordinators, in addition to those who were nominated by the voters according to the agreed formula by either secret ballot or queuing. (*The People*, Nov 21-26, 2002; *Daily Nation*, Nov 21-22, 2002).

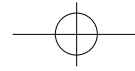
The kind of intrigues during parliamentary and local council nominations have not spared presidential nominations especially where the party leadership has not been settled. This situation presented itself first in the SDP where the 1997 candidate, Charity Ngilu, happened not to be the

de jure leader of the party, having been merely invited in 1997 by the 'real party leaders' to be their flagbearer. When it appeared that the lady was still nursing presidential ambitions in the run-up to the 2002 elections, the struggle for the leadership of the party became vicious. With his own eyes on the presidential contest, Anyang Nyong'o, the party's nominated MP and head of the *politburo*, quickly convened a meeting of the bureau to settle the matter in good time. The decision was to introduce a qualification for the presidential candidate which would have the effect of ruling out Charity Ngilu (the requirement was that the candidate must be a degree holder, which Ngilu was not). That decision was contested by a section of the party, especially the parliamentarians, but to no avail. Hence the formation of the National Party of Kenya (NPK) by Ngilu, which she would later put to good use during the alliance political party formation in the run-up to the 2002 elections. No sooner had Ngilu left than a new rift began to emerge within the *politburo* pitting the head of the bureau and its secretary general. A 'palace coup' was staged that saw Anyang Nyong'o replaced by James Orengo who was soon after designated the party's presidential candidate, and indeed contested the 2002 elections as the SDP candidate.

Another undemocratic choice of a presidential candidate was carried out by KANU when the outgoing party leader and president of the Republic Daniel arap Moi, forced the candidature of Uhuru Kenyatta on the party, which imposition had the effect of creating a major rift within the party. The end result was that senior party leaders, such as the secretary general Raila Odinga (who incidentally was just a few months old in the party having dissolved his former party NDP) and one of the four party vice-chairmen Kalonzo Musyoka from Ukambani in Eastern province, left the party. And they were joined in doing so by the former party vice-president and vice-president of the Republic, George Saitoti, the former long-serving secretary general Joseph Kamotho, and a few other cabinet ministers. The defeat of KANU in 2002 elections can to a large measure be explained by the undemocratic manner in which its 2002 flagbearer was designated.

Similarly, the designation of the National Rainbow Coalition (NARC) presidential candidate was done under very controversial circumstances though the gamble ultimately paid off due largely to the constellation of





the forces that remained in NARC even after the undemocratic nominations. Therefore, the problem of party nomination is a national problem which permeates all levels of nominations for contested positions.

The experience with party nominations and lack of internal party democracy are a manifestation of the lack of a democratic political culture. As Larry Diamond (1999) observes, democratic consolidation encompasses a shift in political culture. The shift from authoritarianism to a participatory political culture is still woefully wanting in fledgling democracies of Africa. And Juan Linz adds that the use of force, fraud and other illegal means to acquire power and influence policies are signs of deconsolidation at the elite level (Linz 1978: 16-18). And this is a problem among the Kenyan political elite.

Democratising the Electoral Process

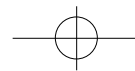
Apart from participation, a major ingredient of *minimalist* democracy (electoral democracy) is *contestation*, namely, open competition in the political process by individuals and parties. This ingredient was a missing link between 1969-1991 when Kenya was a one party system either *de facto* or *de jure*. No one perceived to be unsupportive of the regime could expect to be cleared to run for any elective office. All candidates were required to pledge loyalty to the ruling party, KANU, and to the presidents of the time—Kenyatta and later Moi. The demand for personal loyalty was much more intensified under the Moi regime primarily because of Moi's interventionist style of politics. With the revival of multi-partyism, the situation did not change. KANU still expected all its candidates to be loyal to it and its president. Similarly, the opposition parties that came into the scene behaved in much the same way, as we have indicated above. That was the setting within which the 1992 elections were contested. It is this situation that was responsible for the agitation for constitutional changes to level the playing field with a view to enhancing the opportunity for free and fair political contestation between individuals and parties.

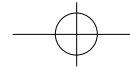
Since 1992, a number of measures have been introduced in the electoral system in order to facilitate free and fair contestation during elections.

The following are worth mentioning:

1. Giving the electoral commission more visibility in the management of the electoral process, a function which had earlier on been performed by the Supervisor of Elections who was based in the office of the Attorney General, and who worked in close collaboration with the Provincial Administration. Note should be taken here that the district commissioner had always been the returning officer in all parliamentary and local council elections for all the constituencies in the district before 1992.
2. Removal of the expenditure ceiling of Ksh. 40,000 in elections (1992).
3. Relaxation of the rules governing the holding of political rallies (1997).
4. The liberalisation of the airwaves which was carried out as part of the wider liberalisation reforms.
5. The legal requirement that the KBC keep "a fair balance in all aspects in allocation of broadcasting hours as between different political viewpoints" (1997).
6. The decision to count the votes at the polling station as a way of ensuring that contestants are not cheated of their votes after the event (2002).

Although the electoral commission was brought on board in a more visible manner to manage the first multi-party elections, it was still too weak as an organisation to meaningfully discharge the responsibilities that go with the conduct of free and fair elections. This weakness forced the commission to continue relying on the Provincial Administration for logistics and security related matters. The Provincial Administration remained a partisan instrument serving the interests of the regime and the ruling party, KANU. It would continue to behave, during the elections, as if opposition parties were illegitimate entities whose activities had to be circumscribed at any cost. Most of the undemocratic acts committed during the 1992 elections were committed in full view of the representatives of the Provincial Administration. They included:



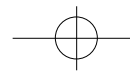


1. Prevention of the opposition from seeking votes in the so-called KANU zones.
2. Denial of IDs for those perceived to be likely to vote for opposition parties.
3. Physically preventing opposition candidates from presenting their nomination papers to the returning officers.
4. Organising and abetting the prevention of voters perceived to be supporters of the opposition from accessing the polling stations.

At the same time, key politicians were busy instigating ethnic animosities with a view to driving out non-KANU voters out of the so-called KANU zones. This was especially the case in the Rift Valley Province. The intention here was to deny the opposition the possibility of gaining 25 per cent of the presidential votes in the Rift Valley, a requirement which was and still is one of the conditions to be met in at least five provinces before a presidential candidate can be declared a winner.

Furthermore, the appointment of the members of the electoral commission by the president alone had the effect of creating a perception in the minds of the opposition leaders that the electoral commission was a partisan organisation serving the interests of the KANU regime.

Again, one of the changes introduced immediately before the 1992 elections was the removal of the electoral expenditure ceiling. This particular provision merely legitimised a situation which had been going on contrary to the provisions of the law. But its immediate effect would be to 'legitimise' political corruption in the electoral process, a problem which persists to date. In the absence of an expenditure ceiling and openness about funding sources, KANU as the party of government that controlled the structure of patronage had been using this position of advantage to extort campaign money from companies and firms that benefited from government patronage. And businessmen wanting to maintain a good relationship with the state are known to have contributed millions of campaign shillings. If the so-called Goldenberg and National Social Security Fund (NSSF) affairs are anything to go by, then the state had also been extorting money from state corporations to finance its elections. All this was done to the disadvantage of the opposition.



From the foregoing, one can deduce that the 1992 elections were held under circumstances which were not conducive to free and fair contestation. It is partly because of the partisanship of the key institutions managing the elections that it became possible for KANU to win the elections in 1992 with a small plurality of the votes (Oyugi 1997; Chege 1995; Throup 1998).

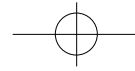
It is the experience which the opposition went through during the 1992 elections that became the stimulus for the push to democratise the electoral process; and the IPPG package of 1997 must be seen in this light. The following changes made under the IPPG are particularly relevant to the democratisation of the electoral process:

1. The membership of the electoral commission was now made inclusive through a constitutional change, which enabled the opposition parties to nominate representatives to the commission. It was hoped that doing so would reduce the partisanship of the commission.
2. Some statutory law reform was carried out, notably, the reform of the Public Order Act¹³ (cap 56 of the Laws of Kenya), which allowed political parties to operate freely without having to obtain a licence from the Provincial Administration to hold public rallies.

Political contestation is about competing for people's minds and, therefore, it is meaningless in the absence of freedom of organisation and communication. Of course, it is not possible to reach every voter directly, particularly in Third World countries. For many in Kenya, the radio has remained the only medium of communication that people rely on to know what is happening outside their own areas. State-owned radio has been the only means with the capacity to reach all corners of the Republic through its national network. The languages used on national radio are English, Kiswahili and various vernaculars. And yet the state has since the resurrection of multi-partyism continued to deny opposition parties access to this facility, this notwithstanding the provision under IPPG that required the KBC to keep a fair balance in all aspects in allocation of broadcasting hours as between different political viewpoints. As

13 • This is the Law which since independence had given the Provincial Administration the power to license all political meetings whether by a cabinet minister or any other individual and had been introduced during the colonial period to control the nationalist movement; it was inherited at independence and given more teeth under the Kenyatta regime especially from the mid-1960s during the struggle for the control of KANU and the state.





already mentioned above, up to the last general elections (i.e. 2002 elections) the Corporation would only give coverage to opposition parties if the net effect was to portray the opposition parties in a negative light. The Corporation was working at the behest of the regime and the ruling party, and in the process contributed to the denial of the voters of the right to hear different viewpoints from various competing parties.

The change in electoral law, which has had the greatest impact on the management of the electoral process, is the one relating to the counting of votes at the polling station. First introduced in the 2002 elections, it succeeded in eliminating the illegal practice of tampering with ballot boxes while in transit, between the polling station and the counting centres (formerly at the sub-district), which were in some cases, tens or even hundreds of kilometres away.

There has, indeed, been some efforts since 1992 to introduce changes intended to democratise the electoral process. However, from the evidence presented, it appears that the ruling party has consistently refused to give away its position of advantage, and this has had the effect of weakening the institutionalisation and consolidation of the changes made since then.

On Civil Liberties

Democracy is not just about participation and contestation; it is also about the enhancement of personal liberty for there cannot be meaningful participation and contestation in the absence of individual rights and freedoms.

At independence, Kenya inherited an 'overdeveloped' state a la Hamza Alavi (in his study of Pakistani and Bangladesh, 1972). Needing special mention is the institution of the Provincial Administration already discussed. The instrument which the Administration has been using, is the so-called Chief's Authority Act, which was enacted in the early phase of colonialism and provided the basis upon which the actions of the Provincial Administration would be anchored throughout the colonial territory. The Act was strengthened after independence and remained in force until 1997 when it was amended as part of the IPPG package. The

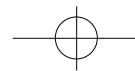
exercise of these powers (see the earlier discussion on the amendments to the Act) was always abused by the chiefs and was responsible for the denial to Kenyans, especially those in the rural areas, of their basic human rights and personal liberties. Those perceived to be critical of the regime were always harassed, by either being arrested or detained at the chief's camp, without any charges being preferred against them.

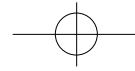
The rights of the people were often violated through:

- a) unauthorised entry and searching of private premises for whatever thing the chief might imagine one may be concealing;
- b) torture of victims as a common method of dealing with real or perceived critics of the administration;
- c) seizure of property from individuals in the name of raising funds for communal projects; and
- d) use of the so-called youth-wingers by the chiefs to intimidate the public.

The chiefs often put all these activities to good use during the elections to target the members of the public perceived to be sympathetic to the political opposition. And more often than not, the chiefs were always acting as agents of the higher administrative authority. Some of the cases of electoral malpractices such as organising to prevent candidates from submitting nomination papers were often carried out by the chiefs. Such behaviour extended to interfering with the free access to polling stations by those perceived to be opposition sympathisers, etc. Therefore, when the Act was amended in 1997 it was hoped that it would go a long way in restoring freedoms to individuals to enable them to participate in elections without let or hindrance. Some achievements have been made in this regard.

At the higher level, the reform of the Preservation of Public Security Act, especially the repeal of the section providing for *detention without trials* well as the one dealing with *sedition*, removed the most lethal weapons that the authoritarian regimes had put to good use between 1966-1991 to stifle political dissent. When the movement for a multi-party political dispensation began in the late 1980s, Moi never hesitated to warn its





advocates that he would not hesitate to take necessary action against them in order to preserve 'peace and tranquility' in the country. The action in question was detention, and, indeed, when the opposition gathered sufficient momentum and challenged the state by scheduling a meeting for Kamukunji grounds in Nairobi on July 7 1990, some of the opposition leading lights (former cabinet ministers Kenneth Matiba and Charles Rubia, and Raila Odinga) were detained before the material day and the public was prevented from accessing the venue of the meeting. These were not the first detentions to be carried out by the state. Many a politician had suffered a similar fate in the earlier years.

Furthermore, the law on sedition had been used much more frequently than the detention one. It was the law used to arrest and charge opposition politicians on very flimsy grounds as a way of making them to toe the state line. Thus, when these laws were removed from the books, it was hoped that political leaders would at once regain their lost freedom of speech and association. Following the repeal of these laws, all detainees were released and nobody has ever been detained since then.

However, arresting real or perceived opponents of the regime under trumped up charges would continue unabated. Such individuals would be arrested, charged in court, released on bail and from then on they would be made to make an appearance before a magistrate on many occasions before the Attorney-General would enter a *nolle prosequi*. The idea was to use legal intimidation as a weapon to get opponents to toe the state line in the absence of political detention. Such things continued right up to the terminal days of the Moi regime, which is to suggest that changing the law may have little or no bearing at all on changing the authoritarian culture of a regime.

At this point, and in consideration of the foregoing discussion, it is fair to conclude that the institutionalisation and routinisation of the changes made between 1992-2002 with a view to liberalizing the body politic in Kenya, has been a mixture of some stagnation (stagnation in the sense that the *ancien regime* of the pre-2003 years, fought very hard to undermine the changes intended to liberalise the political regime) and some consolidation (consolidation in the sense that a number of changes introduced have actually been effected and some of the anti-

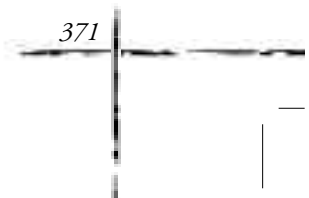
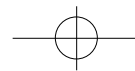
democratic practices associated with them as outlined above are a thing of the past).

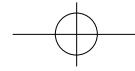
THE SCENARIO IN THE POST-2002 ELECTIONS: SOME TENTATIVE CONCLUSIONS

Although we have discussed the conduct of the 1992, 1997, and 2002 elections, so far no direct mention has been made of the popular and elite reaction to the elections. We shall do so here briefly before focusing on the developments in the post-2002 elections, and drawing some tentative conclusions.

The 1992 elections were observed by domestic and international observers who gave conflicting assessments. The domestic observers presented data to demonstrate that the elections had not been free and fair. And certainly they could not be, considering the effects of ethnic clashes in the run-up to the elections among other factors, (NEMU: 1993a). However, for the international observers (including six foreign missions based in Nairobi—mainly from the West), the reaction was mixed. But on balance there was a general feeling that in spite of a number of electoral flaws experienced here and there the electoral process was, as one mission put it (EEC mission in Nairobi), a major step in the democratisation process in Kenya. The position of the Kenyan masses came much closer to that of the foreign observers. Kenyans accepted the results of the 1992 elections though grudgingly. They refused to listen to the opposition leaders' call for them to reject the results which the latter claimed had been rigged. Instead they accused the opposition of having handed the victory to Moi and KANU by refusing to present a united opposition front against the regime (Oyugi 1997).

Similar sentiments were expressed after the 1997 elections. As in 1992, the Western donors, reacting through their Nairobi-based organisation, Donor Democratic Development Group, pointed out a number of weaknesses, but in the end endorsed the polls as reflecting Kenyan's wishes. Of the three local observers whose reactions were recorded by the writer, two—Strategic Management (made up of three organisations) and FIDA-K—accepted the results of the elections and only one (Media





Institute) characterised the elections as neither free nor fair and gave reasons for their reactions.

What emerges from the two multi-party elections before the latest one held in 2002 is that whereas in 1992 the domestic observers rejected the elections as being neither free nor fair, in 1997 the majority of them accepted the results. And in the case of the external observers, the situation remained unchanged in that they conditionally accepted the results in the two elections as representing some steps towards Kenya's democratisation. And whereas in 1992 the public blamed the opposition for their defeat, in 1997 their response was rather muted. On the other hand, for political leaders, the 1997 elections witnessed another rejection. All the main political parties initially rejected the results but within a few days, all of them, except the DP leadership, changed their minds and accepted the results. The DP proceeded to file a petition, which was later thrown out by the court without being heard.

It is against this background that the results of the 2002 elections ought to be assessed, especially in consideration of Huntington's claim that democracy is consolidated following two successful democratic elections following the initial one (Huntington 1993). There is no doubt that the victory of the opposition might have influenced some of the reactions to the results. On the whole, however, it is evident that between the first and the third multi-party elections, there seems to have been an increase in the degree of acceptance of election results by both the internal and external observers as well as by the mass of Kenyan voters. This acceptance is a manifestation of some institutionalisation of contestation and participation, in spite of the unwillingness on the part of the *ancien regime* to accept willingly the weight and force of domestic and international public opinion which combined to give Kenya incremental gains between the first and the latest multi-party elections.

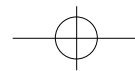
But democracy as we said earlier on is not just about elections *per se*. It is also about those aspects of institutional design and the behaviour in the body politic that are likely to reverse or 'rollback' whatever gains may have been made in electoral politics. The question to ask at this point in relation to the above is: What does the future hold after the last general

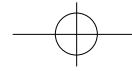
elections? To answer this question, one has to critically assess the nature, character and performance of the new NARC government during the first four months in office in order to gain, albeit tentatively, some insights into how they are likely to perform in the future.

The NARC government inherited the infrastructure of governance from the KANU regime intact. No fundamental institutional reorganisation has taken place yet. Part of the problem is that the new government came into power in the middle of constitution-making, although the Draft Bill released by the Constitution of Kenya Review Commission contains provisions for fundamental reorganisation in the mode of governance. This situation has led to an undesirable consequence in that whenever the government has tried to effect some changes in key organs of the state, the critics have been quick to accuse it of pre-empting the provisions in the Draft Bill.

Indeed, one of the major undertakings of NARC as a party during the elections was that the NARC government would complete the constitution-making process within 100 days of being in power. Initially, some rift appeared to be emerging among members of the coalition between those pushing for the constitution to be ready as promised and those who, once in position of authority and influence in government, were beginning to have second thoughts about certain provisions in the Draft Bill; the fear being that if the provisions in question were accepted, they would have the effect of weakening the constitutional power base of the presidency (e.g. the provision for dual executive offices of an executive president working alongside an executive prime minister).

Thus, at the institutional level, no new organisations have been put in place beyond the usual administrative creation of ministries and departments. In the meantime, however, the attention of the government has been directed at personnel changes targeting especially those perceived to have abated or been involved in corrupt practices especially in the public corporations. The reader may be reminded here that the fight against corruption was a major election pledge by NARC. However, with regard to the ministries, it is not clear, so far, to what extent the personnel changes so far effected at the top level of ministries, i.e. at the level of per-





manent secretaries, had to do with corruption or whether it was merely a political obligation to remove from positions of policy-making, people associated with the previous regime. There has been a lot of public posturing in this regard but no judicial conviction and punishment of the alleged offenders has been reported. It could as well turn out to be yet another political circus as in the past.

The on-going constitutional-making process notwithstanding, there is likely to be a lot of debate, in the very near future about the future of the Provincial Administration in particular. The Draft Bill has proposed the abolition of that institution; and recommendations were based on overwhelming popular opinion expressed to the commission against its existence, having over the years been one of the two institutions (the other one being the political police—the so-called Special Branch [which after being transformed now goes under the name of National Security Intelligence Service]) through which authoritarianism of the *ancien régime* expressed itself at the various levels of government. But once in power, the NARC government is beginning to have second thoughts about the abolition of the department. Somebody must have realised that they need this department to perform precisely the same functions it has performed since its establishment during the colonial period, namely, penetration and control of the localities on behalf of the centre. Since old practices die hard, so to say, it remains to be seen, should this institution be retained, to what extent the NARC government would transform it to be an instrument that serves the people's interest and not the regime's interest.

The behaviour of some key members of the NARC government suggests that the road to consolidation of the little gains that have been achieved in the sphere of democratisation may be full of potholes. Public pronouncements by key ministers have been contradictory on the main, as the ministers continue to operate at cross purposes, creating the impression of the absence of a central coordinating mechanism that informs and guides the activities of the various ministries. On top of this, there is the uneasy co-existence within the NARC family of parties. The fragile relationship that exists has the potential of creating instability in the body politic. The net effect may be democratic 'rollback', instead of con-

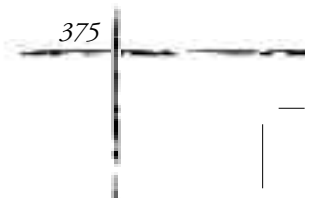
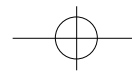
solidation, as factions begin to plot and counterplot against one another. It is these kinds of plots and counterplots that usually end up in some factions "knocking at the barracks" door reminiscent of the fears expressed by Linz in his identification list of the characteristics of deconsolidation (Linz 1978:16-18).

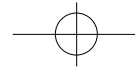
Indeed, the fear about the future lies in the fact that there is a lot of anti-democratic behaviour already that can be discerned in the NARC government so far. The manner in which some ministers have supposedly dismissed public servants in utter disregard of the established guidelines in the civil service leaves a lot to be desired. The autocratic manner in which some ministers carry out their business is equally a manifestation of the lingering authoritarian culture acquired during the one-party era.

What is more is the fact that some of the key men in NARC today were holding equally key positions in KANU only a few months ago and seem to have ended up in NARC not because of any fundamental transformation in their political culture, but simply as a way of looking for a new home to continue their business of politics as usual. This is the continuity that Claude Ake decried in 1996 when he predicted that there would be continuity rather than change as elites are merely recycled by the so-called transitions (Ake 1996; Chabal and Daloz 1999; Ottaway 1999a).

When one considers the violence that characterised NARC nominations and the intolerance of some of its leaders in the way they regard their adversaries' views, the concern expressed a few years by Ihonvbere, namely that intolerance, violence, instability, uncertainty, and stalemate would characterise the body politic of Africa in the near future finds a good illustration in the present Kenyan scenario (Ihonvbere 2000).

A brief sketch of the future scenario of the NARC government can be attempted at this point. It is in the interest of all the parties in NARC to continue bonding together. The coalition of fighting factions is unlikely to fall apart during the life of the current parliament precisely because each one faction values its presence in the coalition, which offers each faction an opportunity to exercise power and to dispense patronage which are the hallmarks of politics. And yet it is a setting which is likely

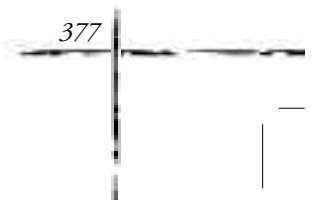
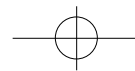


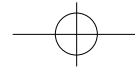


to be beset with intrigues, permanent plots and counterplots hence the instability that we have just referred to above. Under these circumstances democratic consolidation may be difficult. This pessimistic assessment does not suggest that the existence of a multi-party political dispensation in the country is threatened. Kenya seems to have crossed the Rubicon as far as the entrenchment of multi-partyism is concerned.

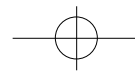
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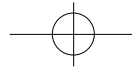
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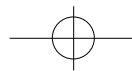


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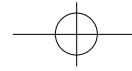
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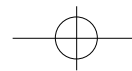
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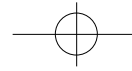
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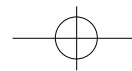
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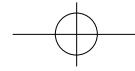




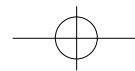
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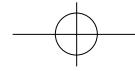
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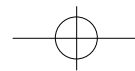


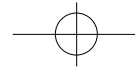
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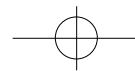
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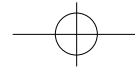




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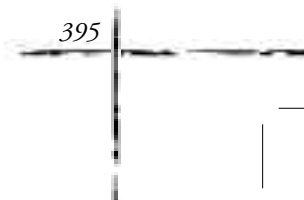
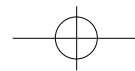
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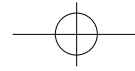




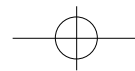
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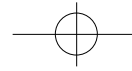
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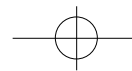
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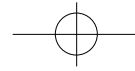




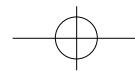
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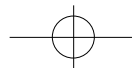
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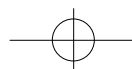
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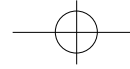
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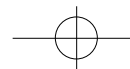


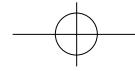
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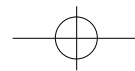


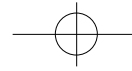


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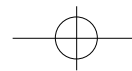
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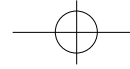




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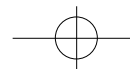


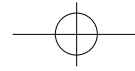
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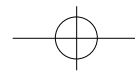
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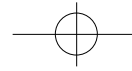
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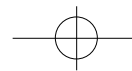
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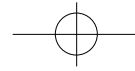
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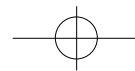
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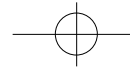




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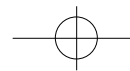


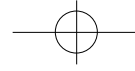
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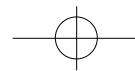


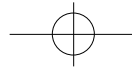


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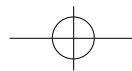
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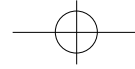




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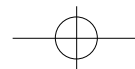
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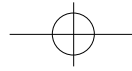
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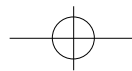


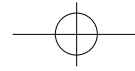


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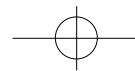
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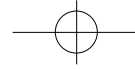
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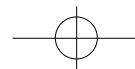




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