

Chapter 2

Background to the Post-Election Violence

Abstract Literature indicates that the violence accompanying the 2007 general elections in Kenya was a spill-over effect of the country’s previous history, hence the need to scrutinize the historical antecedents to these elections. This chapter identifies and analyses five factors, namely negative ethnicity, dictatorship, political alliances, criminal gangs and impunity, which, prior to the 2007 elections, had characterized the Kenyan politics. The chapter reveals that in view of the five factors, feelings had developed in Kenya, already before the 2007 elections, that certain ethnic communities had been deliberately marginalized since independence, while others had been highly privileged or favoured in different ways. This gave rise, inter alia, to a number of historical fears and grievances, mostly in relation to land. It is shown that this state of affairs became a recipe for election violence accompanying all the multi-party elections prior to 2007, and since the grievances were not addressed, and in view of the previous trend of election violence, it indeed became certain that even the 2007 general elections would not be free from violence.

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2.1 Introductory Remarks

Sometimes due to historical connectedness of events, the present may not be fully comprehended unless the past is brought into perspective. By the same token, it may also be impossible to divorce completely the future from both the present and the past. And usually, the link between the past, the present and the future becomes even more relevant when one wishes to analyse a current event which in reality is a culmination of preceding historical state of affairs. Locating such a link becomes particularly crucial if the intention is, *inter alia*, to address the aftermath of such an event and project what the future may hold. Any study, whether legal or otherwise, relating to the post-election violence in Kenya will, by and large, befit this context.

A narrow view would associate the violence with the problem of power transfer which faces most African countries after an election process. Usually, this problem occurs when, after the poll count, it transpires that a ruling party or an incumbent president seeking re-election has lost the election and must hand power over to the opposition. The narrow view would explain why, for instance, the general perception in the run-up to the 1992 and 1997 multi-party elections in Kenya was that a smooth transition from the then ruling party, KANU (in case it lost) to an opposition party (in case any won) was a myth and almost infeasible. This perception existed only because in these two elections, the incumbent President Daniel Arap Moi was seeking re-election.¹ But as this chapter will reveal, this view, although not entirely dismissible, is too narrow to wholly depict the real situation in Kenya. Indeed the problem goes beyond mere electoral politics.

A broad view would indicate that it is inappropriate to describe the post-election violence in Kenya merely as sporadic events attributable only to the 2007 electoral process. On the contrary, this view would describe the violence as a climax of cumulative historical factors or, as it has been described, as “a volcano that had long been waiting to erupt”.² The reference to a “volcano” in this regard describes long-standing grievances and several unresolved issues pertaining to social, political and economic relations among Kenyans that had hitherto not been adequately addressed.³

The preceding remarks should, however, not be taken as suggesting that this study is the work of a historian. The inclusion of this historical account is only intended to bring into perspective the causal and factual links between Kenya’s previous historical, socio-political background and the 2007–2008 post-election

¹ See Troup and Hornsby 1998, p. 2.

² Biegon 2008, p. 34.

³ Cf. Kenya Truth Justice and Reconciliation Commission Report 2013, Vol. IV, para 263.

violence. Such a picture is considered crucial here, because it will prepare a ground for a better understanding of the political paradigms or undertones surrounding the proposed domestic criminal accountability measures to punish the perpetrators of the crimes related to the violence.

To that effect, five factors unfold as generally being the most prominent features that have singly or jointly characterized Kenya's politics at a time since independence. These are entrenched negative ethnicity,⁴ ethno-political alliances, dictatorship, hired violence (criminal gangs) and entrenched "culture" of impunity. This chapter gives a brief but reasonably fair account of these aspects of the Kenyan history.

2.2 Historical Role of Negative Ethnicity in Kenyan Politics

2.2.1 *Transition from Colonialism to Independence*

The earliest indicators that negative ethnicity would adversely affect the post-colonial Kenya were evident during the last days of the struggle for independence from the British. The problem of negative ethnicity is an impress of the colonial legacy, having been reinforced by the British ruling system. The British introduced a divide-and-rule system in Kenya as they also did in their other African colonies. This was a system that entailed a purposeful stratification of the colony's population in a number of ways, including along ethnic lines, mostly for ease of ruling and exploitation.⁵

By 1950 Kenya was already divided by economic differentiation between the minority white population and the majority local population. This differentiation was evident in, among other aspects, the allocation of massive land to the white settler farmers, which land was alienated from the indigenous population.⁶ The Kikuyus were the most affected ethnic community. The land

⁴ Negative ethnicity refers to the use of tribes or tribal affiliations to further the interests of one ethnic group against those of other similar groups or at the expense of national unity, peace and security. It is contrasted from "positive ethnicity" whereby ethnicity is used to mirror group's identity in terms of its customs, traditions and culture. Thus, whereas positive ethnicity, in the African context, is good for the nations that are ethnically diverse, negative ethnicity could become disastrous. For greater detail see *generally* Wamwere 2003a, b.

⁵ Cf. Kenya Truth, Justice and Reconciliation Commission Report 2013, Vol. IV, paras 259–263. The divide-and-rule system created both a physical and social distance among the colonial subjects. It was implemented through, inter alia, dividing the colonial territory into smaller geographical-cum-administrative regions, in order to decentralize and consolidate ruling at the grass root level. It was used as a formal separation of the colonial population according to their ethno-regional origins to facilitate exploitation of each. It also entailed an indirect rule system in which the tribal leaders (chiefs) received favours and privileges from the colonial government, and consequently, were used as instruments/puppets of that government. For more details see Christopher 1988, pp. 233 et seq.

⁶ Troup and Hornsby 1998, p. 7.

issue was one of the underlying reasons which triggered a long war of liberation, the *Mau Mau* movement, between 1952 and 1960.⁷ The earliest impact of the divide-and-rule policy manifested itself during this war. The majority of the members of the other big ethnic groups, mostly the Luo, the Luhya, the Kalenjin and the Coastal people, remained as bystanders, having refused to rally behind the Kikuyu leadership.⁸ Thus, *Mau Mau* was in some way considered as a Kikuyu affair, and was brutally suppressed by the colonial state in the late 1950s.

Apart from this armed struggle, ethnic interests continued to shape most events, even those which concerned or seemed to affect the collective interests of the Kenyan people as a whole. For instance, in the early days of negotiations for independence, specifically in the famous 1962/1963 Lancaster Conferences in London,⁹ ethnicity took precedence, and strongly shaped the demands of the Kenyan participants. The fear that “big tribes” would dominate the “small tribes” after independence was taken seriously by some of the participating members of the Kenyan delegation. There was an informal division among the Kenyan delegation which, to a great extent, was informed by tribal affiliation of the delegates. Two parties, namely, the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU) participated in the conference, apparently representing ethnic demands of their respective members.¹⁰ As the following section will show, the difference between these parties also entailed an ideological dimension which, in a way, had a link to the tribalistic dimension. This pertained to the structure of the constitution which should be adopted at independence. The said ideological dimension remained one of the key issues dominating Kenyan politics throughout, including during the 2007 elections and beyond.

⁷ The *Mau Mau* was not only a rebellion against the British colonial government, but also as a civil war among the Kikuyus. They set against their own chiefs, the ambitious commercial farmers and local Christians who were supportive of the colonial system. See Troup and Hornsby 1998, p. 7.

⁸ Ibid., pp. 7–8.

⁹ Three Lancaster conferences held between 1962 and 1963 were part of the Great Britain’s programme for empire dissolution by relinquishing its political domination over overseas territories. In respect of Kenya, the conference brought together the existing Kenyan political parties to agree on the form of government and the structure of the constitution to be adopted after full political independence. See Manner 1962, p. 8; Ogot 1995, pp. 73–76.

¹⁰ KANU was predominantly of Kikuyu and Luo membership, the largest and second largest ethnic groups, respectively. On the other hand, KADU’s membership comprised the smaller tribes of the Abaluya, the Kalenjin, the Maasai and Coast people. See Manner 1962, p. 9. The remaining small tribes, if taken singly, were not a “threat”, because their population was insignificant. Since independence, these tribes have always showed allegiance to the political affiliations of whichever big tribes they think would best protect and advance their interests. See Lamb 1969, p. 538.

2.2.2 *The Regionalism and Centralism Ideologies*

In the early 1960s, after the British had shown interest in decolonization, party politics in Kenya took a new dimension, as they became dominated by two different themes. In 1961, the main issue was the release of Jomo Kenyatta, a Kikuyu hero and first President of independent Kenya.¹¹ This was followed, between 1962 and 1963, by the argument or theme already alluded to above—the structure of the government to be adopted at independence. It is within the context of the second theme that the 1963 first general elections were dominated by two quasi-ideological arguments, namely *centralism* versus *regionalism*.

From the onset, the two political parties, KANU and KADU, wanted a constitutional structure which, as a matter of priority, would benefit the tribal interests of their members. This placed the expected independent Kenya in a latent problem of tribalism and nepotism. KANU strongly wanted an independence constitution based on centralism (unitary state), while KADU strived for regionalism or federalism. KANU's centralism envisioned a constitutional structure with three main features: an administration of the country done by a central government in Nairobi; a state-driven economy; and a free competition for resources.¹² Apparently, this had a strategic reason: to ensure that its members, predominantly Kikuyu and Luo, would perform relatively better in this set-up. KADU, which claimed to protect the interests of the minority ethnic communities, was in the phobia of “domination” by the two big tribes in the structure proposed by KANU. For this reason it campaigned for *majimbo*¹³ (Swahili word for regional governments) in which different federal “states”, apparently based on ethno-regional demarcations, would have the autonomy to decide their own affairs, more importantly the question of ownership of land and other resources found in their *majimbo*.¹⁴

¹¹ Jomo Kenyatta was the first president of independent Kenya. In 1952, following a declaration of a state of emergency by the British colonialists, he and other Kenyan nationalists were arrested and charged with “managing and being members” of an illegal movement, the *Mau Mau*. He was sentenced to 7 years imprisonment and remained under restriction, even after serving his sentence, until 1961. See “African History: Jomo Kenyatta” <http://africanhistory.about.com/od/biography/a/bio-Kenyatta01.htm>. Accessed August 2014.

¹² Troup and Hornsby 1998, p. 9.

¹³ Originally, this is traceable to the formation of the Federal Independence Party (F.I.P), a political party formed by white farmers in Kenya in 1954. The F.I.P had foreseen that political independence in Kenya was inevitable, and that it would place control into the hands of an African central government. They wanted to seal off the “white highlands” from the reach of a Black central government, so as to ensure that the great wealth of these areas remained in the hands of those who had been responsible for developing it. They would then establish a local self-government (white state) in the area, and so would the Africans in other states to be demarcated. Therefore, the original ambition of the F.I.P. was that Kenya would become a federation of several states. See Sanger and Nottingham 1963, p. 10.

¹⁴ Troup and Hornsby 1998, p. 9. For more details on the *majimbo* ideology see Anderson 2005, pp. 547 et seq.

It was in this context that during the independence negotiations at the Lancaster Conference, KADU's delegation carried the slogan "regionalism or death". In a meeting before departing for London, the party leaders had assured their members that they were prepared to negotiate for *majimbo* constitution at any cost, even if it meant bloodshed.¹⁵ The party secretary even told KADU members that the "Abaluhya, Kalenjin, Maasai and Coast people" would declare their independence if regionalism were not adopted at the Lancaster Conference.¹⁶ Eventually, the framework constitution agreed upon in London, and which was operational at independence, was based on *majimbo* system.¹⁷ This was the case despite the fact that there was a misconception about the framework actually adopted, each party claiming to have triumphed in having its ideology adopted.¹⁸

The Lancaster arrangement led to the first general elections in 1963. In these elections, more divisions were witnessed, whereby tribalism and the phobia of "big tribe domination" manifested themselves clearly. The so-called "small tribes" did not trust KANU's candidate, who was also Kenya's independence hero, Jomo Kenyatta. They accused him of having sided with a group of Kikuyu elites which was allegedly planning on how their tribe should receive awards commensurate with their suffering in the *Mau Mau* war of liberation. Leaders of the "KADU tribes", specifically the Maasai, Abaluhya and the Kalenjin, feared that without regionalism their land would be grabbed by the "KANU tribes", for Kenyatta was nothing but allegedly a "Kikuyu tribalist".¹⁹ As a result, the election campaigns assumed a tribal trend at all levels. In the areas inhabited by the "small tribes" the decision on who to vote for was not necessarily based on candidates' leadership qualities, but rather on their ethnic affiliations.²⁰

Eventually, KANU won the majority seats in the elections, the fact which enabled it to form an autonomous internal government. Jomo Kenyatta became Kenya's first Prime Minister.²¹ For a short period of time, Kenya became a

¹⁵ Manners 1962, p. 9; Sanger and Nottingham 1963, p. 12.

¹⁶ Manners 1962, p. 9.

¹⁷ See Ndengwa and Letourneau 2004, p. 85.

¹⁸ While KADU came out of the negotiation confidently claiming that the *majimbo* structure had been adopted, KANU refuted this claim as a misconception. Instead KANU was confident that the draft which had just been adopted kept intact the centralism structure that was being used by the departing colonialists. See Sanger and Nottingham 1962, pp. 8–9.

¹⁹ Ibid., p. 11.

²⁰ Ibid., pp. 16–17, indicating, for example, that in Kericho East constituency, the KADU's political advisor said that he would resign his seat in protest should a non-Kipsigis candidate be elected as he had too strong feelings against "foreigners". In the Coast the campaign slogans for KADU, on which it won, were "*Wabara kwao*" (literally meaning upcountry people to their own home) and later "*Kila mtu kwao*" (meaning each man to his own home).

²¹ Results for the House of Representatives were: KANU (83 seats), KADU (33 seats) and African People's Party, APP (8 seats). For the Senate, the results were: KANU (18 seats), KADU (16 seats), APP (2 seats), Independents (1 seat), and the Nyanza Province African Union, NPUA (1 seat). See Electoral Institute for the Sustainability of Democracy in Africa (EISDA) at <http://www.eisa.org.za/WEP/ken1963results.htm> and <http://www.eisa.org.za/WEP/ken1963results2.htm>. Accessed August 2014. See also Sanger and Nottingham 1963, p. 36.

Dominion State pending official declaration of independence. In this transitional arrangement, the British monarch remained the Head of State²² and the Prime Minister became the Head of Government. Independence was officially declared on 12 December 1963, and on 1 June 1964, Kenya became a Republic, Jomo Kenyatta being its first Executive President. Having won the elections, KANU was determined to use its overwhelming majority in Parliament to diffuse the *majimbo* system, as it claimed that such a system was “unnecessary and expensive, and that it constrained its (KANU’s) rightful power emanating from its electoral supremacy”.²³

2.3 The Rise of Monopartysm and Consolidation of Dictatorship

2.3.1 From De Jure Multipartyism to De Facto Monopartyism

As pointed out earlier, Kenya was a *de jure* multi-party state at independence, KADU being the official opposition party after the 1963 elections. However, after KANU’s victory in these elections, concentration shifted temporarily from the ideological differentiation of the two parties to the building of a new consensus, i.e. politics of *nation-building*. In this new focus, national stability and identity were heralded as the most important national priorities of the infant state.²⁴ KANU was successful in ensuring that a completely new argument emerged. The argument was that the new priorities of the infant nation could not be realized if the “confrontational electoral politics” envisaged by the Westminster-style democracy inherited from the departing colonialists was emphasized.²⁵ Apparently, the new “consensus”, the paramountcy of nationhood over party ideologies, was put to experiment when the first cabinet was formed. KANU’s “determination” to the consensus seemed to have been confirmed when Kenyatta created a “tribal ruling coalition” within the KANU government by bringing in members of the small or “KADU tribes”.²⁶ This, to some extent, eased the tension, overcame the fears of big tribe domination and, more importantly for KANU, appeared to render KADU’s “protective” ideology of regionalism completely redundant.²⁷

²² Constitution of Kenya of 1963, Article 72.

²³ See Ndengwa and Letourneau 2004, p. 85.

²⁴ Troup and Hornsby 1998, p. 12.

²⁵ Ibid.

²⁶ In order to balance the tribes and factions within KANU, Kenyatta co-opted his long-time Luo rivals, Jaramogi Oginga Odinga and Tom Mboya. These were given portfolios of equal standing. All the regions were found a minister and all big and small tribes had their member in the government. See Sanger and Nottingham 1963, pp. 37–38.

²⁷ Troup and Hornsby 1998, p. 12.

The tribal-regional balance achieved in the Kenyatta's first cabinet, together with the new perception, namely that competitive party politics was detrimental to the development of the infant state, had a serious impact on the continued existence of KADU. First, KADU's strong supporters of *majimbo* vanished from the scene, as the ideology seemed to lose its strength drastically. This paved the way for Kenyatta's new ideology, *harambee* (working together).²⁸ Secondly, KADU was significantly weakened by defections, as most of its members started to cross the floor in the National Assembly to join KANU having been lured by promises of more funds from the government for the development of their communities.²⁹ Apparently, this was a tactic by KANU to have KADU dissolved.³⁰ Shortly thereafter KADU actually dissolved itself voluntarily in December 1964, thereby rendering Kenya a de facto single-party state.³¹ KADU's key leaders, including Daniel Arap Moi (a Kalenjin), joined KANU, and were soon appointed to key ministerial positions in the KANU government.³²

2.3.2 Emergence of Factions Within KANU (1964–1966)

The amalgamation of KADU into KANU did not save the purpose for which it was intended. Instead, it brought the old ideological differences into KANU, and even created more others from within it. The reason being that before the fusion of the two parties, already there were two groups of radicals and moderates within both KADU and KANU.³³ For instance, while on the one hand the radicals advocated for, among other things, a total shift from pure capitalist economic policies inherited from the departing colonialists to socialist policies similar to those that were later adopted in neighbouring Tanzania, the moderates, on the other hand, preferred to continue with the *status quo*. Thus, upon the fusion of the two parties, a number of other radicals and moderates such as Daniel Moi moved from KADU to KANU to add to the numbers. This consolidated the existing factional groups. As a result, KANU experienced an internal threat of stability. A deliberate campaign was launched to eliminate all the followers of the radical faction. It was achieved through rigged party elections, allegedly engineered by President Kenyatta and his moderate allies.³⁴ This was then followed by the demotion of Jaramogi Oginga Odinga, a radical, from vice presidency at the party conference in Limuru. His seat was taken by Daniel Arap Moi, a moderate, who, later in

²⁸ Anderson 2005, p. 547.

²⁹ Odhiambo-Mbai 2003, p. 61.

³⁰ Ibid., p. 60.

³¹ Troup and Hornsby 1998, p. 12.

³² Odhiambo-Mbai 2003, p. 61.

³³ Troup and Hornsby 1998, p. 12.

³⁴ Ibid., p. 13.

January 1967, was named Vice President. This happened after the eliminated radicals—a group of 29 KANU MPs led by Jaramogi Oginga Odinga—did party hopping; they crossed the floor and found a new party, the Kenya People's Union (KPU), in 1966.³⁵ Thus, from 1966 Kenya resumed its *de jure* multiparty status.

2.3.3 *Suppression of Opposition Parties (1966–1982)*

KANU's strategy had always been to remain the sole political party in the Kenya's politics, even where Kenya was *de jure* a multiparty state. The formation of the KPU was viewed as a hindrance to the realization of this ambition. As a result, between 1966 and 1969 there was a serious suppression of political opposition. Firstly, immediately after the KPU's formation, KANU engineered an *ex post facto* constitutional amendment which forced all KANU MPs who had "crossed the floor" to re-contest their seats. Only six of them were re-elected. Secondly, the KPU's political activities were suppressed, including registration of new branches, which was refused or deliberately delayed. Thirdly, constitutional amendments and other draconian laws targeting the opposition were enacted. Such laws banned independent candidates and empowered the President to order preventive detentions.³⁶ The climax of this suppression was reached in 1969 when the KPU was banned and its leaders, including Jaramogi Oginga Odinga, were arrested and detained without trial.³⁷ Kenya became once again a *de facto* single party state.

2.3.4 *From Kenyatta to Moi: Tyrannical Rule Consolidates*

The banning of the opposition parties was never lifted throughout the remaining tenure of Kenyatta, who remained president until 1978 when he died. The then Vice President Daniel Arap Moi, a Kalenjin, took over the presidency, despite the disapproval of the Kikuyus in KANU.³⁸ Having assumed power, Moi promised to follow the *nyayo* (footsteps) of the "old man" (Kenyatta).³⁹ The *nyayo* politics, for sure, saw to it that the dictatorial state originally crafted by the "old man" was perfected. Moi's regime became relatively more tyrannical and self-centred

³⁵ Odhiambo-Mbai 2003, p. 62.

³⁶ Mueller 1984, pp. 407–418.

³⁷ Ibid., 417.

³⁸ When Kenyatta died, the Kikuyu, through the then powerful association, the Gikuyu, Embu and Meru Association (GEMA), strived to retain the political power within their tribes. These efforts became futile as the transition went smoothly in favour of Moi. For more details see Asingo 2003, pp. 20–24; Kimundi 2011, p. 81; Steeves 2006, pp. 211–212; Tamarkin 1979, pp. 21–33.

³⁹ Biegon 2008, p. 37.

compared to Kenyatta's.⁴⁰ For example, notwithstanding the ban against opposition parties, it is said that the Kenyatta regime had a higher level of tolerance for freedom of expression, dissent, criticism and independence of the judiciary than the Moi regime.⁴¹ When Moi took over, ethnic tensions and mistrust grew stronger as attention was perceived to have shifted from the Kikuyus, who had relatively benefited under Kenyatta's rule, to the people of Rift Valley (Moi's home Province).⁴² In the early 1980s, Moi is said to have made deliberate efforts to minimize the control of the Kikuyu elite in both public parastatal boards and civil service by replacing some of them with his loyal appointees.⁴³ The Moi regime continued to show all signs of authoritarian tendencies and concentration of powers in the presidency.

Two landmark events dominated the political scenes in 1982. First, through a motion moved by the then Vice President Mwai Kibaki,⁴⁴ the existing Constitution was amended by inserting the infamous section 2A that officially converted Kenya to a single party state.⁴⁵ It should be recalled that since 1969, when the opposition party, Kenya Progressive Union (KPU) was banned, Kenya had only remained a *de facto* single party state. The leaders of the banned KPU had, therefore, been rendered politically impotent, because they were denied any chance to contest any seats, even those who joined KANU. Once again, led by Jaramogi Oginga Odinga, they tried to form and register a new political party, the Kenyan Socialist Alliance, in order to challenge KANU's monopoly of political power. However, registration was refused, and immediately, the aforementioned constitutional amendment was promulgated to make Kenya a *de jure* mono-party state from 1982.⁴⁶

The second event that dominated the political scene was an attempted *coup d'état* in August 1982, which was allegedly staged by low-rank members of the Air Force. It is not very clear which politicians were behind this attempt, although it is alleged that some of the senior Kikuyu members in KANU, the army and the police force were responsible.⁴⁷ Subsequent to this event, Moi strived more to

⁴⁰ See, generally Adar 2000, pp. 74–96.

⁴¹ Troup and Hornsby 1998, pp. 26–27.

⁴² Biegon 2008, p. 37; Troup 1993, p. 371.

⁴³ Troup and Hornsby 1998, pp. 30–31. This was done in order to deconstruct the Kenyatta hegemony. Two strategies are said to have been used to achieve this. The first strategy was the disengagement of influential politicians from the activities of civil society. The second strategy was the creation of strong patron-client networks within the civil society. In this way, the state was able to silence the opposition groups that were contained in the civil society. See Kanyinga 2003, p. 104.

⁴⁴ NB. During the 2007 elections, Mwai Kibaki was PNU presidential candidate who was vying for his second and last term. Apart from Vice Presidency, he also held various ministerial posts under KANU in both Kenyatta and Moi governments. He left KANU and joined opposition when multipartysm was re-introduced in 1991.

⁴⁵ See Otieno 2010.

⁴⁶ Kanyinga 2003, p. 102.

⁴⁷ Troup and Hornsby 1998, p. 31. For more details about the *coup* see Pal Ahluwalia 1996, pp. 129–148.

centralize power and perfect the repressive state. The operation of an “imperial presidency” became more evident than ever before. The separation between the three arms of state became blurred, as the Judiciary and Parliament are said to have been reduced to mere “appendages” of the all-powerful Executive.⁴⁸ The party (KANU) became the central focus of authority, while the Parliament assumed a subordinate status. Some voices of discontentment were still raised despite serious state intimidation. The clergy, for example, echoed their dissent from the pulpit, having seen that democracy was being trampled underfoot.⁴⁹

Those who opposed Moi had a huge price to pay. The state agents implemented preventive detentions without trial, forcible exiles, political assassinations and extra-judicial killings.⁵⁰ Raila Odinga⁵¹ was Kenya’s longest serving political prisoner in this regard.⁵² After the attempted *coup*, he was put under house arrest for 7 months, detained without trial for 6 years, and later, in 1988, tried for supporting an underground movement, the Kenyan Revolutionary Movement, which was demanding a reintroduction of multiparty system in Kenya.⁵³ The following paragraph, retrieved from a post-Moi government official report, summarizes how tyrannical the Moi State turned:

The Moi government pursued an open policy of using naked state violence to suppress and vanquish the political opposition and pro-democracy campaigners, among them civil society, opposition political parties, journalists, students, the clergy, and any and every real or imagined political dissident. Opposition political rallies and meetings of government critics were frequently broken up, and violently so. Police and security forces have killed scores of reformers throughout the last two decades.⁵⁴

In the 1990s, the Moi-KANU government, under the pretext of land clashes, allegedly instigated and, in some cases, directed an ignition and execution of inter-ethnic violence against the communities and zones which supported opposition against Moi.⁵⁵ In the Rift Valley and Coastal provinces, for instance, people from other provinces (tribes) were termed as “foreigners” or “land grabbers” and subsequently forced out of their land or, in some instances, killed instantly. This has even been equated to “attempted genocide by way of ethnic cleansing”.⁵⁶

⁴⁸ Kimundi 2011, p. 80; Mutua 2001, p. 98.

⁴⁹ Troup and Hornsby 1998, p. 37. Also see Kanyinga 2003, p. 104.

⁵⁰ Kimundi 2011, p. 82. Also see Ajulu 2000, pp. 137 et seq; Londale, 2004, pp. 91 et seq; Muigai 1995, pp. 171 et seq.

⁵¹ NB. Raila Odinga was the presidential candidate for the Orange Democratic Movement (ODM) in the 2007 elections. He is a son of Jaramogi Oginga Odinga, KADU’s leader and the former KANU’s Vice President, who, in a similar way, experienced the mighty hand of the tyrannical state under Kenyatta.

⁵² Musila 2009, p. 447. Cf. Miguna 2012, p. 108.

⁵³ Kimundi 2011, p. 83; Musila 2009, p. 447. For more details see Odinga 2013.

⁵⁴ Republic of Kenya 2003, p. 31.

⁵⁵ Mutua 2001, p. 98.

⁵⁶ Kimundi 2011, p. 82; Musila 2009, p. 447; Republic of Kenya 2003, p. 31.

2.4 Resumption of Political Pluralism and Proliferation of Political Alliances

2.4.1 Resumption of Multipartyism

In December 1991, with Moi still in power, Kenya resumed its roots as a *de jure* multiparty state, thereby responding to the mounting pressure from within the country as well as from the international community, especially the donors.⁵⁷ The Constitutional provision establishing the mono-party state was repealed, and a constitutional restriction of the presidential seat to a maximum of two five-year terms was introduced.⁵⁸ Interestingly, despite its past suppression, the call for the *majimbo* (federalism) ideology resurfaced alongside the domestic pressure for resumption of multipartyism.⁵⁹

The first two multiparty elections were conducted in 1992 and 1997, and in both elections KANU emerged victorious. The presidential term limit introduced with the resumption of multipartyism in 1991 was prospective in nature. Consequently, although the incumbent President Moi had already been in power since 1978, he was allowed, under this arrangement, to count his “first” term effectively subsequent to the date of the law establishing term limits. He thus contested as KANU’s candidate in both the 1992 and 1997 presidential elections. The mere presence of Moi’s name in the ballot paper diminished almost completely the chances for the opposition parties to win these two elections. The main reason for this pessimism was that, although the opposition was

⁵⁷ See Otieno 2010. For details on how this pressure was effective, see Brown 2001, p. 726; Klopp 2001, pp. 481–482; Oyugi 1997, pp. 45–47.

⁵⁸ See Kimundi 2011, p. 80; Otieno 2010.

⁵⁹ The call for *majimbo* mostly came from Rift Valley, the province where KANU had a strong hold. The aim seemed similar to the 1960s idea of *majimboism*. As Klopp notes “[t]he attraction of such a model for Kenya’s patronage bosses was that, even if they should lose control of the central government, they could bargain with the new leaders on the basis of their political strength in ethnic enclaves where their grip on local politics would ensure their dominance”. See Klopp 2001, pp. 483–487. Subsequently, the *majimbo* discussion (pro and against) featured again prominently towards the adoption of Kenya’s 2010 Constitution. See The Standard 29 March 2010; The Standard, 28 March 2010; The Standard 26 March 2010; The Standard, 19 March 2010; Daily Nation, 28 September 2010 and Daily Nation, 16 September 2010. Although the advocates of *majimbo* did not succeed by a 100 %, the new constitution of Kenya of 2010 settled on a county system of governance. It established a dual system of government, consisting of 47 county governments and the national government. In this new structure, the county governments were given semi-autonomous powers of legislation and implementation of governance of their respective plans without prejudice to the control exercised by the National Government. The President was given powers to dissolve any county under prescribed conditions in Part 6 of Chapter Eleven, read *in tandem* with the Fourth Schedule to the Constitution. It is said that the county system is more of a compromise between those who favoured a purely federal/regional system and those who favoured a purely unitary system. See Daily Nation, 31 March 2010; Mugoya, 2010, pp. 1 et seq.

generally too weak and divided to triumph over KANU, Moi, being the head of state seeking re-election, had an added advantage: he had at his disposal all the loyal state agents and machinery which he could use—and which he allegedly used—to manipulate the whole process.⁶⁰ What else could one expect from a framework where the incumbent President was the discretionary appointing (and firing) authority of the officials charged with the task of managing the elections? As will be shown shortly, the opposition parties had to wait until 2002 for them to win against KANU. This time, however, Moi was no longer eligible to contest having exhausted his two-term limit.

2.4.2 Politics of Alliances and Party Hopping

Since its inception, the multiparty system in Kenya has exhibited a constant trend of mergers, alliance forging and pact signing among the parties. The immediately conceivable rationale for this practice could be the need for strength-building in the environment characterized by proliferation of political parties.⁶¹ These alliances have exhibited two characteristics. Firstly, in all cases, they have been ad hoc in nature, emerging only as temporary vehicles for political elites angling for post-election posts. They have hardly lasted after elections, even in the first case in which an opposition alliance won the presidential election in 2002. The composition of the alliances changes frequently due to “party hopping” i.e. the tendency of individual members to constantly change their party affiliations. This tendency has been described sarcastically as “political nomadism”,⁶² and one that makes most political parties in Kenya “indomitable lions”.⁶³ Secondly, ethno-regional interests have remained the common denominator in almost all the party alliances, specific focus being on power and access to state resources.⁶⁴

The following parts describe some of the major party alliances in which the aforementioned features manifest themselves clearly. One notable thing is that most alliances emerged towards the 2002 and 2007 elections.

⁶⁰ Troup and Hornsby 1998, p. 2.

⁶¹ For instance, at the time of general elections in 2007, there were about 300 registered political parties, out of which 117 nominated candidates for the National Assembly. This number had significantly reduced to 47 parties by March 2010 following the enforcement of a new law, the Political Parties Act of 2007, which was introduced to check on the proliferation of parties. See the information by the Electoral Institute for Sustainability of Democracy in Africa (EISA) <http://www.eisa.org.za/WEP/ken2010parties.htm> and <http://www.eisa.org.za/WEP/kenparties2.htm>. Accessed September 2014.

⁶² Tsuda 2010, p. 12.

⁶³ Keverenge (undated), p. 14.

⁶⁴ Ibid., p. 36.

2.4.2.1 The Rise and Fall of the “New KANU” Alliance

Having won the first two multiparty elections in 1992 and 1997, Moi was constitutionally barred from seeking re-election in the 2002 elections. The pre-conceived fear that he would engineer a constitutional change to enable him extend his term limit was rebutted by Moi himself.⁶⁵ Therefore, towards the 2002 elections, the transition in respect of the occupier of the presidential seat became clear. This gave rise to yet another cloud of uncertainty and speculations, which dominated the period preceding the elections. This uncertainty pertained to whether, apart from the transfer of the presidency from Moi to a new individual, the transition would also entail a transfer of the presidency from the long ruling party, KANU, to another political party. Apparently, Moi himself was engulfed in this uncertainty. He, like all other Kenyans, could not predict with certainty how the ethno-regional dynamics in the Kenyan voting patterns would affect this election, especially now that the “professor of politics” (Moi as he was known) would no longer be running for president. This caused fear that KANU’s candidate might fail to acquire the 25 per cent vote threshold required under the existing Constitution.⁶⁶ Only a political alliance was the way out. Moi worked on one.

2.4.2.1.1 Courting Alliance with Odinga’s NDP

To reduce uncertainties and increase KANU’s chances of victory, Moi decided, as the 2002 election approached, to solicit a merger with Raila Odinga’s opposition party, the National Development Party (NDP). It was ironical that Moi sought to ally with Raila Odinga who had previously been a victim of torture and preventive detention by the Moi regime for almost a decade. Odinga had an overwhelming support of his tribe (Luo), one of the biggest tribes in Kenya. So the immediate question was whether these former antagonists would be able to work together in good faith, or whether their “political marriage” was merely one of convenience.

The KANU-NDP collaboration started as a parliamentary alliance on the basis of parliamentary seats each party had won in the 1997 elections.⁶⁷ It culminated into a full merger in March 2002, whereupon NDP leaders, including Raila Odinga,

⁶⁵ This fear had intensified because, among other things, Moi did not show any interest in the Vice President, Professor George Saitoti, as the elections drew near. The public had expected that Saitoti would be groomed as Moi’s successor. See Asingo 2003, p. 32.

⁶⁶ The law required that for a presidential candidate to be declared President, he or she must, among other things, garner a minimum of 25 % of the valid votes cast in at least five out of the eight provinces of Kenya. See Constitution of Kenya, 1963 (R.E 2009), Article 5(3)(f).

⁶⁷ In the 1997 elections, KANU won the majority in the parliament only by a small margin of 4 seats over the combined opposition parties. Thus, a parliamentary alliance with one of the opposition parties was considered inevitable in order to have a comfortable majority for assurance. See Odhiambo-Mbai 2003, p. 70.

were elevated to ministerial positions.⁶⁸ The resulting alliance was named “New KANU”. The underlying aim of this alliance, in Moi’s perspective, was to widen KANU’s voter-strength by securing the vast NDP support in Nyanza Province, which was predominantly of Odinga’s Luo ethnicity.⁶⁹ Following the merger, Moi believed that KANU was now stronger than ever, because it had brought on board each of the five big ethnic groups⁷⁰ by having one of “their persons” as party leader.⁷¹ As Moi was preparing to finish his second term (1997–2002) and leave office, this was part of his broad but hitherto undisclosed succession plan.

2.4.2.1.2 Effect of Moi’s Succession Plan: Project Uhuru

After the KANU-NDP successful merger, it appeared that Moi had managed to play the “ethnic cards” well, because the resulting alliance had a strong fusion of ethnic forces. However, as soon as the secret of his succession plan became known, the merger that Moi had created turned sour and became a source of great discomfort for him. A perception emerged that Moi’s succession plan was crafted deliberately to enable him continue ruling Kenya indirectly even after his formal retirement. The reason was that the party constitution that was adopted during the merger allocated extraordinary powers to the Chair (Moi), such as powers to approve cabinet appointments and a veto over major government policy decisions, that is, if the alliance won and formed the government.⁷² Moi was aware that if this was to be achieved, his successor had to be someone who was loyal to him—an individual who, even as president, could be controlled easily from behind the curtain. Moi, therefore, imposed the 41-year old Uhuru Kenyatta, the son of Kenya’s first president Jomo Kenyatta, as New KANU’s presidential candidate. Moi told the nation:

I have chosen Uhuru to take over leadership when I leave. This young man Uhuru has been consulting me on leadership matters. I have seen that *he is a person who can be guided*. If there are others who are chosen then it will depend on the people.⁷³

⁶⁸ Elischer 2008, p. 19.

⁶⁹ Asingo 2003, p. 115.

⁷⁰ There are at least five most influential ethnic groups the support of which any politician would strive to win in any presidential election in Kenya, if he or she is to increase the chances of victory. Their importance lies in their composition of the total national population. These are: Kikuyu (21 %), Luhya (14 %), Luo (12 %), Kalenjin (12 %) and Kamba (11 %). See Elischer 2008, p. 1.

⁷¹ With this vision, the party leadership structure was changed to create five vice chairmanship positions, apparently to cater for each of “the big five”. Four Vice Chairmen elected were: Uhuru Kenyatta (a Kikuyu), Musalia Mudavadi (a Luhya), Kalonzo Musyoka (a Kamba) and Noah Katanangala (a Mijikenda). Moi (a Kalenjin) remained Chairman, while Raila Odinga (a Luo) was elected Secretary-General. See Odhiambo-Mbai 2003, p. 71. Cf. Steeves 2006, p. 217.

⁷² Steeves 2006, p. 218.

⁷³ Daily Nation 29 July 2002 (emphasis added). See also Odhiambo-Mbai 2003, p. 77.

This imposition was met with a strong, open and unprecedented defiance of Moi. The defiance was orchestrated by Raila Odinga, supposedly due to his “intoxicating influence and his aggressive and uncompromising pursuit of what he believes to be right”.⁷⁴ Consequently, despite Moi’s preference of Kenyatta, five other individuals in the New KANU alliance, including Odinga, also declared their interests to be nominated as the alliance’s presidential candidates.⁷⁵ They formed a faction within the New KANU alliance and named it a “Rainbow Alliance”. The aim of this faction was to push for democratic nominations, opposing the imposition by the Uhuru-Moi faction of an “unpopular” candidate. However, seeing that they were unlikely to defeat Moi, the Rainbow Alliance transformed itself into a political party, the Liberal Democratic Party.⁷⁶ This event happened coincidentally with the endorsement of Uhuru Kenyatta as KANU’s candidate at Kasarani on 14 October 2002.⁷⁷ This marked the end of the short-lived New KANU political marriage. Meanwhile, the other opposition parties were also strategizing on their own political alliances.

2.4.2.2 Advent of the Rainbow Coalition as a Winning Opposition Alliance

The formation of the short-lived New KANU alliance had sent signals to the opposition parties that if they resorted to contesting individually in the 2002 elections, they would lose. The fragmented opposition had lost the two preceding multiparty elections supposedly due to lack of unity.⁷⁸ As a strategy for unity towards the 2002 general elections, two opposition alliances were formed a few weeks before the general elections with a view to competing against KANU in the presidential election. The first alliance was the Liberal Democratic Party (LDP), which, as already explained in the preceding section, originated from the Rainbow Alliance that had severed itself from the New KANU. The second alliance was the National Alliance (Party) of Kenya (NAK) that started as an alliance of three political parties,⁷⁹ but which would later admit more parties to become an alliance of 13 political parties.

⁷⁴ Asingo 2003, p. 34.

⁷⁵ The others were Moi’s Vice President Professor George Saitoti, Kalonzo Musyoka, Noah Katanangala and Musalia Mudavadi. However, Moi was able to persuade and co-opt Katanangala and Mudavadi, who abandoned their interests in the presidency and supported Kenyatta. The other three could not be “deceived” by Moi to abandon their interests. See *ibid.*, p. 34.

⁷⁶ Steeves 2006, p. 220.

⁷⁷ Asingo 2003, p. 34.

⁷⁸ For instance, in the 1997 elections, KANU candidate won by 41 % although the four opposition candidates got 59 % of all the presidential votes in the aggregate. Individually, however, only one opposition party, the DP, got 31 %. See Kanyinga 2003, pp. 108–111.

⁷⁹ This alliance brought together the Democratic Party (DP) under Mwai Kibaki, the National Party of Kenya (NPK) under Charity Ngilu and the Forum for Restoration of Democracy-Kenya (FORD-Kenya) under Michael Wamalwa. See Odhiambo-Mbai 2003, p. 79.

On 22 October 2002 the two alliances above, the LDP and the NAK, decided to merge into one opposition alliance, the National Rainbow Coalition (NARC) (hereafter “Rainbow Coalition”). Thus, the Rainbow Coalition was an *alliance of alliances*—a grand alliance. Its origin was in two agreements (i.e. memoranda of understanding) signed on 21 October 2002 between the LDP and the NAK. The first agreement, which was made public, was based on policy commitments and the principles of power-sharing in a coalition government in the event that the Rainbow Coalition won the elections. The second agreement was signed secretly between the leaders of the parties to the Rainbow Coalition, and was never made public. However, it later came to light that in the secret agreement the parties had agreed on a detailed power-sharing formula which would be adopted after winning the elections.⁸⁰ Indeed the Rainbow Coalition was able to win both the presidential and parliamentary elections by an overwhelming majority. Its presidential candidate Mwai Kibaki was declared the winner, thereby defeating KANU’s candidate, Uhuru Kenyatta.⁸¹

Therefore, the 2002 presidential election in Kenya goes down in history for being the first time that KANU, the party which had been in power since independence, was ousted from power by an opposition alliance, the Rainbow Coalition. But as the next section shows, this particular alliance, too, was another “indomitable lion”; it did not last long.

2.4.2.3 Towards the 2007 Elections: Disintegration of the Rainbow Coalition and Advent of PNU and ODM Alliances

2.4.2.3.1 Rainbow Coalition: A Fragile Alliance

The Rainbow Coalition was a unity whose cohesion remained largely dependent on a *bona fide* implementation of the memoranda of understanding signed among its members. As indicated earlier, the emergence of factions within political parties leading to break aways had become a common feature in Kenya’s politics before and after the advent of political pluralism. This explains the early prediction that, even though it had won the 2002 presidential election, the Rainbow Coalition, too, was a fragile alliance which was prone to disintegration at any time.⁸²

The Rainbow Coalition was *prima facie* a fragile entity for one main reason: It was an *umbrella alliance*. Unlike an ordinary political party whose membership comprises individuals (natural persons), the Rainbow Coalition admitted *political*

⁸⁰ Nyong’o 2007, p. 116. Also see Kanyinga 2003, p. 122.

⁸¹ New York Times, 30 December 2002. Statistically, NARC won the presidential votes by 62.2 % against 31.3 % earned by KANU and 6 % by FORD People. In the parliamentary results, while NARC won the majority by 125 seats, KANU got 64 seats and FORD People got 14 seats. See Troup 2003a, pp. 4–7. See also Bakari 2002, p. 284; Nasong’o 2007, pp. 98–100.

⁸² Cf. Wanyande 2003, p. 151; Ndengwa 2003, pp. 157–158.

parties as members (partners). The parties that acceded to the Coalition retained their identities and own members. As a result, although individuals contested the election carrying the Coalition's flag, their respective parties did not abandon their party interests, such as economic and ethnic demands, nor did they dissolve themselves upon acceding to the coalition.⁸³ This posed an obvious 'danger' that the political parties forming the Rainbow Coalition could withdraw from the alliance any time if a disagreement occurred among them. Indeed this is exactly what happened.

The road to the disintegration of the Rainbow Coalition started with the failure to honour the objectives and principles agreed upon in the agreements creating it. One such principle was that the two sub-alliances forming the Coalition, the LDP and the NAK, would be "equal partners", and for that reason, the cabinet positions would be shared equally between them.⁸⁴ According to the formula that had been agreed upon, a cabinet of 23 members, composed of 11 members from the two sides, with Kibaki as the chair, would be created. However, Kibaki is accused to have breached this agreement by appointing more members from his own side, NAK, and also by disregarding many other aspects of the agreement.⁸⁵ This elicited criticism, caused frustration, dissatisfaction and feelings of betrayal and, more detrimentally, led to the emergence of factions within the Rainbow Coalition.⁸⁶ Responding to the criticisms raised, Kibaki's side, allegedly made of "impenetrable aides" nicknamed the "Mt. Kenya Mafia",⁸⁷ argued that the President was exercising legitimate constitutional powers which could not be curtailed by political or "secret agreements among power-hungry leaders".⁸⁸ This untrustworthiness was the biggest fracture to befall the Rainbow Coalition's foundation. The Coalition's actual disintegration followed in 2005 as described below.

2.4.2.3.2 Effect of the 2005 Constitution Making Process

The ultimate fall of the Rainbow Coalition was triggered by the 2005 attempt at initiating a constitution making process. The parties to the Coalition had agreed, *inter alia*, that if they won the elections, they would see to it that a much needed new constitution was adopted within 6 months.⁸⁹ The background to this commitment is that prior to the 2002 elections, a statutory body known as the Constitution of Kenya Review Commission (CKRC)⁹⁰ had done a survey and recommended an adoption

⁸³ Elischer 2008, p. 20.

⁸⁴ See Troup 2003b, p. 4. See also Kadima and Owuor 2006, pp. 179, 189 and 211.

⁸⁵ Steeves 2006, pp. 230–231.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, p. 230.

⁸⁸ Nyong'o 2007, pp. 116–117.

⁸⁹ NARC's Memorandum of Understanding, General Principle 11.

⁹⁰ It was established under the Constitution of Kenya Review Act of 2000.

of a new constitution in Kenya.⁹¹ When the Rainbow Coalition was formed in 2002, its members agreed wholeheartedly that if they won the upcoming elections, they would pursue this agenda to its conclusion.⁹² In fact, this is believed to have been the *only* policy issue which had bound the Rainbow Coalition together.⁹³

Therefore, the expectation remained that the constitutional draft which was supported widely by all Coalition members, as endorsed by them at Bomas of Kenya (Bomas draft), would be subjected to a referendum. On the contrary, instead of the Bomas draft, President Kibaki, through the then Attorney General Amos Wako, endorsed an alternative draft, the Wako Draft, and put it to a national referendum in 2005.⁹⁴ The Bomas draft and the Wako draft differed fundamentally on several critical aspects in respect of which Kenyans and members of the Rainbow Coalition in particular had originally demanded reforms.

One such difference is that the Bomas draft had proposed an introduction of a parliamentary system in which the president would only be the head of state, while a prime minister with executive powers would be the head of government accountable to the parliament. In contrast, the Wako draft proposed that the existing presidential system be retained, and consequently, the president would continue to be head of both state and government. In addition, under the Wako draft, the prime minister would be an appointee of the president and merely the head of government business in parliament, but without any executive powers. Another key difference between the two drafts is that the Bomas draft provided for a bicameral legislature i.e. one with an upper house (senate) and a lower house (national assembly). The Wako draft, on the other hand, provided for a unicameral legislature.⁹⁵

Few months preceding the constitutional referendum witnessed an irreparable disintegration of the Rainbow Coalition and a birth of new alliances. Both the Rainbow Coalition and KANU, which was now an opposition party, experienced inner-party factions (camps within the parties), which have been described as “pro-reform forces” and “anti-reform forces”.⁹⁶ The pro-reform and anti-reform camps, respectively, opposed or supported the Wako draft Constitution which the government decided to subject to a YES/NO referendum on 21 November 2005. The “no” camp⁹⁷ (pro-reformists), which was led by Raila Odinga, used an orange as their

⁹¹ See Report of the Constitution of Kenya Review Commission 2002.

⁹² The reforms proposed and highly demanded included, inter alia, the introduction of an executive Prime Minister, demotion of the presidency to a mere ceremonial post, establishment of two chambers in the National Assembly and implementation of a county government structure. See Constitution of Kenya Review Commission 2002, pp. 44–75.

⁹³ Elischer 2008, p. 22.

⁹⁴ Steeves 2006, p. 231.

⁹⁵ For more details on the two drafts, see Chr. Michelsen Institute 2006.

⁹⁶ See Tsuda 2010, p. 9.

⁹⁷ The “No” camp brought together the LDP side of the NARC government, one faction of KANU (under William Ruto) and the National party of Kenya (NPK) under Charity Ngilu. See Elischer 2008, pp. 22–23.

symbol to campaign strongly against the government constitutional draft. The Kibaki's "yes" camp⁹⁸ (anti-reformists), which used a banana as their symbol, campaigned in favour of the referendum. In the end, the oranges ("no" camp) succeeded. The government draft constitution was, therefore, rejected by the Kenyans.⁹⁹

Thus, the constitutional reform agenda was not successfully accomplished as it had been expected; it was put in further abeyance. But the constitutional referendum signified a stamp on the death certificate of the Rainbow Coalition. The reason is that subsequent to the referendum, and shortly before the 2007 elections, the two camps in the referendum campaigns, the banana and orange camps, transformed themselves into new political parties. Odinga's "no" camp became the Orange Democratic Movement (ODM), while Kibaki's "yes" camp became the Party of National Unity (PNU).¹⁰⁰ It is these two political parties, the ODM and the PNU, which, 2 years later, were principal participants in the 2007 presidential election, Odinga and Kibaki being their respective candidates. And as will be shown in Chap. 3, the two parties were at the centre of the ensuing post-election violence, the main focus of this book.

2.5 Criminal Gangs, Election Violence and Impunity

2.5.1 *Use of Criminal Gangs for Political Purposes*

Apart from political alliances, the use of violence in the form of militias or criminal gangs is another relatively recent feature of the Kenyan politics since 1980s. Subsequent to the re-introduction of political pluralism in 1991, politicians resorted to sponsoring, creating or manipulating the already existing criminal gangs to achieve their political ends through violence during each election. This practice was first allegedly authored by KANU, being part of its so-called "ethnic crusade" to eliminate or weaken opposition.¹⁰¹ Mueller observes:

In most cases these gangs were formed, aided, or abetted by the state's security apparatus and the provincial administration. Gangs of youth were organized by key KANU politicians who were identified by names in both human rights reports and reports produced by a government commission.¹⁰²

⁹⁸ The "Yes" camp comprised Kibaki's side of the NARC government (i.e. the NAK) which teamed up with other parties, the Democratic Party (DP), FORD-Kenya, FORD-People and one faction of KANU under Uhuru Kenyatta. See *ibid*.

⁹⁹ See Kenya GN No. 9510, 23 November 2005. The "no" vote won by 58 % while the "yes" vote got 42 %. See "Kenya: 2005 Constitutional referendum results" <http://www.eisa.org.za/WEP/ken2005results.htm> accessed May 2011), also see "Elections in Kenya" <http://africanelections.tripod.com/ke.html>. Accessed August 2014.

¹⁰⁰ Elischer 2008, p. 23.

¹⁰¹ Branch and Cheeseman 2008, p. 15.

¹⁰² Mueller 2008, p. 190.

Mungiki (a Kikuyu word for masses or multitude of people) is the largest and most written about criminal gang. It started in the late 1980s under the guise of a Kikuyu religious movement,¹⁰³ before it later assumed diverse cultural, political and socio-economic dimensions.¹⁰⁴ In terms of organization, the *Mungiki* has been described as a “mafioso-style shakedown gang” with reliable sources of income, a requirement for membership and a defined organizational structure.¹⁰⁵ In the 2002 elections it was allegedly “co-opted in a patron-client relationship” by KANU and worked for the Kikuyu KANU’s presidential candidate, Uhuru Kenyatta.¹⁰⁶ After the ouster of KANU in 2002, the *Mungiki* movement rose to a full-fledged criminal gang increasingly engaging in violent activities.¹⁰⁷ Although in 2002 it was banned and its members were declared *persona non grata*, the gang never disappeared from the scene, nor did the government succeed in dismantling it.¹⁰⁸

There are other gangs which have emerged in various towns, being more active during election periods. These include *the Taliban* (a Luo militia), Baghdad boys, *Jeshi la Mzee* (the elder’s battalion), *Jeshi la Embakasi* (Embakasi battalion), Kaya Bombo Youth, *Chionkororo*, *Amachuma*, *The Rwenjes* Football Club, *the Jeshi ya King’ole*, and *Jeshi la Mbela*, *Jeshi la Darajani*, *Bukhungu* (Luhya militia) *Ghetto* and Huruma Youth Group.¹⁰⁹

It is in this context that in the 2007 post-election violence some of these gangs, especially the *Mungiki* and the *Luo Taliban*, were allegedly used by politicians in support of the Orange Democratic Movement (ODM) and Party of National Unity (PNU), respectively.¹¹⁰

¹⁰³ Claiming likeness to the *Mau Mau* movement, the *Mungiki* organization rejects Christianity and advocates a restoration of the traditional African (Kikuyu) beliefs and practices. It administers oath to its members. See Land Info 2010.

¹⁰⁴ Ibid., pp. 5–6.

¹⁰⁵ *Mungiki* became a gang for hire allegedly available to “the highest bidder”, politicians inclusive. Literature shows that the relationship between *Mungiki* and the Moi-KANU regime developed strongly from mid 1990s on a *quid pro quo* basis. E.g., the gang offered its support to the KANU candidate in the 2002 elections allegedly in exchange for arms and aid from the state security forces and allocation of transport routes in the *matatu* (mini-buses for public transport) business in Nairobi. The “bandit economy” of the gang was estimated to be USD 3.8 million per year in 2004, mostly derived from, among other sources, the resale of hijacked cars and USD 58,000 per month from member subscriptions. See Katumanga 2005, pp. 512–515; Mueller 2008, pp. 192–193. It is estimated to have more than one million members. See Immigration and Refugee Board of Canada 2006–2007.

¹⁰⁶ See Kagwanja 2005, p. 59; Katumanga 2005, p. 513. For more details on the role of *Mungiki* during Moi’s era, see Kagwanja 2007, pp. 25 et seq; Rasmussen 2010, pp. 435 et seq.

¹⁰⁷ See Kagwanja 2005, pp. 65–66. Also see Frederiksen 2010, pp. 1065 et seq.

¹⁰⁸ Mueller 2008, p. 193. See also Atieno 2007 p. 527.

¹⁰⁹ Branch and Cheeseman 2008, p. 15; Katumanga, 2005, pp. 512–513; Kenya National Commission on Human Rights 2008, p. 47, para 161; Mueller 2008, pp. 193–194.

¹¹⁰ Kenya National Commission on Human Rights 2008, paras 159–216.

2.5.2 Trends of Election Violence

It can be asserted that the 2007–2008 post-election violence was not a total surprise to Kenyans. The preceding multiparty elections were also characterized by politically and ethnically sponsored violence.¹¹¹ It is alleged that during his presidency Moi and his ruling party KANU actively aided such kinds of violence to fulfil Moi's "prophecy" that the re-introduction of multipartism would increase tribal animosity, polarize the nation and destroy peace and co-existence. To prove this, KANU is accused of having applied deadly tactics in different parts of the country, including incitement to ethnic cleansing through stereotyping people from certain ethnic communities.¹¹² Human Rights Watch uses the title "echoes of Rwanda" in trying to describe what usually happened. This is not, however, to equalize Kenya to Rwanda, but simply to point out the parallelism and close resemblance between the tactics employed to bring to fruition the 1994 Rwandan genocide and those used to cause violence in Kenya mostly during elections. For instance, as regard the violence that followed Kenya's 1997 general elections, Human Rights states:

As in pre-1994 Rwanda, Coast politicians [in Kenya] exploited ethnic divisions to preserve and expand their own power. They blamed a group of perceived outsiders whose ethnic identity was taken as an indicator of their support for the political opposition....politicians mobilized supporters to carry out acts of targeted violence....They began with political attacks ... to kill the designated "enemy." The killers ... depended on guidance from their political leaders, as well as the expertise of highly trained and well-armed military leaders. Their ability to target and wipe out their victims was greatly increased by the use—even the mere possession—of firearms. In essence, the strategy of the Coast killings, as well as the Rwanda slaughter, hinged on two factors: the manipulation of ethnic divisions into ethnic hatred for political ends and the organization and arming of groups of supporters who could execute or orchestrate widespread killings.¹¹³

The violence accompanying *all* multiparty elections prior to those of 2007 had, apart from its general political dimension, assumed ethno-regional patterns.¹¹⁴ The land ownership is among the factors that played (and continues to play) a central role in these incidents of violence. Land disputes, which had been there since independence, worsened with the animosity instigated by politicians playing the ethnic card. People with political connections, mostly the allegedly "over-privileged Kikuyus", were (and still are) accused of corruptly obtaining and holding huge pieces of land, mostly in the Rift Valley Province, which is not their ancestral

¹¹¹ Human Rights Watch 2008, p. 11.

¹¹² Kiage 2004, p. 106.

¹¹³ Human Rights Watch 2002, p. 4.

¹¹⁴ Kenya National Commission on Human Rights 2008, p. 47, para 159. Also see Orvis 2001, p. 8 (describing the Kenyan politics as arguably the "most ethnic in Africa").

land.¹¹⁵ For example, it is alleged, although this could be an exaggeration, that the family of Kenya's first President Jomo Kenyatta alone owns more than 30 per cent of all the land in Kenya.¹¹⁶

A commission of enquiry formed after the 2002 elections (Ndung'u Commission) found that "most illegal allocations of public lands took place before or soon after the multiparty general elections of 1992, 1997 and 2002".¹¹⁷ This finding, therefore, makes the timing of the ethnic violence in Kenya noteworthy: it occurred in the period immediately preceding or following general elections. The reason is that although the issue of land pressure caused by the so-called "land grabbing" raises genuine complaints, it has, over time, been used (abused?) by politicians as a campaign tool, and in so doing, it has caused or intensified hatred of local people towards people from other ethnic groups owning land in their areas, considering them as "invaders" and accusing them of benefiting from land which originally or traditionally did not belong to them.¹¹⁸ Campaigning on the land question usually gives the impression to the local people that if such politicians are elected, they could help the traditional inhabitants in the areas to reclaim their land from the "invaders" or "grabbers" from other ethnic communities.

On the basis of the foregoing historical context, it has been stated that even the approaching 2007 elections were also expected to "reshape national space, and to create ethnically cleansed regions".¹¹⁹ Katumanga describes this as the desire of the political elite "to act, manoeuvre and manipulate social formations against each other that enhance [their] freedom of choice in deciding who to back or displease".¹²⁰ This desire did not start with the 2007 elections. Prior to and after the first multiparty general elections in 1992, a widespread violence orchestrated by the Kalenjin in the Rift Valley province targeted members of other ethnic communities, mostly the Luo, Kikuyu, Luhya and Kisii, who were perceived as opposing president Moi and his ruling party KANU.¹²¹ The aim of the attackers was to expel the so-called "hostile

¹¹⁵ Human Rights Watch 2008, pp. 12–15. It is said that while the Kikuyus migrate largely for commercial farming and business purposes, thereby breaking links with their original homes, the other communities migrate mainly as workers while maintaining links with their rural homes. Arguably, this nature of the Kikuyu has made them "obvious candidates for discrimination and detestation by those whose property or territory (land in particular) they have been accused of "invading". See Oucho 2002, p. 58.

¹¹⁶ See Kenya Today, 27 February 2013. NB. When asked this question in a televised presidential debate in 2013, Uhuru Kenyatta, the presidential candidate for the Jubilee Alliance, did not expressly accept or deny this allegation. Instead he only insisted that all the land that the Kenyatta family owns was acquired legally on a "willing-buyer-willing-seller basis". See second presidential debate [full video], NTV Kenya, published 25 Feb. 2013 <http://www.youtube.com/watch?v=DoBo86ttZCo>. Viewed September 2014.

¹¹⁷ As quoted verbatim in Southall 2005, pp. 142–151.

¹¹⁸ Human Rights Watch 2008, p. 14.

¹¹⁹ Taussig-Rubbo 2011, p. 65.

¹²⁰ Katumanga 2005, p. 506.

¹²¹ Kenya National Commission on Human Rights 2008, para 45.

tribes” from the Rift Valley area.¹²² Specifically, it was demanded that “those Kikuyu settled in the Rift Valley [were “invaders”, and] would have to pack up and return to Central Province”.¹²³ Similarly, during the 1997 elections, widespread attacks occurred in a more organized fashion. Apart from the Rift Valley Province, this particular violence spread to the Coastal Province and other areas.¹²⁴

Estimates by Africa Watch indicate that during the 1992 election violence, about 1,500 people died and about 300,000 others were internally displaced.¹²⁵ These figures pertain to the Rift Valley Province only, and do not include considerable incidents of retaliatory attacks against the Kalenjin in other areas.¹²⁶ Similarly, estimates by Human Rights Watch indicate that during the 1997 elections the accompanying violence claimed at least 2,000 lives and displaced over 400,000 people countrywide.¹²⁷ Literature further indicates that the 2002 elections, too, were accompanied by some violence on a smaller scale (when compared to the previous two elections), but no exact figures or estimates could be found.

Based partly on the foregoing, the Kenyan National Commission on Human Rights (KNCHR) is of the view that one of the factors that differentiated the 2007–2008 post-election violence from the violence that occurred in the preceding three general elections was its magnitude and level.¹²⁸ This could be correct in terms of the scale of destruction of property, sexual crimes and geographical widespreadness. But from the figures given above, one can conclude that regarding loss of life and displacement of people, the election violence of 1992 and 1997 had comparable dimensions with the 2007–2008 post-election violence.¹²⁹ Nevertheless, the 2007–2008 violence remains unique in that it received a particular attention beyond Kenyan borders, as it was the first time in the history of Kenya that an election violence attracted external intervention, particularly in the form of the AU’s mediation process and the intervention by the ICC.

2.5.3 Commissions of Enquiry and Culture of Impunity

If history is anything to go by, then it would not be wrong to contend that to most Kenyans the 2008 Commission of Inquiry into the Post-Election Violence¹³⁰ was not necessarily expected to be a panacea for impunity at the domestic level. There

¹²² Ibid., para 44. See also National Christian Council of Kenya 1992, p. 3.

¹²³ Klopp 2002, p. 274; Oucho 2002, pp. 86–89.

¹²⁴ Kenya National Commission on Human Rights 2008, para 46.

¹²⁵ Ibid., para 45. See also Africa Watch 1993, p. 1.

¹²⁶ Africa Watch 1993, pp. 27–37.

¹²⁷ Human Rights Watch 2002, p. 21 Kiage 2004, p. 107.

¹²⁸ Kenya National Commission on Human Rights 2008, para 43.

¹²⁹ See infra Sect. 3.2.2 in relation to the magnitude of the 2007–2008 violence.

¹³⁰ See infra Sect. 3.4.1.

are historical explanations to this contention. Prior to this particular Commission, the Kenyan government had set a bad precedent, portraying Kenya as state that was indifferent about or condoned commission of serious crimes to encourage impunity. Whenever serious human rights violations occurred, the government would form commissions of enquiry to look into them, mostly due to public outcry for accountability. For example, from 1963 to 2008, a total of 25 commissions of inquiry or bodies similar to them were established to deal with a broad range of issues of great concern to Kenyans.¹³¹ Mostly, such issues included land grievances, murders, political assassinations, political/election violence, grand corruption, politically-instigated ethnic cleansing and other incidents of gross human rights violations.¹³² For purposes of this study, the most relevant commissions are those that looked into political, ethnic or election violence during which serious violations of human rights occurred.

For example, the parliamentary select committee (famously known as the Kiliku Committee) was formed after the 1992 elections to investigate ethnic clashes accompanying these elections. In its final report, the Committee concluded that the violence in the Rift Valley Province, for example, had been instigated and sponsored by senior politicians from the ruling party KANU and Moi's government.¹³³ A similar finding would later be made by a fact-finding mission deployed to Kenya by the United Nations Office of the High Commissioner for Human Rights which concluded that the 1992 election violence was organized under a central command involving local administrative and security officers.¹³⁴ The Kiliku inquiry was followed by a judicial commission of enquiry (famously known as the Akiwumi Commission) formed after the 1997 election violence to inquire again into the tribal clashes in Kenya. This commission, too, made similar findings like those of the Kiliku Committee.¹³⁵

In their findings, these commissions made accusations by identifying and expressly naming individuals, including high-profile politicians and government officials, who, allegedly, were responsible for funding, supporting or committing the crimes. The commissions recommended further investigations and prosecution of the individuals so adversely mentioned.¹³⁶ Despite all these findings and recommendations, neither political nor criminal accountability followed. Most of the politicians accused in the commissions' reports enjoyed state protection, as they

¹³¹ Africa Centre for Open Democracy 2007; Kisemei and Kimani 2010.

¹³² See Kituo cha Katiba 2007.

¹³³ Republic of Kenya 1992. Also see Kenya National Commission on Human Rights 2008, para 46.

¹³⁴ UN Office of the High Commissioner for Human Rights 2008, p. 6.

¹³⁵ For its report, see Republic of Kenya 1999.

¹³⁶ E.g. see Appendix "G" of the Akiwumi Commission Report which contains a list of 189 persons adversely mentioned and notified as suspects of ethnic violence in various places. For a long list of names of people expressly accused by various commissions as perpetrators of various crimes, including economic crime, murder, political assassinations, etc., see Kisemei and Kimani 2010, pp. 6–26.

continued to serve in the Moi's and later Kibaki's governments.¹³⁷ Instead of taking legal measures, the Moi regime is alleged to have labelled the violence as "ordinary insecurity". This, according to the Kenyan National Commission on Human Rights, was nothing but state's effort to subsume crime into the political violence, apparently in order to justify impunity.¹³⁸ That is why even a few people arrested in connection with these incidents of violence were soon released unconditionally.¹³⁹

Given the tendency above, ordinary citizens, as well as politicians, usually consider such commissions as toothless dogs which do not bite. For example, the Waki Commission formed to look into the 2007–2008 post-election violence (see *infra* 3.4.1) reported that many of its respondents expressly stated that the commission, just like all other commissions formed before it, was "a waste of time and resources", because its recommendations "would never be implemented".¹⁴⁰ The paragraph quoted below echoes similar views, underscoring how, prior to the 2007 elections, impunity had already become the rule rather than the exception in Kenya. The paragraph is reproduced from the contribution of Ms Esther Murungi Mathenge, MP for Nyeri Town constituency, during the parliamentary debate on the Motion for the establishment of yet another commission, the Truth, Justice and Reconciliation Commission¹⁴¹ so established also in response to the 2007–2008 post-election violence. The MP lamented:

We have had the same incidents, although not of the same magnitude. One was in 1992, another in 1997, a minor one in 2002 and the major one in 2007. In the past, after such incidents occurred, we formed commissions. We formed the Akiwumi Commission. However, what did we do with it? We put it under the carpet. We also formed the Ndung'u Commission ... What did we do with the Ndung'u Commission Report? We also put it under the carpet.¹⁴²

Thus, prior to 2007, the culture of impunity had already grown roots to become, one could contend, an entrenched feature in Kenya, especially in relation to crimes committed in connection with grand corruption or gross human rights violations, including those accompanying election violence. It is due to this nurtured and deep-rooted impunity that, in 1998, the Law Society of Kenya (Bar Association) wrote a letter to the then UN Secretary-General, Kofi Anan, calling for an independent UN-led investigation and establishment of an ad hoc tribunal to punish the perpetrators of "genocide and crimes against humanity" that had allegedly occurred in Kenya.¹⁴³ This, however, did not materialize. At this juncture, it suffices to say that had Mr. Anan foreseen that 10 years later he would be asked to

¹³⁷ Kisemei and Kimani 2010, p. 10.

¹³⁸ Kenya National Commission on Human Rights 2008, para 47.

¹³⁹ UN Office of the High Commissioner for Human Rights 2008, p. 6.

¹⁴⁰ Republic of Kenya 2008, p. 18.

¹⁴¹ See Chap. 5.

¹⁴² See Parliament of Kenya 2008. For similar sentiments by expressed in Parliament by other MPs, see Parliament of Kenya 2010.

¹⁴³ Kiage 2004, p. 107.

mediate in a similar violence in Kenya (see *infra* 3.3), this time not in his capacity as UN Secretary-General, but as the head of AU's mediation team, he would have probably reacted to the request differently.

2.6 Chapter Summary

In this chapter the historical and sociological dynamics of Kenyan politics prior to the 2007 general elections have been presented. The chapter has shown that, under the first two Presidents (Kenyatta and Moi), the Kenyan politics was dominated by authoritarianism. And since the resumption of multiparty democracy in 1991, the politics became dominated by proliferation of political parties, short-lived political alliances and use of criminal gangs for political gains. At all times negative ethnicity has been the common denominator. Consequently, negative ethnicity has been one of the main reasons for the recurring ethno-political violence, mostly during elections. A pattern of electoral violence, entailing the commission of serious gross human rights violations, can be clearly established with regard to the multiparty elections of 1992, 1997 and 2002. The fact that no accountability measures were ever taken against the main perpetrators (mostly politicians) of such violence in the past was a precursor of the violence that would happen in the upcoming 2007 general elections. What had not been foreseen, however, was the fact that the violence accompanying the 2007 elections would, unlike the one accompanying the previous elections, greatly attract the attention of the international players, particularly the AU and the ICC.

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