

THE POLITICAL AND INSTITUTIONAL CONTEXT OF THE 2007 KENYAN ELECTIONS AND REFORMS NEEDED FOR THE FUTURE

David K Leonard and Felix Odhiambo Owuor
With contributions from Katherine George

Felix Odhiambo Owuor is Senior Programme Manager of the National Democratic Institute for International Affairs Political Parties Programme in Nairobi

E-mail: Fodhiambo@ndi.org

Katherine George received her MA in Governance from the Institute for Development Studies (UK) in 2008

ABSTRACT

For many Kenyans the outcome of the 2007 presidential election represented a continuation of the betrayal of the promise made by Mwai Kibaki's government, elected in 2002, that a new Constitution would be drafted which would help to deal with Kenya's governance problems. The consequence was a closely contested election, ethnic division, a flawed election process, and serious post-election violence, which lasted well into 2008.

This article analyses the underlying political features of Kenya that led to the election failure itself and the fundamental changes to the Kenyan system, including its Constitution, that are necessary to avert a recurrence of the 2007 election violence in the future.

INTRODUCTION: KENYA, CONFLICT AND ELECTIONS

A failure of governance

In December 2007 Kenya erupted into violence after the announcement that its presidential election had been won by incumbent President Mwai Kibaki. The world was shocked, as Kenya had been thought to have made the transition to stable democracy with its peaceful elections in 2002 and 2005. The history of failed constitutional reform, the reopening after 40 years of a particularly toxic combination of ethnic political conflicts, and electoral fraud resulted in post-election violence that exceeded even the scale of the 1992 and 1997 clashes.

In this article we examine the underlying causes of this violence and the fundamental issues that will need to be addressed if the next national elections, scheduled for 2012, are to be successful. There have been numerous other analyses of the details of the elections, with which we broadly agree and which we will not replicate here (see, the Kriegler Commission Report; the Waki Commission Report; Sheehy & Maina 2008; *Journal of Africa Elections* 7.2).

Kenya's quest for constitutional reform

Failures of governance were at the core of the violence that followed Kenya's 2007 national elections. The 2002 government of Mwai Kibaki had promised a new Constitution that would help to deal with Kenya's many governance problems – an overly powerful presidency with a weak legislature and judiciary, a centralised state, mismanagement of and unresolved disputes over land, a history of impunity for violence and corruption, inequalities between ethnic groups, and poverty and unemployment. For many Kenyans, the outcome of the 2007 presidential election was a continuation of the betrayal of that promise, as reflected in the 'Wako' draft constitution Kibaki had submitted to a referendum in 2005, which the people had rejected.

Kenya's independence Constitution of 1963 was based on federal devolution, individual rights, and the separation of powers between a symbolic head of state and an executive prime minister. Its current Constitution evolved through a series of fundamental changes between 1963 and 1969 that undermined democratic safeguards (Gathii 1994). These alterations entrenched executive power in a powerful president by changing from a parliamentary system of government with an executive prime minister to a presidential system; replacing a bicameral with a unicameral legislature; converting from federal devolution to a unitary, centralised state; and moving from a multiparty to a single-party system (de facto in 1969; de jure in 1982) (Chitere, Chweya, Maya, Tostensen & Waiganjo 2006, p 2). The amended sections have been the subject of constitutional debate since 1992, occupied the 2000-2005 constitutional review process, and dominated political party campaign platforms in the 2007 election.

Breakdown into violence

The violence that followed the 2007 elections, during which an estimated 1500 people died and as many as 350 000 were displaced (IRIN 2008a) occurred in three discernable waves (OHCHR 2008). The first came after the announcement of the election results and involved spontaneous looting by youths in the slums of Nairobi and Kisumu of government buildings and of the shops and houses of

known supporters of Kibaki's Party of National Unity (PNU) and his co-ethnic Kikuyu, who were also presumed to have supported him.

The second wave of violence was organised in part before the election by opposition and ethnic leaders as a response should Kibaki win the election. At the announcement of the election results groups of youths attacked Kikuyu and government supporters in the central Rift Valley, with the aim of driving them out of their constituencies for good.

The third wave comprised reprisal attacks, organised by government supporters and Kikuyu militias, mainly targeting migrant workers thought to be opposition supporters in parts of the Rift Valley Province, Central Province, and the Nairobi slums. Male youths played the main role all three waves of violence. The police were also responsible for much of the violence, either because they used excessive force to deal with protestors (potentially accounting for 40% of deaths) or because they chose not to prevent it.

The violence disrupted crop production and transport, resulted in a sharp economic downturn, an 80 per cent reduction in tourism revenue, and a rise in the price of basic goods (Bevan 2008). It also entrenched social fragmentation between ethnic groups in the areas that were hardest hit.

As the post-election disputes and skirmishes dragged on, the international community supported a panel of eminent African personalities, led by former United Nations Secretary General Kofi Annan, to mediate and find a solution. After several weeks of negotiation, on 28 February 2008 the opposition Orange Democratic Movement (ODM) and the PNU reached a power-sharing agreement which created a coalition government, including the position of prime minister, and a redistribution of Cabinet and other ministerial posts (RoK 2008a).

The most concrete aspects of the agreement were: an internationally-composed independent review commission to investigate all aspects of the 2007 general elections and recommend areas for electoral reforms (RoK 2008c); a commission to investigate the causes and effects of the post-election violence and propose solutions (RoK 2008b); a recommendation that a Truth, Justice and Reconciliation Commission (TJRC) should be established to facilitate a lasting healing process and unite the country;¹ and the rekindling of the constitutional review process that aims to provide solutions to the underlying causes of the violence and produce a new draft to be approved by a public referendum (RoK 2008d; 2008e).

1 The TJRC has yet to be convened, as it would require an Act of Parliament.

THE INSTITUTIONAL STRUCTURE OF KENYAN DEMOCRACY

The sociological foundations

In Kenya, as in the rest of Africa, voting is largely determined by ethnicity, kinship and neighbourhood. In the rural areas, where all three tend to coincide, voting at polling station level is generally in favour of one particular candidate, with the decision effectively a collective one, often enforced by violence. Barkan, Densham & Rushton (2006, p 933), found that the average vote for the winning candidate for Parliament in 1997 was 65 per cent, even though there was an average of 4.4 candidates per constituency. And if one had looked at the percentages at polling station level the concentration would have been still higher.) Only in the major urban areas is the coincidence of family and neighbourhood broken. Although kinship and rural ties are still influential among all but second-generation elites, adherence to them will not be as obvious at urban polling stations.

As discussed in the introductory article to this issue these social dynamics contribute to the dominance of patron-client networks in most of the political systems of Africa and, as a consequence, those who are able to distribute patronage goods from their personal wealth dominate politics on the continent. In the 45 years since Kenya's independence African elites have used political office to gain economic advantages, which they have ploughed back into political advancement in an upward spiral.

By now there are wealthy businessmen (and some women) in all but the very smallest Kenyan ethnic groups, who compete with each other for political office. Since political clients trade their votes for benefits targeted to themselves as individuals or to their immediate communities, the patronage-dispensing businessmen are able to direct public policy and its implementation to their personal and collective interests. Not all Kenyan businessmen are politicians, and many (such as the local South Asian community) participate only indirectly in politics. But all but a very few MPs and Cabinet ministers are businessmen.

The strength and weakness of Kenya is that it is unapologetically friendly to business: the major political parties compete over *whose* businesses benefit from access to the state, not over *whether* they do (Leonard 1991). As a result, the collapse of the country's tourism and export economy in response to the continued post-election violence eventually prompted powerful businessmen to press for a negotiated settlement.

A History of political violence

Another critical dimension of Kenyan politics is its violent heritage. In most of sub-Saharan Africa independence was achieved relatively peacefully. In Kenya,

however, the Kikuyu Mau Mau rebellion had broken out in the late 1940s and was put down in the 1950s only with substantial military assistance from the United Kingdom. The presence of those British troops deprived the colony's white settlers of the local control that might have enabled them to mount a Rhodesia-like unilateral declaration of independence.

Thus, even though the Mau Mau were defeated, it is common in Kenya to credit them with hastening the country's independence, and their rituals may sometimes be recreated as an instrument of Kikuyu political struggle – as they were in the oath-taking movement of the mid-1970s and by the underclass Mungiki in the past decade and during the 2008 post-election riots.

The violence of Mau Mau seems to have legitimated other forms of political violence as well. Kenya has had five or six prominent political assassinations – in order, Pio Pinto (a radical Asian), Arwings-Kodhek (a Luo Cabinet Minister), Tom Mboya (a Luo heir apparent to Kenyatta), J M Kariuki (a populist Kikuyu hoping to succeed Kenyatta), possibly Ronald Ngala (a Cabinet minister from the Coast who also figured as a possible successor) and Robert Ouko (a Luo Cabinet minister who was thought to have offended Moi). It was not lost on the Luo ethnic group that all these men were Luo or were reaching out to them politically. All but the last of these assassinations took place during the Kenyatta administration.

Extensive violence accompanied the first multiparty elections, in 1992, and also attended the elections in 1997. Violence targeted mainly the Luo and Kikuyu communities, which had refused to toe the Moi line. In his efforts to retain power for the small ethnic groups when he changed the Constitution to re-permit multiparty competition in 1992, President Moi inserted a requirement that a victorious presidential candidate had to win both an overall majority and no less than 25 per cent of the vote in five of Kenya's eight provinces.

A Kikuyu candidate in an ethnically divided field will easily pass the latter threshold in Central, Nairobi, and (with their Embu and Meru allies) Eastern provinces. There are also substantial numbers of Kikuyus in smallholder settlement schemes and the largest towns in the Rift Valley and Coast provinces. In the rural areas of the latter two provinces most Kikuyu live in multiethnic settlements on land to which other groups had historical title (of which more below).

The strategy for those running against a Kikuyu candidate for president has, therefore, been to deny him the '25 per cent in 5' threshold by mobilising those in the central Rift Valley or on the Coast who were indigenous at the start of colonialism and who are aggrieved about the land issue to attack Kikuyu settlers there, displacing them and rendering them unable to vote.

Moi used this strategy successfully in both 1992 and 1997 but it became irrelevant in 2002 when Moi manoeuvred the nomination of Uhuru Kenyatta

(the late President's son) as the candidate for the Kenyan African National Union (KANU) to stand against the opposition's Kibaki, so that both candidates were Kikuyu. The political logic of creating internally displaced persons (IDPs) became salient again in 2007 when a Kikuyu president (Kibaki) was challenged by a Luo (Odinga), who had Kalenjin indigenous allies in the central Rift Valley. In this case, however, the violence broke out only *after* the election and did not engulf the Coast. We elaborate on this below.

Competing narratives of grievance

The tragedy of Kenyan politics is not just that it is organised around ethnic differences and the 'horizontal' inequalities between ethnic groups (for more about this term, see Stewart 2008a), characteristics that are common to most African countries. The problem is that in Kenya three competing and legitimate grievance narratives accentuate these features.

Early white settlers in Kenya appropriated most of their land from the Kikuyu (Central and Nairobi provinces), Miji-Kenda (Coast), Maasai and Kalenjin (Rift Valley) areas. Land pressures resulted first and most acutely among the Kikuyu, who, as a result, were, by World War I, taking up disproportionate numbers of tenant-labourer positions on white farms (as well as availing themselves of the education the missionaries brought).

The eviction of these tenant-labourers in the late 1930s laid the foundation for the Mau Mau rebellion (Rosberg & Nottingham 1966). To suppress it, the British rusticated Kikuyu labourers, moved Kikuyu peasants into fortified villages, detained large numbers of suspects, and, while they were away, conducted land registration.

At independence the Kikuyu had not only suffered most during the anti-colonial struggle, they alone faced serious problems of landlessness. To pacify them both the British and President Kenyatta favoured them disproportionately in the smallholder settlement schemes that government created out of the old white farms.

The Kikuyu also did well in the labour market (as they had been early entrants, were better educated, and had the country's capital in their territory). Furthermore, their education, entrepreneurialism and support from the Kenyatta presidency enabled them to rise rapidly in the civil service and to do well in business. The combination of all these factors then meant that when white farms were sold in the post-settlement era the Kikuyu were more likely to be able to buy them and divide them up into still more smallholdings.

The Miji-Kenda (Coast), Maasai and Kalenjin (Rift Valley) came to this competition for land later, with less capital and later political support. They also

suffered from the fact that both Kenyatta and Moi used the presidency's ultimate authority over land to reward their most prominent clients (and themselves) with large farms in these areas. Today the Miji-Kenda, Maasai and Kalenjin are aggrieved that lands that were theirs at the time of the British incursion are all occupied and their young adults no longer have access to farmland.

From 1982 on Moi worked aggressively to counter-balance the historical advantage of the Kikuyu, resulting in their becoming disadvantaged, to some degree, in education, civil service employment and business contracts and privileges, while the Kalenjin received special favours.

Despite the removal of state patronage, however, the Kikuyu continued to do well in education and business; their prominence in trade making them the target of still more envy today. But they are aggrieved because they were the most prominent victims of British colonialism and of Moi's affirmative action; to them the fact that they have nonetheless done well is a sign of virtue, not of quite clear favouritism under presidents Kenyatta and Kibaki. The Kikuyu discourse of grievance focuses on the colonial period and the period between 1982 and 2002; other Kenyans focus on 1963-1978 and 2002-2007.

Our purpose is not to determine who, on balance, is more right or wrong but to indicate the ways in which all the discourses have some basis in historical fact and talk past each other.

The third aggrieved people are the Luo. At independence they were as well educated as the Kikuyu and more entrenched in the civil service. They were the victims of Kenyatta's turn against the left in 1966 (both in politics and in the civil service), many of their leaders were assassinated and they have remained political outsiders until this year.

Each of these groups has difficulty appreciating the injustices felt by the others. The leaders of all three groups also tend to use grievances to mobilise their non-elites and then to deliver 'compensating' benefits to their elites. As the Kikuyu elite (*but not their poor*) has prospered despite the difficulties it has sometimes faced, it is a lightning rod for the problems faced by everyone else – and its members aggravate the situation by assigning themselves still more 'compensating' advantages.

The tragedy of Kenya is that it has no unifying national ideology – only incompatible narratives of injustice. The country is not divided on economic ideology – even though the large inequalities it manifests might make such policy divisions seem natural. The question is not *whether* the elites will benefit from a pro-business environment but which ones *will benefit*. For a brief period after independence nationalism *did* provide a unifying political ideology. It is possible that it could again, but to date no political leader has succeeded with it or any other option.

The strong presidency

African states are weak in the face of very strong societies (Migdal 1988). As Aristide Zolberg (1966) noted more than 40 years ago, this makes nervous national politicians construct governmental systems that are as strong as possible – hence the long period of one-party rule on the continent and the persistence even today of very strong presidencies. Kenya's presidents exercise unchecked authority over virtually every aspect of government. Until recently the ability of Parliament to initiate legislation has been all but non-existent and neither it nor the courts has been able to check the executive. Since immediately after independence civil servants have felt obligated to execute presidential directives even when they are manifestly illegal. The result is that the stakes for winning or losing State House become inordinately high.

A Parliament of rural ambassadors

As noted in the introductory article in this issue, the pressures of patronage cause parliamentarians in Africa to see themselves primarily as supplicants to the centre for discrete goods that will benefit their constituents. Kenya conforms fully to this pattern. Nonetheless, many of the country's MPs do also care deeply about public policy. When the democratisation movement in the country began in the early 1990s such MPs had no institutional support. It became the responsibility of various civil society organisations (CSOs), usually with international funding, to analyse pending legislation, note policy areas of concern, draft new laws, and so on. The Constitutional Amendment Bill of 1999 finally created a Parliamentary Service Commission and staff support, which enabled committee work and provided some autonomy.

The MPs who were newly elected in 2002 showed increased legislative independence – but they were most active in relation to matters that enhanced their role as patrons. They voted themselves high salaries and created constituency development funds (CDF), both of which enhanced their ability to distribute patronage.

Ironically, the very fact that they visibly controlled this patronage may have created as much jealousy as loyalty. When MPs were 'ambassadors' seeking patronage for their clients from an 'imperial presidency' they could take full credit for anything that was provided while blaming the president for any disappointments – after all, if they did well for some in this round they also might be able to help in the next round those who had been let down. Now, however, MPs are clearly responsible for the patronage they distribute and must bear the brunt of criticism from those who received nothing. This dynamic may help to explain the fact that two-thirds of sitting MPs were defeated in the 2007 elections.

On the other hand, the CDFs do make the MPs independent of the president in their quest for patronage resources.

Political parties and partisanship

Political parties in Kenya are organised along ethnic lines. Half a century ago it was not obvious that this would be the case. The Mau Mau rebellion arose among the Kikuyu as a result of landlessness and displacement from large white farms (Rosberg & Nottingham 1966). The movement was never wholly about poverty but those Kikuyu who supported the British and joined the Home Guards during the uprising were more likely to come from the better off and/or missionary-educated sectors of the population.

When the British began to permit African political parties among Kenya's ethnic groups in the mid-1950s they restricted them to district-only organisations – which, given the geographical specificity of ethnicity in most of Kenya, meant that they represented particular groups. When Jomo Kenyatta emerged from detention by the British in 1961 he faced a political landscape designed to be ethnically divided. Although he was a national hero he joined KANU, which was an alliance of the Kikuyu and Luo (the two largest and best educated groups), with a streak of Mau Mau-inspired radicalism. It was opposed by an alliance (the Kenyan African Democratic Union – KADU) of all the other, smaller groups, who feared dominance by the Kikuyu and Luo. Kenyatta perceived the potential for class conflict (particularly over land) to fragment political unity among the Kikuyu – but only among them. If he were to support the radical wing in Kenyan politics his own ethnic base would split and KADU would be politically dominant. But if he insisted on class unity (the more conservative line) and provided the landless Kikuyu privileged with access to land vacated by white settlers he could keep the Kikuyu together and emerge as president.

In a series of brilliant political moves in the mid-1960s he enticed KADU to join KANU to create a government of national unity and then destroyed the radical wing of KANU. Radicalism prevailed only among the Luo, because of their remaining leader, Oginga Odinga (father of Raila Odinga, the opposition presidential candidate in 2007), helping to make them the permanent outsiders in Kenyan politics. In the de facto one-party state that resulted, with the Luo and radical Kikuyu excluded, the government in effect became a KADU state, with the addition of conservative Kikuyu in the leadership roles (Leonard 1991, pp 73-81).

When Kenyatta died in 1978 he was succeeded by Daniel arap Moi, his vice-president, a minority Kalenjin and a former leader of KADU. After the attempted coup staged by a group of airforce officers in 1982 Moi was able to jettison the conservative Kikuyus who had supported him (in effect making the government

even more a KADU one) and to concentrate on reversing the gains made by the Kikuyu under Kenyatta (Leonard 1991, pp 168-69; 176-77).

By the late 1970s all ideology had disappeared from Kenyan politics, replaced by purely ethnic competition over the division of spoils derived from control of the state, with a deep split between the Kikuyu (joined by the Embu and Meru) and the small ethnicities / tribes (led by the Kalenjin) and with the electoral balance decided by the second- through fourth-largest groups – the Luo, the Luhya and the Kamba. The battle to control State House began in earnest in 1969 after the assassination of Tom Mboya and the accompanying Kikuyu oath-taking, whose explicit objective was to retain the presidency. The non-ideological nature of this competition began with the banning of the Kenya People's Union (KPU) (to create the de facto single-party state) and the assassination in 1975 of the populist, J M Kariuki. The curtailment of fundamental freedoms and political space, which accelerated after the 1982 coup attempt, eventually led to a sustained clamour for the restoration of multiparty democracy, a movement spearheaded by politicians who had fallen out with President Moi joined by civil society and the international community. The movement was also aided in part by the collapse of the Cold War, which allowed Western governments, no longer needing to worry about 'Communist' competition, to insist on democracy and good governance as a prerequisite for donor engagement. This pressure led to the reintroduction of multiparty politics through the repeal in 1991 of s 2A of the Constitution.

During the first multiparty elections in 1992 it was obvious that Moi and KANU did not have the support of the majority of the country. The newly registered pressure group, the Forum for Restoration of Democracy (FORD), quickly gained and mobilised support across the country. FORD brought together once again the independence era alliance of Kikuyu and Luo, their unity posing a direct threat to Moi and KANU. Nonetheless, the opposition to Moi fell into competing camps, neither group being willing to stand aside and endorse one of the other's leaders as president. After letting Moi through in a three-way race in 1992 and 1997 the opposition finally won in 2002 by uniting around Mwai Kibaki, a Kikuyu and former vice-president. Raila Odinga, who was central to bringing the opposition together, was promised the post of prime minister under a reformed constitution.

Kibaki has been a low-key president and Kikuyu ministers close to him persuaded him to renege on this deal (which was embodied in the 'Bomas'² draft of a new constitution that was prepared just before the 2002 elections). Instead

2 The 'Bomas' draft emanated from the National Constitutional Conference which took place at the Bomas of Kenya theatre facility, Nairobi, and became known simply as the 'Bomas Talks'. The draft was initially formulated by the Constitution of Kenya Review Commission, appointed in 2000 to gauge the views of Kenyans about what they wished to see incorporated in their new constitution.

Kibaki put to a referendum in 2005 the 'Wako' draft constitution,³ which made no provision for a prime minister (and also omitted other key provisions of the 'Bomas' draft) and was defeated by the ODM, led by Odinga. This history helps to explain why Odinga was at first unwilling to accept Kibaki's offer of a prime ministership in a coalition government after the 2008 elections; he had been there before and felt he had been betrayed. Odinga's concerns could only be assuaged by a constitutional amendment creating the position and making it answerable to Parliament (where the ODM has the largest number of seats – 99). This amendment was delivered as part of the Annan agreement.

The other major political parties are Kibaki's PNU, with 43 MPs; the rump of KANU, which supported Kibaki and has 14 MPs; and the Kamba breakaway, ODM-Kenya, which supported Kalonzo Musyoka for president and has 16 MPs. Kibaki appointed Musyoka to the vice-presidency in the midst of the post-election violence.

Although there is stability in the major ethnic blocks of Kenyan politics there is considerable factionalism within and between them as the 'big men' try to assemble and hold together a winning coalition. In the past decade Odinga has continually surprised his opponents by his ability to assemble such coalitions, first for Kibaki, then against him, and finally for himself. To do so, however, the shape of the alliances and the names of the winning group have constantly changed.

In order to counter the fragmentation and instability of parties, in October 2007 Parliament passed the Political Parties Act, which provides a framework for the registration, regulation and financing of political parties. The Act took effect on 1 July 2008 and all registered political parties had to adhere to it by no later than 1 January 2009. Thus far 38 of the 168 previously registered political parties have been certified as complying with the new standards.

Until the old 'brief case'⁴ political parties have been definitively deregistered the intention of the Act to impose discipline within parties by arresting the defections and factionalisation and the irregularities in internal processes which so often characterise them will not have been achieved.

The courts

An independent judiciary is critical to ensuring that the executive respects the laws passed by the legislature. Otherwise the election of a Parliament and its deliberations are meaningless. The judiciary is also central to ensuring the

3 The Wako draft – the government version of the constitution – was named for Amos Wako, Chief Justice of Kenya, who was believed to be the key author of this alternative constitutional document.

4 These are parties that exist only on paper and whose rights to legal existence are kept in the 'brief cases' of individual leaders in order to facilitate factional splits.

framework within which democratic competition takes places – by protecting human and minority rights and by enforcing the integrity of the electoral process. The courts in Kenya, emerging from a long period of authoritarian rule, do not yet play these roles fully and hence were not trusted during the crisis, contributing to its escalation.

The judiciary has even less power than Parliament to check the executive. The current Constitution does not provide guidelines for the exercise of judicial powers, it merely defines their bare structure. The judiciary has weak infrastructure, biased courts, incompetent and corrupt personnel, and serious problems upholding the rule of law (Chitere, Chweya, Masya, Tostensen & Waiganjo 2006). The president appoints without oversight the High Court, Appeals Court, and other judges, as well as the Judicial Service Commission, which recommends judicial appointments (NEPAD 2007). The executive has fiscal control over the courts (Chitere et al. 2006).

It is true that judicial appointments now can be made only on the recommendation of the Judicial Service Commission with the approval of the president (which Kibaki has never denied) and judges can be removed from office only by a tribunal – both improvements over the Moi era. On the other hand the current chief justice manages the judicial system in such a way as to prevent its ever challenging President Kibaki, for example, through his assignment of critical cases.

When there is no competent and independent judiciary there are few incentives for the legislature to spend time and political capital writing or amending laws that will restrict or challenge the presidency – for such laws will not be enforced.

Even during the one-party era the courts heard petitions contesting the outcome of primary elections (which determined who would sit in Parliament). These proceedings, however, could be and continue to be very slow – in some cases lasting as long as an MP's term of office. Mwai Kibaki, when he was running for president in 1997, refused to appeal to the courts for this reason. Thus it is no surprise that the ODM also refused to test its contentions of vote rigging before the courts in 2008 (Gathii 2008).

The media

Independent and competent media are generally considered essential to democracy. Without them citizens and even societal elites have no hope of being informed about critical issues of public policy or of the performance of the government they elect. The existence of strong media also gives opposition and back-bench MPs an incentive to be vigilant in their oversight of the executive;

they are sure to be outvoted on any censure motions but information they obtain by subpoena and/or by speaking aloud under parliamentary privilege will be disseminated by the media.

The past decade has seen significant growth in the Kenyan media. Indeed, that period has been characterised by the mushrooming of print and electronic media with national coverage. The conduct of the media particularly during the 2002, 2005 and even the start of the 2007 elections was very good. However, in the final periods of 2007 some vernacular and regional media were used to propagate ethnic animosity and hate speech. KBC, the national broadcasting corporation, also failed, by and large, to accord equal coverage to the main presidential candidates despite agreements reached by the Inter-Parties Parliamentary Group (IPPG) of 1997.

On the whole, Kenya's print media are among the best in Africa. They are professional and represent competing points of view. It is the proliferation of new, private FM radio stations that has presented a problem. Talk radio shows and live coverage of political events became vehicles for the propagation and implicit legitimisation of inter-ethnic hatred in 2007. There is no effective regulation of these inflammatory practices. In fairness, one should acknowledge that some of the problems stem from a lack of training of radio hosts in handling talk radio contributions in an inflammatory situation and that some vernacular radios also played a major role in urging peace after the conflict erupted (BBC 2008).

Civil society

Today civil society organisations are regarded as essential to democracy. Kenya has a very large number of them, covering virtually every public interest and including many working on election issues. These groups were extremely important in the attempts to reform the Constitution, in advocating a return to multiparty democracy, and in monitoring the end of Kenya's 35 years of one-party rule.

In the transitional elections they were able to put large numbers of non-partisan volunteers into the field as observers. However, most of these individuals are now involved with government or with the new, competing democratic parties and are therefore no longer non-partisan. Thus, there are now fewer genuinely non-partisan groups promoting best democratic practice in Kenya and those that exist are smaller and more dependent on international finance than they were in 2002. The democratisation CSOs were late in mobilising for voter education and election observation and found it harder to recruit observers prepared to be wholly non-partisan. The competing political loyalties of the CSOs may have contributed to the failure of their basket-fund management to deliver finances to them in a timely manner (Sheehy & Maina 2008).

The management of the electoral process

We turn now from the general architecture of democracy to the governance of its electoral processes. The Election Commission of Kenya (ECK) managed the key components of voter registration, election-day mechanics and certification of the results. It had performed very well in 2002 and 2005, was thought to be robust, and its chairman, Samuel Kivuitu, was highly respected.

Kibaki's last-minute appointment of 18 of 21 new commissioners without consulting the opposition, as he had agreed, during the 1997 IPPG negotiations would be the case and the refusal of the ECK to carry out a number of technical improvements recommended by the donor-provided experts assisting it were important danger signals, but the second was not widely known and their significance was appreciated by the international community only afterwards.

Some Kenyans, particularly ODM supporters, did appreciate the significance of these actions, however, and, prior to the elections, began to plan violence in the event of ODM losing the election – for, given the ECK's structure, a loss at the polls would not be accepted as legitimate (Kenya National Commission for Human Rights 2007). The ECK's failures were the most obvious and fatal part of the 2007 elections and have been subject to a detailed investigation by the International Review Commission (IREC) headed by Johann Kriegler, retired South African Constitutional Court judge and the chair of South Africa's first Independent Electoral Commission (hereafter the Kriegler Commission). The commission found that electoral fraud began at polling-station level and was rampant.

It determined that the errors made in the various stages of the tallying process were so great and widespread that it is impossible to reconstruct from the formal record who, in fact, won the presidential contest. The commission focused on the many computational errors it found and a majority of the its members concluded that they had 'not been able to substantiate ... accusations [of] ... malfeasance [at the national tallying centre]' (Kriegler Commission report 2008, ch 6, p 131). The commission's findings therefore implicitly legitimised the negotiated construction of a government of national unity for the country. Our findings concur on all these points.

We note, however, certain limitations in the Kriegler Commission report. Most of the members of the commission were lawyers. Their finding that they could not 'substantiate accusations [of] malfeasance' at the national tallying centre should therefore be taken in a strict legal sense (which raises the threshold for the admissibility of evidence and the burden of proof) – no witnesses were willing to come forward and testify under oath. Our own interviews did uncover those who had received first-hand reports from people who had seen such malfeasance but were unwilling to give testimony under oath. A verdict of 'not guilty' was correct,

but we believe that should not be construed to mean a finding of 'innocent'. In any case, from the point of view of the election itself, what did or did not happen at the tallying centre proper, is less important than the commission's conclusion that there was massive fraud in the general process.

The Kriegler Commission also did not seem to appreciate the significance or evaluate the reliability of the evidence that emerged from the exit poll conducted by the University of California/International Republican Institute (IRI) (Gibson & Long 2008). IRI did not make these results available until after the government of national unity had been negotiated, and polls are not an accepted basis in any country for deciding an election. Nonetheless, in the absence of reliable data from the polls themselves, this survey is the best evidence we have of the way the people of Kenya who actually cast their ballots claimed to have voted. The results are superior to the flawed election returns in that they do not include any ballot-box stuffing, were collected under strict controls by well-trained personnel and are free of computational errors. The poll indicates clearly and with statistical reliability that Raila Odinga should have won the election with approximately 46 per cent of the vote (vs Kibaki's 40%).⁵

Finally, the Kriegler Commission, surprisingly, did not explore whether or not President Kibaki met the minimum standard of 25 per cent of the vote in the required five provinces even if he had won a plurality from the national. The survey evidence indicates that he fell short, in that he received only 17 per cent of the vote in the North-Eastern Province (the ECK claimed he won 50%). In these circumstances there should have been a run-off election, which would probably have produced a decisive result.

None of the foregoing can, or should, provide a legal basis for changing the negotiated settlement brokered by Kofi Annan. We present these concerns instead as an indication that the flaws in the election process not only produced a violent outcome but also one quite different from that which may have been intended by a majority of Kenyans.

The electoral trustees

The above processes and organisations are formally responsible for the conduct of free and fair elections and the implementation of the results. But they hardly

5 The question arises as to why the survey results were not released until after the conclusion of the Annan-mediated agreement. The study had been funded by US Government on the explicit understanding that it would be held in confidence for a period after the elections, doubtless so as not to be seen as interfering with them. Also, some individuals in IRI had doubts about the results (for reasons that are not wholly clear to us) and before they would release them insisted they undergo two US survey audits (which they passed). It has been both alleged and denied that there was a political motive behind the delay in releasing the results.

acted alone. The support of other actors is key to their success. Among these are the army and police, who insure that democracy is not subverted by violence, and the international community, which provides finance and technical assistance. Save for the UN Development Programme (UNDP) it would be a mistake to classify these bodies as participating directly in the management of elections, but their indirect roles are critical. It is helpful to think of them as the trustees of the electoral process.

Networked donors

The donors who support democratisation work in Kenya, and the UNDP, to which they supplied joint programme funds (which paid for full-time election expertise), were well coordinated, held meetings monthly, and had very good interpersonal relations. The lead donor was the USA, deputised by the Danish embassy. Nonetheless, early danger signals about the performance of the ECK were not well communicated within the donor group and therefore neither it nor the diplomats were mobilised into precautionary activity.

The major political focus was on assuring the reappointment of Kivuitu as chair. He was highly respected and had performed well in leading the ECK in 2002 and 2005 but he was not in good health and had taken several months off in 2007. Thus the group over-estimated his and other respected commissioners' ability to organise a complex process and to stand up to intense pressures in a very high-stakes election. In effect, at both the international and the ECK level, the problem was that too much faith was placed in too few people.

The army

Kenya's armed forces might be likened to the Hound of the Baskervilles, which did not bark – they were notably absent in the aftermath of the election. There was the attempted coup by the airforce officers in 1982 and an army mutiny in the 1960s, but the Kenyan military has never successfully intervened in the country's politics. Today it seems determined to be professional and apolitical, a commitment reinforced by its participation in peace-keeping missions elsewhere in Africa. During the post-election violence the generals made it clear to the president that they were not willing to be called out, that they had seen during their peace-keeping work that military involvement could make domestic conflicts worse, and that political problems needed political, not military solutions. Such conclusions bode well for the future of democracy in Kenya.

The police

The assessment of the police is much less positive. Of course their *job* includes dealing with domestic violence, but they are not well prepared to handle it,

meeting it with more force rather than containing or de-escalating it. The police were provided with money from the donor election basket but they used it to purchase riot gear rather than for training. They are alleged to have been responsible for much of the violence, either because they chose not to prevent it or because they used excessive force to deal with protestors (possibly accounting for 43% of an estimated 1 500 people killed in the election aftermath [IMLU 2008]). The Waki Commission is highly critical of their role.⁶

COULD THE VIOLENCE HAVE BEEN PREDICTED?

Clearly some international observers and Kenyans were more sanguine about the 2007 elections than they should have been. They reasoned that there had been no violence or significant fraud during the 2002 presidential elections, despite these having led to a change in governing party, or in the 2005 constitutional referendum, which had been lost by the new president. Furthermore, Samuel Kivuitu would once again head the ECK.

The weaknesses in the ECK were either unknown or poorly communicated to those who might have been able to mitigate them (particularly the internationals). Surely, it was believed, Kenya had now entered the ranks of mature democracies. This conclusion, however, ignored important differences between the 2002 and 2007 elections. In 2002 both the competing presidential candidates were Kikuyu, which removed from contention the most toxic ethnic issue in Kenyan politics.

In the 2002 presidential elections Kibaki had promised a new constitution with a position of prime minister in return for Odinga's active support, with the understanding that the post would be given to Odinga. Kibaki kept his commitment to submit a new constitution to a referendum but it did not include the prime ministership that had been promised to Odinga. Odinga then led the fight to defeat this new constitution and won a 'no' vote, leaving Kibaki with the old Constitution, with the full powers of the Kenyatta-Moi 'imperial' presidency fully in place. In important ways he won by losing.

In contrast to the 2002 elections the candidates in the 2007 presidential contest represented two of the ethnic communities with the bitterest history of conflict – Kibaki, the Kikuyu, and Odinga, the Luo – with the added elements that their fall out over the constitution meant the two men did not trust each other. The presence of the third- party 'spoiler' candidate, Musyoka (Kamba), made it just possible that Kibaki might squeak through despite widespread disappointment with the corruption of the Kikuyus who surrounded him in the government. A sitting president, a deep ethnic divide, personal animosity between the contestants,

6 <http://www.nation.co.ke/blob/view/-/483378/data/46262/-/4cocav/-/WakiRep.pdf>.

the extraordinary powers of an 'imperial' presidency at stake, and the likelihood of a very close election all carried the threat of trouble.

Perhaps some internationals did not want to see the danger signals. Despite his corrupt administration, Kibaki was highly respected as an individual, the country was undergoing excellent economic growth, and Kenya was a good ally in dealing with the 'war on terror' in the Horn of Africa. If this were the view of the US, which played a leading role in supporting the elections, it might have encouraged some members of the Kibaki government to think they could get away with tampering with the election results.

This was not the case with the European Commission or the UK High Commission, however, both of which foresaw that the election would be difficult and expected that there might be violence in the central Rift Valley. As a result, the EC representatives in Kenya put in a strong, early bid for a European Union observer mission and, with support from the UK High Commission, was able to overcome the optimism of Brussels and obtain field observers.

The EC and the UK hoped that a strong international presence would be all that was necessary to keep the election reasonably fair. Very close to the election there were signals that the most likely strategy for illegitimately keeping Odinga from the presidency would be to fraudulently deny him a victory in his Nairobi parliamentary seat. (In Kenya only an MP can become president.) Thus the UK high commissioner and the US ambassador personally observed the elections in Odinga's Langata constituency.

There were other danger signals the international community failed to see. For example, the significance of the fact that the ECK declined to implement important recommendations for its technical operations was not adequately conveyed to the donors who were not directly supervising the election support programme.

Nonetheless, it is perplexing that the only attempt to mitigate the dangers of violence in the powder keg of the central Rift Valley, where ethnic conflicts over land always boil just below the surface, was to provide election observers. The Rift Valley had exploded in similar electoral circumstances in 1992 and 1997 and internal and external experts on conflict warned that the same might happen again (Bayne, Muragu, Newton & Thomas 2007).

The donors had offered to finance district peace committees, which might have mitigated the danger, or at least provided information about the violence being planned. The ECK turned down this offer, which mystifies us, since it was known that the major victims of such violence would be poor Kikuyu, the ethnic group that controlled the presidency. Were the Kikuyu political elite so anxious to retain full control over the election machinery that they were willing to sacrifice their poorer brethren? Perhaps the attitudes of both the ECK and the

police should have sent warning signals to the donors. If, indeed, they did, the signals were ignored.

The major point we are making here is that if there was a failure by domestic and international officials to prepare for violence during the 2007 elections it was not due to the absence of risk analysis but to de facto policy. Although the full scale of the violence was not anticipated, and although it was not predicted to happen in the locations where it would damage international and elite interests, there was enough warning that it should have been a major concern to the government and development agencies in the country. The loss of life in the central Rift Valley in 1992 and 1997 was considerable and the large numbers of IDPs that resulted from it had never been adequately dealt with.

COULD THE VIOLENCE HAVE BEEN AVOIDED?

There were eight main causes of the violence. Starting from the premise that a trigger factor is required to shift a country with underlying tensions from a peaceful to a violent state (Kimenyi & Ndung'u 2005), the immediate cause of the 2008 election violence was the mismanagement and likely rigging of the elections. Two intermediate causes: the role of the media and hate speech and the predominance of ethnic politics. Finally, there were five underlying causes: an overly powerful executive, a centralised state with ethno-regional inequalities, mismanagement of land, a history of impunity for violence and corruption, and poverty and youth unemployment. All these causes were intertwined and mutually reinforcing.

Observers of Kenya's politics agree that the gross mismanagement of the elections triggered the violence. If the polling and counting had been conducted transparently and fairly and if the loser had accepted the results, it is probable that the country would have experienced only minor violence. *If* the donors had been fully aware of the impending technical difficulties in the electoral management process and had pressed aggressively for their repair and *if* the international community had spoken strongly to President Kibaki in a unified voice about the advantages of conducting a fair election and accepting its outcome, it is *possible* that the trigger would not have been pulled and the violence would have been avoided. In the event, as noted above, the international community missed or failed to prioritise some of the important signals of impending trouble and it may not have been united in its message to Kibaki. Finally, it is *possible* that if donors had created a conflict mediation and early warning system for the central Rift Valley early enough and had forcefully signalled its disapproval of any electoral violence, it might have been possible to persuade the key perpetrators to take a different course of action.

Nonetheless, the very factors that made the consequences of electoral mismanagement so explosive also made it *possible* that the Kenyan government and its opponents, in a close contest, would have been willing to risk manipulating the results. Too much was at stake and the chances of squeaking through were too great. In the event, what is past cannot be undone. On the other hand, as Santayana said, those who ignore history are doomed to repeat it. What is crucially important is that the underlying causes of Kenya's recurring electoral violence now be addressed.

WHAT IS NEEDED NOW?

Agenda 4 of the Annan agreement committed the signatories to address most of the sources of violent conflict in Kenyan society. The process of doing so has only just begun and may possibly be stalled. Here we review what we believe are the most important of these issues and what might be done about them.

Constitutional issues

A number of the most difficult issues facing the country have constitutional roots. Several attempts have been made in the past decade to reform the Constitution, good ideas have been deliberated and public views solicited. There is no need to begin the process afresh. The most thorough constitutional review was led by a distinguished Kenyan Asian law professor, Yash Ghai, and resulted in what is called the 'Bomas' draft. If, as originally planned, it had been adopted before the 2002 elections it would probably have been easily accepted and created a far less conflictual foundation for Kenyan politics. For a variety of reasons, however, its presentation was delayed, and the opposition felt it was unacceptably dangerous to extend in any way the term of office of then President Daniel arap Moi.

As a consequence President Kibaki was elected under the old Constitution and, once in power, was unwilling to surrender the powers of the office. Instead, he submitted to a referendum what is called the 'Wako' draft, which did not satisfy other sections of the reform coalition and was defeated by the Orange Democratic Movement under the leadership of Raila Odinga.

It is said that Professor Ghai has recently prepared another draft that pulls together the most acceptable features of all the drafts that are under consideration. Justice Minister Martha Karua has also been charged with presenting still another constitutional proposal. Nonetheless, many observers believe that Kenya is now more likely to proceed by amending the existing constitution rather than putting a new one to another referendum. Whatever the strategy, a number of key constitutional issues must be addressed.

Presidential authoritarianism must be reduced

A key dimension of the violence that frequently surrounds presidential elections in Africa is the extreme concentration of authority in the presidency, with almost no checks on its power. The result is not only an election in which 'the winner takes all for life' but in which there is almost no limit to the president's control. In the political science literature this phenomenon is known as 'imperial presidency', but a Cabinet minister we consulted preferred to speak of 'presidential authoritarianism', which may be a more politic term.

The deconcentration of the powers of the presidency may follow from a number of coordinate reforms which are under consideration in Kenya – the creation of a prime minister with specified authority, an enhanced role for Parliament, an independent and impartial judiciary, legal limits on what civil servants can be asked to do, and devolution of authority to local government bodies.

Clarity about the role of the prime minister

Following the Annan agreement, Kenya's constitution was amended to provide for a prime minister, answerable to Parliament. The duties and authority associated with this position are not clear, however, and are contested within the Cabinet. Currently the issue is not pressing because Kibaki is willing to let Odinga take the initiative as prime minister. It may, however, become a source of conflict between any succeeding president and prime minister.

Some analysts express doubts about the long-term feasibility of a hybrid presidential-parliamentary system, pointing to its inherent potential for inter-governmental conflict. However, others call attention to the fact that a strengthened Parliament with a prime minister counterbalances the presidency and injects accountability into the executive, and that most Kenyans, in fact, support the concept of an executive president with diminished authority.

Executive responsibility to the electorate or Parliament

There is significant debate over what form of representation would best prevent ethnic politics and violence. The problem is that direct presidential elections create incentives for political elites with firm majorities in their constituencies either to prevent opponents and minorities from voting or to displace them from their constituencies and provinces. The reason for this is that if a candidate is to achieve the 25 per cent threshold every vote counts in each constituency and in each province. A Westminster-style executive selected by MPs according to a single-member-first-past-the-post (SM-FPTP) system would reduce the incentive to ethnic violence in a society like Kenya because the votes of ethnic minorities (who are currently driven from the polls) would become irrelevant. The fact that

a significant proportion of the executive (the prime minister and those he selects to the Cabinet) is responsible to Parliament would therefore somewhat reduce the incentive to violence.

Method of Representation

The allocation of seats in the Kenyan Parliament is hugely unequal, with the largest constituency more than 20 times more populous than the smallest. These inequities result from the merging of the National Assembly and the Senate in the 1960s and the addition in the Moi years of districts for small ethnic groups. In both periods Parliament gave symbolic representation but had no real power, so the disparities in constituency size did not matter. Now that Parliament has re-emerged as a significant governmental institution and selects the prime minister, the extent of the inequalities is no longer supportable. As noted above, single-member constituencies with plurality votes (SM-FPTP) in a purely parliamentary democracy, as advocated in 'Bomas', reduce the incentives for violence because most constituencies are drawn along ethnic lines and are thus controlled by one ethnic group. But to achieve equality among SM-FPTP constituencies would require major changes in the electoral map. At the other end of the spectrum, Kanyinga (2006) argues that pure proportional representation (PR) using a list system would require leaders to take a national rather than geographic outlook during elections. But pure PR might well increase the chances of inter-ethnic conflict because it would make the country a single multi-ethnic constituency.

A mixed system, with a proportion of MPs selected by FPTP and a compensating balance voted in by a list PR system, has been advocated as a recipe for a more ethnically balanced Parliament. While this system would probably provide a balance in Parliament, it might still produce incentives to use violence to prevent minority opponents from voting. A final possibility would be to return to the two-house system created at independence, with the Assembly chosen in equal population constituencies and the Senate based on distinct ethnic groups (which would give more effective representation to the smaller groups).

This last option shares with the SM-FPTP system the advantage that it provides no incentives for violence against minority voters. No electoral reforms formally proposed to date call for pure PR or MPR. Barkan, Densham & Rushton (2006, pp 926-39) use 1997 demographic and electoral data to model how the different systems would affect the distribution of parliamentary seats between the major parties and find that the effects would be remarkably modest, which enhances their political feasibility. It is clear that one of these reforms must be introduced in the interests of the long-term legitimacy of parliamentary representation and, given Kenya's history, those that would reduce the incentives for violence deserve special scrutiny.

Devolution

The 'Bomas' draft proposed a return to the system, provided for in the independence Constitution, of regional governments placed between the centre and the district and municipal councils. The Swahili term for regions is *majimbo*, which is the word used when proposals for such devolution are debated in Kenya. On the one hand, devolution would decrease the powers of the centre, make the attraction of capturing the presidency a bit less overwhelming, and provide more alternative bases of power for ethnic politicians who were out of favour at the centre – all of which would seem to reduce electoral violence. On the other hand, *majimbo* has become a code word for returning control of land to local communities and driving out the 'foreign' ethnic groups. As such, *majimbo* is advocated as an instrument of autarchy by the aggrieved Kalenjin and Miji-Kenda and feared as a mechanism for discrimination by the Kikuyu, who are land scarce and widely settled throughout the country.

Mahmood Mamdani (1996) has argued that such ethnically exclusive control over land is fundamentally regressive, both socially and politically, as it gives the local chiefs who control the land despotic powers over their subjects. Independent of the question of what is historically progressive, for a number of reasons it is probably not an opportune moment to move forward on *majimbo*.

- The topic itself has become deeply divisive and greater spur to violence than the other constitutional issues.
- Devolution, or some greater local voice on land issues, could just as easily be addressed by expanding the powers of the district councils, which are already in place.
- The need for greater equity and transparency in the distribution of central resources could as easily be achieved by means of legislated allocation formulae.⁷
- International evidence suggests that there would be fewer governance gains from regional governments than from the centre and few democratisation gains over the district councils. Politicians with frustrated national aspirations would be the main beneficiaries.
- The *majimbo* debate is really about conflict over land, an issue that would be better addressed directly, as we suggest below.

⁷ Note, however, that Kenyatta (through *harambee*) decentralised to communities the responsibility for initiating service expansion in order to legitimate an *unequal* distribution to Kikuyus (who were better placed to raise funds locally). Also note that redistribution was a major agenda for Moi and that central reallocation is unlikely to go further than the extent he achieved.

Electoral Management

Re-establishment of the Electoral Commission of Kenya

The 1997 Inter-Party Parliamentary Group (IPPG) agreement made the ECK a representative body. There are two downsides to this reform.

Firstly, there is no effective oversight mechanism to ensure that opposition parties nominate commissioners. Instead of relying on legislation (which may never be enacted) the 'Bomas' draft entrenched an oversight mechanism in the Constitution that hindered the president's ability to appoint commissioners without consultation. It required that Parliament approve presidential nominees to the renamed Electoral and Boundaries Commission (EBC) (Chitere, Chweya, Masya, Testensen & Waiganjo 2006).

Secondly, most commissioners in a representative ECK are not sufficiently qualified to carry out their tasks (Muite 2008), leaving the commission open to incompetence and abuse. The 2006 Constitutional Minimum Reforms Package, which called for detailed legislation providing for a professional ECK comprising nine commissioners (instead of the current 21) who would formulate electoral policy and supervise a professional secretariat, would have professionalised the ECK. Paul Muite (2008), the MP who spearheaded the package, argues that the professionalisation of the ECK prior to the elections would have resulted in free and fair elections in which the results, even if the victor won by only a small margin, would have been accepted. In terms of the Minimum Reforms Package commissioners would not be appointed but would be openly recruited with regard to merit, regional diversity, gender and approval by Parliament (Muite 2008).

This is one area where there has been some progress. Parliament has passed a constitutional amendment creating the Interim Independent Electoral Commission and the Interim Boundary Commission and has disbanded the disgraced ECK.

Voter Registration

The Kriegler report (2008) details problems with the voter registration process and suggests ways of improving it. It finds that it is highly likely that there are significant numbers of deceased voters still on the voters' rolls (in some provinces more than others) and that the voting procedures make it easy for voters to cast their ballot in one electoral contest and not in another (making it impossible to use the roll to determine whether ballot boxes have been stuffed).

During the course of our interviews a senior person in a CSO concerned with voter education reported an incident he had personally witnessed in his home rural constituency on which he has never given evidence. At the end of the election day a voting official announced to those present at the counting

that X number of presidential ballots had been ‘unused’ (presumably because the voters had died or because they had cast their ballots in one of the other elections and not in the presidential election).

The group agreed that those ballots would be cast for the presidential candidate who was overwhelmingly favoured at that polling station and that the surplus parliamentary ballots would be distributed evenly between all the candidates so that they would not affect those results and would not produce a discrepancy between the two races. The agent for the party that was hurt by this procedure announced that he had no objection as his sole concern was for his party’s parliamentary candidate; he did not disagree with the others about the presidency.

If even someone who is professionally engaged in voter education will not act against such fraud it is clear that the temptations and social pressures are overwhelming in (rural) constituencies where the community is united in its wishes. The only thing that can be done, realistically, is to reduce the temptation and this demands both that the names of deceased voters be removed from the rolls well in advance and that voters be issued with all their ballot papers when they arrive at the polling station.

The courts

Both the ‘Bomas’ Draft and the ‘Wako’ Bill strengthen the judiciary by making it more independent and able to check the executive. ‘Bomas’ and ‘Wako’ describe principles that guide the exercise of judicial power and create a Supreme Court that exercises jurisdiction over presidential impeachment, election petitions, and constitutional matters.

Both documents recommend a Judicial Service Commission composed of appointees who are independent of the executive. The commission’s recommendations for the appointment of judges must be approved by Parliament, and the judiciary is granted fiscal autonomy from the executive (NCC 2004, pp 85-95; RoK 2005, pp 93-102). If they had been implemented these reforms might have restored some faith in the judiciary as a credible institution independent of the executive. One article which is especially salient to the prevention of election violence is that the Supreme Court would replace the current ad hoc system of resolving election disputes. If such a system had been in place the ODM and its supporters would have been able to choose a legal rather than a political – and violent – route to resolve the election dispute.

On the other hand, it is unrealistic to think that the courts can stand alone against extreme pressure from the presidency. Such changes in the Constitution may well make the courts effective in resolving disputes over parliamentary

seats, but for them to decide on disputes with a sitting president the current concentration of powers in the presidency would have to be reduced or the stakes would be too high.

The police

The 'Commission of Inquiry into Post-Election Violence' chaired by Justice Philip Nyamu Waki (2008) submitted a hard-hitting report suggesting a number of reforms in relation to the police. The report as a whole initially met with a hostile reception from all the major parties but it is not clear at this stage whether or not this also applies to the recommendations about the police.

Prosecutions

Political violence in Kenya has been conducted with impunity. Prosecutions have been extremely rare, which has only encouraged further violence and built resentment and calls for revenge. The Waki Commission called for an independent tribunal to prosecute those against whom it is believed there is a prima facie case of organising electoral violence. It gave Kofi Annan a confidential list of those whom it felt should be charged and asked that it be turned over to the International Criminal Court if the government of Kenya did not prosecute them (Waki 2008).⁸ Despite the hostility of the major political parties to the Waki report a local tribunal seemed less threatening than the prospect of international indictments so the government moved swiftly to propose a mechanism for establishing such a tribunal and Parliament was recalled on Tuesday 20 January 2008 to pass the necessary legislation. Only time will tell how vigorously the cases will be prosecuted.

National Land Commission

We noted above that the government's failure to address land conflicts and the manipulation by political elites of grievances over land have been the underlying cause of election violence since the introduction of multiparty politics. Furthermore, the earlier rounds of electoral violence inspired by land disputes (dating back to 1992) have left substantial numbers of internally-displaced families whom it is inhumane to ignore any longer and whose own inclination to violent revenge is undeterred.

It is vital that the land-inspired conflicts be addressed. But it is also important to recognise that they are unlikely to be 'solved'. First, the competing discourses

8 <http://www.nation.co.ke/News/politics/-/1064/485606/-/yw8abjz/-/index.html>.

over land are not only incompatible; they are also legitimate. It is true both that the central Rift Valley was not occupied by Kikuyu when the colonial incursion occurred but also that they have now been living there in significant numbers for nearly a century and that they moved there in good faith.

The land was stolen, but by whites. Kikuyu smallholders who live there now bought the land and are as poor as the Kalenjin who want the land 'back'. Secondly, many of the large landholders did acquire their land under questionable conditions and, in many cases, justice would be served by their being made to surrender it – either by order or by the pressure of progressive land taxation. However, the amount of such land that is viable for smallholder crop production is inadequate to meet the demands of those with historical claims to be in the area, much less of those who are landless.

These questionable large landowners are also among the most politically powerful people in Kenya and are therefore unlikely to be easily or entirely dislodged. Thus, no matter what is done, there will be a 'land problem'. According to experts in this field the crucial step is to create a process of deliberation, negotiation and mediation so that all parties come to realise the limits of what is possible and reach a compromise with which they can live. The first steps for such deliberative and participatory processes are contained in a Bill proposed by Lands Minister James Orengo.

The current Constitution concentrates control over land in the hands of the president, who holds it in trust for the state. The president uses these powers without oversight to make land grants to individuals and corporations and to arbitrate land disputes. One recommendation for resolving the land problems that is contained in both the 'Bomas' Draft and 'Wako' Bill is to remove powers over land allocation from the hands of the executive by creating a central regulatory agency, the National Land Commission (NCC 2004, p 38; RoK 2005, pp 40-1). The Land Commission would regulate the ownership and use of land on behalf of the national and devolved governments.

One drawback is that neither draft constitutionally guarantees the Land Commission's independence. Both are silent on its funding, regulation, and appointment of commissioners.

The 'Bomas' Draft goes a necessary step further than the 'Wako' Bill by outlining legislation on land for Parliament to enact, which includes key provisions for revising land laws and policy, affirming spousal land rights, investigating the legality of government grants and dispositions of public land, settling the landless, redistributing land from individuals back to the appropriate communities, and setting limits on maximum land holdings (NCC 2004, pp 38-9).

If these articles had been implemented they would have started the much needed process of establishing a tribunal to investigate and settle land disputes

by peaceful means and would have contributed significantly to preventing the 2007 election violence.

The Draft Land Policy 2006, which closely mirrors the 'Bomas' recommendations (Wambua 2008), was to have been introduced in Parliament by Cabinet Minister Orengo, and the passage and implementation of this policy may reduce the likelihood of further violent conflicts over land. The debate over land reform seems, in early 2009, to be subsumed once again in the whole discussion about a comprehensive review process for the Constitution (of which more below).

Employment-led development

Kenya is poor; 50 per cent of the population lives in absolute poverty (UNDP 2005). Empirical studies find that violence is much more likely to occur in a low-income country (Fearon & Laitin 2003; Collier, Hoeffler & Sambanis 2005; Collier 2007).

Kenya is currently experiencing a 'youth bulge', where the median age is 18 years and 42 per cent of the population is under 15 (UNICEF 2006). Forty per cent or more of these youths are unemployed and most are under-educated; only 22 per cent go on to secondary education (SID 2004). Being young, poor, uneducated, and with limited prospects of employment or access to land makes people more likely to engage in violence (Collier 2007). A recent analysis of the role of the youth in the election violence (Youth Agenda 2008) confirms that they are easily manipulated to violent ends when the bulk of them are unemployed and disillusioned. The Kenyan government's strategy for reconciliation acknowledged that youth violence was due to a 'lack of effective opportunities to integrate the majority of Kenyan youths into the mainstream economic activities' (RoK 2008b, p viii).

Youth vigilante groups have emerged in Kenya in the past decade offering an attractive route for socialisation, income, and informal employment. Many of these groups were activated during the election violence (OHCHR 2008). For other youths recruitment was based on promises of a new leadership that would redirect state assets to their ethnic group, direct payment (through a locally levied 'fighting' tax [HRW 2008]), land, jobs, and goods derived from looting. Grievances about inequality and marginalisation were used to justify their actions.

Patterns of violence in some districts of Central and Western provinces corroborate that unemployment is a motivating factor, for violence was directed against the homes and food reserves of (competing) commercial and tea-farm workers but left the commercial infrastructure intact (Mozersky 2008). While the youth perpetrated 73 per cent of the attacks they were involved in planning and financing only 7 per cent. Youth Agenda (2008) concludes that the youth were at the tail end of the perpetrator chain and constituted the majority of the victims of violence.

Young men are likely to remain available for violent mobilisation until they find reasonable employment, accumulate some capital, and get married. An 'employment-led development strategy', as suggested in the International Labour Office's 1972 report on Kenya, would address both poverty and violence.

Conflict: resolution and management

Youth violence has been a persistent feature of political activity in Africa for the past 60 years, particularly in relation to elections. It would seem that other, less violent tools for conducting conflict are weakly developed, so the repertoire of mass action is confined to the alternatives of passive acceptance of repression or riot, with nothing in between. Instruments that other societies have discovered for pursuing personal interests in the face of resistance or repression – petitions, demonstrations, strikes, civil disobedience – are weakly developed in most of Africa. The flowering of civil society in Kenya has provided some tools of protest and change for the middle classes but far fewer for the poor.

Tools used to mediate inter-communal violent conflict and bring about reconciliation have fallen into disrepair. International non-governmental organisations and the Conflict Early Warning project based in Addis Ababa are involved in innovative mediation work to reduce cattle raiding in the 'Karamajong cluster', which includes Kenya but applies only to pastoralist areas.

In terms of reconciliation, the African Great Lakes Initiative of Friends Peace Teams has made creative use of 'alternatives to violence' techniques in Rwanda and Burundi and modest efforts are underway in Kenya (*Peace Ways* 2008). Much more could be done on all these fronts. It would be unwise to allow Kenya to slip back into silent resentment and unresolved wishes for revenge. Similarly, the internally displaced persons created during episodes of election violence should not be forgotten. There is an urgent need, on both humanitarian and conflict prevention grounds, for programmes which will either reintegrate them in the places from which they were chased or find them suitable alternative land on which to settle.

WHAT ARE THE PROSPECTS FOR REFORM?

Agenda item 4 of the agreement Kofi Annan negotiated between the PNU and the ODM nominally committed the parties to addressing the above issues. The question is whether they will do so. In the past Kenya's leaders have simply ignored the causes and consequences of electoral violence and pretended they were no longer relevant. This time around, the response has been more positive, although still mixed.

As noted, the Krieger Commission's call for the members of the ECK to resign went unheeded. Ultimately, however, Parliament took the matter out of the commissioners' hands and passed a constitutional amendment creating the Interim Independent Electoral Commission and the Interim Boundary Commission. Appointments to the two commissions will be made by the Parliamentary Select Committee on Constitutional Review (PSC), and confirmed by Parliament as a whole. The term of office of the two commissions will be two years, after which they will be dissolved.

The selection of the commissioners to serve in the IIEC was not without drama. Parliament voted to reject the individual nominated to serve as chairman, forcing the PSC to begin the recruitment procedures afresh.

Similarly, both the ODM and the PNU voted against the implementation of the criminal prosecution recommendations of the Waki Commission.⁹ The government drafted a Bill to establish a local tribunal to try suspects (some of them Cabinet Ministers) rather than have them indicted by the International Criminal Court, but Parliament voted against the Bill, preferring to have the alleged perpetrators tried in the Hague.

Now that Odinga and the ODM have succeeded in achieving an amendment to the Constitution to provide for the post of prime minister do they have an incentive to attempt to reduce the constitutional powers of the 'imperial' presidency? As Kibaki is not an activist president Odinga, as prime minister, is, in practice, already exercising most of the powers he might claim and he is in a favourable position to win the presidency in 2012.

Those in the PNU who will challenge Odinga in his attempt to succeed Kibaki have a better chance of winning the presidency than the prime ministership if parliamentary constituencies continue to be constructed as they are at present, so their motivation to press for constitutional change might not be as strong as it would seem.

Informed observers of Kenyan politics believed it was more likely that selective amendments would be made to the existing Constitution than that a completely new one would be drafted and that even those changes would have to be motivated by dedicated reformers. Opinion polls showed that there had not been strong pressure from the public for a new constitution.

Contrary to these assessments, however, towards the end of 2008 Parliament passed the Constitution of Kenya Review Act to pave the way for the completion of the constitutional review process. The Act provides for a committee of seven experts, of which three are international. The committee has been nominated

9 <http://www.nation.co.ke/News/politics/-/1064/485606/-/yw8abjz/-/index.html>.

by the PSC and thereafter appointed by the president. Thus, after a slow start, progress is now being made.

The fact that Kenyans were deeply shaken by their country's descent into violence after the December 2007 elections, as was the international community, has created an atmosphere in which the democratic changes for which the country's citizens have battled since 1990 can now be fully achieved. This is the moment when Kenya's democratic future can be secured. There is resistance to fundamental change, but there is hope that that can be overcome.

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