

Chapter 7 Intra-Party Democracy and the Chasm between Political Parties and Democratisation in Kenya

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1. Introduction

At independence in 1963, the newly formed Kenyan state had a multiparty devolved system of government. However, its descent into a *de facto* single-party state began immediately thereafter, starting with a series of constitutional amendments the core objective of which was to centralise power in the executive.¹ The Kenya African National Union (KANU) became the sole political party² and only available vehicle for direct political participation in the country's elections.³ On succeeding President Jomo Kenyatta in 1978, Daniel Moi's government completed Kenya's transformation into a *de jure* single-party state through the insertion of section 2A in the Constitution via the 1982 Constitution of Kenya (Amendment) Act,⁴ which

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- 1 D Juma, "The Normative Foundations of Constitution Making in Kenya: The Judiciary Past, Present, and Future", in C Murungi (ed.), *Judiciary Watch Report, Vol. IX: Constitutional Change, Democratic Transition and the Role of the Judiciary in Government Reform: Questions and Lessons for Kenya*, Nairobi, Kenya Section of the International Commission of Jurists (2010), p 220.
 - 2 The only other political parties at independence were the Kenya African Democratic Union (KADU), which was disbanded in 1964 and saw its members integrated in KANU; the African People's Party, which was disbanded in 1963 when its eight Members of Parliament (MPs) crossed the floor to join KANU; the Nyanza Province African Union (NPAU), which held only one Senate seat and became defunct after the Senate was abolished in 1966; the Baluhya Political Union and Coast People's Party, which did not win any seats in the 1963 elections and was deregistered in 1965; and the Kenya People's Union (KPU), which was founded by the founding Vice President, Jaramogi Oginga Odinga, after he fell out with President Kenyatta and resigned in 1966 – thereupon he formed the KPU, but the party was banned in 1969. See SD Mueller, "Government and Opposition in Kenya: 1966–1969", 22 (1984) *Journal of Modern African Studies*, p 399.
 - 3 B Bwire, "Interrogating the Evolution of a Constitutionally-legitimised 'Big Man' Political Culture and its Influence on Political Participation by Kenyan Youth", 23 (2023) *African Human Rights Law Journal*, p 266.
 - 4 Constitution of Kenya (Amendment) Act 7 of 1982.

established KANU as the only political party in Kenya.⁵ However, KANU's dominance ended nine years later with the repeal of section 2A via the 1991 Constitution of Kenya (Amendment) Act.⁶ This re-transformation was achieved six years later with the 1997 Constitution of Kenya (Amendment) Act's⁷ insertion of section 1A in the Constitution, which provided that "[t]he Republic of Kenya shall be a multiparty democratic state".

This constitutional framework marked the establishment of Kenya as a constitutional democracy.⁸ A functional constitutional democracy is characterised by two basic elements: regular, free, and fair elections; and respect for basic rights to the freedom of speech, expression, and association.⁹ Democracy thus builds upon, and is reinforced by, respect for human rights, particularly civil and political rights, and basic rights to the freedom of speech, expression, and association.¹⁰ Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides that every citizen has the right to take part in the conduct of public affairs, either directly or through freely chosen representatives; the right to vote and to be elected at genuine periodic elections by universal and equal suffrage; and the right to have access to public service on general terms of equality.¹¹

Political parties are private associations whose aim is to be represented in political institutions by fielding their members as candidates to contest elections.¹² They are crucial actors in a democracy because, through their membership and voting, they facilitate the electorate's choices and thus enable citizens to participate in politics, as provided for under Article 25.¹³ Given their crucial role, it is therefore desirable that they are also internally democratic institutions that safeguard their members' rights to political participation under Article 25. These rights include the right to vote and to

5 Section 2A provided that "[t]here shall be in Kenya only one political party, the Kenya African National Union".

6 Act 12 of 1991.

7 Act 9 of 1997.

8 M Loughlin, "The Contemporary Crisis of Constitutional Democracy", 39 (2019) *Oxford Journal of Legal Studies*, pp 435–454.

9 T Ginsburg and AZ Huq, *How to Save a Constitutional Democracy*, Chicago, University of Chicago Press (2018), p 295.

10 S Lagoutte and MJ Petersen, *Political Parties and Human Rights: An Introduction*, Copenhagen, Danish Institute for Parties and Democracy (2018), p 2.

11 International Covenant on Civil and Political Rights (ICCPR) UN Treaty Series, Vol. 999, I–14668, 179, 19 December 1966.

12 Lagoutte and Petersen, *supra* n. 10, p 4.

13 *Ibid*, p 4.

be elected in regular, free and fair elections, which can be achieved only if political parties also respect and protect their members' basic rights to the freedom of speech, expression, and association.¹⁴

Intra-party democracy enables party members to participate in the conduct of party affairs, which includes the selection of party leaders and legislative candidates.¹⁵ Moreover, it also enables parties to become vehicles for improved representation by elevating people and policies endorsed by party members.¹⁶ Ignazi argues that a party is considered truly internally democratic when it has “the four knights of intra party democracy”: (a) the formal involvement of members in leadership or candidate selection and policy development through votes; (b) a degree of pluralism reflected in internal factions; (c) deliberative processes engaging members in the formulation of party policies; and (d) a diffusion of power through party organs at different levels.¹⁷

However, despite the existence of a constitutional framework that inherently calls for intra-party democracy, Kenyan political parties seldom practise internal democracy. Prior to the second multiparty elections held in 1997, the International Foundation for Electoral Systems assessed Kenya's electoral system¹⁸ and found that although multiparty politics appeared to be an established fact, the country was not yet a democracy and its democratisation had in fact stalled.¹⁹ The reason for this inference was, among other things, that “political parties in Kenya are severely wanting in respect of the requisite skills and organizational capacity to make them viable political organizations”.²⁰

Against the backdrop above, this chapter critically analyses the evolution of political parties in Kenya since the restoration of multiparty politics

14 *Ibid*, p 2.

15 SE Scarrow, PD Webb, and T Poguntke, “Intra Party Decision Making in Contemporary Europe: Improving Representation or Ruling with Empty Shells”, 37 (2022) *Irish Political Studies*, pp 196–217.

16 *Ibid*, p 6.

17 P Ignazi, “The Four Knights of Intra Party Democracy: A Rescue for Party Delegitimation”, 26 (2020) *Party Politics*, pp 9–20.

18 Funded by the United States Agency for International Development (USAID), the study's objectives were to assess the electoral environment, identify constraints to free and fair elections, and recommend steps to eliminate them. See JD Barkan and RE Henderson, “Toward Credible and Legitimate Elections in Kenya: Part II IFES Assessment Report”, Nairobi, USAID (May 1997).

19 *Ibid*, p i.

20 *Ibid*, p 27.

in 1992 to the present day, with its focus on their internal organisational structures. The analysis is based on the core thesis that for parties to succeed in facilitating the transition to democracy, they themselves must also be democratic internally. Drawing on the historical development and contemporary characteristics of their internal party structures, the chapter portrays the ineffectiveness and shortcomings of Kenyan political parties in promoting free, fair, and open competition. In so doing, it examines party leadership and candidate selection, while also interrogating the interdependence between political parties and a country's democratic transformation. Ultimately, the chapter argues that internal democracy within political parties is an essential ingredient in a country's transition to democracy based on the principles of good governance and constitutionalism.

2. Internal democracy in Kenya's political parties

2.1 The rise and fall of KANU's strongest opponent

At the advent of multiparty democracy in Kenya in 1992, the Independence Constitution²¹ provided a sound constitutional and legal framework on which Kenyan political parties could build their organisational structures to ensure that these were internally democratic. The freedoms of speech, expression, and association were specifically protected under sections 79 and 80 of this constitution. Section 5(3)(a) provided that each political party participating in the general election would nominate one candidate for President, while section 34(d) stipulated that a person qualified to be elected as a member of the National Assembly if he were nominated for election by a political party. The underlying assumption was that party members would be formally involved in the selection of party leaders as well as the candidates which the parties present to contest the elections.

In 1992, the Forum for the Restoration of Democracy (FORD), a movement which led agitation for multiparty democracy in Kenya, was registered as a political party, instantly transforming it into the country's biggest opposition party.²² It was registered under the Societies Act since at that

21 The Independence Constitution of 1963 was repealed and replaced by the 2010 Constitution. It is this constitution (the former) that was amended several times to transform Kenya into a one-party state. See Juma, *supra*, n. 1.

22 See "Ford Kenya: Our History", *Ford Kenya Party*, <https://www.fordkenya.party/our-history/> (accessed 18 February 2024).

time Kenya did not have a Political Parties Act.²³ From the outset, there were tensions between those who had founded the organisation when it was still an opposition movement and those who joined it after it became a political party.²⁴ FORD's transition to a party raised tensions based primarily on ethnicity, along with generational conflicts, between the six founders, who were veterans of the Kenyan political scene since independence, and the young professionals who joined the party.²⁵ The latter, known popularly "the Young Turks",²⁶ also played a vital role in speaking out against the excesses of the Moi regime and agitating for multiparty democracy in Kenya.

FORD was the dominant opposition party in the run-up to the 1992 elections. Consequently, its membership ranks witnessed an increase in numbers, with new members comprising veteran opposition politicians as well as former KANU loyalists who had defected for the sake of their political survival.²⁷ However, aside from the high-profile recruits who joined of their own volition, the party lacked a structured system for recruiting and registering ordinary citizens as members, a limitation due primarily to its lack of a coherent party structure per se.

FORD had a written constitution which provided for grassroots elections; these were to be followed by an annual delegates conference to elect those who would serve in its national executive council.²⁸ However, the elections did not take place, owing to persistent squabbles between factions

23 *Ibid.*

24 FORD, an opposition movement, was founded by six people: Oginga Odinga, Masinde Muliro, Martin Shikuku, Philip Gachoka, George Nthenge, and Ahmed Bamahriz.

25 D Throup and C Hornsby, *Multi-Party Politics in Kenya: The Kenyatta & Moi States & the Triumph of the System in the 1992 Election*, Nairobi, East African Educational Publishers (1998), p 92.

26 These were youth leaders who mostly began their political careers fighting against the excesses of the Moi regime as leaders of the Student Organization of Nairobi University and the University Academic Staff Union. They included Paul Muite, Raila Odinga, James Orengo, Anyang Nyong'o, Kiraitu Murungi, and Mukhisa Kituyi. See JM Klopp and JR Orina, "University Crisis, Student Activism, and the Contemporary Struggle for Democracy in Kenya", 45 (2002) *African Studies Review*, pp 43–76.

27 They included two cabinet ministers, Peter Oloo Aringo and Dr Njoroge Mungai, as well as the former vice president, Prof. Josephat Karanja, and the former head of the civil service, Geoffrey Kariithi. See Throup and Hornsby, *supra* n. 25, p 92.

28 *Ibid.*, pp 93–94.

in the party;²⁹ these resulted in a compromise being brokered by the interim chairman, Oginga Odinga, events which saw him establish a 108-member national steering committee and a 14-member interim executive council – structures not provided for in FORD’s constitution.³⁰ Undemocratically, those party members who got to serve in either the steering committee or the council did so on the basis of political patronage rather than through a free and fair electoral process. This political patronage was divided amongst three personalised ethnic-based factions centred around Kenneth Matiba,³¹ Martin Shikuku, and Oginga Odinga, who respectively represented Kenya’s three largest ethnic groups at the time: Kikuyus, Luos, and Luhyas.³² As such, these structures were in violation of FORD’s own constitution due to the biased selection of their members that denied party members equal voting rights and thereby suppressed their formal participation in party affairs.

There was also disagreement over who should be allowed to join the party, especially when former KANU loyalists began defecting to FORD. However, it soon emerged that such disputes were on account of political machinations to secure leadership of the party, with some amongst the old guard seeing the influx of new members as a threat to their authority in the party.³³ These intrigues gave rise to ethnic-based factions within the party as politicians schemed to position themselves to secure nomination slots to run for office on the party ticket in the upcoming general elections. As a result, FORD neglected to develop a structured system for membership recruitment and registration, as this was abandoned by the party

29 The squabbles resulted in Martin Shikuku, one of the six founding members of FORD, scheming with fellow Luhya lawyers Japheth Shamalla and Benna Lutta to rewrite the party’s constitution in a bid to retain and centralise power within FORD’s original six founder members. See Throup and Hornsby, *supra* n. 25, pp 93–94.

30 F Holmquist and M Ford, “Kenya: State and Civil Society the First Year after the Election”, 41 (1994) *Africa Today*, pp 5–21.

31 Matiba emerged as a dominant force when he declared that he would also be seeking the party’s nomination to run for president, becoming the second member to do so after Oginga Odinga. A veteran of the Kenyan political scene since independence, he later became a key agitator for multiparty democracy in Kenya and was jailed by the Moi regime. See Throup and Hornsby, *supra* n. 25, p 106.

32 According to the 1989 census, Kenya’s population was 21,443,636, of which the Kikuyu comprised 20.78 per cent, the Luhyas, 14.38 per cent, and the Luos, 12.38 per cent. See Central Bureau of Statistics, “Kenya Population Census, 1989, Volume I” (March 1994), p 390.

33 Throup and Hornsby, *supra* n. 25, p 93.

leadership in favour of schemes to seize overall control of the party. These actions eventually coalesced around two main factions led respectively by the members seeking the party's presidential nomination, namely Odinga Odinga and Kenneth Matiba. The factions subsequently formed parallel party structures that were replicated at all levels of the party, so much so that it was common to find rival formations at the sub-branch and branch level contesting each other's legitimacy while refusing to be merged into a single branch.³⁴

Attempts at internal dispute resolution were rendered almost impossible by the contestation of legitimacy among the parallel party structures, as a result of which neither faction was willing to concede to the other's authority. Moreover, the lack of a coherent party structure meant that FORD did not have any suitable internal dispute resolution mechanism in place. Subsequently, when a major dispute arose as to the nomination of the party's presidential candidate, the Matiba faction went to court seeking an injunction to stop the impending elections that were to be held at FORD's first annual delegates conference, called by the Odinga faction.³⁵ However, the court declined to intervene, with Justice Akiwumi declaring that the court had no authority to intervene in the party's internal affairs.³⁶

Ultimately, FORD split into two rival parties, with Odinga's faction transforming into FORD-Kenya and Matiba's faction, into FORD-Asili.³⁷ This divided KANU's most formidable opponent down the middle, thereby increasing KANU's chances of reclaiming power in Kenya's first multiparty elections and perpetuating the Moi regime in this new political era. FORD's split was a major source of disillusionment for most Kenyans, since at the time it was the only opposition party capable of forming a nationwide multi-ethnic coalition that could win seats in every province and mount a challenge to KANU in forming the next government.³⁸

From the foregoing, it is evident that, despite having a written constitution that specified its party structures and provided for elections of office-holders, FORD still failed to achieve the internal organisational coherence required of a national political party and essential for internal democracy to prevail. Consequently, it failed to achieve internal democracy since it was

34 *Ibid*, p 111.

35 *Ibid*, p 131.

36 *Ibid*, p 133.

37 G Muigai, "Kenya's Opposition and the Crisis of Governance" 21 (1993) *Issue*, pp 26-34.

38 Throup and Hornsby, *supra* n. 25, p 109.

unable to hold free and fair elections for internal party positions. Moreover, FORD lacked a credible and verifiable system of membership recruitment and registration, and had a fragmented national presence with parallel party structures, all of which ultimately affected the credibility of its annual delegates conference.

2.2 The fall of KANU and the rise of coalition parties in 2002

Despite the reintroduction of multiparty politics in Kenya, KANU was able to win the first two elections of the multiparty era in 1992 and 1997, thereby prolonging President Moi's reign.³⁹ Meanwhile, the number of parties continued to increase, such that by 2002 Kenya had 22 registered political parties.⁴⁰ Subsequently, in order to strengthen their positions ahead of the impending 2002 elections, most of these parties formed alliances, primarily for the purpose of consolidating their potential vote baskets and increasing their chances of winning more seats, as opposed to forming alliances on the basis of congruence of ideologies. These alliances were based on memoranda of understanding between the parties, and were not specifically provided for under the then constitutional and legal framework of the Independence Constitution.

Ironically, KANU was the first party to enter into a political alliance after the 1997 elections, where it won a pyrrhic victory that left it with a mere four-seat majority in Parliament.⁴¹ Looking ahead to the next elections, to be held in 2002, President Moi foresaw an uphill battle for KANU, and looking to the path immediately ahead, a similarly difficult time for

39 Moi won the 1992 elections with 1,927,645 (36.7 per cent) of the votes, while his closest challenger, Kenneth Matiba, had 1,352,856 (26 per cent) of them. Matiba challenged the win in court, but the courts ruled in Moi's favour. See *Kenneth Stanley Njindo Matiba v Daniel Toroitich Arap Moi* (1994) eKLR. Moi later won the 1997 elections with 2,445,801 (40.13 per cent) of the votes against his closest challenger, Mwai Kibaki, with 1,895,527 (31.09 per cent). Kibaki also challenged the win in court but was unsuccessful. See *Kibaki v Moi & 2 others (No.2)* (2008) KLR (EP) 308.

40 Office of the Registrar of Political Parties, "Post-Election Evaluation Report" (May 2023), p 6.

41 KANU emerged on top with 107 elective seats, but the combined opposition captured 103. See "Kenya Parliamentary Election Results 1997", http://archive.ipu.org/parline-e/reports/arc/2167_97.htm (accessed 20 February 2024).

himself, since he was serving his second and final term as President.⁴² Consequently, he reached out to Oginga Odinga's son and political heir, Raila Odinga, to form a merger between KANU and Odinga's National Development Party (NDP).⁴³ The two parties merged on 18 March 2002, albeit for different reasons. Odhiambo-Mbai observes that Moi was focused on his succession plan to hand over power to a proxy who would guarantee his political security, whereas Odinga was intent on seizing total control and becoming the next President.⁴⁴

The two parties began on a solidly democratic footing by deciding that office-bearers to the newly merged KANU-NDP party would be elected at a national delegates conference on 18 March 2002; it was also at this conference that party members would ratify the merger and approve a new constitution for the merged party.⁴⁵ Moreover, the NDP would be dissolved and the merged party would be New KANU.⁴⁶ However, despite the presence of 6,000 delegates drawn from both parties' nationwide branches, with KANU bringing 4,500 and the NDP, 1,500,⁴⁷ it soon emerged that the new party's leadership was predetermined and not subject to any free and fair electoral process. Undemocratically, candidates were elected by acclamation instead of secret ballot; even in instances where delegates jeered to express rejection of a particular candidate,⁴⁸ they were simply ignored, with President Moi stating that complaints should be forwarded to party officials overseeing the elections.⁴⁹

42 Section 9(2) of the Independence Constitution specifically stated: "No person shall be elected to hold office for more than two terms."

43 C Odhiambo-Mbai, "The Rise and Fall of the Autocratic State in Kenya", in WO Oyugi, P Wanyande, and C Odhiambo-Mbai (eds.), *The Politics of Transition in Kenya: From Kanu to NARC*, Nairobi, Heinrich Boll Foundation (2003), p 70.

44 *Ibid*, p 71.

45 *Ibid*, p 72.

46 "Merger to Change Kenya Politics", *News24*, 18 March 2002, <https://www.news24.com/news24/Africa/Features/Merger-to-change-Kenya-politics-20020318> (accessed 30 December 2024).

47 *Ibid*.

48 Kipngeny Arap Ngeny's election as party treasurer was loudly jeered by the delegates since he had just been charged in court with the embezzlement of millions of shillings during the time he served as the head of the Kenya Posts and Telecommunications Corporation in the early 1990s. See "Kenyan Parties Merge Ahead of Presidential Elections", *Voice of America*, 18 March 2002, <https://www.voanews.com/a/a-13-a-2002-03-18-17-kenyan/392132.html> (accessed 19 November 2024).

49 *Ibid*.

Ultimately, Moi remained as chair, Odinga was elected as secretary-general, and a newly created four vice-chair positions were shared out between Uhuru Kenyatta, Musalia Mudavadi, Kalonzo Musyoka, and Noah Katana Ngala.⁵⁰ Moi came out eventually to declare Uhuru Kenyatta as his preferred successor and choice as New KANU's presidential candidate, doing so without engaging in any free and fair internal electoral process despite vehement reaction from Odinga and the four vice-chairmen, who declared their own interest in running for the party's nomination as New KANU's presidential candidate.⁵¹ Subsequently, a group of 32 KANU Members of Parliament (MPs) called a press conference to announce that while they were not opposed to Moi's choice of Kenyatta as the party's presidential candidate, they believed that the nomination process should be conducted democratically in accordance with the party's constitution.⁵² However, Moi pointedly ignored all opposition to his preferred candidate and officially endorsed Kenyatta on 14 October 2002.⁵³ This marked the end of the coalition experiment that Moi had begun, given that Odinga led the others in abandoning the party to seek viable alternatives ahead of the 2002 elections.

Any chance of resolving the dispute internally was thwarted by the fact that the merger was stillborn and that the proposed New KANU party which would have resulted from the merger between KANU and NDP was never formally established or registered. Additionally, the disgruntled members who wished to contest the presidency in the impending elections were cognizant of the pressure of time, with only two months left before elections were scheduled to be held on 27 December 2002.

Odinga moved quickly to forge another alliance, now with two ex-KANU loyalists, namely the former vice-president, George Saitoti,⁵⁴ and the former KANU secretary-general, Joseph Kamotho.⁵⁵ However, the Rainbow Alliance, as the new grouping was called, needed to be transformed into

50 Odhiambo-Mbai, *supra* n. 43, p 71.

51 *Ibid*, p 75.

52 *Ibid*.

53 *Ibid*.

54 Professor Saitoti was publicly humiliated by President Moi on the day of the merger with the NDP when Moi omitted his name from the list of candidates for vice-chair. On another occasion, Moi told a public crowd, with Saitoti present, that even though Saitoti was his friend, friendship and leadership are two different things. See J Kamau, "Trying Times for George Saitoti under President Moi", *Nation*, 12 March 2020, <https://nation.africa/kenya/nation-prime/trying-times-for-george-saitoti-under-president-moi-258962> (accessed 19 November 2024).

55 Odhiambo-Mbai, *supra* n. 43, p 78.

a political party for its members to be able to stand for seats in the upcoming elections, and to this end it usurped a minnow known as the Liberal Democratic Party (LDP).⁵⁶ Undoubtedly, the takeover of the LDP by the Rainbow Alliance was anything but democratic since its leadership was simply bought out, thereby setting an enduring trend for Kenyan politicians to buy out the registered leaders of moribund political parties and use these parties as vehicles to contest elections.⁵⁷ Kanyinga notes that the vast majority of Kenyan political parties are active only during election years, when they are used as vehicles to maximise votes and win elections;⁵⁸ the LDP is a good example of this phenomenon.

Meanwhile, leaders of the main opposition parties – Mwai Kibaki’s Democratic Party, Michael Wamalwa’s FORD-Kenya, and Charity Ngilu’s National Party of Kenya – led 11 other minor parties to form an opposition alliance party, which was dubbed the National Alliance of Kenya (NAK).⁵⁹ Ultimately, NAK and the LDP merged to form the opposition super-alliance called the National Rainbow Coalition (NARC).⁶⁰

Unfortunately, even though the NARC’s manifesto expressly said that “the NARC leadership will move fast and facilitate the establishment of a firm foundation of a truly democratic and empowered national community”,⁶¹ its presidential nominations were not democratically contested. The race for NARC’s presidential nomination was prematurely terminated when Odinga, without prior consultation or agreement with other party leaders, proposed Mwai Kibaki’s name to the huge crowd gathered for the party’s first public rally, held at Uhuru Park on 14 October 2002.⁶² Odinga’s proclamation of “*Kibaki Toshi!*” (“Kibaki is enough!”) was met with loud

56 S Karume, “Factional Intrigues and Alliance Politics: The Case of NARC in Kenya’s 2002 Elections”, 2 (2003) *Journal of African Elections*, pp 1–13.

57 Odhiambo-Mbai, *supra* n. 43, p 83.

58 K Kanyinga, *Kenya: Democracy and Political Participation*, Nairobi, Open Society Initiative for Eastern Africa (2014), p 155.

59 Odhiambo-Mbai, *supra* n. 43, p 83.

60 After its formation on 22 October 2002, it became the biggest opposition party in Kenya. Politicians began to defect to it in droves, as it was almost guaranteed that one would win if one stood on a NARC ticket. See Karume, *supra* n. 56, p 3.

61 National Rainbow Coalition (NARC), “Democracy and Empowerment: Manifesto for the National Rainbow Coalition (NARC)”, November 2002, <http://libraryir.parliament.go.ke/handle/123456789/15687> (accessed 19 November 2024).

62 Odhiambo-Mbai, *supra* n. 43, p 83.

popular approval from the crowd, and with that Kibaki became NARC's presidential candidate.⁶³

After the rally, other party leaders tried to express their disapproval, with the most vocal being Simeon Nyachae,⁶⁴ who vigorously protested that the NARC presidential candidate must be democratically nominated by all its constituent parties through a delegates' system.⁶⁵ His proposal was rejected by other coalition members on the grounds that NARC could not successfully organise a delegates conference in the one month remaining before the deadline set by the Electoral Commission of Kenya for the national nominations of presidential candidates.⁶⁶ Another ground for the rejection of Nyachae's proposal was that some of the constituent parties, particularly Odinga's LDP, did not have verifiable members who could serve as genuine delegates at such a conference.⁶⁷

The subsequent nominations of NARC parliamentary and civic candidates further exposed its complete lack of internal democracy at all levels. The European Union's election observation mission in its final report notes that, in some constituencies, NARC had double nominations, while certain party leaders by-passed party elections to directly give candidates the party's nomination certificates.⁶⁸ The nominations were also marred by actual election offences such as rigging, vote-buying, and voter bribery⁶⁹, while in other cases some candidates doubled up as returning officers and declared themselves as the sole party nominees.⁷⁰ The Carter Center's election observation delegation in its final report notes that NARC's candidate nomination process was marked by "administrative chaos, double

63 "The Deal and the Deal Makers in Kibaki's 2002 Victory", *Nation*, 30 August 2008, <https://nation.africa/kenya/news/the-deal-and-deal-makers-in-kibaki-s-2002-victory-557104> (accessed 19 November 2024).

64 A veteran in both government and politics since independence. He went on to contest the presidency as the candidate of his Ford-People party, the membership of which was drawn mainly from his Gusii ethnic community. See R Mbula and N Gisesa, "The Life and Times of Political Heavyweight Simeon Nyachae", *Nation*, 2 February 2021, <https://nation.africa/kenya/news/-life-times-nyachae-3276590> (accessed 19 November 2024).

65 C Odhiambo-Mbai, *supra* n. 43, p 83.

66 *Ibid*, p 82.

67 *Ibid*, p 83.

68 EU Election Observation Mission, "Kenya General Elections 27 December 2002 Final Report", Nairobi, EU Observation Mission (2002), p 22.

69 At the time they were offences under the Election Offences Act (Cap. 66).

70 Odhiambo-Mbai, *supra* n. 43, p 84.

nominations, and incidents of intraparty violence”.⁷¹ The process, overall, was hence not democratic by any measure. Unfortunately, this pattern of undemocratic party nominations endures, and is replicated by virtually all Kenyan political parties, which continue to fall short in their efforts to achieve internal democracy.

Therefore, it is evident that NARC and its constituent parties were in total lack of well-articulated internal structures that could enable them to hold a national delegates conference to democratically elect a presidential candidate or to conduct democratic party elections for parliamentary candidates. Both NARC and its constituent parties thus failed to achieve internal party democracy. Moreover, as with the LDP, most of the smaller constituent parties⁷² did not have verifiable members, were dormant prior to the election year, and did not have a national character or presence.

NARC went on to win the 2002 elections resoundingly and form a government with Kibaki as President. However, once in power, it slowly became fragmented owing to disagreements among the leaders of its constituent parties on how to share power.⁷³ NARC ultimately disintegrated along ethnic fissures,⁷⁴ and in the run-up to the 2007 elections was no longer the giant it had been in 2002, with its main factions having splintered into the Kibaki-led Party of National Unity (PNU) and the Odinga-led Orange Democratic Movement (ODM). Just like FORD, New KANU, and NARC, both the PNU and ODM were personalised and ethnic-based parties whose internal organisational structures were dominated by patronage politics. Consequently, they continued to engage in the same undemo-

71 The Carter Center, *Observing the 2002 Kenya Elections: Final Report*, Atlanta, The Carter Center (May 2003), p 10.

72 NARC was a coalition between the NAK and LDP. The NAK itself was a cluster of 12 political parties: the Democratic Party, FORD-Kenya, National Party of Kenya, FORD-Asili, Saba Saba Asili, SPARK, Labour Party of Kenya, United Democratic Movement (UDM), Social Democratic Party, Kenya National Democratic Alliance, Federal Party of Kenya, and Mazingira Green Party.

73 The cause of the disagreement was that Raila accused Kibaki of failing to implement a memorandum of understanding on how to share power that they had signed prior to the elections.

74 Other leaders came to denounce Kibaki for being surrounded only by Kikuyu loyalists (known popularly as “the Mt Kenya Mafia”, some of them had also been in Kenyatta’s government); a related criticism was that Kikuyus were said to be receiving the lion’s share of government appointments. See Bwire, *supra* n. 3, p 269.

cratic practices that they inherited from their leadership's past experiences in both the Moi and Kibaki regimes.⁷⁵

A key trend that emerged during this period and thereafter became a mainstay of Kenya's multiparty politics was the formation of coalitions between different parties. However, this also revealed a lacuna in Kenya's constitutional and legal framework at the time, since the latter did not specifically provide for how coalitions were to be formed or governed. As noted earlier, coalitions were then governed by memoranda of understanding between the constituent parties, and when these were breached, there was no legal recourse for the disaffected parties, as was seen in the cases both of New KANU and NARC. Indeed, NARC became fragmented because one of the key constituent parties, Odinga's LDP, contended that the memorandum of understanding on which the coalition was built was not honoured.⁷⁶ Nonetheless, there was no basis in the then prevailing constitutional and legal framework on which to implement it, and some of the positions negotiated in the memorandum were not entrenched in the Constitution.⁷⁷

75 By this point, Kibaki was Kenya's longest-standing politician, having served 10 consecutive terms as an MP before becoming President in 2002, while Odinga had been in opposition politics since the 1980s. See M Mwende, "State Canonizes Kibaki as Kenya's Longest Serving MP", *Pulse*, 27 April 2022, <https://www.pulselive.co.ke/news/local/senate-canonises-mwai-kibaki-as-kenyas-longest-serving-mp-for-10-consecutive-terms/gvnvzjp> (accessed 19 November 2024).

76 P Wanyande and PO Asingo, "Beyond Election Campaign Rhetoric: Challenges Facing the National Rainbow Coalition (NARC)", 31 (2004) *African Review*, pp 18–38.

77 The NARC memorandum of understanding proposed the creation of the position of an executive prime minister, thereby decentralising power from the executive. It is assumed that Odinga would have occupied this position once created; however, the agreement was never made public. *Ibid*, p 26.

2.3 Political parties in the era of the 2010 Constitution

In the aftermath of the 2007 post-election violence,⁷⁸ a coalition government was formed with Kibaki as President and Odinga as Prime Minister.⁷⁹ This government later established the Independent Review Commission (IREC) to investigate all aspects of the 2007 elections. In its examination of Kenyan political parties, the IREC found that their internal organisational structures rendered them “incapable of providing democratic space to their membership”.⁸⁰ It found in this regard that their election of party leaders lacked transparency and was entirely undemocratic, consequently delivering leadership that was inclined to be arbitrary, autocratic, and unaccountable.⁸¹ The IREC thus recommended, amongst other things, a complete overhaul of the Kenyan electoral system so as to change the way in which politics was conducted.⁸² In a bid to reform Kenya’s political culture and institutionalise political parties, this culminated in the enactment of a revamped Political Parties Act in 2011,⁸³ which replaced the one which had been enacted just two months before the 2007 elections.⁸⁴

Part IVA of the 2011 Political Parties Act specifically outlines the rules for organising and conducting party nominations. Under section 38B, a political party, when conducting nominations, is obligated to establish structures that provide mechanisms for the resolution of disputes arising from the

78 The dispute over the results of the presidential elections – in which both Kibaki and Odinga claimed victory – degenerated into widespread violence that resulted in the death of 1,133 people. See Commission of Inquiry into Post-Election Violence (CIPEV), *Report of The Commission of Inquiry into Post-Election Violence (CIPEV)*, Nairobi, Government of Kenya (16 October 2008), pp 345–346.

79 The coalition government was the outcome of talks to end the post-election violence; these talks were led by the African Union (AU) Panel of Eminent African Personalities, which was headed by the former United Nations Secretary-General, Kofi Annan, and included the former Tanzanian president, Benjamin Mkapa, and Graca Machel of Mozambique. The Panel was appointed by the AU in January 2008 to mediate in the crisis following the 2007 post-election violence.

80 Independent Review Commission (IREC), *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007*, Nairobi, Government of Kenya (17 September 2008), p 12.

81 *Ibid.*

82 *Ibid.*, p 15.

83 No. 11 of 2011 (Cap 7D), <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%207D> (accessed 20 October 2024).

84 The Political Parties Act 10 of 2007 was assented to on 22 October 2007, with a commencement date of 1 July 2008.

nominations, to designate the person to issue nomination certificates, and to prescribe the functions of the internal body responsible for conducting nominations.⁸⁵ Moreover, under section 38C(3), a party must apply to the Registrar of Political Parties⁸⁶ for a certified copy of the register of members to be used in the party nominations. The Act also provides a Code of Conduct for Political Parties⁸⁷ and, among other things, requires every political party to respect, uphold, and promote democratic values and principles as well as the inclusive participation of party members.

The push for reform of Kenya's political culture and the institutionalisation of political parties also found sound footing in the 2010 Constitution. To begin with, Article 4(2) recognises Kenya as a multiparty democratic state founded on national values and principles of governance, which include the rule of law, democracy, and the participation of the people.⁸⁸ Article 38 thereafter specifically recognises and protects the political rights of all citizens, including their right to free, fair, and regular elections, based on universal suffrage, in any office of any political party of which the citizen is a member.⁸⁹ Moreover, Article 91 outlines the basic requirements for political parties, one of which is that they should have a democratically elected governing body and both promote and practise democracy through regular, free, and fair elections.⁹⁰

However, despite the existence now of a comprehensive constitutional framework for intra-party democracy, Kenyan parties continue to fall short of achieving internal democracy. In 2013, Kenya held its first elections under the 2010 Constitution, with the two main contenders being the Kenyatta⁹¹-led Jubilee Alliance⁹² and Odinga's Coalition for Reform and

85 *Ibid*, section 38B.

86 The Office of the Registrar of Political Parties is established under section 33 of the Political Parties Act. Its mandate is to register, regulate, monitor, investigate, and supervise parties to ensure compliance with the Act.

87 First Schedule of the Political Parties Act.

88 Constitution of Kenya, 2010, Article 10(2)(a).

89 *Ibid*, Article 38(2)(b).

90 *Ibid*, Article 91(1)(b) and (d).

91 The son of Kenya's founding father, Mzee Jomo Kenyatta, he was running for president against Odinga, who in turn was the son of the founding father of Kenya's opposition politics, Mzee Oginga Odinga.

92 Its constituent parties were the National Alliance Party, United Republican Party, Republican Congress, and National Alliance of Rainbow Coalition, which drew the core of their members from the Kikuyu and Kalenjin communities, respectively supporting Uhuru Kenyatta and William Ruto.

Democracy (CORD).⁹³ However, as with FORD, New KANU, NARC, the PNU, and the ODM before them, CORD and the Jubilee Alliance were formed primarily to serve as vehicles to contest the elections and drew the core of their membership from the ethnic groups of their leaders. Cheeseman, Lynch, and Willis observe that despite the new Constitution's aim to transform Kenyan politics through the institutionalisation of political parties, parties in 2013 were still as organisationally insubstantial and unaccountable as they had been in 2007.⁹⁴

Indeed, the Jubilee Alliance was referred to as the “coalition of the accused”⁹⁵ because its two principals, Uhuru Kenyatta and William Ruto, were charged at the International Criminal Court with crimes against humanity committed during the 2007 post-election violence.⁹⁶ In keeping with what has been the trend since the reintroduction of multiparty politics in Kenya, both had their own individual parties, parties which relied for their existence on the leaders' personal resources and whose supporters were drawn primarily from their respective ethnic groups. In establishing these parties, they also followed the established trend of taking over dormant parties in an election year and using them as vehicles to contest elections. Subsequently, Kenyatta took over the National Alliance Party of Kenya,⁹⁷ while Ruto for his part took over the United Republican Party,⁹⁸

93 Its constituent parties were the Orange Democratic Movement, Wiper Democratic Movement, FORD-Kenya, the Kenya Social Congress, KADU-Asili, the People's Democratic Party, the Mkenya Solidarity Movement, Chama Cha Uzalendo, the Muungano Party, the United Democratic Movement, Chama Cha Mwananchi, and the Federal Party. The uniting factor was that Kenya's other 40 tribes coalesced around Raila Odinga (Luo) and Kalonzo Musyoka (Kamba) to overcome the Kikuyu-Kalenjin domination of the Kenyan presidency which had prevailed since independence in 1963.

94 N Cheeseman, G Lynch, and J Willis, “Democracy and its Discontents: Understanding Kenya's 2013 Elections”, 8 (2014) *Journal of Eastern African Studies*, p 6.

95 *Ibid*, p 7.

96 Six Kenyans, popularly known as the “Ocampo Six”, were charged at the International Criminal Court: William Ruto (Minister of Higher Education); Uhuru Kenyatta (Minister of Finance); Henry Kosgey (Minister of Industrialisation); Francis Muthaura (Head of Civil Service and Secretary to the Cabinet); Major-General Mohammed Hussein Ali (Commissioner of Police); and Joshua Sang (Head of Operations at Kass FM).

97 The party was registered by a wealthy Kikuyu businessman, Nginyo Kariuki, who agreed to hand it over to Uhuru Kenyatta.

98 The party was founded in 2012 by a faction of Ruto-allied politicians in the ODM who left the latter when Ruto fell out with Raila Odinga; they went to form this new party as their own vehicle for running in the 2013 elections.

with these two entities later joining forces as the Jubilee Alliance. As a result, the presidential ticket of the Jubilee Alliance was a foregone conclusion and not open to any democratic contest: Kenyatta was the presidential candidate and Ruto, his running mate. It was in many ways a coronation uniting the two tribes that have dominated the Kenyan presidency since independence, namely the Kikuyu and Kalenjin.⁹⁹

Kenyatta and Ruto's candidacy did not go unchallenged. In keeping with the spirit of the 2010 Constitution, three civil society organisations¹⁰⁰ filed a constitutional petition, *International Centre for Policy and Conflict & 5 others v The Hon. Attorney General & 4 others*,¹⁰¹ on the grounds, among others, that the "honour, integrity, and confidence bestowed on public office under Chapter Six¹⁰² of the Constitution would be seriously eroded".¹⁰³ The petitioners argued that the two candidates did not meet the threshold of the guiding principles of leadership and integrity provided for under Chapter Six and should therefore be barred from holding public office. Ultimately, the High Court held that it did not have the jurisdiction to determine the matter since the Supreme Court possessed exclusive original jurisdiction to hear and determine disputes relating to the elections of the Office of the President under Article 163(3)(a) as read with Article 140 of the Constitution. The court ruling came 15 days¹⁰⁴ before the elections that were due to be held on 4 March 2013, effectively marking the end of any dispute over the Kenyatta-Ruto candidature.

CORD traversed a similar path of ethnic-based calculation to maximise votes. Additionally, CORD's principals, Odinga and Musyoka, signed a memorandum of understanding that Odinga would be President for only one term and then support Musyoka for the presidency in 2017.¹⁰⁵ Consequently, the CORD presidential ticket-holders were arrived at through a negotiated agreement rather than an open, free, and fair democratic contest.

99 All Kenyan presidents since independence have come from one or the other of these two ethnic communities: Jomo Kenyatta (Kikuyu), Daniel arap Moi (Kalenjin), Mwai Kibaki (Kikuyu), Uhuru Kenyatta (Kikuyu), and William Ruto (Kalenjin).

100 The International Centre for Policy and Conflict (ICPC), the Kenya Human Rights Commission (KHRC), and the International Commission of Jurists-Kenya Chapter.

101 [2013] eKLR.

102 It provides the guiding principles of leadership and integrity required for state officers.

103 *Supra* n. 101, paragraph 15.

104 It was delivered on 15 February 2013.

105 Raila Odinga would later renege on the memorandum of understanding in the subsequent elections of 2017.

Kadima and Owuor note that negotiated power-sharing agreements like these, which became common practice in Kenya thereafter, are generally focused on short-term gains, such as appointments to lucrative government posts as a reward for party loyalists, and tend to work in favour of only the larger parties in the coalition.¹⁰⁶ In the absence of democratically contested presidential primaries, there is virtually no chance for a candidate from one of the smaller parties in the coalition to be the presidential candidate.

The deficiencies in the internal organisational structures of CORD and the Jubilee Alliance were glaringly exposed during the party primaries. Neither of them was able to hold free, fair, and transparent party nominations. The Kenya National Commission on Human Rights, which monitored the party primaries, notes that the exercise was ruined by sheer lack of preparedness and massive irregularities, while the culture of cronyism and political patronage continued to dominate the nominations.¹⁰⁷ Nevertheless, disaffected candidates had recourse to incremental avenues for dispute resolution, starting with the internal party mechanisms established in line with section 38B of the Political Parties Act.¹⁰⁸ Thereafter, they could pursue the matter at the Independent Electoral and Boundaries Commission (IEBC),¹⁰⁹ the Political Parties Dispute Tribunal,¹¹⁰ and ultimately the courts.¹¹¹ The disputes were raised on the grounds of electoral malpractices such as multiple voting, voter transportation, and voter bribery.¹¹² Consequently, the IEBC determined 200 nomination disputes,¹¹³ while the

106 D Kadima and F Owuor, “Kenya’s Decade of Experiments with Political Party Alliances and Coalitions: Motivations, Impacts and Prospects”, 13 (2014) *Journal of African Elections*, p 179.

107 Kenya National Commission on Human Rights (KNCHR), “Break from the Past? A Monitoring Report of the 2013 Political Party Nominations” Nairobi, Kenya National Commission on Human Rights (2013), p vi.

108 *Supra* n. 84.

109 The IEBC has the mandate to settle disputes arising from nominations, as provided for under Article 88(4) of the 2010 Constitution.

110 Established under section 5 of the Political Parties Act.

111 Parties could appeal the decision of the Political Parties Dispute Tribunal to the High Court, and subsequently to the Court of Appeal and the Supreme Court, respectively. However, parties did not pursue the decisions beyond the Tribunal due to the tight deadlines for submission of party candidate lists to the IEBC.

112 KNCHR, *supra* n. 107, p 114.

113 Electoral Institute for Sustainable Democracy in Africa (EISA), *Case Digest: Decisions of the IEBC Dispute Committee*, Nairobi, EISA (2013).

Political Parties Dispute Tribunal determined 60 cases.¹¹⁴ However, rather than await the outcome of their disputes, most politicians defected to other parties in a rush to secure nomination slots to contest the elections before the IEBC deadline lapsed.¹¹⁵

Both of the coalitions tried to establish a nationwide presence by opening up branches in the counties, but the linkages between the branches and the respective coalition headquarters in Nairobi were weak in most cases and entirely lacking in others.¹¹⁶ Moreover, the branch offices lacked proper facilities while the officials had inadequate knowledge of the rules and regulations governing political parties. Additionally, headquarters did not allocate them the financial resources to enable them to manage the logistics of overseeing the party primaries.¹¹⁷ Consequently, in most cases it was the candidates who personally facilitated transportation of nomination materials, hence making the entire process susceptible to rigging.¹¹⁸

Furthermore, the constituent parties of the two coalitions lacked verifiable membership registers and hence opted to use the IEBC provisional voter register.¹¹⁹ This opened up the party primaries to people who were not bona fide party members, since all that was required for them to vote was the production of their national identity cards. Consequently, many areas witnessed electoral malpractices such as multiple voting, voter transportation, and voter bribery.¹²⁰ Additionally, party officials overseeing the elections were poorly trained, and some also openly engaged in tallying malpractices.¹²¹

Based on the foregoing, it is evident that both of the coalitions failed to establish intra-party democracy. Nevertheless, some progress was made towards the institutionalisation of Kenyan political parties, given that parties

114 L Awuor and WE Otieno, *Case Digest of the Decisions of the Political Parties Dispute Tribunal*, Nairobi, National Council for Law Reporting (2013).

115 PO Asingo, "Party Strengths, Partisan Identities and Voter Mobilization in the Kenya Elections of 2013", in F Otieno (ed.), *New Constitution, Same Old Challenges: Reflections on Kenya's 2013 General Elections*, Nairobi, Society for International Development and Uraia Trust (2015), p 159.

116 KNCHR, *supra* n. 112, p 12.

117 *Ibid.*

118 *Ibid.*, p 11.

119 The IEBC has the constitutional mandate under Article 88 (4) (a) to prepare and maintain a register of voters for each polling station, ward and constituency.

120 KNCHR, *supra* n. 112, p 14.

121 The Carter Center, *Observing Kenya's March 2013 Elections: Final Report*, Atlanta, The Carter Center (2014), p 33.

at least attempted to comply to some degree with the provisions of the 2011 Political Parties Act.

The gains achieved in 2013 include political parties attempting to establish a nationwide presence through membership recruitment and setting up branch offices in the counties. This is in fact a prerequisite for full registration as a political party under section 7 of the Act, which requires that a provisionally registered political party qualifies for full registration only if it has recruited at least 1,000 registered voters from each or more than half of the counties. However, it remains the trend that, once registered, some parties lie dormant and are reactivated, or taken over, by other politicians who were not original members for use as vehicles for contesting the general elections. Another key step forward was that, however deficiently, parties began establishing internal structures – such as election management boards and nomination dispute resolution panels – in order to conduct nominations in keeping with section 38B of the Act.

The party which currently exhibits the longest institutional continuity is the ODM, which was founded in 2005.¹²² Unfortunately, however, it exhibits this continuity largely because its party leader, Odinga, has used it as his political vehicle of choice in four presidential bids – in 2007, 2013, 2017, and 2022. Moreover, ODM’s core membership is drawn from his near-fanatical following among members of his Luo ethnic group, who are Kenya’s fourth-largest tribe.¹²³ Consequently, as with other Kenyan political parties, the ODM exists in the shadow of being a personalised ethnic-based party.

2.4 A return to single-party dominance cloaked as multipartyism

The Jubilee Alliance went on to win the 2013 elections and dominate the eleventh parliament, commanding 58 per cent of the seats in the National Assembly and 57 per cent in the Senate.¹²⁴ It subsequently used its numbers

122 Orange Democratic Movement, “Party Ideology and Our History” <https://odm.co.ke/odm-party-ideology-and-our-history/> (accessed 24 February 2024).

123 According to the 2019 census. See Kenya National Bureau of Statistics (KNBS), “2019 Kenya Population and Housing census”, Nairobi, KNBS (2019).

124 Inter-Parliamentary Union, “Kenya National Assembly Elections in 2013”, http://arc.hive.ipu.org/parline-e/reports/arc/2167_13.htm (accessed 24 February 2024).

to force a majority vote on issues and laws that it wanted passed in what came to be known popularly as the “tyranny of numbers”.¹²⁵

In this regard, a clear pattern developed in which the Alliance, at the behest of its party leaders – in this case, then President Kenyatta and Deputy President Ruto – would use its parliamentary majority in attempts to side-step, mutilate, or ignore certain provisions of the Constitution.¹²⁶ There was no clear separation between the executive and MPs elected on a Jubilee ticket; as such, these MPs were not in a position to provide effective oversight of the executive, given that their strong allegiance to party politics meant that their decision-making capabilities were dominated by their party leaders.¹²⁷

This dangerous trend began during President Kenyatta’s first term and was replicated in his second when he won the 2017 elections. However, as had happened in the case of NARC, at the start of his second term the Alliance fragmented into factions owing to disagreements over power-sharing between Kenyatta and Ruto when Kenyatta chose to call a truce and work with Odinga in what was known as “the handshake”.¹²⁸ Nevertheless, this truce brought the entire Parliament under Kenyatta’s control since Odinga could now be relied upon to marshal those MPs allied to him to support the President’s motions in Parliament.¹²⁹ In essence, it completed the fusion of

125 W Maina, “What Tyranny of Numbers? Inside Mutahi Ngunyi’s Numerology”, Nairobi, AfriCOG (2013).

126 G Murunga, D Okello, and A Sjogren, “Preface”, in G Murunga, D Okello, and A Sjogren (eds.), *Kenya: The Struggle for a New Constitutional Order*, London, Zed Books (2014), p ix.

127 It also saw Parliament openly ignoring court orders at the instruction of the President, who sought to enact unconstitutional laws in defiance of the doctrine of separation of powers. See B Bwire, “How Far is Too Far? The Separation of Powers Doctrine and Judicial Review of Legislative Action in Kenya”, Unpublished PhD Thesis, University of Nairobi (2020), p 227.

128 E Okumu, “How We Got Here: Story of Handshake”, *The Standard*, 12 August 2019, <https://www.standardmedia.co.ke/politics/article/2001315921/the-story-of-handshake> (accessed 19 November 2024).

129 They later launched the Building Bridges Initiative, which was a proposed set of constitutional amendments for bringing about a more inclusive political structure with new positions, such as a prime minister and deputies, introduced in the executive. This was vehemently opposed by President Ruto, whose 2013 agreement with Kenyatta was that after Kenyatta had served his two terms, he would back Ruto for President in 2022. See Building Bridges Taskforce, “Highlights of the Report of the Building Bridges Initiative Taskforce”, <https://dc.sourceafrica.net/documents/120776-Highlights-of-the-Report-of-the-Building-Bridges.html> (accessed 24 February 2024).

the executive and the legislature that began in his first term; henceforth, the country could be said to have reverted to a political structure dominated by a single party, just as KANU had done in the past.

However, in the run-up to the 2022 elections, Ruto finally split with Kenyatta and led his faction out of the Jubilee Alliance to form yet another coalition, the Kenya Kwanza Alliance,¹³⁰ which would serve as his instrument for contesting the presidency. In keeping with past practice, ethnic arithmetic was at the core of the coalitions formed to serve as vehicles for the top two presidential contenders in the 2022 elections, Ruto and Odinga. Ruto went on to choose Rigathi Gachagua (Kikuyu) as his running mate as he moved to consolidate the crucial Kikuyu and Kalenjin voting blocs while at the same time seeking to establish alliances with other ethnic groups. For his part, Kenyatta chose to back Odinga's presidential bid and have his Jubilee party join the Odinga-led Azimio La Umoja-One Kenya Party.¹³¹ Odinga selected Martha Karua (Kikuyu) as his running mate; Ruto's Kenya Kwanza Alliance went on to win the elections and form the current government.¹³²

President Ruto's Kenya Kwanza government is treading the same path that Kenyatta paved in terms of blurring the separation between the executive and Parliament. This political fusion of the executive and legislature, coupled with strong party politics and ruling-party domination of administrative decision-making, severely limits Parliament's ability to constrain executive power. In turn, this creates opportunities for the re-centralisation

130 Its constituent parties are Ruto's United Democratic Alliance (UDA); the Amani National Congress; FORD-Kenya; Chama Cha Kazi; the Devolution Party of Kenya; Economic Freedom Party; Farmers Party; Service Party; Tujibebe Wakenya Party; Umoja na Maendeleo Party; Democratic Party; Grand Dream Democratic Party; Chama Cha Mashinani; and National Agenda Party of Kenya.

131 Its constituent parties are as follows: the ODM; Jubilee Party; Wiper Democratic Movement; KANU; NARC; NARC-Kenya; Muungano Party; Maendeleo Chap Chap Party; Democratic Action Party-Kenya; United Party of Independent Alliance; United Democratic Movement; United Progressive Alliance; Pamoja African Alliance; Kenya Union Party; Union Democratic Party; Movement for Democracy and Growth; Kenya Reform Party; Chama Cha Uzalendo; Party for Peace and Democracy; National Liberal Party; People's Trust Party; Ubuntu People's Forum; Party of National Unity; and Party for Growth and Prosperity.

132 Ruto won the presidential elections with 50.5 per cent of the vote as against Raila's 48.8 per cent. This was disputed by Raila, however, who filed a petition at the Supreme Court; the Court went on to uphold Ruto's victory. See *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* [2022] KESC 54 (KLR).

of power in the executive, which was the key deficiency of the structure that bred the dictatorial excesses of the KANU regime. Such a fused structure is a major hindrance to Kenyan democracy since it essentially enables the President to rule by decree – all of which represents a great regression in the progress the country has made since the reintroduction of multiparty politics in 1992.

Nevertheless, the judiciary's invocation of the safeguards in the 2010 Constitution give Kenyans hope. The judiciary is serving as an effective watchdog over democracy, especially in its interpretative role under Article 165(3)(d) of the 2010 Constitution, as is seen in the cases brought before it seeking judicial review of executive or legislative action where such action is deemed unconstitutional.¹³³ The judiciary has been consistent in issuing orders that invoke constitutional safeguards to prevent excesses in the exercise of either executive or legislative power, which is in keeping with the doctrine of separation of powers. This began during the first term of Kenyatta's presidency and continues to date, with the courts in some instances declaring presidential decrees or laws passed by Parliament as being in contravention of the Constitution. For now, it is the judiciary alone which is fighting to uphold democracy; as for political parties, in their current form they lack the capacity to ensure democracy within their own organisations, let alone at the national level.

2.5 The role of the Office of the Registrar of Political Parties

The Office of the Registrar of Political Parties has a crucial role to play in facilitating intra-party democracy, given that its mandate is to monitor, regulate, and enforce compliance with the Political Parties Act. Under its watch, the financing of political parties has improved greatly thanks to its administration of the Political Parties Fund, which is established under section 28 of the Political Parties Act. This fund gives parties access to 0.3 per cent of national revenue, alongside other revenue sources of their own such as membership fees, contributions, and donations.¹³⁴ Stringent administration of the fund by the Registrar, combined with oversight of

133 . See, for example, *Petition No.71 of 2013; Petition No. 628 of 2014* (2015) eKLR; *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* (2015) eKLR; *Constitutional Petition E005 and E001(Consolidated) of 2021*.

134 In 2023, the top three recipients of money from the fund were the UDA (KES 577.2 million), ODM (KES 308.3 million), and Jubilee Party (KES 135.1 million). See F

how parties spend the monies received, can help ensure that funding is used to establish and maintain sound internal party structures that enable parties to hold regular, free, and fair party elections. This would promote internal party democracy and support the institutional continuity of Kenyan political parties beyond election years alone; in turn, this could help them wean themselves off their dependency on their founding patrons, evolve organically, and organise themselves on the basis of ideologies that enable them to undertake recruitment and grow their membership bases.

3. The impact of ethnicity on Kenya's democracy

Despite the fact that the reintroduction of multiparty politics in 1992 signalled a major change in Kenya's political direction, "the commitment of Kenya's leadership and its people to the realities of multiparty democracy was always ambiguous".¹³⁵ This ambiguity is reflected in the inchoate manner in which opposition parties have been formed, structured, and run. From the outset, they were set up as patronage parties¹³⁶ wholly dependent on party leaders, figures whose ascension to leadership was solely on account of their role as the founders of the party. Moreover, ethnicity emerged as a central factor in party mobilisation and sensitisation of members,¹³⁷ giving credence to President Moi's ominous warning that the introduction of multiparty politics would divide Kenyans into rival ethnically-based political parties.¹³⁸

Fjelde and Høglund observe that Kenyan politicians base their mobilisation and sensitisation of voters on ethnicity, which they then use as the

Kagonye, "Full List: Millions of Shillings Your Party has Pocketed from Political Parties Fund", *The Standard*, 2022, <https://www.standardmedia.co.ke/article/2001459893/full-list-millions-of-shillings-your-party-has-pocketed-from-political-parties-fund> (accessed 25 February 2024).

135 Throup and Hornsby, *supra* n. 25, p 2.

136 Political parties where party leaders use their own private resources to run the party and consolidate support. See P Kopecky, JH Meyer-Sahling, and M Spirova, "(Extreme) Political Polarisation and Party Patronage", 37 (2022) *Irish Political Studies*, pp 218–243.

137 H Fjelde and K Høglund, "Ethnic Politics and Elite Competition: The Roots of Electoral Violence in Kenya", in MS Kovacs and J Bjarnesen (eds.), *Violence in African Elections: Between Democracy and Big Mana Politics*, London, Zed Books (2018), p 27.

138 D Throup, "Elections and Political Legitimacy in Kenya", 63 (1993) *Africa*, pp 390–394.

conceptual prism through which to explain actual or perceived inequalities in the distribution of national resources.¹³⁹ Kenyan political parties are thus a curious amalgam of ethnic alliances; those which are composed of the largest ethnic groups continue to dominate Kenyan politics in much the same way as KANU did, albeit realigning, reinventing, and rebranding themselves as new parties with each passing election.

This echoes Kanyinga's observation that Kenyan parties are poorly organised, lack sufficient financing, are without distinct ideological grounding, and are active only in election years.¹⁴⁰ In addition, the trend since the defeat of the KANU regime in the 2002 elections is for coalitions to be formed for the sole purpose of maximising votes in order to win elections and thereafter exercise power.¹⁴¹ They are also averse to holding free, fair, and peaceful party elections, and once in power, inevitably splinter into fragments along the ethnic lines represented by their constituent parties.¹⁴²

Although Article 91(2)(a) of the Constitution prohibits the formation of ethnically-based political parties, this prohibition is ineffective in the context of a first-past-the-post (FPTP) electoral system¹⁴³ in a non-homogeneous and multi-ethnic society such as Kenya. Political parties follow the trend of forming alliances based on ethnicity – primarily so as to expand their vote baskets and increase their chances of winning more seats – as opposed to forming alliances based on a congruence of ideologies. The FPTP system in the Kenyan context leads to a winner-take-all politics across all arms and at all levels of government and, as a result, to the exclusion of those who do not win elections. This provides a basis for politicians' exclusionary ethnicisation of social, political, and economic spaces, which is potentially a catalyst for violence.¹⁴⁴ It is a state of affairs which stands

139 Fjelde and Høglund, *supra* n. 137, p 27.

140 Kanyinga, *supra* n. 58, p 155.

141 *Ibid.*

142 *Ibid.*

143 The FPTP system is the simplest form of a plurality or majority electoral system: the winning candidate is the one who gets more votes than any other candidate, even if this is not an absolute majority (that is, more 50 per cent) of valid votes. For the Kenyan context, see B Bwire, "Constitutional Quotas and Women's Political Representation: A Way Out of the Kenyan Dilemma", Unpublished LLM Thesis, University of Nairobi (2012).

144 M Mutua, *Kenya's Quest for Democracy: Taming the Leviathan*, Colorado, Lynee Reiner Publishers (2008).

in direct contrast to the conceptualisation of democracy as a means of containing violence and stabilising political competition.¹⁴⁵

A possible solution lies in Arend Lijphart's influential model of consociational democracy, which posits that ethnic diversity can be managed by infusing measures that protect the interests of each community into the foundations of the political system.¹⁴⁶ Lijphart identifies executive power-sharing among the representatives of all significant groups as the key pillar of consociationalism,¹⁴⁷ and it is this aspect of consociationalism which is proposed here as a stabiliser of Kenyan politics. Indeed, this has been proposed several times in the past – in 1967, 1970, and 1992; in 2002 in the NARC memorandum of understanding; in 2002–2010 in proposals made during the drafting of the 2010 Constitution; and, recently, in 2019, under the Building Bridges Initiative.¹⁴⁸

Although these proposals were never permanently integrated in the Kenyan democratic system by way of constitutional amendment, they have prompted different regimes to share power on this basis, albeit temporarily and usually as a reactive measure. This has helped overcome periods of political volatility, and resulted in legislative and policy reforms that strengthened Kenya's democracy. In 1997 when Moi's KANU shared power with Odinga's LDP, it helped move along the Inter-Parliamentary Parties Group reforms, which levelled the political playing field as well as paved the way for constitutional reforms that culminated in the promulgation of the 2010 Constitution.¹⁴⁹ The NARC coalition government, before it dissolved along

145 M Ossome, "States of Violence: Structural Dynamics of Gendered, Ethnicized, and Sexualized Violence in Kenya's Democratic Transitions", Unpublished PhD Thesis, University of Witwatersrand (2015).

146 A Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*, California, University of California Press (1968).

147 According to Lijphart, the four pillars of consociationalism are (a) executive power-sharing among the representatives of all significant groups; (b) a high degree of internal autonomy for groups that wish to have it; (c) proportional representation in civil service positions and public funds; and (d) a minority veto on the most vital issues.

148 The proposals all focused on further decentralising the executive by introducing more executive positions such as a prime minister, more deputy-president slots, and an official leader of the opposition, with all of these positions based on separate mandates derived from executive power.

149 The reforms produced the Constitution of Kenya Review Act of 1997, enabling a comprehensive constitutional review after the elections. Consequently, the Constitution of Kenya Review Commission (CKRC) was established in 2000 under the leadership of the renowned Kenyan constitutional scholar, Yash Pal Ghai. It

ethnic fissures, was able to shepherd the constitutional review process that gave rise to the 2010 Constitution.¹⁵⁰ Power-sharing also saved the country from the brink of the precipice after the 2007 post-election violence,¹⁵¹ and, more recently, helped calm it after the 2017 elections.¹⁵²

Ultimately, proposals for constitutionally entrenched power-sharing mechanisms merit reconsideration given that whenever the government has entered into informal power-sharing agreements with other parties, it has stabilised Kenyan politics and spurred democratic growth.

4. Conclusion

Kenyan political parties continue to struggle to achieve intra-party democracy despite having a constitutional and legislative framework geared to that end and prescribing key internal infrastructure, such as a written constitution specifying the party's structures and providing for the election of office-holders. This continuing struggle is due primarily to their failure to achieve internal organisational coherence across all organs and levels of the party, as a result of which they are unable to hold free and fair elections for internal positions. The problem is compounded by the enduring trend in which coalitions are formed only to disband in due course because they are unable to achieve internal democracy.

Nevertheless, Kenyan parties can achieve progressive institutionalisation by complying with the mandatory requirements of the 2010 Constitution and the provisions of the 2011 Political Parties Act – which together provide a comprehensive constitutional and legislative framework to facilitate intra-party democracy. Moreover, the growing prominence of the Office of the Registrar of Political Parties in the regulation of the internal affairs of political parties is another bulwark against any regression by the parties. Ultimately, the continued realisation of the requirements of the Constitution and the Political Parties Act, under the oversight of the Office of the

was the CKRC which oversaw the consultative process of the drafting of the 2010 Constitution.

150 After the NARC government came to power, it reconvened the National Constitutional Conference under the Constitution of Kenya Review Act, Cap. 3A, to continue the constitution-making process led by the CKRC; the decade-long process of constitutional reform that began in 2000 was concluded in August 2010 with the adoption of the 2010 Constitution.

151 CIPEV, *supra*, n. 78.

152 Okumu, *supra*, n. 128.

Registrar of Political Parties, will steadily build internal democracy within Kenyan political parties and coalitions.

However, there remains the greater challenge of the impact of negative ethnicity on Kenya's democracy as a whole. The positive results of those instances where the government has shared power with other political parties can be studied and used to build a case for the reconsideration of previous proposals to have constitutionally entrenched power-sharing mechanisms. This can help to permanently surmount this recurring challenge that every so often ignites volatility and instability within Kenya's democracy.

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