Kenya

Democracy and Political Participation

DISCUSSION PAPER

A review by AfriMAP,
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Summary

Violence engulfed Kenya following a dispute over presidential election results in December 2007. The violence spread fast and split the country along two main ethno-regional blocs. Not many expected Kenya to go up in flames that fast. The country had a history of political transition from one-party rule since the early 1990s and a tradition of regular elections. Although violence accompanied both the 1992 and the 1997 elections, which were held after the return of multiparty democracy in 1991, the violence following the December 2007 election was unprecedented. It pushed the country towards the brink of civil war. The violence ended in February 2008 after mediation by the African Union Panel of Eminent African Personalities. The panel persuaded the two parties in the dispute, the Party of National Unity (PNU) of the incumbent President Mwai Kibaki and the main opposition, the Orange Democratic Movement (ODM) of Raila Odinga, to sign a National Accord committing to end violence and to share power in a coalition government. But the signs of this violence had shown early. The African Peer Review Mechanism (APRM) had warned in 2006 that Kenya was so deeply divided along ethnic lines that if the government did not address some of the reasons causing divisions, conflict would occur. The violence indeed occurred as a result of the failure to respond to long-standing governance issues. It continued to threaten the consolidation of democracy and it constrained political participation. Among these issues were: the manipulation of ethnic identity by politicians, the lack of comprehensive constitutional reforms, centralisation of power in the executive, and the problems around the majoritarian electoral system.

Kenya normalised fast and held a peaceful referendum for a new constitution in August 2010 and, following this achievement, promulgated the constitution and later held a peaceful election in March 2013. Attempts to make a new constitution had failed to deliver one for about two decades, but the National Accord signed in February 2008 to end the violence, developed a framework and timelines for constitutional review and institutional reforms. The negotiations on the National Accord revealed that constitutional review, among other reforms, was urgently required to prevent a recurrence of violence. What is interesting in the evolving political economy dynamics, is that the two main ethnic communities that fought one another in the post-2007 election violence, the Kikuyu and Kalenjin, grouped together into a political alliance, the Jubilee Alliance, which finally won the March 2013 elections. The Alliance had both the presidential (Kikuyu) and deputy presidential (Kalenjin) candidates who were indicted by the International Criminal Court (ICC) for the post-2007 election violence. They mobilised the numeric strength
of their hitherto communities and won the election. They were elected as president and deputy president in spite of their indictment.

These are the abnormalities that characterise Kenya’s politics of transition to democracy. This discussion paper unravels the challenges to Kenya’s participatory democracy. The discussion seeks to find out what went wrong with the project to bring ‘democracy and participation’ to Kenya. The paper is based on the findings of a detailed assessment of Kenya’s compliance with standards adopted by African states regarding democracy, elections and popular participation in government. The paper discusses the key issues raised in the main report, and identifies the key challenges to popular participation in the governance of Kenyan society.

The discussion paper notes that the 2010 constitution has addressed some of the obstacles that prevent the consolidation of democratic gains. It has established two levels of government: national and county. It requires that appointments to public office reflect the face of Kenya. County governments are given resources to undertake development in their areas. The powers of the president have also been reduced; the president cannot make appointments without the approval of Parliament. The constitution has secured the independence of the judiciary and Parliament and, therefore, the executive cannot compel them to tend to its interests. To ensure that these gains are not reversed, this paper recommends strong oversight by civil society groups and the Commission for the Implementation of the Constitution (CIC), among others.

The discussion concludes that Kenya’s first-past-the-post (FPTP) electoral system undermines the institutionalisation of political parties, because it provides incentives for the perpetual formation and reformation of ethnic alliances for the purpose of electoral contest. This system has embedded patronage politics and corruption in the political arena, thereby resulting in poor accountability of political leaders to society. It is recommended that the electoral system be revisited with a view to establishing a system that would promote inclusivity, build stronger and institutionalised parties, and eliminate the zero-sum aspects of the current system. It is also recommended that the position of Registrar of Political Parties be adequately resourced to implement the relevant laws on political parties. It should be staffed with competent individuals and be given adequate institutional, political and financial independence to carry out its mandate.

The constitutional promise to deliver democracy will not be realised if the values and principles of the new constitution are not translated into concrete actions. To realise these principles and anchor a democratic order, Kenya must nurture the rule of law by committing to enforce all laws and by embracing constitutionalism. In this regard, the government should pass enabling legislation to realise these values and align other laws with the new constitution. In particular, the government must pass a strong leadership and integrity law to bring the new constitution to life and which should provide for the vetting of persons seeking public office, through elections or appointment, to ensure they are persons of integrity as required under chapter 6 of the constitution. Such a law should allow for public input in the vetting of persons seeking public office. It should also set a minimum threshold of standards for elections and the appointment of persons to public office by paying attention to the person’s integrity, competence and suitability. This on its own will erode the firm foundation on which impunity in Kenya is founded. Related to this is the need to ratify key international and regional instruments, including the African Charter on Democracy, Elections and Governance. Tracking Kenya’s
performance in terms of improving the conditions for people's democratic participation at all levels of government and society in general should be a central concern of all people and the various public oversight groups.
Introduction

Public participation requires that people be at the centre of decision-making processes. This is an important element of democracy because ‘rule by the people’ is its underlying and founding principle. Thus, involving people in making decisions that concern their lives is a distinguishing feature of democratic societies. Participatory democracy, therefore, requires the active and meaningful engagement of citizens in public affairs. It is a principle universally accepted as requisite for a just society. The Universal Declaration of Human Rights (UDHR), 1948, provides that ‘everyone has the right to take part in the government of his/her country, directly or through freely chosen representatives’. The International Covenant on Civil and Political Rights (ICCPR) also provides that:

Every citizen shall have the right and opportunity... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his [or her] country.

Participation in public affairs is important in another respect. It builds people’s abilities to hold authorities to account for the implementation of decisions and actions agreed upon. It is in this respect that the African Union’s African Charter on Human and Peoples’ Rights recognises the importance of participation in public affairs as an essential element of democracy. The African Charter on Democracy, Elections and Governance also requires the African Union member states to recognise people’s participation as an inalienable right of the people of the continent.

The quest to promote participatory democracy and to make participation an important principle in the governance of public affairs, has been an important theme in debates on governance in Kenya. Because of this, and in recognition of protracted struggles for democratic reforms, article 10 in Kenya’s new constitution has included democracy and participation of the people among the values and principles of governance, which bind all state organs and

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institutions as well as state officials. In assessing the quality of democracy in Kenya, there are questions whether successive governments have consistently upheld the rule of law, allowed citizens to freely elect their leaders, and whether or not people have been making political choices without hindrance. Thus, transition to democracy implies progress in both opening up decision-making processes to the active participation of the people, as well as enhancing the accountability of governments to their citizens. This transition involves developing a culture of constitutionalism and accountability to citizens.

Giving people freedom to make political choices, especially in elections, plays an important role in consolidating democracy. This freedom of choice enables them to put in place an accountable and responsive government whose mandate is renewed periodically – depending on the extent to which it has governed in line with the aspirations of the people. Thus, if the elected government applies the law without discrimination, citizens obey the law conscientiously. When the government however applies the law in an inconsistent manner, citizens tend to disconnect from the government. The distance between government and society widens in tandem with the failure of government to account to society and abide by the founding principle of democracy, namely, rule by the people.

How to secure and consolidate participatory democracy has dominated discourses on governance in Kenya for a long time. The struggle for political liberalisation from the late 1980s was particularly informed by the need to open the political space to competitive politics after several decades of domination by the one-party regime. These struggles placed primacy on people’s participation in decision-making, because the government and the ruling party often imposed decisions that promoted parochial and individual political interests rather than the public good. But the protracted struggles for reforms have not translated into concrete participatory democratic practices. Some gains have been made in this respect but the same gains are constantly facing the spectre of reversal as a result of the competition for political power.

Kenya was at a point of consolidating its democratic gains when a government with a reform agenda, the National Rainbow Coalition (NARC), came to power after winning the December 2002 general election. NARC had campaigned on a reform platform, promising to promote economic recovery and good governance reforms. The new government did then implement some good governance reforms, such as initiating the fight against corruption and setting up a semi-autonomous human rights agency. But the government abandoned the reform path halfway after the coalition collapsed due to internal disagreements over power and the distribution of spoils in particular. After the collapse, NARC, like the previous governments, began to secure power for those in leadership positions. A small group of ethnic elites close to President Mwai Kibaki pulled the government out of the reform agenda. They started to consolidate political power by manipulating the political environment and reneging on some of the promises made before coming to power. They manipulated the constitutional review process.

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4 These issues are also raised with regard to the quality of democracy among AU member states. A recent report shows that many countries are yet to develop and consolidate a culture of democratic elections. See ‘Report on the African Charter on Democracy, Governance and Elections. A Case Study of 12 African Countries’, (2009) Electoral Institute of Southern Africa.
to come up with a draft that reflected their political interests. They preferred a constitution that favoured their desire to secure a hold on power.

This contradiction, in which gains are made through struggles for democracy, but are then reversed through state actions and the practice of politics, has considerably undermined the concrete realisation of participatory democracy. The continued reversal of these gains and political actions to promote the interests of a cabal of ethnic elites in leadership, laid a foundation for Kenya’s post-2007 election violence. The dispute over the presidential election resulted in unprecedented violence, which divided the country into two major ethno-regional blocs that were fiercely opposed to each other. The post-2007 election violence reversed many of the democratic and economic gains made since the return of multi-party democracy in 1991. The space for the enjoyment of fundamental rights and freedoms contracted. Society became more polarised.

Ironically, the post-2007 election crisis paved the way for a greater gain: the promulgation of a new constitution. The crisis revealed a number of fundamental weaknesses in Kenya’s political system that required addressing to prevent future conflicts over contestation for political power. The international mediation resolved that constitutional and institutional reforms were a requisite in this respect. The parties signed a National Accord that outlined the steps towards a new constitution and institutional reforms. The new constitution was promulgated in August 2010.

The new constitution entrenches a culture of accountability and includes democracy and people’s participation, the rule of law, inclusiveness, social justice, human rights and non-discrimination among the national values and principles of governance that the state and its officials must abide by and respect when applying and interpreting the constitution. The new constitution promises a clear path to democracy. It recognises the sovereignty of the people as the anchor of the nation and provides for the participation of the people in decision-making at all levels. It fosters accountability and checks the powers of all organs of the government and state institutions.

The 2010 constitution provides for a break from the past; it charts the path for a new beginning in many ways. It reduces presidential powers, creates a new structure of governance and provides specifically for a devolved system of government where people effectively participate in the governance of their devolved units. In spite of this promise for a new beginning, it did not take long for old habits to creep back. Political parties and alliances continued to form along the old lines of ethnicity and regions. Parliament itself introduced weak laws to govern the transition to the new beginning. Because of this, leaders whose integrity had been questioned by the public, were nevertheless elected to office. Additionally, the president and his deputy were elected to office when they were still facing criminal proceedings at the ICC over crimes committed during the post-2007 election period. What promised to be a new beginning turned into ‘business as usual’.

This discussion paper examines the challenges of democracy and participation in Kenya; it explores the general promise and failure of Kenya’s hesitant transition to democracy. The paper

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seeks to find out what went wrong with the project to bring ‘democracy and participation’ to Kenya. It identifies ethnicity, Kenya’s electoral system, the dominance of the executive and its abuse of the rule of law as some of the obstacles to democracy and participation in Kenya. The paper is based on the findings of a detailed assessment of Kenya’s compliance with standards adopted by other African states regarding democracy, elections and popular participation in government.

The discussion shows that the interplay of ethnicity and struggles over executive power has constrained people’s participation and democratic transition in general. The paper notes that this interplay revolves around the capture and retention of the over-centralised executive or the presidency. The new constitution has addressed some of these challenges by establishing strong checks on the powers of the executive and by establishing two levels of government: national and county. However, the electoral system remains largely unaltered. The devolved system of government is likely to inherit the very challenges that the constitution is seeking to address, if its implementation does not effectively reflect the spirit and letter of the constitution.
I: Kenya’s transition to democracy

Since Kenya’s independence in 1963, the development of democracy and public participation has had mixed results. Kenya adopted a Westminster style of democracy with multi-party institutions and a federal system of government. There was a devolution structure of government, popularly known as majimbo, under which the country had seven autonomous regions, some of whose boundaries were coterminous with ethnic settlement patterns. Some of the numerically large groups have a region to themselves and therefore some regions are identifiable with ethnic groups. Each regional government was responsible for setting and implementing a broad range of policies.

There were several political parties, the main ones being the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU). KANU’s membership included some of the large ethnic groups, the Kikuyu and the Luo, while KADU absorbed the numerically smaller ethnic communities, many of which feared domination by large groups after independence.

The first government dismantled this set-up after independence. The ruling party, KANU, made it difficult for the regional governments to operate. The main opposition, KADU, joined KANU to form one party and govern with them. The government also introduced a series of constitutional amendments that centralised power in the presidency.

These changes significantly constrained democratic participation. The government became increasingly intolerant of dissent. In 1966, some critics within government resigned their positions to form a new political party – the Kenya People’s Union (KPU). Keen to consolidate power without rivalry, the government banned the opposition in 1969. This gave the then ruling party, KANU, unchecked dominance. More amendments to the constitution to centralise power in the executive followed. In 1982, Parliament changed the constitution to make Kenya a one-party state. The country remained as such until 1991 when pressure, through people’s struggles for democratic change, compelled the government to repeal this constitutional provision and provide for a return of multi-party democracy.

Despite these political setbacks during the 1960s and 1970s, international commentators on Kenya cited the country as a successful development model of growth, with useful lessons for the

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6 Majimbo is Kiswahili for regionalism. Numerically smaller communities preferred a regional form of government at independence because they feared domination by large groups. In the early 1990s, the debate over majimbo resurfaced but was used to describe balkanizing the country into ethnic political enclaves.
rest of the developing world. With an average annual economic growth rate of more than 5% and relatively high per capita income compared to many developing countries, the West generally praised Kenya as ‘one of the few economic and political ornaments to be held up, admired and analysed to detect what might be transferable in its exceptional performance’. Explanations for the ‘exceptional ornament’ varied. Some argued that Kenya had followed a relatively free market economy compared to its neighbours. Others attributed this success to a generally stable political system. The ‘Kenya debate’ occasioned robust discussion on relations between development, indigenous capital and state-society relations in developing countries.

The return of multi-party democracy in 1991 led to the expansion of space for the enjoyment of civil and political freedoms. It generally enhanced the space for participatory democracy. The state loosened its grip on political space and allowed for the proliferation of political groups, including opposition political parties and human rights organisations. But these gains were not effectively consolidated. The state paralysed the opposition political parties by preventing them from operating in areas which the government considered to be strongholds of the ruling party. In other instances, the government would deny the opposition the licence to hold political meetings. Thus, in spite of multi-party democracy, the ruling party (KANU) and its leader, President Daniel arap Moi, continued to constrain the new space through repressive measures. The 1992 and 1997 elections, in particular, were marred by serious political violence at the hands of militia organised by the ruling party. Through legal and extra-legal means, the government weakened the opposition political parties and obstructed the making of a new constitution. This enabled Moi and KANU to win both the 1992 and the 1997 general elections.

In 2002, the opposition parties formed an alliance, the National Alliance Rainbow Coalition (NARC), to compete against KANU in the December 2002 elections. They were aware that in the absence of comprehensive constitutional reforms, the ruling party would have advantages over the opposition and thus retain power. The Alliance campaigned on a platform of comprehensive reforms and a promise to deepen democracy, and won.

In line with the campaign promise to implement governance reforms, the new government enhanced the space for participatory democracy and the general enjoyment of rights. From the outset, the government undertook to protect and promote fundamental rights and freedoms, and thus established the Kenya National Commission on Human Rights (KNCHR) for this purpose. The government introduced legislation to facilitate the fight against corruption and developed a sector-wide reform programme – the Governance, Justice, Law and Order Sector (GJLOS) – to guide governance and justice reforms. The government re-started the constitution-making process, established institutions to address corruption and purged the judiciary of judges accused of corruption.

The NARC government also implemented a series of policies that resulted in the recovery of the economy and somehow restored the confidence of the people in government and its

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institutions. Kenya’s economic growth had been below zero, but implementing the government’s policy, the Economic Recovery Strategy for Wealth and Employment Creation (ERSWEC), increased growth to about 7.0% in 2007. Real per capita incomes increased by 3% and poverty declined from 56% in 2000 to 46% in 2007.

The coalition did not hold together for long. It disintegrated after the ethnic elites disagreed on how to share power. This created two factions. One faction comprised the president and elites from his ethnic region, the former Gikuyu, Embu and Meru Association (GEMA) members or the Mt. Kenya cabal. The second comprised elites from other communities, notably, the Luo, Luhya, Kalenjin and the Kamba, whom the president’s faction had marginalised from the centre of political power. Both factions had agreed on how to share power if they won the 2002 election but the president reneged on this agreement upon assuming office.

The fissure in the power structure undermined key reforms. In particular, factionalism spilled over to the constitution-making process. The president’s faction preferred a presidential system of government with centralised powers while the opposing faction preferred a parliamentary system. Amidst these divisions, the government and the elites around the president finalised their own version of the constitution, which was presented to the country at a referendum in November 2005. The draft did not pass muster with the voters and did not receive sufficient support. People voted along the same ethnic divisions that divided the coalition. The draft got support from the president’s Mt. Kenya region and a few other votes were brought in by promising future inclusion in government. Other regions of the country voted against the draft.

This polarisation and deep ethnic divide shaped the violence after the disputed December 2007 presidential election results. The division gave rise to two political parties, the ODM, which drew members from communities whose leaders were excluded from power; and the PNU, which was hurriedly formed to enable President Kibaki to run for a second term in office. By this time, national officials of NARC had joined the ODM and refused to let the president use the party to run for the 2007 elections.

The government failed to recognise that the politics of exclusion had sharpened ethnic divisions in society. The APRM report of 2006 had identified the politics of exclusion and the marginalisation of ethnic groups as critical fault lines and advised the government to attend to these concerns before the 2007 general election. The report also warned that the absence of accountability and impunity in general had weakened the relations between the state and citizens. The APRM report warned that these would lead to a crisis if not addressed.

The divisions laid a firm foundation on which the post-2007 election crisis developed and spread. But the crisis had another important outcome. The violence brought to the fore the key weaknesses in Kenya’s political system that required addressing to prevent a recurrence of violence. International mediation, under the auspices of the African Union’s (AU) African Panel of Eminent African Personalities led by Kofi Annan, identified a lack of political inclusion, perceptions of marginalisation and a culture of impunity as some of the factors that undermined

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9 GEMA stands for Gikuyu, Embu and Meru Association. It is a socio-political grouping of related ethnic groups who occupy the Mt. Kenya region. The group was politically powerful during President Jomo Kenyatta’s rule and was central in making decisions to further the interests of GEMA elites. Some of the elites in this group made bold attempts to stop President Moi from ascending to power. President Moi banned the operation of this and other socio-political groups when he took office in 1978.
democracy in Kenya and which required fundamental reforms. Similarly, a number of reforms were identified under what constituted Agenda Item 4 of the mediation. These included undertaking a constitutional review and institutional reforms, addressing regional imbalances in development, implementing land reforms, promoting national unity and cohesion, addressing youth unemployment, promoting transparency and accountability and tackling impunity. As already noted, these were considered as the long-standing issues that had remained unaddressed. They were responsible for the cycle of violence that Kenya continued to witness during elections. To provide a framework for these complex reforms, the coalition government was formed and a roadmap for completing them was developed within a year.

The results have been mixed. The most important achievement was the promulgation of the new constitution in 2010. A new constitution had remained elusive until a National Accord provided a framework and timelines for the review, under a bipartisan leadership, of the parties in the coalition government. The new constitution became the basis for institutional reforms. Some of the institutions began to undertake reforms and new institutions were established. Programmes to address youth unemployment were introduced as short-term measures immediately after the signing of the National Accord. A Ministry for the Development of Northern Kenya and other arid regions was established and the government later evolved plans to develop different regions. But little progress was made in the fight against impunity; there were no major initiatives or political commitment against corruption or efforts to reconcile the country.

Kenya’s transition is characterised by a lot of back-and-forth. Democratic gains are yet to be consolidated. Citizens’ efforts to promote change are visible and well rooted in all spheres. Also, the political sphere is highly pluralised. There are many registered political parties and many people participate in periodic elections. There is a relatively free media and general respect for freedom of expression. In spite of this pluralised space, there is a weak culture of political accountability in that leaders rarely account for their actions. The political system is one in which ethnicity comingles with the electoral system to form a strong obstacle to democratic transition.

The new constitution seeks to address some of the challenges to development and democracy. It is comprised of provisions to address some of the long-standing issues. A devolved system of government, for instance, is expected to promote development in all regions. An equalisation fund will provide resources to marginalised areas so that they can catch up with other regions. The constitution also emphasises the establishment of a government that reflects Kenya’s diversity. All the same, there has been no coherent approach to addressing ethnic divisions. The formation and reformation of parties along ethno-regional lines remains a major challenge in this respect.

The new constitution identifies democracy and people’s participation as essential to the national values and principles of governance on which the government is based. It also seeks to foster the accountability of leaders by privileging integrity and leadership as the key pillars of governance; it requires public officers to adhere to the principles of public service. It also seeks to punish self-service and to promote social justice, including making guilty parties take responsibility for past abuses. Important also is that the new constitution promotes rights and freedoms in an unprecedented manner. The Bill of Rights is fundamental and radical in
many ways: the state is required to promote rights and freedoms while the courts are required to interpret the new law in a manner that seeks to promote these rights. Accountability to the people and participation of the people are key aspects of the framework of the new law.

Will the new constitution foster democratic accountability? The politics of ethnicity have presented an important challenge to democratic governance and the rule of law in Kenya. Ethnicity is appropriated for both good and bad. In some instances, it is appropriated to prevent enforcement of the law and is, therefore, responsible for a deepening culture of impunity. As noted above, the mobilisation of ethnic numbers in the communities where those indicted by the ICC come from, enabled the president and his deputy to win the election after forming an alliance (the Jubilee Alliance), in spite of their indictment. On the whole, ethnicity comingles with other factors, including Kenya’s electoral system, to establish formidable obstacles to the transition to democracy.
II: Ethnicity and democratic participation

Ethnicity, when viewed as the mobilisation of groups sharing a language, culture and ancestry, is the main fulcrum around which national and local politics in Kenya revolves. The ethnic structure and the quest to control the centralised executive powers accounts for this. Notably, Kenya comprises many ethnic groups but none of the groups are large enough to dominate the others. Estimates show that the country has about 42 groups. On the basis of the 2009 population census, the major groups whose individual share of the national population exceeds 10% are the Kikuyu (17.15%), Luhya (13.82%), Kalenjin (12.86%), Luo (10.47%), and Kamba (10.07%). Their total share of the population is 64.4%. The second largest cluster constitutes 15.07% of the population. These figures show that over 35 groups comprise only 8% of the population. They include Kenyan Europeans and Asians, as well as minority and marginalised indigenous Kenyan groups. They are all poorly represented in elective bodies and in public service.

The absence of a single numerically large group, the relative equality of the five main groups, as well as the presence of many smaller entities whose combined share of the population is still in the minority, have all increased politicisation of ethnicity in Kenya. Political elites tend to mobilise support on an ethnic basis. An incentive for coalition-building in this regard is the first-past-the-post electoral system, which makes it possible for the presidency (and parliamentary as well as civic seats) to be won by a small proportion of votes cast. Both the electoral rule and the relative equality of the five ethnic groups have meant that the competing elites form coalitions or obtain substantial support from small but significant groups.

Several factors account for the dominance of ethnicity in the practice of politics in Kenya. First is the significance of centralised executive powers. This issue is discussed later. It suffices to say, that over the years the constitution was amended to provide for a powerful executive. The amendments removed inbuilt checks and balances and weakened other organs of the

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11 These groups are the Kenyan the Kisii (5.71%), Mijikenda (5.07%) and Meru (4.29%). The Somali are excluded from this cluster because their 2009 population census figures remain disputed. There are two other groups whose individual share of the population is just over 2%. These are the Turkana (2.56%) and the Maasai (2.18%).
government. The presidency evolved as the most important institution because without checks on accountability, the president could use public resources to reward followers and to punish dissenters. The use of public resources for patronage purposes has, therefore, been widespread.

Ethnicity is also central to politics because of inequalities in ethno-regional development, which stems from the colonial policy of developing areas occupied by the colonial settlers, namely the White Highlands. The settlers favoured central Kenya and the highlands in the Rift Valley. These regional disparities in development also coincide with ethnic inequalities because the regional boundaries correspond to ethnic settlement patterns or territories. Groups in marginal and poorly developed regions blame successive governments for the failure to invest resources in their regions. This intensifies conflicts because they view access to and control of political power as synonymous with access to development resources. There is the view that a region from which the president comes is favoured in terms of development resources allocation. ‘It is our turn to eat’ becomes a mobilising slogan among groups during elections. Ethnic coalitions are formed on the promise of sharing power.

The actions by elites from the president’s community, once in power, do not assuage fears of groups whose leaders fail to capture power. Appointments to public service favours the regions of those in power. Thus, the areas from which influential elites and the president originate tend to have a relatively higher share of senior public sector positions than those of other groups. The state is, therefore, not viewed favourably from an accountability point of view. This perception has been entrenched by the actions of the Kikuyu elites in power under President Jomo Kenyatta and President Mwai Kibaki and by the actions of the Kalenjin elites under Daniel arap Moi. An ethnic audit of the civil service by the National Cohesion and Integration Commission has shown that members of the president’s communities have been dominant in all senior and strategic positions in government ministries and departments. The government that was formed after the March 2013 general election has followed this familiar path. Distribution of cabinet posts was skewed in favour of the president and deputy president’s community. Their alliance, comprising their two communities, won the election and subsequently shared the spoils.

The skewed and imbalanced regional development has its origins in this tendency to distribute senior public posts along ethnic lines. This is followed by a skewed distribution of development resources in favour of the regions where these elites come from. Political elites consciously mobilise support on an ethnic basis to counterbalance each other and sometimes uses this model of skewed development to garner votes. Furthermore, to solidify their constituencies and numbers, politicians sometimes make derogatory statements against members of other communities. This often deepens divisions between groups.

Ethnicity has undermined efforts to hold the state accountable. There has been active citizen engagement in public affairs, but with very little consequence for state accountability because the competition for power takes place on an adversarial ethnic platform. This, on its own, makes the state and its institutions fragile. Ethnic leaders tend to identify with parochial community

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13 Seven of the 18 (39%) Cabinet posts went to the Kikuyu and Kalenjin communities. Advisory posts are distributed largely to the elites from these two and allied groups such as the Meru.
interests rather than the national good. And even when they do so, their own communities are not able to hold them to account because the electoral system makes it difficult for ethnic leaders to be held accountable by voters outside their constituency.

Overcoming ethnicity

Despite the negative impact of ethnicity on Kenya’s transition to democracy, people rarely discuss it publicly. In particular, the media do not mention names of communities when reporting other than with innocuous references. Nonetheless, the government has made some attempts to address the challenge of ethnicity in the public sphere. Some of these efforts were made after the post-2007 election violence.

The government introduced the National Cohesion and Integration Act (NCI Act) (2008) which directly addresses the problem of ethnic discrimination. The law established an independent National Cohesion and Integration Commission (NCIC) to facilitate and promote equality of opportunity, good relations, harmony and peaceful coexistence among different communities. The law mandates the commission to eliminate discrimination on the basis of ethnicity and to promote tolerance among Kenyans.

The NCI Act outlaws discrimination on the basis of ethnicity, race, colour and religion. The law prohibits victimisation and even harassment on the basis of ethnicity. It prohibits discrimination in access to and distribution of public resources, in employment, in membership of organisations, property ownership and management and in a wide range of other fields. The law emphasises that discrimination against and harassment of any person on the basis of ethnicity is a violation of that person’s dignity.

In recognition that the use of hate speech has played an important role in promoting ethnic divisions, this law prohibits the use of threatening and abusive language intended to arouse ethnic hatred and animosity. It also seeks to promote access to services by all, irrespective of their ethnic background, race, colour or religion. The new law directly upholds equality for all and seeks to promote access to opportunities by all people, especially in employment and other sectors. This law directly prohibits discrimination.

The 2010 constitution also outlaws discrimination on the basis of ethnicity. It specifically identifies non-discrimination towards and the protection of marginalised groups as part of Kenya’s national values and principles of governance. The constitution also provides for equality and freedom from discrimination. It is emphatic that neither the state nor any person can discriminate against another person on the grounds of ethnicity, among a comprehensive range of other grounds.14

Despite the enactment of the NCI Act in December 2008 and efforts to punish hate speech, ethnicity remains an impediment to the efforts to consolidate democracy. The composition of public sector institutions remains skewed in favour of the president’s Kikuyu community. The Kikuyu comprise more than 30% of staff in some government ministries and departments. This has led to growing perceptions that the government is not inclusive enough. Transforming the state and making it more accountable to all will certainly impact on the challenge of ethnicity.

14 Article 27(4) is emphatic that the state cannot discriminate against a person on a wide range of grounds, including ethnicity and culture. Article 27(5) prohibits a person from discriminating against others on the same grounds.
Enforcing and applying the new law and the constitution is very challenging, especially now that there are two levels of government. To eliminate using ethnicity in a negative manner will require a range of other laws because the practice is deeply embedded in Kenyan politics. It will require a culture of inclusive politics and merit-based appointments to public offices. Affirmative action measures should also be put in place to address inequalities in the public service. The constitution requires that appointments to public institutions reflect Kenya’s diversity. There is a need to regularly monitor how the government ministries and departments are staffing various positions. This should be a task for the NCIC, among other agencies. Importantly, there is a need to establish a framework for monitoring and making recommendations regarding appointments to public posts.
III: Citizenship, identity and the politics of belonging

The challenge of fostering citizenship as an impediment to Kenya’s transition to democracy is tied to that of ethnicity. The way ethnicity is utilised to advance or undermine socio-political interests has significant implications for the consolidation of citizenship rights. Indeed, the politics of belonging, or being ‘insiders’ or ‘outsiders’ of a particular group in power, has been central in defining exclusion and inclusion in Kenya’s politics.

Generally, the twin issues of citizenship and rights have come to occupy a central place in Kenya. The question of who is a member and who is not a member of an ethnic group plays perhaps the most important role in deciding how people vote and the type of rights they should enjoy at local level. The status of ‘outsiders’, or those who are not indigenous to an area, and that of ‘insiders’, remains central to conflicts in different parts of the country. Hostilities between these identities manifest during elections. Also, competing ethnic elites mobilise political support by demarcating these identities, thereby creating a basis for political discrimination against groups that are seen as ‘outsiders’. Identity then becomes the basis for accessing opportunities in the public sector. In the end, this undermines the democratic principle of equality for all citizens. This use of identity results in a vertical form of inequality; it becomes the basis for inclusion or exclusion on ethnic grounds.

Erosion of citizenship has continued to occur even though the constitution, the old and the new, provides for equal rights for all citizens. The old Kenya constitution provided for the ‘Protection of Fundamental Rights and Freedoms of the Individual’. Application and conferment of these rights was devoid of race, tribe, place of origin or other considerations, but subject to respect for the rights and freedoms of others, and for the public interest. The constitution defined citizenship not in terms of belonging to groups but in terms of belonging to the Kenyan nation-state. The law then provides protection to citizens on the basis of belonging to Kenya, not a particular part of Kenya. In light of conflicts over land ownership, the law provides for individuals to own property anywhere in the country. While the legal framework for the enjoyment of rights is clear, the politics of belonging have eroded the basis for the enjoyment of such rights, and enforcement has been problematic. The new constitution has provided a radical Bill of Rights binding all state organs, private individuals and institutions. The 2010 constitution
recognises human rights and freedoms to preserve the dignity of individuals and communities. These rights and fundamental freedoms belong to individuals and are not granted by the state.\footnote{Article 19.}

The discrimination on ethnic grounds that permeates politics in Kenya is reflected and perhaps finds endorsement in discriminatory practices at national level with regards to granting Kenyan citizenship. The previous constitution discriminated on the basis of gender, thereby excluding women from the enjoyment of rights. A foreign woman married to a Kenyan man would obtain citizenship by registration, while the same right was not accorded to men who married Kenyan women. Kenyan men were the dominant bearers of identity. If only the mother of a child was Kenyan, she would not pass her nationality to her children born outside the country’s borders.

Though the law does not provide for citizenship to be granted or withheld on the basis of ethnicity, in practice, discrimination in Kenya on ethnic grounds has been widespread. Individuals of Nubian and Somali origin have been systematically excluded from recognition as citizens, even when they are third and fourth generation Kenyan residents. Members of border communities, descendants of migrants and others living in geographically isolated areas experience relatively more difficulties than other Kenyans in processing their registration as citizens. They undergo multiple vetting processes to ascertain their citizenship. Interestingly, corruption is increasingly blamed for the failure to give citizenship documents to some Kenyans in border communities. Among the Somali in Kenya, elders in vetting committees that recommend the awarding of citizenship documents, such as identification cards, are often blamed for passing off Somali citizens as Kenyans. The Kenyan Somali fail to get the documents if the elders do not recommend them. Thus, the problems of citizenship are expressed in multiple ways. Those in border communities have the challenge of proving their identity during the formal process of registering as citizens. They also have difficulties in consolidating their rights of belonging at local level, especially if their group is seen as comprising of ‘outsiders’.

The discrimination in issuing citizenship documents disadvantages individuals in these communities in several ways. Without an identity card or passport, a person will be denied the right to vote and participate in public affairs. This official discrimination at national level is essentially reproduced in popular and official behaviour at local level, deepening the fragmentation of the communities. With the introduction of county governments, this is likely to be reinforced at county level, especially in multi-ethnic counties.

It is also worth noting that the population census often raises tension partly because it reproduces this fragmentation, and partly because it fails to list the identities of some groups. The census thus denies citizenship to some groups by failing to list them as distinct groups. Some of the smaller groups are listed as ‘others’ or lumped together, thereby negating or denying their identity and citizenship altogether. The last census was carried out in August 2009. Several groups complained that they were omitted from the list. Failure to recognise their identity leads to future challenges regarding citizenship rights. Significant also is that the census fragments some of the large groups into various sub-groups. This raises tension within the group because such fragmentation reduces their overall numeric strength – numbers are an important element.
in the voting patterns and in the negotiations when forming ethno-political alliances competing to control power.

In an attempt to address the erosion of citizenship rights, the new constitution provides for a comprehensive Bill of Rights that applies to all, and binds state organs and all persons. It provides for the courts to make interpretations that favour the enforcement of rights and freedoms. The new constitution also provides for citizenship by birth and by registration. It also provides for dual citizenship, thus preventing a Kenyan citizen from losing their citizenship because of acquiring the citizenship of another country. Furthermore, the constitution eliminates gender-based discrimination in the granting of citizenship rights. It now allows for both men and women to confer Kenyan citizenship to their foreign spouses and their children.

The various forms of discrimination against women has impacted on their ability to participate in political processes. This is in addition to cultural attitudes, the general lack of adherence to electoral laws during elections, the lack of enabling legislation, threats of and actual use of violence, and the use of abusive language against women participating in competitive politics. This has resulted in very few women participating in elective politics. At independence, the Kenyan Parliament was all male. About five decades later, women in Parliament comprise 9.5% of the National Assembly. The number of women in other public sector posts is similarly low.

Efforts to pass the Affirmative Action Bill (2007) which sought to have over 50 women specially elected as members of Parliament, failed, but the new constitution has developed innovative approaches to increase the number of women in all public positions. The constitution requires that no more than two-thirds of the members of all elective and appointive positions in public bodies shall be of the same gender. This is aimed at guaranteeing the representation of women at all levels and in all institutions. An important achievement is the requirement that membership in the new bi-cameral legislature comprise special seats for women.

The constitution makes provisions for gender quotas. The National Assembly reserves 47 (about 13%) out of the 349 seats for women. The Senate reserves 18 out of 67 seats for women nominated by political parties according to their proportion of elected members. However, the gender quotas for the National Assembly and the Senate lack precise formulation on how to meet the constitutional requirement that no more than two-thirds of the members in any elective or appointive posts shall be of the same gender. This lack of precise formulation does not provide adequate safeguards for women’s representation in the National Assembly and the Senate, especially if the women elected are less than one third in each of the houses. The Constitution of Kenya (Amendment) Bill (2011) (as further amended on 18 October 2011) sought to remedy this problem by re-writing the formula for the special seats relating to the National Assembly and the Senate, but Parliament did not pass the Bill. The Attorney-General referred the matter to the Supreme Court for an advisory opinion. The court did not resolve the matter; it did not compel Parliament to make a new law. The Court advised that gender quotas should be achieved progressively after the March 2013 general election, but not later than August 2015.

The principle of guaranteeing representation for women and other special groups, such as those with disability and marginalised groups, is reflected in the devolved governments too. The constitution requires that no more than two-thirds of the members of representative bodies
in each county shall be of the same gender. This guarantees relatively unconstricted women’s participation at local level. Similarly, the law now requires political parties to fill positions by providing a list of qualified male and female candidates. The constitution requires that the parties alternate between male and female candidates when listing them in order or priority.

Will these new provisions guarantee quality representation and participation of women in the democratisation process? One important outcome of the new constitution is the guaranteed number of women representatives in elected bodies. The constitution guarantees a certain minimum number of women to be elected at different levels. It also creates opportunities for women to seek election alongside other candidates. This implies the possibility of having more women than the minimum provided for by law. The absence of clarity on how the gender quota for the Senate and the National Assembly will be achieved if less than one third of those elected are women, raises a major challenge for the new constitution.

These provisions are good on their own, but they will require new legislation and enforcement mechanisms. Kenya, however, has a poor track record in enforcing laws. This then calls for a strong mechanism to monitor the extent to which the government is implementing these new provisions. There are other challenges too. The constitution has not addressed the socio-cultural challenges that hinder women’s participation in the electoral process. Again, this demands that new legislation be introduced to eliminate these and other obstacles.

These provisions will be enforced in the public sector. Yet, the private sector has similar inequalities in terms of the representation of women and other marginalised groups. Thus, lobbying the private sector to take similar measures is essential. There is a need to lobby for the re-introduction of the law on affirmative action to address the rights and needs of marginalised groups in the private sector.

To address the problems of citizenship, Kenya should thoroughly revise its citizenship law, providing for a right to nationality on clear, objective and non-discriminatory grounds. In addition, it should formulate policies to ensure that officials responsible for issuing citizenship documents do not have discretionary powers regarding who qualifies and who does not. The government should also eliminate the mass vetting of communities because this usually opens the door for arbitrary discrimination, which in turn leads to corruption in the procurement of registration documents.
IV: The electoral system and political parties

By at least some standards, Kenya has consolidated an election culture. Since independence, Kenya has held regular and periodic elections roughly every five years. The principle of free and fair elections is legally enshrined in Kenya’s constitution and provided for in the Elections Act and the Political Parties Act. In addition, Kenya has ratified many international and regional treaties that contain standards on the conduct of democratic elections. It has signed, but not yet ratified, the African Union’s Charter on Democracy, Elections and Governance.

Although Kenya has consolidated a culture of elections, the electoral system of first-past-the-post has prevented the institutionalisation of democracy and political parties. This echoes the findings of the Independent Review Commission (IREC), later referred to as the Kriegler Commission after its chairman Justice Johann Kriegler, on the general election of 2007, which found that Kenya’s electoral system was not founded on the principle of equal votes. The system had been distorted for a long while through gerrymandering. The Kriegler Commission pointed out that the system contained gaps and weaknesses that warranted radical review in order to provide free and fair elections.16

Elections are won or lost by a simple majority, regardless of the number of registered voters in a constituency that cast their ballots. This system reinforces ethnicity by privileging the mobilisation of communities through discourses that emphasise the need to access and control state power for the benefit of those elites that win the presidency. For these reasons, parties are formed and reformed along ethno-regional lines as vehicles for electoral competition only, causing people to associate any new government with the community of the president. The majoritarian electoral system thus makes rivalry for power a constant element in Kenya’s political life. Because winning an election using the first-past-the-post system requires mobilising sufficient numbers, elites enter into ethnic coalitions using the numeric strength of their respective communities as a bargaining chip. This leads to a cycle of the formation and break-up of ethnic coalitions every election period. Many of these alliances break up after the election and few live beyond one election.

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The new constitution has not radically altered the electoral system. Although there were discussions about introducing proportional representation (PR) or mixed member proportional representation (MMPR), the constitution generally retained the first-past-the-post system, because MPs did not want to give up representing their constituencies. PR, and the MMPR electoral system in particular, would have strengthened democracy in several ways. It would have assisted in laying a foundation for stronger political parties as institutions because people would be voting for political parties rather than their ethnic leaders. MMPR would have weakened ethnicity as a basis for political organising and representation by ensuring that membership of parties is national and that the parties have a membership that represents the diverse interests and groups that make up Kenya. By allocating seats in Parliament to political parties on the basis of their share of the national vote, the contentions around representation that arise with the delimitation of boundaries for single member districts in a first-past-the-post system would have been addressed. The system would have provided incentives for parties to organise nationally rather than regionally. It would have reduced disparities in the representation of different groups and interests in society.

The team drafting the constitution nonetheless sought to give Kenya a fairer electoral system through the establishment of a two-round system (TRS) in the presidential elections and a first-past-the-post system with gender quotas for the National Assembly, the Senate and county assemblies. The constitution requires the winning presidential candidate to receive more than half of the votes cast in an election and garner at least 25% of the votes cast in more than half of the 47 counties.\footnote{Article 138(4).}

The electoral system has not radically changed. It nonetheless requires that a winning president enjoys broad support from at least half of the counties. This failure to radically alter the electoral system might lead to the continuation of conflict because it still promotes a winner-take-all culture. Furthermore, the new constitution provides for the delineation of boundaries on the basis of population size, among other factors. The electoral system will require further reforms for it to sufficiently contribute to democratic governance.

The electoral system has prevented the institutionalisation of political parties. It motivates parties to form along ethno-regional lines since what is required is to win by a simple majority. Mobilising ethnic numbers then becomes a priority for leaders as they compete against one another. The parties are at best institutionally weak and are formed as vehicles for electoral politics. Very few, if any, live beyond one election period in their current form in terms of the size of membership and support. A party’s membership is ethno-regional and revolves around ethnic leaders. Thus, if a party leader moves on to form a new alliance, the party ceases to exist or exists as an empty shell. The parties generally revolve around wealthy ethnic elites, as they heavily rely on ethnic coalitions or singular ethnic groups as their primary base of support.

Many parties do not espouse a coherent ideology or doctrine on which to articulate interest, mobilise supporters and shape public opinion. To address these weaknesses, the Political Parties Act (2011) creates an institution specifically responsible for the regulation of political parties, the Registrar of Political Parties. However, enforcing the law remains problematic because the main
parties are under the leadership of senior politicians in government who have failed to make their parties accountable. Furthermore, the parties are themselves formed for election purposes. Their leaders pay little attention to them until election time when the parties are dissolved to form new alliances. Although the new constitution provides for the improved governance of political parties, enforcing the law will remain a challenge as long as political leaders retain positions in both the parties and government.

Institutionalising political parties requires commitment to the rule of law. It requires the effective enforcement of the laws governing the operations of political parties. The constitution has established a new elections management body, the Independent Electoral and Boundaries Commission (IEBC), with a broad mandate, including the supervision of party nominations of candidates. The Political Parties Act also provides for how political parties should be regulated and governed. Thus, the laws are very much in place, what is lacking is effective enforcement. This failure to enforce the law is a running theme in Kenya's political life. It is informed generally by the dominance of the executive and the attendant tendency to interfere with the running of independent institutions.

The law established the post of Registrar of Political Parties, but the post remained vacant for a long time. The Registrar operates from within the IEBC, which does not guarantee the institutional autonomy required to transform political parties into agencies for consolidating democracy. As already mentioned, there is a need to fill the post through a competitive process. The office should also be provided with adequate resources and be given, by law, the independence required to carry out its mandate. The capacity of the office should be maximised to enable it to commit parties to the rule of law.
V: Concentration of power and abuse of the rule of law

Successive governments have manipulated the constitution to concentrate more powers in the presidency. Amendments to the constitution began at independence in 1963 in order to create a powerful ‘imperial presidency’ by combining the powers of the queen (head of state) and those of the prime minister (head of government). The amendments sought to create a powerful president, who was both the head of state and head of government. These powers were centralised and concentrated in the presidency but with minimal checks. With absolute powers, the first president, Jomo Kenyatta, and the cabal of ethnic elites around him, began to amend other provisions of the constitution. Amendments were made to dismantle the semi-federal system of government and later on the bi-cameral legislature was abolished. In other instances the government would use administrative fiat to cause changes in the practice of politics. For instance, from 1969 the government did not allow opposition political parties to operate. This practice of politics and increased appetite to concentrate power in the executive was passed on to the regime of President Moi who assumed office after Kenyatta’s death in 1978. Constitutional amendments were made to constrain dissent and suppress viewpoints that differed from those of the government and the ruling elites in KANU.

The amendments to concentrate power in the executive watered down the foundational principles and values of the independence constitution and undermined participatory democracy. In the end, the amendments resulted in a dominant executive. The amendments also eroded the independence of other organs, the legislature and the judiciary. They also evolved the executive into the dominant player in the policy-making arena. Furthermore, influential politicians had an overwhelming impact in the policy arena. Their informal power was so overwhelming that they would subjugate the government ministries/departments in policy-making. Political influence took primacy over everything else and undermined the capacity of state institutions to make policies. Even within the executive, it became increasingly difficult to independently formulate policies because everything had to be referred to the president or be sanctioned by him. Civil servants who delayed implementing the different directives or questioned them were punished.

The first few years of President Kibaki’s rule saw a radical departure from these approaches. During this time, before the fragmentation of the ruling coalition, the government expanded the space for policy-making to include civil society and non-state actors in general. The
government would use an inclusive and participatory approach to policy-making. Thus, civil society organisations (CSOs) participated in the drafting of the Economic Recovery Strategy (ERS), the policy framework that NARC used to guide planning and national development. CSOs also contributed to the development of a framework for governance and justice reforms immediately after the new government came to power. So much so that the new government’s policies borrowed the language and thinking of civil society and other pro-reform groups. But the collapse of the alliance saw a return to the tendency by government to consult minimally with civil society.

The collapse of the alliance also meant the government could not without effort deliver on its legislative agenda in Parliament. The government had to look for new allies, which included political parties that were initially part of the opposition and individual politicians who had limited or no interest in pursuing the radical reforms that NARC had promised to undertake. With these new allies, NARC reduced its interest in governance reforms. This had immediate consequences. The momentum for reforms dissipated because the government had no interest in any reform that could hurt its quest to maintain adequate numbers in Parliament.

Although the NARC government did not amend the constitution to concentrate powers in the executive the same way the previous governments had done, the government’s actions to ensure a tight grip on political power halted the pace of implementing governance reforms. Furthermore, as argued above, the government watered down the draft constitution in 2005 to come up with one that concentrated powers in the presidency. This was not NARC’s position when their new allies were still part of the opposition. The president’s party, the Democratic Party (DP), favoured a parliamentary democracy with reduced executive powers. The new government was moving fast to take actions that would lead to a strong executive.

The absence of strong checks against the executive made it easy to concentrate power in one institution. The centralisation of power in the executive led perhaps, most damagingly, to the subjugation of the powers of the legislature and the erosion of the independence of the judiciary. Thus, Kenya’s Parliament has in the past acted as a rubber stamp for executive fiat while the judiciary has tended to make judgments that favoured the executive. Without respect for the principle of separation of powers, Parliament and the judiciary lost their independence. This considerably weakened the accountability of the executive.

The resolution of the post-2007 election violence inadvertently resulted in another problem. The sharing of power by a coalition government comprising of the two parties initially involved in the dispute, eliminated opposition within Parliament. It is usually the opposition that holds the government to account. This absence of opposition was heighted by smaller parties joining either of the two main parties so as to benefit from the power-sharing arrangements and it led to the absence of structured criticism in legislative processes. It meant the absence of effective vigilance over the activities of the government. This also reduced opportunities through which people could impact on decision-making. The two partners in the coalition lacked unity of purpose and therefore at times failed to pass important policies. Party interests increasingly undermined the spirit of bipartisanship.

The March 2013 election resulted in the formation of two main alliances. Leaders of communities that hitherto remained protagonists cobbled together alliances to unify their
communities for the purpose of the 2013 election. The two main alliances, the Jubilee Alliance and the Coalition for Reform and Democracy (CORD), were formed for the purpose of capturing state power rather than to promote national good. Because of this, the alliances are not institutionalised and any disagreements will certainly result in fragmentation.

Kenya’s new constitution has addressed some of the factors that made it easy for the executive to amend the constitution. The new constitution provides for the independence of the judiciary and the legislature. It has provided for the establishment of an independent Judicial Service Commission (JSC) to promote the independence and accountability of the judiciary. It also strengthens the powers of the Parliamentary Service Commission (PSC), which plays a similar role in Parliament. Article 255 requires amendments relating to the functions of the president, Parliament, and the independence of the judiciary, to be the subject of a referendum. To pass, the amendment must be supported by at least 25% of voters in at least half of the 47 counties, and must win by a simple majority at the referendum.\footnote{Other amendments effected under this article include amendments touching on the Bill of Rights, supremacy of the constitution, structure of devolution, and the provisions of this article itself.} This certainly implies that future governments will not easily amend the constitution to concentrate powers in the hands of a few individuals. After the promulgation of the new constitution, the executive attempted to make nominations for judicial appointments without following the provisions of the constitution. This provoked unprecedented protests from the public. The judiciary also ruled that the president had no powers to make these appointments. He withdrew the nominations.

The new constitution has also imposed a radical change to the structure of government and governance. Firstly, it has identified values and principles of governance by which all state institutions and citizens must abide. Among others, democracy and the participation of the people are identified as key principles to guide the conduct of public officials. The constitution also underlines that public office is entrusted to the nominated officials and they must, therefore, bring dignity to the office they hold. The importance of these provisions is that public participation in decision-making is now a constitutional obligation. Key decisions must have public support and must be developed through public participation. For this purpose, the government should develop and implement a policy to guide how people will participate in the making of key decisions at different levels of the government. The government should also introduce a strong freedom of information bill to enable people to gain access to the information they require to effectively participate in public affairs as well as to the information they require to hold the executive accountable.
VI: Local self-governance and the devolution of power

Kenya’s local government system has operated under the authority of the central government and the Minister for Local Government. The mandate, management and operations of the local government authorities were set out in the Local Government Act. Their core mandate was to provide public services with the support of the central government, collect revenue, promote good governance and stimulate economic growth in their territories. The country had 175 local authorities, which were further clustered into city municipalities, as well as town and county councils. Each of the local authorities was governed by its own set of by-laws. Membership of councils consisted of elected and nominated members. The nominated councillors articulated the interests of the central government in all important issues under consideration by the local authority. The Minister for Local Government therefore had considerable influence in the management of local authorities and was consulted on virtually every activity. Local governments also lacked the independence to make and implement critical decisions.

A mayor (or chairman) elected by councillors during the first full council meeting after a general election headed the council. In most local councils, mayoral elections had been acrimonious and often violent. The reasons for this included the desire to access and be in control of patronage resources under the control of the local authorities. The local authorities would give these to elected leaders and senior government officials without any form of accountability. For instance, local authorities held land in a trust on behalf of the local communities, where the land has not been privatised and individuals given title deeds. Also, urban local authorities had the power to award licences for trading within their jurisdictions. Conflicts arose between elected leaders and administrative officials in local authorities. Administrative officials, who were employees of the central government, implemented policy decisions at local level in line with instructions from their superiors. However, elected officials usually sought to control the implementation of such decisions. This resulted in conflicts between the two. Further, the gaps in the law were usually exploited to create opportunities for corruption and patronage. There were demands to democratise the governance of local authorities but these have not yet been met.

Although Kenya had a local government structure, its effectiveness was limited by the central government. Moreover, local government was a structure of administrative decentralisation;
it lacked financial and political independence to make decisions. This limited the extent to which local authorities could promote governance at grassroots level and the extent to which citizens could effectively participate in decision-making. There was little participation in local government affairs and even elections because the units at this level were seen as low-value and providing inadequate services.

**Devolved system of government**

This arrangement of local government, however, ended after the March 2013 elections when the devolved system of government began to operate. The country now has two levels of government, national and county. There are 47 counties. The devolved governments, under the new structure, are required to reflect three basic principles: democratic principles and the separation of powers; reliable sources of revenue and the autonomy to govern and deliver services effectively; and the inclusion of not more than two-thirds of the members of representative organs from the same gender. These also relate to the national values and principles of government espoused under article 10, which underlines, among other principles, the participation of the people in decision-making and the adherence to transparency and accountability.

A county government comprises a county assembly and a county executive committee. The executive authority of a county is exercised by the county executive committee, comprising an elected governor and deputy county governor, together with an executive committee appointed by the governor from non-county assembly people. Voters directly elect the county governor, deputy governor and members of the assembly. The county governor serves only for two terms. The county assembly contains special seats for women and persons with disabilities, as well as the youth.

The constitution protects the devolved system of government from unlawful national government interference. The national government is required to share revenue with the county governments. The constitution requires that the government sets aside at least 15% of revenue for them as unconditional grants. A grant system supports operations, but counties are also allowed to raise their own revenue by collecting levies. Most important is that the number of counties and their roles cannot be altered without a constitutional amendment through a referendum. An Equalisation Fund is available to provide basic services for marginalised counties. These provisions prevent the political mischief that frustrated operations of the devolved system of government after independence. It also prevents interference in counties by the national government as happened with local authorities previously.

The governments at the national and county levels are distinct and interdependent; none is subordinate to the other. The constitution provides that they interact through consultations and cooperation. This implies the independence to make decisions in functional areas without interfering with each other. However, the constitution requires the national government to ensure access to its services in all parts of the country ‘as far as it is appropriate to do so’. This needs to be done with mutual respect, because article 189(1) requires both levels of government

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20 Article 6(3).
to perform ‘functions, and exercise its powers, in a manner that respects the functional and institutional integrity of governments at the other level, and respect the constitutional status and institutions of government at the other level and, in the case of county government, within the county government’.21

To promote interdependence and cooperation between the two levels of government and even among the county governments, the Inter-governmental Relations Act (2012) established several organs. These include the National and County Government Coordinating Summit. This is the apex body and comprises the president and the 47 county governors. It was established with the aim of promoting national cohesion, unity and national interest. It also has the responsibility of facilitating and coordinating the transfer of functions, power and competencies to either level of government but in line with the constitution. The Inter-government Technical Committee serves as the secretariat of this body.

The second body is the Council of County Governors. This was established for the consultation among county governors on matters of common interest. The council also facilitates the sharing of information, dispute resolution and builds the capacity of governors. It receives reports and monitors the implementation of inter-county agreements, especially those concerning inter-county projects. The council has the mandate to establish other inter-governmental forums and sectoral working groups.

Although the structure to support devolution is very much in place, there have been tensions between those who want a centralised government and supporters of devolution. What took place in the formative years of Kenya’s independence is being repeated. The national government and the executive would prefer to have total control rather than let local institutions operate as independent units. Although the government has introduced legislation to support county government, there must be vigilance against those who want the centre to maintain control over the devolved units. Although the Senate will play this role, it is possible that the centre will begin clawing back some of these gains. The Transitional Authority, the institution that is helping the transition to county government, should be provided with sufficient resources to secure the process of establishing county governments.

21 Article 189(a).
Conclusion and recommendations

This discussion has identified several problems that impact on the efforts to bring ‘democracy and public participation’ to Kenya. Ethnicity and identity politics, the centralisation of power in the executive and a majoritarian electoral system are some of the issues underlying the failure to consolidate democracy and political participation.

Ethnicity is the problem around which major political events in the country revolve. The centralised power of the executive and the winner-take-all electoral system reinforce ethnic cleavages. Ethnicity is not the problem, per se. It is a symptom of the structure of political power and how that power is abused to provide resources to unaccountable elites. Its mobilisation for political use has exacerbated the fragility of state institutions.

Despite the centrality of ethnicity in Kenyan politics, the country has no policy on how to address its impact on governance and politics. There is a reluctance to confront ethnicity as a problem in policy and politics, yet it is the central pillar in Kenya’s politics and development and, therefore, critical to democracy and political participation. There is a need to confront ethnicity by developing relevant policies and laws, as well as by taking appropriate political action. In this respect, Kenya may consider passing laws that demand that the composition of public office holders reflect ethnic diversity. There is a need to formulate policies to guide the composition of public and private sector positions and to ensure the transparent and equitable distribution of public positions.

The first-past-the-post electoral system polarises society along ethnic and other lines. The system has de-institutionalised political parties and transformed them into vehicles for transporting voters and their leaders from one election to another. The new constitution has not radically altered the electoral system. The winner-take-all system was largely adopted, except for special seats in the National Assembly, the Senate and the county assemblies. It will not be easy to comprehensively review the system, given that members of Parliament prefer to retain their single member districts. Moreover, mixed member proportional representation and proportional representation in general were not discussed during the constitutional review process. In mitigation, there is a need to establish citizen-led oversight bodies in the constituencies and in every county to promote discussions on the quality of representation. There is also a need to establish public-interest litigation centres in every county to ensure that those elected are first vetted to establish their qualities with regard to integrity and leadership as laid out in the constitution. Thirdly, civil society should develop qualifications indicators and lobby for their
adoption by the Ethics and Anti-Corruption Commission. This new body should then use these indicators to vet those vying for public positions.

The new constitution promises to alter the structure of governance in fundamental ways. It creates a new Kenya, complete with new institutions and values. It also shields these new institutions from political patronage. But the challenges facing the creation of a new Kenya are many. First, the implementation of the new constitution is dependent on the old political and bureaucratic elites, including those who were opposed to it. The transitional provisions did not allow for a new election immediately after the new constitution was promulgated. The new constitution has nonetheless raised public expectations on the possibilities of a new culture of governance in Kenya. It fosters accountability in the conducting of public affairs, but impunity is still widespread. It is this culture of impunity that is likely to frustrate efforts to promote democracy and political participation of the people in remaking Kenya.

The road ahead is challenging. How Kenya addresses these numerous challenges will, in many ways, have a bearing not only on its stability but also on the wider legitimacy of the ruling elite, as well as on citizens’ confidence in participating in the reconstruction of the state.