

THE LEGAL FRAMEWORK OF THE GNU AND THE DOCTRINE OF THE SEPARATION OF POWERS

*Implications for Kenya's National Legislative Assembly**

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ABSTRACT

The central theme of this study is that the formation of the coalition government has undermined the sanctity of the doctrine of separation of powers, is inconsistent with democratic principles, and, more particularly, undermines the right of popular sovereignty exercised by the electorate on 27 December 2007 in conformity with the Constitution and constitutionally established electoral laws. The National Accord and Reconciliation Act which established the government of national unity (GNU) has put in place a unique legal regime in Kenya's post-independence history. In many respects, while Kenya has a multiparty state system it currently operates like a de facto one-party state. The dominant political parties, namely, the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) and their party affiliates are the contracting parties to the agreement, leaving the legislative assembly without an effective official opposition party to check the potential excesses of the executive branch of government. This anomaly is further aggravated by the fact that the third-largest political party, the ODM-Kenya, is an affiliate of the PNU.

INTRODUCTION

The disputed presidential election results of 27 December 2007 announced by the chairman of the Electoral Commission of Kenya (ECK), Samuel Kivuitu, triggered violence and the deaths of almost 1 500 people and left more than 350 000 internally

displaced people (IDPs) and nearly 100 000 refugees (Waki Report 2008, p 308; Kriegler Report 2008, p 3).¹

Kivuitu failed in his constitutional responsibility to, among other things, 'reassure voters with regard to the secrecy and integrity of the ballot' (Kenya 1998a, Fourth Schedule, s 6(k)(l)). The violence rekindled the decades-old delicate and contentious question of land, an issue which has never been comprehensively addressed. The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2004a; b; c) appointed by President Mwai Kibaki in 2003 submitted its report in 2004, yet those implicated in the report have not yet been charged.

It also exposed land-driven ethnocentrism, which, historically, has been encouraged and instigated by political leaders (Adar 1998). The underlying failure of the electoral process is the result of a lack of transformative leadership, particularly at presidential level. More specifically, the underlying constraint to a constitutionalism which would lead to the extension and consolidation of democracy is the fact that power is skewed in favour of the presidency, a problem which had undermined the doctrine of the separation of powers ever since independence.

The National Accord and Reconciliation Act brokered by former United Nations Secretary-General Kofi Annan, former Tanzanian President Benjamin Mkapa and Graça Machel, one of whose objects was to find an amicable solution to the impasse that had led to the violence, paved the way for the establishment of a grand coalition government (GCG) or government of national unity (GNU) negotiated by the Orange Democratic Movement (ODM) and the Party of National Unity (PNU). Figure 1 shows that the ODM enjoys a comfortable majority in Parliament, nearly twice as many seats as those held by the other parties combined. The Act, passed in March 2008, established a new legal framework of separation of powers which is unique in Kenya's independence history.

1 This study is not about the 27 December 2007 general elections per se, a subject which is examined extensively elsewhere.

Figure 1
Members of Parliament elected in the 2007 general elections

Party	Total number of candidates	Female candidates	Male candidates	Number of elected female candidates	Number of elected male candidates	Total number of MPs in Parliament	% of representatives in Parliament
ODM	190	9	181	6	93	99	48%
PNU	135	12	123	4	39	43	21%
ODM-Kenya	133	15	118	0	16	16	8%
KANU	91	2	89	1	13	14	7%
Safina Party	88	4	84	0	5	5	2%
NARK Kenya	57	5	52	0	4	4	2%
National Rainbow Coalition	74	18	56	1	2	3	1%
Forum for the Restoration of Democracy for the People	45	2	43	0	3	3	1%

Source: Electoral Commission of Kenya (2008)

NOTE:

1. Democratic Party of Kenya (DP), Chama Cha Uzalendo (CCU), Party of Independent Candidates of Kenya (Pick), New Ford Kenya, Sisi Kwa Sisi Party of Kenya (SKSPK) each won 2 seats while the Kenya National Democratic Alliance (Kenda), Kenya African Democratic Union (Kadu), Mazingira Greens Party of Kenya (MGPK), Forum for the Restoration of Democracy (Ford)-Kenya, Forum for the Restoration of Democracy (Ford)-Asili, National Labour Party (NLP), Kenya African Democratic Union (Kadu)-Asili, United Democratic Movement (UDM), People's Party of Kenya (PPK), and People's Democratic Party (PDP) each won 1 seat.
2. Orange Democratic Movement (ODM) affiliates: National Rainbow Coalition (NARC) and United Democratic Movement (UDM).
3. Party of National Unity (PNU) affiliates: Democratic Party (DP), Ford-Kenya, Ford-People, Kanu, NARC-Kenya, New Ford-Kenya, Shirikisho and 20 other parties operating as a single party (see, Party of National Unity 2007, *PNU Manifesto 2007*, p 5).

The GNU has put in place a new legal regime, with important political implications, particularly with respect to the role and effectiveness of Kenya's national legislative assembly as the main watchdog over the excesses of the executive and as the law-making organ of the state.

Apart from the post-electoral debacle and the violence that ensued, the 2007 elections were among the most peaceful held in the country since the repeal in 1991 of s2A of the Kenyan Constitution, which re-introduced multipartyism (Adar 2008). The multiparty elections held in 1992 and 1997, for example, were plagued with high levels of violence prior to, during and after the elections, claiming nearly 2 000 lives and creating more than 300 000 IDPs and 300 000 refugees (Kenya Human Rights Commission 1998; National Council of Churches, Kenya 1992a; 1992b; Solomon 1993). Responding to intense national and international criticism then-President Moi appointed Justice A M Akiwumi to head a judicial commission with a mandate to investigate the ethnic clashes (Kenya 1999, pp iii-iv).

To my knowledge none of the officials adversely implicated in the report has been charged and it remains to be seen whether those implicated by Justice Philip Waki's *Commission of Inquiry into Post-Election Violence* (the Waki report) or Judge Johann Kriegler's *Independent Review Commission* (the Kriegler report) will face justice.

The central purpose of this study is to explore the conceptual and theoretical meaning of the doctrine of separation of powers and its relevance to the structure and functions of the legislative assembly and the GNU in Kenya. It proceeds from

the thesis that the formation of the coalition government by the Kenyan political leaders is inconsistent with democratic principles and undermines the sanctity of the doctrine of separation of powers and, more particularly, the right of popular sovereignty exercised by the electorate on 27 December 2007 in conformity with the Constitution and constitutionally established electoral laws.

Popular sovereignty, individual liberty and fundamental rights prescribed in the Constitution are vested in the ballot box and the state has the cardinal responsibility and custodial duty to facilitate, uphold, protect and promote these virtues.

The paper is divided into four parts. Part one puts into perspective the theoretical and conceptual meaning of the doctrine of separation of powers, with a special focus on Kenya. Part two explores the trajectory of the doctrine of separation of powers as it has evolved in Kenya over the years since independence and compares the application of the doctrine by the administrations of presidents Kenyatta, Moi and Kibaki. Part three explores the legal framework established by the National Accord and Reconciliation Act and its impact on the doctrine of the separation of powers while part four examines the doctrine with a special focus on the National Assembly within the framework of the GNU.

SEPARATION OF POWERS: A THEORETICAL AND CONCEPTUAL FRAMEWORK

The doctrine of the separation of powers presupposes the existence of three main branches of government, namely, executive, legislature, and judiciary, each of them vested with constitutional powers. Specifically, the doctrine provides for a system of checks and balances, with powers clearly vested in each institution by the Constitution. Inherent in the concept of separation of powers is that power should not be centralised and accumulated in one branch of government and that the role of each branch should be strengthened and enhanced. This is not to argue that the doctrine implies rigidly constituted constitutional structures, rather it is associated with the structural relationship of the three institutions.²

Separation of powers denotes power-sharing arrangements and responsibilities conferred on the three branches of the government (*trias politica*) by the Constitution with the object of preserving and promoting good governance and preventing tyranny (Ackerman 2000, pp 640-2; Labuschagne 2004; Barber 2001).

2 For a detailed analysis of the historical evolution of the concept of the separation of powers see Labuschagne 2004, pp 86-7; Rautenbach & Malherbe 1996.

One of the inherent objects of the doctrine is to preserve and promote democracy and to entrench professional competence and fundamental rights (Ackerman 2000, p 640). In democratic societies, and emerging ones such as Kenya, governments are elected to, among other things, preserve and promote these constitutional arrangements. In exercising their constitutional rights in any elections the electorates vest plenary law-making authority on legislators through the electoral process, thus promoting the virtues of the separation of powers. As La France (1989, p 30) argues, 'No law or rule is legitimate unless it rests directly or indirectly on the consent of the people.' Fundamentally, the separation of powers can be conceived as a doctrine of democratic responsibility and functional specialisation (Ackerman 2000, p 691). In other words, the *trias politica* constitutional structure provides for institutionalised checks and balances in government, the object of which, at least in theory, is to preserve the freedom and rights of citizens (Ely 1980). The normative principles associated with the concept since the time of its main advocates, John Locke and Baron de Montesquieu, are fourfold (Labuschagne 2004, p 87). They include the *trias politica*, the separation of personnel functions, separate functions, and checks and balances.

Inherent in these principles is the fundamental rights of citizens, largely entailed in the concept of democracy. The structural and functional responsibilities vested in the executive, the legislature, and the judiciary as well as their practical application vary from country to country. As Wade & Phillips (1979, p 42) observe, 'It is not always easy or indeed possible to determine under which head a particular task of government falls'. The overlap leads to a fusion of power in a situation in which the president exercises executive and legislative authority and where the Cabinet doubles as legislator, as in the case of Kenya. In many ways this arrangement has the potential to undermine the spirit of the doctrine of separation of powers, which envisages adherence to effective checks and balances (Labuschagne 2004, p 99). The debate about the doctrine takes place between advocates of pure and those of partial theory.

Advocates of pure theory suggest that a complete separation is the most viable option because the established institutional structures contain specific constitutional mechanisms for restraining the excesses of the state, that is, strict delineation encourages separate but equal institutional structures (Vile 1998). An individual or agency should not hold office in more than one organ of state.

In many respects, institutionalised separate arrangements would pave the way for identifying failures and successes within the specific organs of the state and would encourage professionalism. With such arrangements none of the organs would be able to grow stronger than the other two.

Partial theory advocates, on the other hand, stress the importance of entrenching checks and balances which allow for overlap and institutional conflict

(Barendt 1995; Jennings 1959). The incorporation of institutional conflict into the Constitution, partial theorists argue, has the potential to restrain the actions of the state and, by extension, to protect the rights and liberties of individuals. These distinctions vary from country to country according to the circumstances that inform the development of a constitution.

There are, however, certain assumptions that underly both the pure and partial theories of the separation of powers. Firstly, they opine that it is possible to isolate specific powers that fall within the ambit of the three branches of government; Secondly, they argue that 'there is a natural connection between these powers and the corresponding state institution' (Barber 2001, p 60).

In Kenya the dominance of the executive over Parliament and the judiciary, which has had an adverse effect on the structure and functions of the separation of powers, has historically been accomplished in some of the following ways – constitutional amendments (Okondo 1995; Ojwang 1976); presidential style of leadership (Throup & Hornsby 1998); retention of colonial laws in the constitution (Kenya 1997a;1997b;1998b); and the establishment of the 2008 GNU.

The Constitution also vests other powers in the president and these are critical to understanding the relationship between the executive, the legislature and the judiciary. Apart from appointing the vice-president, the Cabinet and assistant ministers, who are members of Parliament, the Constitution also empowers the president to appoint judges (Kenya 2001). The contentious issue in this regard is the influence of the executive over the judiciary, which has been a feature in Kenya over the years (International Bar Association 1996; RFK Memorial Center 1992; ICJ 1998).

The fear of the influence of the executive over the judiciary was behind the ODM's reluctance to seek legal redress to settle the 2007 presidential election dispute. The negotiations to resolve the impasse over the election began after Chief Justice Evans Gicheru had sworn in Mwai Kibaki as president. While s62 of the Constitution confers tenure on judges of the High Court, s62 (4) stipulates that 'a judge of the High Court shall be removed from office by the President if the question of his removal has been referred to a tribunal', members of which are appointed by the president (Kenya 2001). Section 25(1), on the other hand, gives the president more powers over the tenure of employees of the state, stating, in part: 'save in so far as may be otherwise provided by this Constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the president'.

Read together ss 62 and 25 clearly vest more constitutional powers in the executive than in the judiciary, whose members are public servants.

The next part of this paper examines Kenya's independence within the context of the models of the doctrine of separation of powers.

SEPARATION OF POWERS AND ITS APPLICATION IN KENYA, 1963-2008: A SYNOPSIS

The post-independence Constitution, which provided for a bicameral legislature consisting of an upper house (Senate) and a lower house (House of Representatives) was a compromise between advocates of a unitary state system (led by Kanu) and those who favoured *majimboism* (Swahili for federalism or provincial self-government – led by Kadu. The *majimbo* model did not withstand the test of time or the power of the executive (Kyle 1999; Ojwang 1976). By 1965 most members of opposition political parties such as Kadu and the African People's Union had joined the ruling party, Kanu, culminating into the gradual dissolution of the opposition as well as the Senate as a legislative body. As Figure 2 indicates this marked the beginning of the fusion of powers and, by extension, executive dominance.

Part 3, s23(1) of the Constitution provides that 'the executive authority of the government of Kenya shall vest in the President and, subject to this constitution, may be exercised by him either directly or through officers subordinate to him' (Kenya 2001). Presidents Kenyatta (1964-1978), Moi (1978-2002), and Kibaki (2002-) have been reluctant to devolve the power of the presidency through comprehensive constitutional reforms, in effect institutionalising the fusion of powers within the executive at the expense of a decentralised separation of powers.

Mwai Kibaki, who ascended to the presidency in 2002 promising to overhaul the post-colonial constitution within 100 days if NARC took over the leadership, completed his first term in office (2002-2007) without fulfilling his party's commitment in this regard.

As Figure 2 indicates, the *de facto* (1965-1966 and 1969-1982), the *de jure* (1982-1991) and the multiparty (1963-1964, 1966-1969 and 1992-) state systems fall into what would best be characterised as decentralised, fusion of powers-cum-centralised, and fusion of powers-cum-mixed models of separation of powers. Admittedly, there is no clear-cut delineation of powers in relation to the functions of the executive, the legislature and the judiciary. In Kenya, for example, the president and the Cabinet ministers are also elected members of Parliament.

DECENTRALISED MODEL OF SEPARATION OF POWERS, 1963-1964

The post-independence opposition political parties in the House of Representatives and the Senate played a key role in restraining the excesses of the executive. In 1963, for example, the Senate defeated the request by the Kenyatta

Figure 2
Models of constitutive and political processes in Kenya, 1963-2008

Context	Year of Model of Constitutive and Political Process							
	1963-1964	1965-1966	1966-1969	1969-1982	1982-1991	1992-2001	2002-2007	2008-
Character of the state	Multiparty system	De facto one-party system	Multiparty system	De facto one-party system	De jure one-party system	Multiparty system	Multiparty system	Multiparty system
Separation of powers	Executive, Parliament & Judiciary	Executive, Parliament & Judiciary	Executive, Parliament & Judiciary	Executive, Parliament & Judiciary	Executive, Parliament & Judiciary	Executive, Parliament & Judiciary	Executive, Parliament & Judiciary	Executive, Parliament & Judiciary
Character of separation of powers	Decentralised	Fusion of powers-cum-centralised	Fusion of powers-cum-Mixed	Fusion of powers-cum-mixed				
Decision-making/ power process	Mixed	Executive dominance	Mixed	Executive dominance				

Source: Compiled by the author

administration to authorise emergency powers to be imposed in the Northern Frontier District (NFD), a region which involved Kenya in an internal war against Somali *shifitas* (bandits).

The Senate, led by Kadu, argued against the emergency Bill because, in the view of the opposition legislators, it would empower the executive to operate outside the framework of the Constitution, limiting the role of the legislature. In the end the Senate, persuaded by the Minister for Justice and Constitutional Affairs, Tom J Mboya, did, in fact, support the emergency Bill (Kenya 1963, cols 25-32; Adar 1994, p 67). However, this attempt to exert the separation of powers lasted only briefly and separation is yet to be reintroduced and institutionalised.

FUSION OF POWERS-CUM-CENTRALISED MODEL OF SEPARATION OF POWERS 1965-2001

As a result of the difficulties the government faced in the National Assembly the power to declare a state of emergency was entrenched in the executive branch of government during both the *de facto* and the *de jure* one-party state regimes (Kenya 1983, Art 127). It was not until the introduction of multiparty politics in 1991 that Article 127 was repealed by an Act of Parliament in 1992.

The dominance of the executive over the judiciary and the legislature has, for most of the independence period, transformed Parliament into a rubber stamp. During much of Moi's presidency Kanu and the state solidified their symbiotic relationship, with the executive branch as the driving force (Adar 1999; Nowrojee 1992; Kuria 1995). The enactment of the Interparty Parliamentary Group (IPPG) agreement as law in 1997 and 1998, which, *inter alia*, introduced electoral laws consistent with a multiparty system and repealed some of the colonial laws, did not prevent the Moi administration from exercising its executive functions outside the framework of the Constitution, undermining the spirit of the doctrine of separation of powers for much of the time between 1992 and 2001 (Kenya 1997b;1998a).

As Figure 2 shows the periods 1965-1966, 1966-1969, 1969-1982, 1982-1991, and 1992-2001 exhibited what I call fusion of powers-cum-centralised model of separation of powers.

FUSION OF POWERS-CUM-MIXED MODEL OF SEPARATION OF POWERS 2002-PRESENT

The drive for comprehensive constitutional reform that swept NARC into power in 2002, I would argue, brought into the Legislative Assembly proactive

parliamentarians who championed, albeit with limitations, the cause of the adoption of a number of broad-based national policies, one of which was the conclusion of a people-centred comprehensive draft constitution in 2004 also known as the Bomas draft (Kenya 2005). This period was characterised by what would best be described as fusion of powers-cum-centralised separation of powers. The intransigence of President Kibaki about adopting and implementing the new draft constitution led to a number of members of Parliament, some of them Cabinet Ministers, resigning from NARC to form the ODM (ECK 2006; Adar 2008).

The proposed draft constitution, the details of which are outside the scope of this study, would, if adopted, put in place a complete new legal regime, particularly with respect to institutionalisation of the doctrine of the separation of powers.³ It provides for a clear devolution of powers as well as the protection of the rights of the people. The preamble contains the words 'We, the people of Kenya', a vision that is elaborated on in Chapter One, with the concepts of the 'sovereignty of the people' and the 'supremacy of the constitution' as the underlying functional, operational, and statutory principles (Kenya 2005). However, one of the shortcomings of Kenya's independence history is that the 'country's entire legal framework does not provide for any definitive, substantive or procedural essentials of official opposition' (Kenya 2008a).

THE LEGAL FRAMEWORK OF THE GNU AND THE SEPARATION OF POWERS: A CONTEXTUAL ANALYSIS

The fact that the coalition government was negotiated prior to the conclusion of the electoral process and the release of the outcome of the presidential election before all the votes had been counted puts into question the political legitimacy of the GNU. Section 40(2)(a) of the Presidential and Parliamentary Elections Regulations in the National Assembly and Presidential Elections Act provides that the ECK 'shall in the case of a presidential election, whether or not forming part of joint election, hold the *certificate* until the results of that election in every constituency have been received and thereafter publish a notice in the *Gazette* declaring the person who has received the greatest number of votes in the election ... to have been elected president' (Kenya 1998a, my emphasis).

The impact of the ECK's decision to declare Kibaki the winner of the presidential election before the all the votes had been counted cannot be over

3 For a review of these laws and amendments in relation to the legal regime in Kenya see Amnesty International 1997; Okondo 1995; Wachira 1996.

emphasised, particularly with respect to the relevance and sanctity of the doctrine of the separation of powers. The National Assembly and Presidential Elections Act, for example, is premised on the principles of *impartiality* and *independence* and the members of the electoral commission are expected to perform their duties 'without fear, favour, or prejudice and without influence from the government, public officer, political party, candidate participating in an election, and any other person or authority' (Kenya 1998a, Second Schedule; Kenya 1998b, Second Schedule).

Four interrelated issues are critically important and have implications for the doctrine of separation of powers.

The first of these is that at the time the negotiations began Mwai Kibaki had already been sworn in as president, as prescribed in s8 of the Constitution, making him the only elected leader who had taken the oath of office. This gave the PNU, of which Kibaki is the leader, more leverage than the ODM. Those PNU and ODM members of Parliament who were part of the negotiating team participated in the negotiations, initially at least, as ordinary citizens because when the negotiations began they had not yet taken the oath of office, as prescribed by s49(1) of the Constitution.

Secondly, the legal framework of the GNU does not provide for the establishment of the office of the president. Specifically, the GNU was established after Kibaki, acting alone and potentially in contravention of the Constitution and the electoral laws, had already assumed his executive powers.

Thirdly, the legal framework is silent on the specific timeframe for its provisional operations before the 2012 general elections. However, s6(a-c) of the Act implies that the GNU is expected to operate until 2012, or as circumstances may dictate. The section states that 'the coalition shall stand dissolved if (a) the Tenth Parliament is dissolved (b) the coalition partners agree in writing (c) one coalition partner withdraws from the coalition by a resolution of the highest decision-making organ of that party in writing' (Kenya 2008b). Chapter II, s9(1) of the Constitution of Kenya, stipulates that '[t]he President shall hold office for a term of five years beginning from the date on which he is sworn in as President' (Kenya 2001).⁴ Fourth, in my view, the GNU lacks ownership by the people, whose sovereign rights were not strictly adhered to during the general elections.⁵ Laver & Shepsle (1996, p 4) correctly observe: 'Elections have meaning for voters because they provide a choice between different packages of possible political outcomes, offered by different political parties.'

4 For details of the draft constitution see Kenya 2005.

5 On the importance of involving the people in constitution-making in Africa, see Mutunga 1999; Hoyden & Venter 2001; Barkan 1998; Oloka-Onyang'o 1996.

Kenya, like any other established or emerging democratic state, should conduct its elections within the framework of universal standards and institutions as well as in conformity with its own national laws and procedures.⁶ Although Kenya is a contracting party to international instruments which govern electoral process it has not ratified the 2002 Organisation of African Unity (now the African Union) Declaration on Principles Governing Democratic Elections in Africa and the 2007 African Charter on Democracy, Elections and Governance (Kriegler Report 2008, p 12).⁷

It is not far-fetched to categorise the National Accord and Reconciliation Act as an *extra constitutional plebiscite by the pen*, an exercise entered into by the political leaders to legitimise political cohabitation and demonstrate a modicum of political stability in a country plagued by post-election violence. The signing of the agreement contrary to the popular will of voters who participated in the elections is akin to a presidential decree (Carey & Shugart 1998; Mainwaring & Shugart 1997) or what others have called elective dictatorship (Hailsham 1976).

In my view the coalition government may potentially erode the bedrock of democratic ideals that Kenyans have enjoyed, albeit with problems, since the reintroduction of multipartyism in 1991. The doctrine of separation of powers remains an elusive concept in Kenya, with its structure and functions skewed and solidified in favour of the executive in the legal framework of the GNU.

The Act which established the GNU is worded in such a way that it carefully and deliberately excludes the words *executive authority* in relation to the office of the prime minister (PM). Section 4(1)(a) states: 'The Prime Minister shall have *authority* to co-ordinate and supervise the execution of the functions and affairs of the Government, including those of the Ministers' (Kenya 2008b, my emphasis).

The prime minister's post, as provided for in the Act, is largely non-executive, with limited powers in relation to the presidency. Part 3 of the Constitution vests the executive authority of the government in the president – authority that Mwai Kibaki assumed when he took the oath of allegiance prior to the commencement of the negotiations.

Section 4(2) of the Act limits the authority of the prime minister further, stating that: 'in the formation of the coalition Government, the persons to be

6 International institutions that govern universal standards of elections include, for example, the Universal Declaration of Human Rights (UDHR 1948), the International Covenant on Civil and Political Rights (ICCPR 1966), the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD 1963), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW 1979), and the Convention on the Rights of Persons with Disabilities (CRPWD 2006).

7 The constitutional and legal framework that governs elections in Kenya includes: the Constitution, the National Assembly and Presidential Elections Act (Cap 7 of the Laws of Kenya), the Local Government Act (Cap 265), the Societies Act (Cap 108), the Public Order Act (Cap 56), the Penal Code (Cap 63), the Kenya Broadcasting Corporation Act (Cap 221), and the Registration of Persons Act (Cap 107).

appointed as Ministers and Assistant Ministers from the political parties that are partners in the coalition other than the President's party shall be nominated by the parliamentary leader of the party in the coalition and thereafter there shall be full *consultation* with the President in the appointment of all Ministers' (Kenya 2008b, my emphasis).

The PM's input into the appointment of ministers who are members of the PNU (the president's party) remains at the consultative level, that is, after the president has made the nominations. The constitutional right to appoint the vice-president, the PM, deputy prime ministers, ministers and assistant ministers is vested in the president (Kenya 2001; 2008b).

The National Accord and Reconciliation agreement driven by the executive powers, effectively disenfranchised and subordinated the popular will of the people of Kenya and it must be noted that history is repeating itself. In 1982 Mwai Kibaki, then vice-president and leader of government business in the National Assembly, rushed a Bill through Parliament in one day, transforming Kenya into a *de jure* one-party state, which, by implication, undermined the separation of powers. In 2008 under Kibaki's presidency the National Accord and Reconciliation Bill was rushed through the National Assembly and became law in March of that year, transforming Kenya into what, technically, remains a *de facto* one-party state, again, with adverse effects on the separation of powers (Kenya 2008b).

Among the principles detailed in the preamble to the Act are the following:

- Portfolio balance. Section 4(3) provides that 'the composition of the coalition government shall at all times reflect the relative parliamentary strength of the respective parties and shall at all times take into account the principle of portfolio balance'.
- Coalition and partnership. The principle parties to the accord, that is, the PNU, the ODM and the affiliated political parties, are to transact and promote the business of coalition in the spirit of partnership.
- Power-sharing to foster healing and national reconciliation. The central objective of the contracting parties to the agreement was to ensure equity to defuse further conflict under the prevailing uncertain situation.
- Willingness to compromise. The survival and functional operation of the coalition government is contingent upon the willingness of the parties to compromise on inter-party and national issues.
- Mutual trust and confidence. The issue of mutual trust and confidence

is critical for the survival of the coalition government, particularly given the volatility of the post-election violence and the uncertainty surrounding the outcome of the presidential elections.

The Act establishes the offices of prime minister and two deputy prime ministers (PMs). This is the second time in Kenya's independence history that the office of the PM has been entrenched in the Constitution. The first time was the 1962 Lancaster House Constitution establishing the country's independence and which saw Jomo Kenyatta, the leader of Kanu, taking over the premiership in 1963.

The legal framework of the GNU has expanded the role of the executive to include the president, the PM, the vice-president, deputy PMs, and Cabinet ministers, all of whom exercise dual roles as members of the executive and as elected legislators, putting into question the relevance of the separation of powers.

The prime minister is both a member of Parliament and the leader of either the largest political party or a coalition of political parties in the National Assembly, a requirement which puts the PM in a delicate political situation. Firstly he or she must ensure that the party or the coalition under his or her leadership maintains its majority in the legislature. Secondly, any rebellion within the PM's party or coalition, which may lead to defections followed by by-elections and the potential loss of majority in the National Assembly, may jeopardise the PM's position.

Whereas s3(1) of the National Accord and Reconciliation Act provides that the PM and the deputy PMs shall be appointed by the president, the power to remove them through a motion of no confidence is vested in the National Assembly (Kenya 2008b). The Act also provides that 'the removal of any Minister of the coalition will be subject to consultation and concurrence in writing by the leaders' (Kenya 2008b, preamble). These clauses contradict certain sections of the Constitution, particularly that relating to the executive powers of the president.

While s16 (3)(a) of the Constitution stipulates that 'the office of a Minister shall become vacant if the President so directs', s25(1) provides that 'save in so far as may be otherwise provided by this constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President' (Kenya 2001).

At issue here is the doctrine of the separation of powers, particularly with respect to the relationship between the executive and the legislature.⁸ The

⁸ These sections were not included in the Amendment Bill which established the GNU. The sections of the Constitution which the Bill proposed to amend include ss3 and 17. Section 3, for example, states in part: 'if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void'.

government may be paralysed if the executive and the legislature disagree on any issue relating to the dismissal of the PM, deputy PMs or a Cabinet minister. On the other hand, the president may decide to invoke his executive powers, jeopardising the GNU's *raison d'être* and its operational functions.

THE DOCTRINE OF SEPARATION OF POWERS AND THE NATIONAL LEGISLATIVE ASSEMBLY IN THE GNU LEGAL FRAMEWORK

The Constitution of Kenya (Amendment) Bill setting out the legal framework of the GNU and tabled in Parliament by the government in March 2008 received overwhelming support from the MPs in the Legislative Assembly, who were influenced by both the volatility and instability in the country and their personal political survival.

There was consensus on a number of issues considered pertinent to the restoration of confidence among Kenyans and to the attempt to move the country out of its post-election political quagmire. The issues included, among others, a full review and adoption of the new constitution or the Bomas draft, the organisation of an ethnicity conference to address inter-ethnic differences, willingness to compromise, mutual trust, partnership, settlement of the IDPs and the need to address the land question comprehensively (Kenya 2008c, cols 280-226). As stated above, the new structure and functions put in place by the Act were distinct in many respects from any that had existed in Kenya since independence.

This paper seeks to explore certain areas of fusion of powers in relation to the Legislative Assembly and its law-making role vis-à-vis that of the executive, particularly in light of the power-sharing model concluded in 2008 by the PNU and the ODM. Technically, under the GNU legal framework the National Assembly is operating without an official opposition, which puts in question the role of the legislature as the law-making institution. As the representative of the people and the custodian of democracy Parliament must remain the watchdog of the excesses of the executive. In other words, 'parliaments must be and must see themselves as both the custodians and promoters of democratic values and assume the responsibility for consolidating democracy' (Ginwala 2003, p 3).

In Kenya, for example, for accountability purposes, the Public Accounts Committee and the Public Investments Committee are chaired by a 'Member who does not belong to the parliamentary party which is the ruling party' (Kenya 2002, ss147(1) and 148(1)). Section 148(5) of the National Assembly Standing Orders enumerates the role of the Public Investments Committee, which is:

- to examine the reports and accounts of the public investments;

- to examine the reports, if any, of the Auditor-General (Corporations) on the public investments;
- to examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments are being managed in accordance with sound business principles and prudent commercial practices.

Kenya 2002.

The above indicates clearly the importance Parliament attaches to the role of the opposition in the Legislative Assembly.

As indicated above if the National Assembly (Parliamentary Opposition) Bill 2008 is enacted it will broaden the legal and institutional scope of the responsibilities of the official opposition by empowering the backbench caucus to play the traditional role of a properly constituted official opposition.

Section 12(1) provides that 'the Backbench Caucus shall not be a political party and membership thereof shall not in any way affect the membership of a member of parliament in his or her political party' (Kenya 2008a). It is important to note that the Bill aims to address the historical anomaly of the role of the official opposition and the GNU legal framework as well as any future political dispensation that may adversely affect the role of the official opposition. The underlying principle of s3(2) is that a party in government cannot, at the same time, play the role of official opposition. However, the leaders of the political parties, particularly the PNU and the ODM, are unwilling to accommodate internal divisions within their ranks in Parliament which may have an adverse impact on inter- and intra-party strategies. The other problem the group faces relates to s17(4) of the Political Parties Act, which provides that:

a person who, while a member of a political party (a) forms another political party (b) joins in the formation of another political party (c) joins another political party or (d) in any way or manner, publicly advocates for the formation of another political party... shall be deemed to have *resigned* from the previous political party

Kenya 2007 (my emphasis)

Even if the objective of the backbench caucus is merely to form an association within the precincts of Parliament to play the role of official opposition the Act would still render such good intentions nugatory. Section 18(1) of the Political Parties Act states that 'an association of persons or an organization shall not operate or function as a political party unless it has first been registered in accordance with the provisions of this Act' (Kenya 2007).

The issue of the distribution of ministerial posts, which almost derailed the GNU negotiations, is worth a brief appraisal.

Figure 3, which compares the size of the Cabinets of presidents Kenyatta, Moi and Kibaki shows that under Kibaki the number of ministers appointed increased from 10 per cent of parliamentarians in 2003 to 14 per cent in 2004 and 16 per cent 2005.

Figure 3
Numbers of Cabinet ministers during the regimes of
Kenyatta, Moi and Kibaki*

PRESIDENT JOMO KENYATTA (1964-1978)	1964	1966	1967	1968	1970	1978	
Number of ministers	20	21	21	20	21	21	
Total number of elected MPs	113	158	158	158	158	158	
Ministers as % of seats in Parliament	18%	13%	13%	13%	13%	13%	
PRESIDENT DANIEL ARAP MOI (1978-2001)	1979	1982	1983	1987	1994	1998	2001
Number of ministers	26	27	25	28	24	27	28
Total number of MPs	158	158	158	188	188	210	210
Ministers as % of seats in Parliament	16%	17%	16%	15%	13%	13%	13%
PRESIDENT MWAI KIBAKI (2002-	2003	2004	2005	2008			
Number of ministers	22	29	34	41			

Total number of elected MPs	210	210	210	210			
Ministers as % of seats in Parliament	10%	14%	16%	20%			

Sources: Institute for Education in Democracy 1997; Kanyinga 2007; Kibaki 2008.

*The number of members of Parliament does not include the 12 nominated by the president according to the provisions of s33 of the Constitution.

As some scholars have observed, the expansion of a Cabinet for the purposes of controlling Parliament and other governmental operational functions may have adverse effects on delivery and accountability (Laver & Shepsle 1996). As Figure 3 indicates the 41 PNU and ODM ministers appointed by President Kibaki account for more than 20 per cent of the elected MPs, a figure that increases dramatically if assistant ministers are included.

Kenya's legislative assembly, like any other properly and constitutionally constituted legislature, derives its authority and legitimacy from the people, that is, through the electoral process. Jean-Jacques Rousseau (1712-1778), in his celebrated classical work the *Social Contract* (1762), postulated, among other things, that legislative powers are vested in the people, giving popular sovereignty its theoretical and practical credibility.⁹

Rousseau's theoretical postulation on popular sovereignty, which has evolved over the centuries, provides a clear nexus between the people (the electorate), the legislators, and the legislature. This triadic link is critical to an understanding of the sanctity of the doctrine of the separation of powers, specifically the law-making authority vested in the legislators' role.

The general practice in established or emerging democracies, Kenya included, is that the authority for the role of the legislators vests in the ballot box and takes legal and legislative effect once they are sworn in after an election.

Chapter III, Part 2, s49(1) of the Constitution provides, in part, that: 'every member of the National Assembly shall, before taking his seat in the Assembly, take and subscribe the oath of allegiance before the Assembly...' (Kenya 2001). It is this oath that legitimately and constitutionally formalises the powers of the legislators. Chapter III, Part I, para 30 of the Constitution provides that 'the legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly' as well as elected,

9 For interpretations of the works of Rousseau, see Melzer 1990 and Held 2000.

nominated and ex officio members (Kenya 2001).¹⁰ Unless otherwise prescribed by the Constitution only the legislators vote in the proceedings of the National Assembly.¹¹ The overriding original intention of the newly-elected ODM and PNU legislators who participated in the GNU negotiations and who were yet to take the oath of allegiance was to amend the Constitution. The circumstances under which the negotiations took place remain questionable. In my view, the 2008 GNU framework has led to a regression of democracy and placed in question the separation of powers.

RECOMMENDATIONS

The GNU should, in my view, give careful attention to a number of issues.

- Its formation and legitimacy should be tested in a referendum.
- The GNU Cabinet remains a heavy burden on a country with meagre resources and should be reduced to an affordable size.
- The GNU should operate as an interim government for a maximum of two years and fresh presidential elections should be held before 2012. The failure of the Kriegler and Waki commissions to give a clear verdict on the winner of the 2007 presidential election makes this recommendation pertinent.
- The law-enforcement agencies, particularly the police, should be retrained to enable them to deal with civilians without using excessive force.
- The new Constitution should be adopted and implemented in toto prior to the 2012 general elections.¹²

CONCLUSION

The GNU should be considered a temporary *modus vivendi* because it has not been put to the test through a referendum and the leaders who are parties to the agreement have violated the sovereign rights of the electorate.

¹⁰ The Attorney General is an ex officio member of the National Assembly.

¹¹ Section 56, para 2 of the Constitution provides that 'subject to this Constitution, the National Assembly may act notwithstanding a vacancy in its membership (including a vacancy not filled when the Assembly first meets after a general election), and the presence or participation of a person not entitled to be present at or to participate in the proceedings of the Assembly shall not invalidate these proceedings'.

¹² For details of the views expressed by Kenyans and other stakeholders during the drafting of the new constitution see Constitution of Kenya Review Commission 2003.

Although the Kriegler and Waki commissions provided useful information about the December 2007 electoral debacle it is doubtful whether the Kibaki administration will implement their recommendations *in toto*. Implementation of the recommendations would, by implication, mean putting on trial some key figures in government, and their accomplices. If the reluctance to implement the recommendations of similar commissions established in the past in Kenya is anything to go by, it is unlikely that the alleged perpetrators will be given an opportunity to prove their innocence in court.

The GNU has brought together former competitors across the political divide in a fragile alliance. It is in the interests of the PNU and the ODM that stability prevail within the GNU and the leaders of the two parties are watching nervously the persistent inter- and intra-party differences and instabilities, any of which may lead to one of the contracting parties disintegrating. Of critical importance, particularly for an emerging democracy like Kenya, is the issue of consolidation and institutionalisation of the separation of powers.

As I have shown in this paper, ever since Kenya became independent the executive has dominated the other branches of government. Two interrelated issues are worth reiterating, particularly with respect to adherence to the doctrine of the separation of powers. First, the draft constitution, which provides for a clear separation of powers, must be adopted and implemented. Secondly, Kenya needs a transformative leader, that is, an individual who is willing to consolidate and institutionalise democracy and is committed to fundamental change. As one MP observed in the Legislative Assembly during the debate on the GNU Bill, the civil strife that engulfed the country after the elections was the result of the leadership's resistance to change (Kenya 2008c, col 197).

* This paper, which was presented at the South African Association of Political Science Biennial Conference, organised by the University of Johannesburg, 3-5 September 2008, and at a seminar organised by the Africa Institute of South Africa, Pretoria, 20 March 2009, is an abridged version of a monograph entitled *The Doctrine of the Separation of Powers and the GNU Legal Framework: The 'Place' of Kenya's National Legislative Assembly*. The study was conducted in Kenya, between May and June 2008, with financial support from the Africa Institute of South Africa. I am indebted to a number of people who provided useful information for the study. Due to lack of space only a few will be mentioned here: Hon Dr Kilemi Mwiria, Assistant Minister, Higher Education, Kenya; Judson Oriema Okoth of Okoth and Kiplagat Advocates, Kenya; Maina Kiai, Kenya National Commission of Human Rights, Kenya; Thomas Joseph Mboya and Patricia Ochieng, Maseno University, Kenya; Shitsimi P Anjimi, National Statistical System Project, Ministry of Planning and National Development, Kenya; Fredrick Otoro, Tumsifu Centre, Kisumu, Kenya; Dalmas Oleko, Bible Society of Kenya, Kisumu, Kenya; Joshua Osewe, Diocese of Maseno, Kisumu, Kenya; Kepta Ombati, Youth Agenda Secretariat, Kenya, the International Organization for Migration, Nairobi, Kenya; and Ayub Imbira, Electoral Commission of Kenya, Nairobi, Kenya. It should be noted that some officials from the government and the NGOs in Kenya provided useful information but requested to remain anonymous. I am grateful for the comments made by participants in both the conference and the seminar as well as suggestions from the following colleagues who read the earlier drafts of this manuscript: Patrick Loch Otieno Lumumba, Faculty of Law, University of Nairobi, Kenya; Rok Ajulu, University of South Africa, Pretoria; and Monica Juma, Norman Mlambo, and Biong Deng, AISA, Pretoria. I, however, remain solely responsible for the paper's shortcomings.

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