

# OLD WINE IN NEW SKINS

## *Kenya's 2013 Elections and the Triumph of the Ancien Régime<sup>1</sup>*

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### ABSTRACT

*On 4 March 2013 Kenya held transitional elections that were significant for three reasons. Firstly, they were a test of the country's institutions under the new Constitution, which was promulgated in 2010. In 2007 Kenya experienced violently disputed elections, partly because of weak and dysfunctional institutions not capable of impartially arbitrating political disputes. Secondly, Uhuru Kenyatta and William Ruto presented a joint presidential ticket despite having been indicted by the International Criminal Court as among suspected masterminds of the 2007-8 post-election violence. Thirdly, Raila Odinga, the loser of the controversial 2007 presidential election, attempted to succeed the incumbent, Mwai Kibaki, through a third presidential bid. Thus stakes were much higher in 2013 than at any other election time in Kenya's independence history. Some reforms under the new Constitution, the Kikuyu-Kalenjin tribal alliance and the ICC factor ensured that the elections were relatively violence free. However, as in the past, the presidential contest was primarily about control of the state by expediently cobbled together ethnic alliances of self-styled ethno-regional barons for spoliation opportunities. In this article I argue that the triumph of the ICC duo was a setback for reform since it ensured continued dominance of Kenya's economic and political spheres by the ancien régime. Kenyatta and Ruto could not countenance reforms because they were beneficiaries of an unreformed and centralised state. Thus they were bound to frustrate implementation of the Constitution, which was intended to secure Kenya's stability by consolidating democracy.*

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<sup>1</sup> This article was written while Dr Shilaho was attached to UJ's Centre for Social Development in Africa.

## INTRODUCTION

This article analyses Kenya's 2013 elections through the prism of the country's multiparty politics and specifically within the gamut of the unfinished events of the violently disputed 2007 elections. The overarching argument is that the results of the 2013 elections constituted a democratic reversal and posed a threat to the democratic gains Kenya had made under multiparty politics.

The Jubilee Coalition, the victorious ethno-regional grouping, was an extension of a section of Kenya's political elite that contributed to divisive multiparty politics through predatory and exclusionary politics.

The elections were conducted in a political atmosphere that was not substantially different from that in which previous multiparty elections were held. In spite of the new Constitution, change was more about style than substance. A history of electoral fraud, weak institutions beholden to the president, a deeply ethnically bifurcated society and a self-replicating plutocracy stood in the way of credible elections.

The local owners of capital could not afford to lose the power critical to patronage networks. Hence, for Kenyatta and Ruto, winning the presidency was the absolute goal. There were two reasons for this: firstly, victory was imperative in order to ensure continued dominance by Kenya's primitive accumulators of the country's political and economic spheres. Secondly, as head of state and deputy, respectively, they hoped to have some leverage over The Hague-based judicial process. A loss would have rendered them more susceptible to international criminal justice.

The 2013 elections were transitional, given that the incumbent, Mwai Kibaki, was constitutionally barred from seeking a third term. Prime Minister Raila Odinga's second attempt to succeed Kibaki faced the greatest challenge of all his previous presidential bids. The seasoned opposition politician apparently compromised his position when he acceded to a power-sharing agreement in February 2008, making his chances of winning in 2013 much lower than they were in 2007.

By signing the national accord that resulted in the formation of the coalition government Odinga contributed to halting the ethnic violence that had threatened to tear the country apart.<sup>2</sup> However, with the stroke of a pen he gave Kibaki and his allies a political lifeline to consolidate power in the lead-up to the 2013 elections. It was bound to be hard for Odinga to overcome the challenge, especially having lost Kalenjin support after he fell out with Ruto in the wake of the 2007 elections.

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2 For an analysis of the intricacies and nuances of the mediation process that resulted in the signing of the peace accord between Mwai Kibaki and Raila Odinga, see Khadiagala 2008.

The article begins by showing that the election results ensured the continuity of the dominant postcolonial reactionary politics and discusses the nexus between tribalism and power and how it led to the emergence of tribal barons. It then explores the role of reform in the 2013 elections. It highlights the point that, despite the reforms, the elections were essentially Kenyan elections, characterised by organisational and managerial challenges and resultant disputes.

Focusing on the issue of devolution of power and resources, the article argues that although they might address the question of zero-sum politics they could also cause a rift in the country. It underscores the vigilance of sections of civil society that insisted on accountability and respect for the rule of law through legal challenges against apparent breaches of the law. However, entrenched impunity and weak and compromised institutions trump constitutionalism.

The article brings to the fore the institutionalisation of amnesia in Kenya's social fabric. The 2013 elections showed that, as a collective, Kenya has learnt little or nothing from its history, specifically the destructive 2007-8 post election violence. Local political actors such as the clergy, sections of the media, the judiciary, Parliament, the executive and politicians and their supporters, shied away from confronting the challenges bedeviling Kenya's troubled multiparty politics.

Unresolved historical injustices, particularly those related to land and the inequitable distribution of national resources, were a threat to political stability. The peace industry that sprang up in the run-up the elections was a form of escapism from the hard questions at the heart of Kenya's viability as a cohesive nation state. Ultimately, the article highlights the overarching role of tribalism in Kenya's politics, to the extent of reducing party manifestos to a mere formality as politicians mapped differences with opponents on the basis of visceral tribalism. It cautions that tribal alliances, the staple of ethno-regional barons, pose a threat to Kenya's democratic consolidation and political stability, fostering the Balkanisation of the country along ethnic fault lines.

#### THE WATERSHED 2013 ELECTIONS

The 2013 elections were significant for three main reasons. Firstly, the disputed elections in 2007 had resulted in unprecedented countrywide ethnic violence that almost plunged the country into civil war (see Branch & Cheeseman 2008; Mueller 2008; Throup 2008; Shilaho 2008 for analyses of the 2007 elections and the aftermath) and, since Kenya is of geostrategic relevance and an anchor state, the international community monitored the elections closely, lest the country descend into violence again.

The second reason was the charges of crimes against humanity facing Kenyatta and Ruto at the International Criminal Court (ICC). The two politicians

exploited their predicament to whip up Kikuyu-Kalenjin tribal solidarity and stir up antipathy to Odinga and the ICC, especially its face, the then Chief Prosecutor, Luis Moreno-Ocampo, whom they blamed for their legal woes. The politics of the ICC cases, nestled in tribalism, greatly influenced the outcome of the elections.

The third reason was that Kenya's *ancien régime* was opposed to a possible Odinga presidency. Despite the fact that Odinga was a member of Kenya's oligarchy, his background in opposition politics distinguished him from the rest of the grouping, the pillars of which were Jomo Kenyatta, Daniel arap Moi and Mwai Kibaki, Kenya's first three presidents.

The *ancien régime* was self-reproductive in the sense that Moi deputised for Kenyatta, while Kibaki deputised for Moi and Uhuru Kenyatta was Moi's protégé. Its ethnic exclusiveness and predatory politics, impunity and exploitation of violence for political ends contributed to the fragmentation of Kenya's social fabric.<sup>3</sup> The stakes had never been higher and fears of violence in the event of a dispute over the election results were not far-fetched, since tribal clashes had been the norm since Kenya's return to multiparty elections in the early 1990s.

Apart from being united by the ICC adversity, Kenyatta and Ruto represented the past, both of them being protégés of Moi. Kenyatta was the nucleus of Kenya's postcolonial oligarchy, his father having been the first president (1963-1978) during a period in which exploitation of tribalism for political and economic gain took hold in Kenya's polity.

In terms of political pedigree, however, they were poles apart. Uhuru Kenyatta is a man born with the proverbial silver spoon in his mouth. His rise to the presidency was meteoric, owing to lineage, oligarchic interests and ethnicity. He was an unknown quantity before he was thrust into national politics by Moi in the run-up to the 2002 elections (see Shilaho 2012). Ruto, who comes from peasant background, described himself during the 2013 election campaign as a 'hustler' (*The Standard*, 10 August 2013). Whether he meant he was 'an enterprising person determined to succeed; go getter' or 'a person who employs fraudulent or unscrupulous methods to obtain money; swindler' (Dictionary.com) is not clear. Politically streetwise, he emerged as an ethno-regional baron within the space of ten years, no mean feat given that he entered Parliament only in 1997. Pairing the two was a political masterstroke in a country in which voting patterns are ethnic and regional.

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3 The Kenya Human Rights Commission (KHRC 2011) in its report, *Lest we Forget: Faces of Impunity in Kenya*, recorded the names of individuals in successive governments who were implicated in corruption, incitement to ethnic violence and land grabbing, among other abuses of power.

### THE NEW CONSTITUTION AND THE 2013 ELECTIONS

The 2013 elections were held under the 2010 Constitution, which sought to provide both vertical and horizontal accountability with regard to the exercise of presidential powers and devolution of power from the centre (the presidency) to the periphery (the counties). Horizontally it has constitutional organs like Parliament and the judiciary and constitutionally-recognised oversight commissions; vertically there is a devolved system of government and lastly there is a normative check in the form of constitutional principles and values. It was hoped that these reforms would ameliorate the power of the executive (*Standard on Sunday*, 27 March 2011, p 29).

The new Constitution attempted to institutionalise power and curtail the arbitrary, whimsical and capricious rule which had been the hallmark of neo-patrimonial rulers under the old Constitution.

When there was a one-party state the president exercised power through informal networks. This accounted for Moi's penchant for impromptu roadside declarations that passed for government policy. Some of the president's allies, often drawn from his tribe, wielded a power that was disproportionate to their official designations. Reform was aimed at emancipating the Kenyan state from kinship ties, tribalism and regionalism and transforming the country into a nation based on strong and independent institutions, which had, in the past, been resisted by those in power (Chabal & Daloz 1999, pp 4-8).

The 2013 elections tested the strength of the fledgling Constitution and were a barometer of Kenya's commitment to the rule of law. Previous elections lacked credibility, largely because the incumbent could interfere with their management. Members of the electoral commission, judges of both the then-highest court, the Court of Appeal, and the High Court, the police and the entire security sector were beholden to the president as the appointing authority.

The electoral body could not guarantee credible elections and the judiciary could not arbitrate ensuing disputes impartially. The police took sides in partisan politics in defence of the incumbent president and his allies, resulting in the cases of torture and extrajudicial executions that marred Kibaki's tenure (Kenya National Commission on Human Rights 2008; Alston Report 2009).

### JUDICIAL REFORM AS A PREREQUISITE FOR DEMOCRATIC CONSOLIDATION

In 2002 the Advisory Panel of Commonwealth Judges handed down a damning report on Kenya's judiciary, which, they found, was defined by endemic corruption and other acts of impropriety. They recommended reform. Moi and Chief Justice

Bernard Chunga ignored the report. Kenya's judiciary had deferred to the executive and often ruled in its favour in politically sensitive cases. This lack of jurisprudential independence rendered the judiciary integral to the entrenched culture of impunity in the country.

The absence of a credible judiciary contributed to the 2007-8 post-election violence because the opposition had no confidence in it and so resorted to mass action to express anger rather than file a petition against the results.

The judiciary underwent some reforms before the 2013 elections with the establishment of the Judges and Magistrates Vetting Board and the Judicial Service Commission (JSC). The former gauged the suitability of jurists in office at the time the Constitution was promulgated in 2010 to continue serving on the bench. Some were dismissed on the bases of corruption, tardiness and other professional misconduct.

Previously the incumbent president was solely responsible for the appointment and promotion of judges, based on their political loyalty and ethnic affiliation. The Supreme Court, the apex court in the land and an innovation in Kenya's criminal justice system, came into being courtesy of the new Constitution. Supreme Court judges were appointed by the Judicial Service Commission in a competitive and open interview process that was broadcast live by the local electronic media. These measures restored in Kenyans some confidence that the judiciary would safeguard the credibility of elections.

The Supreme Court had exclusive jurisdiction over petitions relating to the presidential election and had to dispose of matters within 14 days after the electoral body announced the official results. Its verdict was final and could not be appealed. What also inspired confidence in the judiciary was the appointment of Willy Mutunga as the new chief justice and president of the Supreme Court. Mutunga had not served as a judge before but was a reputable academic with a widely acknowledged track record in the struggle for reform, so the JSC could not have recommended a more qualified candidate. He was widely regarded as the personification of the desired judicial reform. Therefore, as head of the judiciary, his role in the 2013 elections was of paramount importance.

In the wake of the promulgation of the Constitution the judiciary showed some modicum of independence and, unprecedentedly, the executive lost some cases. For instance, a High Court judge ruled that the government was legally bound to arrest Sudanese president Omar Al Bashir if he visited the country (*Daily Nation*, 28 November 2011). Bashir, the subject of an arrest warrant issued by the International Criminal Court, had previously visited Kenya to attend the ceremony for the promulgation of the new Constitution. The government appealed the ruling (*The Star*, 8 December 2011).

The High Court also declared unconstitutional Kibaki's attempt to unilaterally appoint the chief justice, the attorney-general, the director of public prosecutions and the director of budget. Kibaki backed down and allowed the due constitutional recruitment processes to unfold after resistance from Odinga and civil society. Although the courts declared unlawful Kibaki appointees who went by the title 'county commissioners', because the Constitution had no provision for such posts, Kibaki ignored the verdict and, at the time of writing, these bureaucrats were still in office.

County commissioners, who owed their loyalty to the president, were considered to be an element of the central government's efforts to resist the devolution of power. They were an extension of the discredited provincial administration and a relic of the oppressive colonial state and were unpopular with many Kenyans. Almost five months into the tenure of the Jubilee government the appointees continued to serve.

#### THE BATTLE OVER THE ELECTION DATE

The first litmus test of the judicial reforms was the controversy surrounding the date of the elections. The new Constitution (2010, p 84) stipulated that elections be held on 'the second Tuesday in August in every fifth year'. Traditionally, Kenya held general elections every five years and the Constitution did not change that. However, at some point there was uncertainty about the date of the elections, with some politicians suggesting that they be held in December 2012 and others maintaining they should be held in August 2012.

The Commission for the Implementation of the Constitution (CIC), whose brief could be summarised as being to 'monitor, facilitate and oversee the development of legislation and administration procedures required to implement this constitution' (CIC site), argued that elections, according to the Constitution, must be held in August 2012.

The controversy over when to hold the elections was the subtext of a larger plot, in which Kibaki's succession and The Hague cases were the core issues. Kibaki arbitrarily declared 4 March 2013 as the date of the elections. The electoral management body, the Independent Electoral and Boundaries Commission (IEBC), confirmed the date, despite the fact that the Constitution removed from the president the prerogative of naming the election date. Moreover, the IEBC endorsed the date despite the fact that, in response to an objection lodged by civil society, there was a court case pending over the legal interpretation of the matter.

The case had originally been brought before the Supreme Court, but that court inexplicably referred the matter to the High Court. The lower court handed down an ambivalent ruling, which was interpreted to mean that elections could either

be held in 2012 or in 2013 provided that Kibaki and Odinga, the co-principals of the coalition government, concurred. Given the bickering and mutual suspicion that afflicted the coalition government, it was unlikely that the two would agree on such a politically sensitive issue. An appeal to the Appeals Court was rejected.

#### ELIGIBILITY CASE AND IMPUNITY: YET ANOTHER FALSE START

The consequences of the case at The Hague against Kenyatta and Ruto were another test of the independence of the judiciary.

The debate over whether Kenyatta and Ruto met the requirements of Chapter six of the Constitution, which deals with leadership and integrity, divided the country and ended up in court. Civil society, led by the Kenya Human Rights Commission, the Kenya chapter of International Commission of Jurists (ICJ) and the International Centre for Policy and Conflict, lodged an objection, maintaining the two were ineligible to occupy public office, arguing that because of the ICC indictment they did not meet the threshold set by Chapter six.

Just before the elections the High Court handed down a judgement, stating that it had no jurisdiction over the matter, but ruling that the two were presumed innocent and so had the right to stand for public office (*The Standard*, 15 February 2013).

Moreno-Ocampo, who stated repeatedly that the case against the two Kenyans was about culpability for the crimes against humanity committed during the post-election violence but not about the politics of the 2007 elections, said the issue of eligibility was a matter for the local courts. His opinion was confirmed by his successor, Fatou Bensouda.

Despite the new Constitution, the old order of impunity persisted. The day of the promulgation of the Constitution, 27 August 2010, a watershed moment that Kenyans hoped would mark the beginning of a new dispensation anchored in the rule of law, justice and inclusive politics, was both historic and anticlimactic.

The attendance of Omar Al Bashir was symbolic. Because he was presumed innocent of ICC charges of crimes against humanity, war crimes and genocide in the Darfur region, his presence as an invited guest highlighted the hostility of the Kenyan government to the spirit and letter of the new Constitution. It was also an expression of hostility to the ICC, which was considered to be an interloper in Kenya's internal affairs and to be encroaching on its sovereignty. The inference was that implementation of the Constitution was bound to be tempestuous and the occasion was an archetypal case of old wine in new wineskins. The promulgation of the Constitution seemed to be yet another false start in Kenya's quest for socio-economic and political renewal.



Kenyatta's insistence on running for president in spite of the ICC charges presented a formidable challenge to Odinga's third presidential attempt. However, like most Kenyan politicians, Odinga was guided by self-interest and related to the ICC issue from a political angle, flip-flopping on the matter out of political expediency. The only memorable remark attributed to him about Kenyatta's indictment, made during an American-style presidential debate, was a humorous one in which he alluded to the possible incarceration of Kenyatta, saying, 'If we say we run the government through Skype, then there will be challenges' (*BusinessDay*, 13 February 2013).

Odinga had been a member of the Cabinet and Parliament that had watered down the Leadership and Integrity Bill before it was enacted, deleting, for instance, a provision that barred public officials from involvement in gainful employment while in office. Also expunged was a clause that demanded that those aspiring to elective office declare their income, assets and liabilities. These changes allowed individuals of dubious standing to occupy public office, thus going against the spirit and letter of the Constitution, which sought to institutionalise a culture of probity and accountability. Although there were challenges in framing the Bill to prevent abuse through witch-hunts, the quest for self-preservation among the political elite trumped the national good.

Odinga was caught on the horns of a dilemma with regard to the ICC cases. On the one hand, by not campaigning vigorously against the eligibility of his opponents, he had to contend with the Jubilee Coalition, an ethno-regional grouping that the ICC cases helped to crystallise and for whom the 2013 elections were a matter of political survival. On the other hand, had he chosen to harp on about the 'ineligibility' of Kenyatta and Ruto, he would have further antagonised Ruto's Kalenjin supporters.

He could not lose Kikuyu support since the tribe had no history of voting for a candidate from a different tribe.<sup>4</sup> The notion that a fraction of Kalenjin supported him was not misplaced. Some senior Kalenjin politicians remained loyal to Odinga even as Ruto's political wave swept across the community.

Significantly, Kalenjin voted overwhelmingly for Odinga in 2007 and even adopted him as their political son, giving him a Kalenjin moniker, 'arap Mibei' ('son of Mibei'), as a sign of affection. He could therefore not afford to alienate the community further by calling for the trial of Ruto in The Hague. Furthermore, such a stance would have vindicated his opponents, who claimed that Odinga had

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4 In 'the little general elections' of 1966 and since the founding multiparty elections in 1992, rigid ethnic bloc voting was a preserve of the Kikuyu. In the 1992 presidential elections they voted for Kenneth Matiba and Mwai Kibaki, who came second and third respectively after Moi. In 1997 they voted for Kibaki, who came second, after Moi. In 2002 Kibaki defeated Uhuru Kenyatta to succeed Moi. In 2007 Kikuyu rallied behind Kibaki. Kenyatta inherited the Kikuyu vote in the 2013 elections.

connived with 'imperialists' to try to lock Kenyatta and Ruto out of the elections in order to have a walkover. 'Imperialists' connoted the US, United Kingdom and France, three of the five permanent members of the UN Security Council, which insisted that The Hague cases run their full course.

The politics of ethnicity weighed on Odinga's 2013 game plan. He hoped to benefit from the resentment of Kikuyu hegemony. He and his ethnic alliance, the Coalition for Reform and Democracy (CORD), counted on the rest of the tribes, including the Kalenjin, to rally behind him to stop Kenyatta, a Kikuyu, from succeeding a fellow Kikuyu.

The other tribes detested what they saw as the monopolisation of the presidency by Kikuyu. Of Kenya's four presidents since independence, only Moi had been Kalenjin. As it turned out, though, the Kalenjin were firmly behind Ruto and the community voted for Kenyatta almost to a man, despite the fact that he was facing charges of crimes against humanity for organising a Kikuyu-dominated militia to attack Kalenjin, Luo, Luhya and members of other tribes that had supported the opposition Orange Democratic Movement (ODM) in 2007. This support was eerily reminiscent of Charles Taylor's slogan during Liberia's 1997 elections, to the effect that, 'He killed my ma, he killed my pa, I'll vote for him' (BBC, 28 July 2009).

#### THE PRESIDENTIAL PETITION AND THE LINGERING 'TECHNICALITY' QUESTION

The IEBC declared Kenyatta winner of the presidential election with 6 173 433 votes (50.07% of the total votes cast), against Odinga's 5 340 546 (43%). Musalia Mudavadi of the Amani Coalition came a distant third, with 483 981 votes (IEBC 2013). Odinga and a local non-governmental organisation, Africa Centre for Open Governance (AfriCOG), launched an objection to Kenyatta's first-round victory, an indication of confidence in the judiciary, unlike the situation in 2007 when Odinga and his supporters sought recourse in mass action. The dispute played out before the Supreme Court and was broadcast live by the local electronic media. However, the judiciary appeared not to have broken ranks with the past.

The court admitted as *amicus curiae* (friend of the court) the attorney-general, Githu Muigai, who, since his appointment, had not distinguished himself as an impartial interpreter of the law. He was party to passage of Bills that were at variance with the letter and spirit of the new Constitution, a concern raised by the Commission for the Implementation of the Constitution. Since the government was not one of the respondents to the petition the inclusion of Muigai, the chief government legal advisor, was curious. In the course of his submission during the presidential petition hearing Muigai cited legal precedents in Nigeria and Uganda which are anything but constitutional democracies and have no history of credible

elections. The petition hearing and his performance since his appointment have portrayed him as an impediment to reform.

At the same time as admitting Muigai, the court declined an application by Prof Yash Pal Ghai, a renowned Kenyan legal mind, to be enjoined in the case in the same capacity, arguing that he was biased towards the petitioner.

The Supreme Court returned a 'unanimous' decision to uphold Kenyatta's win, arguing that the elections met constitutional requirements, although, in an apparently contradictory decision, the court also recommended that some IEBC officials be investigated for possible criminal misconduct over electoral malpractices. Moreover, the court refused to admit part of the petitioner's evidence on the basis that it was lodged late, but, in its ruling, argued that there was no evidence to prove electoral irregularities (Republic of Kenya 2013b). It was a judgement that lacked consistency and set a disturbing precedent.

The Supreme Court brushed aside its own findings after an audit of some of the election results unearthed electoral irregularities. The results at 22 polling stations which the court ordered to be recounted and scrutiny of the results from all 34 000 polling stations showed discrepancies between the number of presidential votes cast at the polling stations and those tallied at the national tallying centre (Republic of Kenya 2013).

Some of the forms the law requires be used to capture the results were full of discrepancies and some were missing.

Although upon assuming office the new chief justice had exhorted judges and magistrates to expedite court cases and had cautioned them against frustrating access to justice through technicalities, the Supreme Court ruling was consistent with previous petitions relating to presidential elections that the courts had dismissed on similar technicalities.

The Law Society of Kenya (LSK)(2013) criticised the judgement, arguing that throwing out the petition on a technicality did not augur well for justice in the country. Although Odinga accepted the ruling, he did not agree with it. He consistently criticised both the Supreme Court and the IEBC, dismissing them as being compromised by the executive, and even threatened not to participate in subsequent elections unless the IEBC was reformed. However, he stopped short of accusing the Supreme Court of judicial activism.<sup>5</sup>

Odinga had expressed confidence in both the judiciary and the IEBC in the run-up to the elections because they had been reformed. Even after filing the petition he maintained confidence in the Supreme Court. In fact, his ODM cited judicial reform measures such as the competitive appointment of the chief justice

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5 David A Strauss, a distinguished professor of Law at the University of Chicago, argues that judicial activism refers to a situation in which a judge either overturns statutes or established precedents or makes rulings that go against popular understanding of the Constitution (*Standard on Sunday*, 6 February 2011).

and his deputy, the vetting of judges and the setting up of the Judicial Service Commission as among the party's achievements between 2007 and 2012 (ODM Manifesto 2013).

However, the fact that Odinga had once expressed confidence in these institutions did not diminish the concerns he raised about the management of the elections and the resolution of the ensuing dispute. Whether the image of the judiciary was damaged or improved by the way it handled the petition and election-related cases prior to the elections remained as divisive an issue as the elections.

The Supreme Court ruling divided Kenyans along ethno-regional lines in concert with the voting patterns of the elections. Whereas Jubilee supporters hailed the Supreme Court, their CORD counterparts condemned and dismissed it as an appendage of the executive. The merits and demerits of the cases appeared to be immaterial. What mattered was that the elections did not help heal the country. If anything, they widened rifts.

A legal analysis of judicial rulings on the date of the elections, the eligibility of Kenyatta and Ruto to run for public office and on the petitions relating to the presidential election is beyond the scope of this article. What I attempt to do is argue that despite some judicial reforms Kenya's courts had not yet embraced constitutionalism. The executive still acted with impunity and even, in some cases, ignored court rulings.

The one-party legacy robbed the judiciary of its independence, a shortcoming that could not be addressed solely by vetting judicial officers. Kenyans' confidence in the judiciary because of the appointment of Mutunga was informed by the legacy of personal rule as opposed to governance based on strong and independent institutions. Trust, in this context, was susceptible to individual foibles and systemic deficiencies in the judiciary.

The Law Society of Kenya (LSK) accused Mutunga of influencing the reinstatement of a Supreme Court judge whom the Judges and Magistrates Vetting Board had found unsuitable to continue serving because of his inefficiency. Judge Mohammed Ibrahim exploited his 'three month temporary sacking' to complete 264 cases, some of which had been pending for as long as eight years. The Chief Justice wrote a letter commending him for having expedited the cases within a record time, a move the LSK interpreted as a tacit endorsement of Judge Ibrahim's reinstatement. Ibrahim was vetted afresh and got his job back (*Sunday Nation*, 16 September 2012).

Despite the security of tenure and budgetary allocation that were intended to free the judiciary from interference by the executive, an institutional culture of deferring to the executive prevailed. According to Transparency International's Global Corruption Barometer report, released in July 2013, Kenyans ranked the judiciary, Parliament, the police and political parties as the most corrupt

institutions in the country, despite some reforms under the new Constitution (*Daily Nation*, 9 July 2013).

In the period immediately after the elections, the judiciary further degenerated into infighting over allegations of corruption that pitted the chief registrar of the judiciary against the Judicial Service Commission, led by Mutunga. The JSC accused the registrar of corruption and, in return, she levelled similar allegations against some members of the JSC.

The JSC sacked her for corruption, incompetence, gross misconduct and insubordination (*Daily Nation*, 18 October 2013). The row sucked in Parliament after the sacked registrar sought the assistance of the Jubilee-dominated House in an attempt to save her job. The saga assumed an ethnic hue as a section of Kalenjin MPs protested her innocence.

The JSC ignored a summons from the Parliamentary Committee on Justice, citing the doctrine of separation of powers, whereupon Parliament recommended the formation of a tribunal to investigate the conduct of six of the 11 members of the JSC whom the registrar had blamed for her woes (*Saturday Nation*, 9 November 2013). The conflict put yet another damper on the anticipated judicial reform and further sapped the confidence of Kenyans in the judiciary.

At the time of writing, a person described as 'a human rights activist' had filed a petition before the JSC seeking the removal of Willy Mutunga as Chief Justice, accusing him of 'incompetence and breach of the Judicial Code of Conduct' (*The Star*, 22 November 2013). It was clear that the *ancien régime* forces that had, for years, manipulated the judiciary for political and economic ends, posed a hindrance to reform.

To appreciate the manner in which the judiciary handled disputes surrounding the elections one must look at the ethnic composition of top-ranking state officials, which casts doubts on the evenness of the political playing field. Individuals of Kikuyu ancestry held influential positions in the rent-generating state apparatus. The commander-in-chief of the armed forces, the chief of the general staff, the director of national intelligence services, the head of the civil service, the director of the criminal investigations department and the governor of the Central Bank were all Kikuyu.

The first inspector general of police, a Kalenjin, succeeded a Kikuyu only days before the elections, although his predecessor had served as the last commissioner of the defunct Kenya Police under the old Constitution. The mentality of the new police boss seemed out of sync with the new Constitution. He resisted attempts to reform the National Police Service (NPS), which had been renamed, and place it under civilian oversight through the National Police Service Commission (NPSC) and the Independent Police Oversight Authority Board, as envisaged in the Constitution (*The Standard*, 29 May 2013).

The attempt to retain the status quo put the inspector general of police on a collision course with the NPSC. The rift was an indication that the police, as members of the coercion forces, were keen to resist any new ethos such as accountability in order to remain integral to entrenched impunity. The police traditionally acted at the behest of the executive and had a propensity to respond high-handedly, especially in quelling protests by opposition supporters (Amnesty International 2013). In the circumstances, the police motto, '*Utumishi kwa Wote*' (Swahili for 'Service to All') was a mere slogan, devoid of commitment to the rule of law, fair play and the pursuit of justice.

Why does the ethnic background of these individuals matter? Firstly, in a country in which tribalism was the overarching variable in the struggle for power and a lightning rod for competition over resources it was hard to gloss over ethnicity in the allocation of strategic positions in the state apparatus. The monopolisation of these positions by Kikuyu contravened the Constitution, which stipulates that appointments to the national government must reflect the regional and ethnic diversity of the people of Kenya (Republic of Kenya 2010). Secondly, for an incumbent to tamper successfully with elections in Africa and beyond, the cooperation and trust of powerful individuals in charge of legitimate instruments of violence and logistical and financial state resources is indispensable.

#### FRAUDULENT ELECTIONS, COMPROMISED ELECTORAL BODIES AND ENTRENCHED AMNESIA

According to the Report of the Independent Review Commission on the General Elections held on 27 December (the Kriegler Commission)(Republic of Kenya 2008a), weak laws and an institutionalised disregard for the rule of law mean that Kenya has a history of fraudulent elections dating back to the one-party state (Throup & Hornsby 1998).

All post-independence elections, apart from that in 2002, were marred, to various degrees, by irregularities and during the period of the one-party state no presidential elections were held. The 2002 elections were seen to have been free and fair for three main reasons. Firstly, Mwai Kibaki and Uhuru Kenyatta, the leading presidential candidates, were both Kikuyu, so whoever won the elections, they were bound to mark a resurgence of the Kikuyu hegemony that was halted in 1978 when Jomo Kenyatta died.<sup>6</sup> Secondly, Kibaki's support was drawn from

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<sup>6</sup> According to the National Cohesion and Integration Commission, Kenya's civil service was dominated by the Kikuyu, followed by the Kalenjin, in numbers that were disproportionate to their share of the population. The Kikuyu constituted 17.7% of the population but occupied 22.3% of all government jobs. The Kalenjin, who constituted 13.3% of the population, occupied 16.7% of all civil services jobs (*Daily Nation*, 6 April 2011).

a broader ethnic alliance, making it difficult for the incumbent, Moi, to influence the results in favour of Kenyatta. Kibaki had 62% of the vote to Kenyatta's 31% (Electoral Commission of Kenya 2002). Thirdly, both candidates were *ancien régime* members, which removed the incentive to engage in electoral malpractices since, either way, it was a win-win situation for this membership.

The history of controversial elections was linked to the battle for control of the state and ownership of capital. In Kenya political power presented an opportunity for patronage. The higher the office and the more connected to the power matrix, the more lucrative opportunities there were to accumulate wealth.

Kenya's former presidents and their close allies were the leading land and property owners in the country, with commercial ventures that traversed various sectors of the economy. Therefore it was not in the political or economic interest of the *ancien régime* to reform the state to create a level political playing field. The urge to rig elections in Kenya's multiparty political system was high, since, in a zero-sum political setting where the state was used for 'primitive accumulation', election victory came with economic benefits for the president and allies, while loss of power spelled exile in an economic and political wilderness (Cowen & Kanyinga 2002).

#### THE INDEPENDENT ELECTIONS AND BOUNDARIES COMMISSION: A SENSE OF DÉJÀ VU

The IEBC replaced the defunct Electoral Commission of Kenya (ECK), which had been beholden to the government and contributed to the irregularities that marred the 2007 presidential elections (Republic of Kenya 2008a). An interim electoral body, the precursor to the IEBC, presided over a number of by-elections after the 2007 elections, including the 2010 Constitution referendum. These events were hailed by local and international observers, but the stakes were not high, making the 2013 elections the litmus test of the independence and preparedness of the IEBC.

The IEBC accepted Kenyatta's nomination papers and cleared him as a presidential candidate on the grounds that, at the time, the High Court was yet to rule on the eligibility case. Once the case came up before the court the judges, in turn, observed that Kenyatta and Ruto had already been cleared by the IEBC so they could not nullify their candidatures (*The Standard*, 15 February 2013). This situation brought into focus the strategic importance to the elections of the independence of these institutions.

By clearing Kenyatta and Ruto to stand the IEBC and the High Court gave their political careers a boost and gave the elections the dubious distinction of being the first in the world in which ICC inditees jointly contested the presidency

and won. Having been permitted to stand, it became almost impossible for the two politicians to lose.

The 'Kriegler Commission', which investigated issues involved in the 2007 elections, had recommended a shift to an electronic voters' register in an effort to curb irregularities such as ghost voters and ballot-box stuffing and thus to secure the credibility of subsequent elections (Republic of Kenya 2008a, p 138).

As a result, the IEBC stated that it would use a biometric voter registration (BVR) system and electronic transmission of presidential results from the polling stations to the tallying centre in Nairobi and conducted mock elections in selected constituencies, although these did not involve the BVR technology (IEBC 2012).

However, like any other electoral management body, the IEBC required political will in the form of support from government, staff and commissioners of integrity in order to deliver on its mandate. The body's apparent lack of preparedness was consistent with a sense of amnesia that afflicted Kenya's society courtesy of successive governments. Integral to the institutionalisation of this amnesia were sections of the media that supported the government of the day uncritically, the clergy, who had a close relationship with those who wielded power, a pliable and corrupt judiciary, a populace that supported fellow ethnic politicians uncritically and an oligarchy that sacrificed Kenya's stability for short-term economic and political ends.

The ubiquitous phrase in the wake of the 2013 elections was 'move on', a catch phrase used to cover concerns about the credibility of the results of the presidential election. A two-pronged peace crusade spearheaded by religious groups and amplified by the media preceded the elections and continued immediately afterwards.

On a positive note, it urged Kenyans to shun violence, cautioning them against the damage and atrocities the country had suffered five years previously, as documented in the CIPEV report (Republic of Kenya 2008b).

The flipside, however, was that the peace industry sought to entrench amnesia by glossing over salient issues at the root of the animosity and ethnic divisions in Kenya's body politic. Overemphasis on ethnic coexistence and reconciliation at the expense of the rule of law, justice and fair play could not foster peace and social cohesion in the long run. The inability to learn from Kenya's history and the idea that Kenya's pressing challenges would uncannily resolve themselves made divisive issues fester, putting the country's long-term political stability in jeopardy and creating anxieties.

Because the IEBC registered some voters using the BVR system it was assumed that an electronic register was in place, but, on election day the voter identification devices 'broke down', forcing the electoral body to revert to the manual register(s).



The transmission of the results of the presidential election through the results transmission system (RTS) initially 'worked', but later 'crashed',<sup>7</sup> forcing the IEBC to count the votes manually, thus creating grounds for another disputed election. Odinga and his supporters suspected foul play, believing that the malfunctioning of the system was part of a scheme to tamper with the votes to ensure that Kenyatta secured a first-round victory.

The late procurement of the BVR devices and the abrupt shift from an electronic to a manual system during the course of the elections set the stage for a dispute. It was ironic that Kenya, a comparatively tech-savvy country and a trailblazer in cellular telephone banking, could not exploit technology to organise dispute-free elections.

The country waited for six days after voting ended before the results of the presidential election were officially announced. Immediate release of the results would have helped to defuse tensions and allay fears and accusations of election tampering and, in addition, the IEBC became embroiled in the politics of the elections and lost its impartiality.

In his petition Odinga did not focus on the significant margin of difference between him and Kenyatta. Instead he concentrated on the votes that enabled Kenyatta to obtain the 50% plus one threshold. The petition exposed the existence of multiple voters' registers, making it impossible to know the exact number of registered voters.

Odinga's request for an independent inspection to establish why the electronic devices failed was rejected by the Supreme Court. The IEBC released the final election results almost five months later, but its chairman and his fellow commissioners refused to vouch under oath for the authenticity of the results before Parliament's Justice and Legal Affairs Committee (*The Standard*, 18 July 2013). Kenya's media attributed the delay to the IEBC's inability to reconcile the presidential votes and those for the other positions. It was reported that there was a difference of more than a million votes (*The Star*, 23 May 2013).

In his submission during the petition hearing the IEBC chairman, Issack Hassan, accused Odinga of serially rejecting election results, citing elections in 1997, 2007 and 2013 (Republic of Kenya 2013a – IEBC Reply to the petition). Given that Kenya had no record of holding credible elections, previous elections were flawed and disputes were inevitable (Kanyinga, Long & Ndi 2010).

Hassan's political history did not inspire confidence in him as an impartial chairman of the IEBC. He had served as a commissioner of the Constitution of Kenya Review Commission (CKRC) under Moi and was among the com-

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7 I use quotation marks because it is yet to be established why the devices malfunctioned.

missioners seen as working at the behest of Moi and the Kenya African National Union to derail the constitutional review process (Lumumba 2008, pp 131-2). He had no track record in reform and his appointment to head the IEBC seemed to be part of the *ancien régime's* efforts to retain power.

Voters going to the polls in the 2013 elections were expected to cast six ballots – for president, MP, senator, governor, councillor and women's representative. Hitherto, in general elections they had only voted for president, MP and councillor, making the 2013 elections considerably more complex. The complexity might have accounted for the high number of spoilt votes but the reason might also have been that there was insufficient civic education prior to the elections. Before the results transmission system 'collapsed', the number of spoilt votes was in excess of 300 000, but the number shrank to 221 053 when the IEBC announced the official results (IEBC 2013).

In future, perhaps, presidential elections should be held separately, to minimise logistical hitches. I hasten to add, however, that the challenges encountered in 2013 stemmed from a lack of political will and fidelity to the rule of law in Kenya's body politic rather than from the complexity of the elections per se. Additional ballot boxes, the manual register and tallying of votes in and of themselves could not have led to electoral irregularities. The IEBC did not conduct the elections competently because, like its predecessor, the ECK, it broke a cardinal rule which 'assumes that electioneering must be procedurally certain even as the outcome of that process must remain substantively uncertain' (*Daily Nation*, 12 July 2013).

In addition to effecting judicial and electoral reform it was imperative for the country to reach closure with regard to the violence that followed the disputed 2007 elections. The non-resolution of the 2007 electoral controversy did not augur well for democratisation, peace and development, as it portended political instability. Because those responsible for the electoral fraud were emboldened by impunity, their behaviour could easily become emblematic of the country's electoral process.

There was a need for the truth to be told in order to facilitate reconciliation and healing. Knowledge of what transpired with regard to the mismanaged elections in 2007 and the irregularities encountered during the 2013 elections was relevant to justice and to the reform of the electoral law. The fact that no one had been held to account for mismanaging the 2007 elections (Brown & Sriram 2012; Human Rights Watch 2011) did not inspire confidence in the transparency of the 2013 elections or of subsequent elections.

## DEVOLUTION VERSUS CENTRALISATION OF POWER: THE NAGGING QUESTION

One of the salient features of the new Constitution was the creation of a devolved state, known in Kiswahili as *majimbo*, or *ugatuzi* – a contentious issue in the protracted constitutional reform process because it relates to the collection and allocation of state resources, making it an issue that is central to Kenya's elections and political stability (Ghai 2008). Under the centralised state, rent-seeking thrived among the gatekeepers.

The president, as the patron, was surrounded by close allies who were, in effect, clients in a system that permeated the entire body politic (Jackson & Rosberg 1984). Endemic and unresolved corruption scandals that affected the delivery of public goods were some of the consequences of a centralised state. The economic benefits provided by control of the state were an incentive to ethnic mobilisation in Kenya's multiparty elections. The most prominent corruption scandals were the matters of Goldenberg and Anglo Leasing, in which politicians accumulated resources for patronage in a fashion verging on felonious or criminal (Bayart, Ellis & Hibou 1999; Bayart 1993; Gastrow 2011).

In its draft constitution, which was later amended by the politicians, the Committee of Experts had proposed comprehensive devolution (Revised Harmonised Draft Constitution of Kenya 2010).

In an attempt to reduce zero-sum politics, whereby the presidency under the centralised state was the ultimate prize, the Constitution created an extra tier of government under 47 semi-autonomous administrative units, called counties, which were run by directly-elected governors. However, as the hotly-contested 2013 presidential election shows, the devolution clause does not seem to have reduced the intense competition for the presidency.

A bicameral legislature came into being with the creation of a Senate, which comprised 47 senators. Devolution, if well implemented, would promote social cohesion and spur development by chipping away at the centralised state. However, there would be challenges, primarily emanating from endemic governance shortcomings at the centre, hence, in most county assemblies, the first item on the agenda was a demand for hefty salaries and perks, luxury cars, seminars at the coast, and residences for governors. Profligacy and the abuse of public funds were some of the inadequacies of the central government. Without exemplary leadership at the centre, the periphery was likely to replicate bad governance.

Kibaki and his successor, Kenyatta, opposed devolution by hampering the operation of county governments with a reluctance to allocate funds and by retaining the provincial administration and county commissioners. Governors

were caught up in turf wars with the parallel provincial administration system and jostled for mundane facilities, like office space.

The Jubilee government tended to give greater weight to decisions taken in Parliament, forcing the Senate to fight for relevance. For instance, Kenyatta signed a controversial revenue Bill into law, slashing financial allocations to county governments, contrary to a recommendation by the Senate (*Daily Nation*, 11 June 2013). This apparent resistance to reform of the centralised state was as old as independent Kenya (Morton 1998, pp 111-18).

Hardly had the dust generated by the elections settled than a bipartisan call for a referendum among the Senate, the governors and CORD ensued. The politicians called for a plebiscite to amend the Constitution to ensure the allocation of at least 40% of funds from the national government to the counties. Senators campaigned for a referendum to give them more powers of oversight over affairs in the counties (*Sunday Standard*, 11 August 2013).

Moreover, CORD and some activists, under the aegis of the March 4 Movement (M4M), raised the referendum issue in order to amend the Constitution to change the mode of electing the president. M4M, named after the date on which the elections were held, ostensibly sought to address the Kikuyu hegemony and ensure that politicians from small and marginalised communities stood a chance of being elected president (*The Standard*, 16 August 2013).

Kenya's ethnic-census-type presidential elections made it impossible for minority tribes to produce a president. However, no sooner had the referendum campaign started than it fizzled out, as did the enthusiasm in CORD and among some Jubilee affiliated politicians, and M4M faded into oblivion as fast as it had emerged. There are two possible reasons for this. Firstly, Kenya's politicians have a knack for ephemeral pursuits for self-preservation as opposed to long-term issues in the interest of statecraft. Secondly, Jubilee deflated the referendum debate by browbeating affiliated politicians into backtracking on their support for the referendum.

The quest to neutralise the ICC cases became the *raison d'être* of the Jubilee government. Kenyatta and Ruto spared no effort in exploiting state power to mobilise support locally, continentally and even globally in an attempt to have the charges withdrawn.

#### THE 2013 ELECTIONS AS TYPICAL KENYAN MULTIPARTY ELECTIONS

Although the 2013 elections were devoid of the violence witnessed in 2007 they were quintessentially Kenyan elections, resembling previous elections not only in terms of disputes but also in the sense of insecurity that enveloped certain parts of the country before and after the elections. In the lead-up to the elections in

the Tana River Delta there was inter-communal violence between rival tribes of Pokomo, who were traditionally farmers, and the pastoralist Ormo. This resulted in the destruction of property and loss of lives (BBC 2012). In the wake of the elections, rampaging armed gangs injured and killed residents in parts of the Bungoma and Busia counties in the western region. The cause of the violence has not been established, but previous elections have been characterised by violence in the area (Republic of Kenya 1992, Republic of Kenya 1999, KNCHR 2008, KHRC 1998, HRW 2008a, HRW 2008b, HRW 1991).

In addition, irredentist moves by a group known as the Mombasa Republican Council (MRC) caused insecurity in the coastal city of Mombasa and its environs. The group tried to mobilise around a protest slogan, *Pwani si Kenya* ('Coast region is not part of Kenya'). The MRC tried to exploit the frustrations of indigenous tribes over years of neglect in resource allocation and a squatter problem caused by land dispossession occasioned by successive governments (Truth Justice and Reconciliation Commission 2013). The group called for the boycott of voter registration and voting as an expression of resentment of what they considered to be state sponsored marginalisation and disinheritance. On election day violence claimed 19 people, including police officers, government officials, civilians and suspected MRC members in Mombasa and Kilifi counties (Associated Press, 4 March 2013).

The primaries, popularly known as nominations, were chaotic, and some candidates defected to other political parties after losing. Gatekeepers in political parties exercised undue influence over the exercise, locking out some popular candidates in favour of either allies or relatives. In a show of defiance, Odinga's supporters in his Luo land backyard protested against what they perceived as his attempt to impose relatives on them at senatorial, gubernatorial and parliamentary levels.<sup>8</sup>

Some popular politicians caught up in the anomalies defected to other political parties under the same coalition, won the primaries and were eventually elected. Others were not as successful, having decamped to fringe parties in strongholds of their initial parties of choice. Party hopping, or, as it was known in the former Zaire (now the Democratic Republic of Congo) '*vagabondage politique*' (political vagrancy) was, in most cases, inspired by the spoils of the political game (Ihonvbere 2006, p 25). However, this political behaviour was not entirely antidemocratic. In fact, it could be seen as a way of fighting the undemocratic

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<sup>8</sup> Odinga became so influential in Luo politics after inheriting the community leadership from his father, who passed on in 1994, that he virtually decided who became a member of Parliament. Given that the party he led commanded overwhelming support among fellow ethnics, his endorsement in the primaries has, in the past, effectively meant automatic election. Fellow Luo politicians who tried to establish an alternative power base ended up in the political wilderness. It was this domineering influence that the supporters opposed during the primaries before the 2013 elections.

tendencies that were trying to narrow the political space. Through defection those frustrated by gatekeepers were given a chance to stand in the general elections.

Political parties that participated in the 2013 elections flouted the Political Parties Act, which was intended to inject a sense of discipline and internal democracy into the organisation and management of these entities. Parliament watered down this piece of legislation to allow for the formation of pre-election coalitions. In its original form it outlawed such alliances, since they were opportunistic, fragile and election centred.

Parliamentarians also amended the Elections Act to allow defections until two months before the elections. Previously the Act had demanded that a member be on a party list for three months before the lists were submitted to the Registrar of Political Parties (*The Star*, 5 October 5). This amendment reduced the period within which the parties had to submit their nomination lists to the IEBC, leaving no room for the resolution of disputes arising out of the primaries.

These changes illustrated the aversion of politicians to the institutionalisation of the political parties. It was the undemocratic character of the parties that stifled the entrenchment of democracy in the country. Under the new constitutional dispensation Parliament was still ineffectual owing to deficiencies such as impunity, corruption, ethno-regional political parties and sycophancy. The IEBC and the Registrar of Political Parties appeared powerless to rein in errant politicians and streamline the management of political parties.

#### TRIBALISM VERSUS MANIFESTOS: WHO IS KING?

The two main competing tribal alliances, Jubilee and CORD, released campaign manifestos articulating their programmes of action. As in previous campaigns there was little difference between the manifestos. CORD summed up its manifesto in a 10-point programme that encapsulated jobs, security, poverty, food security, social equity, infrastructure and land, quality education, healthcare and national cohesion (CORD site).

Jubilee's manifesto had three cardinal planks: unity, economy and openness. The issues contained in the two manifestos comprehensively covered the most pressing challenges facing the country. However, both coalitions presented these challenges in a generic sense reminiscent of the populism of the one-party state. Commitment to tangible goals within, say, the first five years, would have been a better way of presenting the manifestos. The documents were unwieldy, containing too many pledges, hence making it hard for voters to assess the parties effectively. The major inadequacy was that the coalitions did not state where they would source the funding to implement their ambitious pledges.

Realistic pledges sensitive to the state of the economy and with a direct impact on the lives of the most vulnerable and marginalised would have been a pragmatic way of framing the manifestos. For instance, a pledge to build affordable houses for low-income earners in the country's urban areas would have reflected the housing problems that account for the mushrooming of informal settlements and the lack of planning in Kenya's urban areas.

Basic but essential public goods, like the supply of potable water to both rural and urban areas and acceleration of the connection of households to the electricity grid, were other pressing needs. Other infrastructural facilities necessary if the country is to realise Vision for 2030, popularly known as Vision 2030, a socioeconomic and political blueprint, include the construction of modern schools, a modern railway network, paved roads and the modernisation of the agricultural sector, Kenya's economic mainstay.

The framing of the manifestos appeared consistent with a knack for what was described as 'grandiose plans' and an obsession with grandeur, a perennial shortcoming of postcolonial African leadership (Adebajo 2010, p 266). The pledge to supply laptops to children starting school, the main plank in the Jubilee Coalition manifesto, was a case in point. The laptop project in the context of a lack of extensive electrification, overcrowded classrooms, poorly equipped public schools and teachers who were less than enthusiastic owing to poor remuneration appeared to be a case of misplaced priorities. According to the UNESCO report, more than a million Kenyan children were not at school and education opportunities excluded the marginalised (UNESCO-Education for All Monitoring Report 2012).

The fact that the manifestos lack specifics shows that they are camouflaging a contest for political power based on tribalism. As tables 1 and 2 illustrate, support for both Kenyatta and Odinga was based on tribal affiliations and they performed abysmally in each other's strongholds. Five of the 10 counties in which Kenyatta received more than 200 000 votes – Kiambu, Murang'a, Nyeri, Nyandarua and Kirinyaga – were in the Central region, which is predominantly inhabited by Kikuyu. In the Kalenjin counties of Kericho and Uasin Gishu the electorate also overwhelmingly voted for Kenyatta. So did the electorate in Meru county, inhabited by Meru, cousins of Kikuyu. Nakuru county in the Rift Valley region is somewhat cosmopolitan but is predominantly inhabited by Kikuyu and Kalenjin and hence supported the Jubilee Coalition.

Four of the 10 counties in which Odinga received more than 200 000 votes were inhabited by his Luo tribe. In Kisumu, Homa Bay, Siaya and Migori counties he had absolute majorities. Given that Odinga's running mate was Kalonzo Musyoka, a Kamba, Odinga also had unassailable victories in Makueni, Machakos and Kitui counties, which are inhabited by Kamba. Kakamega and Kisii counties

are the ancestral homes of Luhya and Kisii respectively. The majority of voters from these tribes supported CORD and Odinga was seen as a shield against Kikuyu dominance. Like previous multiparty elections, the 2013 elections brought to the fore 'ascriptive' voting patterns whereby voters expressed tribal identity as opposed to a preference for any other ideology, other tribalism or a vision for the country.

It can therefore be inferred that even in the cosmopolitan Nairobi county voters cast their ballots in consonance with ethnic affiliation. Although the popular narrative after the elections was that there was a higher turnout of supporters in Kenyatta's strongholds than in Odinga's on election day, irregularities exposed by the presidential petition cast doubts on the claim that the presidential election results were decided entirely on this basis.

**Table 1**  
**Voting patterns in the ten leading counties that supported Kenyatta**

	Kenyatta		Turnout %	Odinga	
	County total	County %		County total	County %
Kiambu	702 185	95.21	91	61 700	7.89
Nairobi	659 490	46.75	86	691 156	49.00
Nakuru	494 239	80.19	89	105 660	17.14
Murang'a	406 334	95.92	94	10 312	2.43
Meru	384 290	89.41	88	32 447	7.55
Nyeri	318 808	96.33	93	5 638	1.70
Kericho	238 556	90.74	91	17 326	6.59
Nyandarua	232 808	97.11	94	2 889	1.21
Kirinyaga	231 868	95.99	91	3 471	1.44
UasinGishu	211 438	74.26	86	60 060	21.09

Source: IEBC 2013



**Table 2**  
**Voting patterns in the 10 leading counties that supported Odinga**

	Odinga		Turnout %	Kenyatta	
	County Total	County %		County Total	County %
Nairobi	691 156	49.00	86	659 490	46.75
Kisumu	337 232	96.64	90	4 630	1.33
Machakos	319 594	85.89	84	35 660	9.58
HomaBay	303 447	98.93	94	725	0.24
Kakamega	303 120	63.84	84	12 469	2.63
Siaya	284 031	98.47	92	884	0.33
Kisii	236 831	67.93	84	95 596	27.42
Makueni	228 843	90.73	85	12 652	5.02
Migori	225 645	86.38	92	26 055	9.97
Kitui	219 588	79.53	85	40 752	14.76

Source: IEBC 2013

From these tables I deduce that a manifesto and a track record in reform did not count in Kenya's presidential elections. A solid tribal backing that transformed into a broad ethnic alliance was the presidential springboard. The 50% plus one threshold institutionalised ethnic alliances.

Ironically, the framers of the Constitution had hoped that it would address ethnic mobilisation by forcing presidential candidates to appeal to as wide a diversity of Kenyans as possible on the basis of their programmes of action. The corollary of ethnic mobilisation was that whoever won the presidential election became beholden to the kingmaker(s). Failure to reciprocate hamstrung government operations and rendered the beneficiary a lame duck president. In extreme cases, renegeing on this quid pro quo arrangement led to recriminations that spilled over into the wider populace, thus imperilling the country's political stability.

The traumatic events that defined Kenya's politics under Kibaki, such as the divisive 2005 constitutional referendum, the 2007 elections and the subsequent violence, and the ICC cases could be traced directly to Kibaki's failure to honour a pre-election power-sharing agreement with those who had supported him in

the 2002 elections under the National Rainbow Coalition. One of the reasons why Odinga fell out with Ruto after the 2007 elections related to a dispute over sharing of positions among ODM-affiliated tribal constituencies.

## CONCLUSION

Kenya's 2013 elections entrenched status quo politics and showed how difficult it is to hold 'free and fair' elections in a country in which those who monopolise capital and political power are the same individuals who are expected to facilitate an even political playground that might result in them losing power. The new Constitution, which chipped away at the imperial powers of the presidency, provided a glimmer of hope that comprehensive reform was possible. However, Kenya's oligarchs, uncertain of their fate once they were out of power, frustrated its implementation.

This article has brought to the fore the challenges facing multiparty politics in Kenya, a deeply ethnically divided country. There is a need for comprehensive reforms to address the issues of poverty and per capita and regional inequalities in order to genuinely enfranchise the majority of Kenyans. Poverty, lack of education and the resultant economic disempowerment has reduced most citizens to pawns in a destabilising political game whose only beneficiaries are predatory politicians and their allies.

There is a clear link in Kenya among fraudulent elections, monopolisation of capital and election-related violence. The cure cannot be found in ethnic alliances, which are the very cause. Land reform, reform of the attitude of the judiciary, Parliament and other institutions, intended to act as checks against the abuse of power by the executive, are a prerequisite to the enhancement of the democratisation process.

Sustainable political stability hinges on how far changes in institutions that are intended to undergird democracy will go. Centralisation of power is responsible for the deleterious zero-sum politics and resistance to devolution which risk heightening tensions and further polarising the country.

Although Kenya has made some strides in reform since the advent of multiparty politics, further reform is required to make the government of the day more vulnerable and to make it possible for any Kenyan, regardless of ethnicity, creed, religion or social status, to stand a chance of being elected president.

There is a need for accountability and a shift from the politics of electoralism. Elections must cease to be periodic rituals and must give Kenyans an opportunity to have a genuine say in how they want to be governed. The tendency to regard elections, which are often imperfect, as the be-all and end-all of democracy, after which the citizenry is asked to 'move on' and wait for the next round, five

years down the line, has stifled Kenya's renaissance. Concerns about the lack of independence of the IEBC, coupled with threats by some opposition leaders to boycott future elections unless the electoral body is reformed, deserve attention in the interests of Kenya's democratic consolidation and political stability.

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