Observatoire AfriquE de l'Est
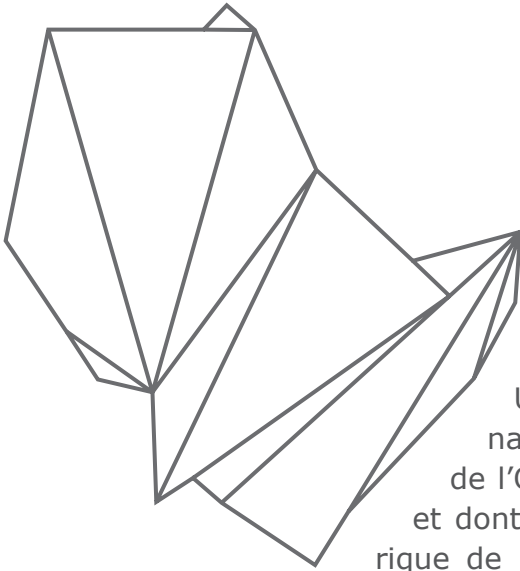
Enjeux politiques & sécuritaires

RIDING THE CREST OF THE WAVE?

The 2017 election and stagnation of Kenya's democratization process

KAMAU WAIRURI

PHD STUDENT, CENTRE OF AFRICAN STUDIES, UNIVERSITY OF EDINBURGH

DGRIS
Direction générale des relations
internationales et de la stratégie
MINISTÈRE DE LA DÉFENSE

CEDEJ
KHARTOUM الخرطوم

SciencesPo
CENTRE DE RECHERCHES
INTERNATIONALES

L'Observatoire de l'Afrique de l'Est (2017-2010) est un programme de recherche coordonné par le Centre d'Etude et de Documentation Economique, Juridique et Sociale de Khartoum (MAEDI-CNRS USR 3123) et le Centre de Recherches Internationales de Sciences Po Paris. Il se situe dans la continuité de l'Observatoire de la Corne de l'Afrique qu'il remplace et dont il élargit le champ d'étude. L'Observatoire de l'Afrique de l'Est a vocation à réaliser et à diffuser largement des Notes d'analyse relatives aux questions politiques et sécuritaires contemporaines dans la région en leur offrant d'une part une perspective historique et d'autre part des fondements empiriques parfois négligées ou souvent difficilement accessibles.

L'Observatoire est soutenu par la Direction Générale des Relations Internationales et de la Stratégie (ministère de la Défense français). Néanmoins, les propos énoncés dans les études et Observatoires commandés et pilotés par la DGRIS ne sauraient engager sa responsabilité, pas plus qu'ils ne reflètent une prise de position officielle du ministère de la Défense.
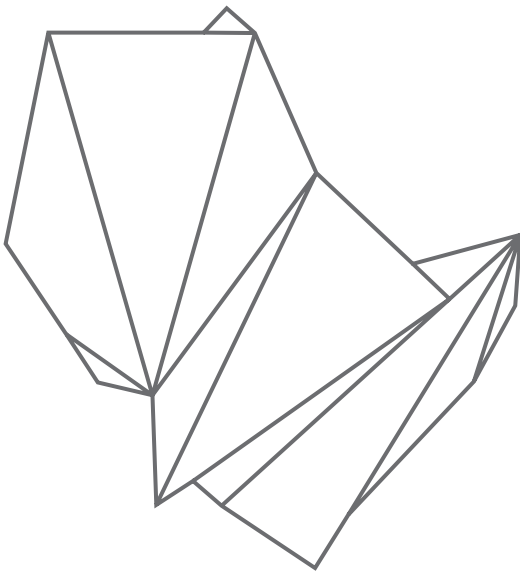
Il s'appuie par ailleurs sur un large réseau de partenaires : l'Institut français des relations internationales, le CFEE d'Addis-Abeba, l'IFRA Nairobi, le CSBA, LAM-Sciences Po Bordeaux, et le CEDEJ du Caire.

Les notes de l'Observatoire de l'Afrique de l'Est sont disponibles en ligne sur le site de Sciences Po Paris.
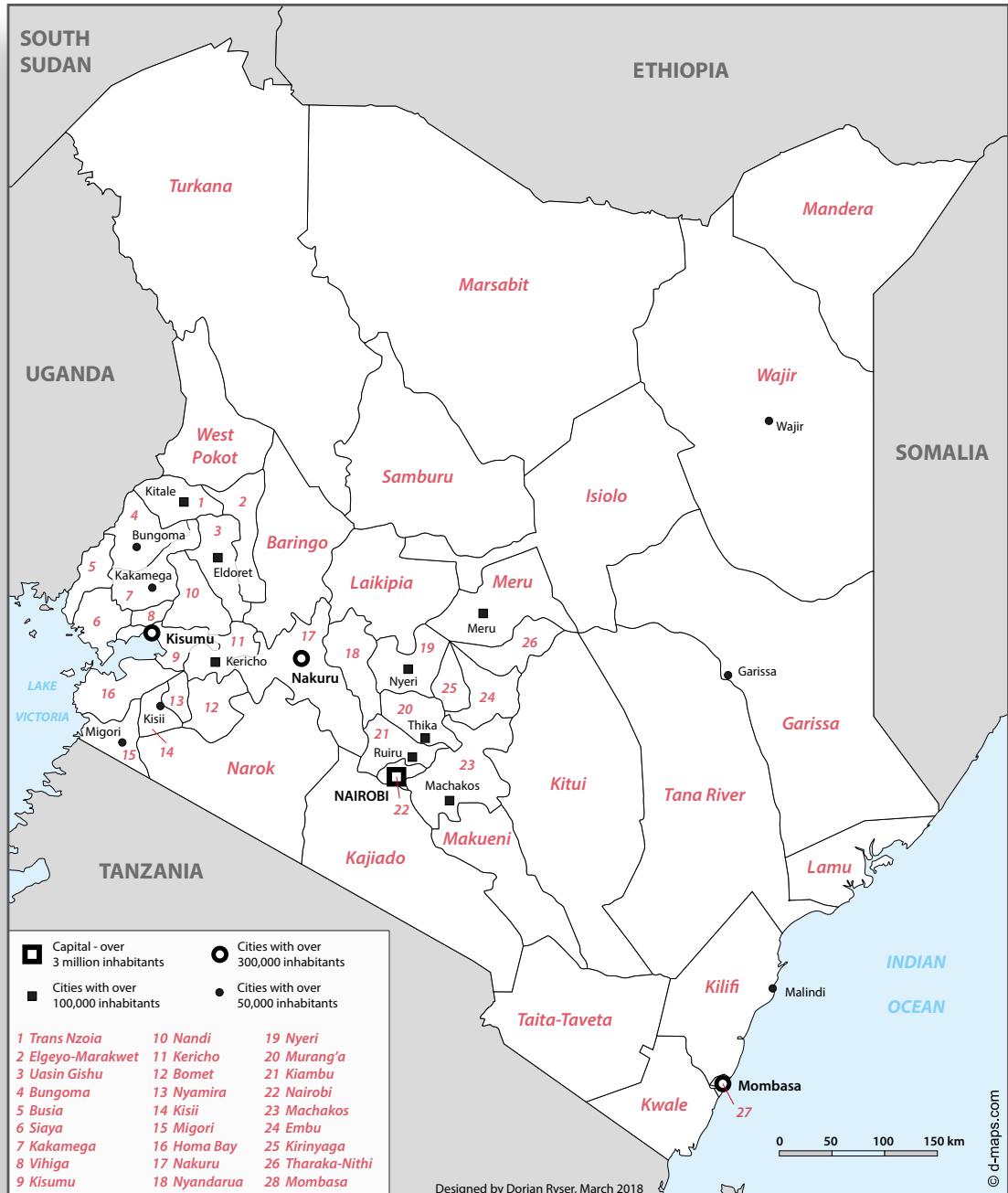
Coordination
Jean-Nicolas BACH
Roland MARCHAL

Les notes de l'Observatoire de l'Afrique de l'Est sont disponibles en ligne sur le site de Sciences Po Paris.

Table of Contents

Main cities and counties of Kenya

SOUTH SUDAN

ETHIOPIA

UGANDA

SOMALIA

Turkana

Mandera

Marsabit

Wajir

- Wajir

West Pokot

Samburu

Isiolo

Kitale
1   2
4
Baringo
3
Bungoma
Eldoret
5
Kakamega
7   10
6   8
Kisumu
11   17
9   Kericho
16
13
Migori   Kisii   12
15   14
Narok

Laikipia

Meru

- Meru

18   19
Nyeri
25   24
20
21   Thika
Ruiru
22   23
NAIROBI   Machakos

Kitui

Garissa

- Garissa

Garissa

Tana River

Lamu

Kajiado

Makueni

TANZANIA

INDIAN OCEAN

Kilifi   - Malindi

Taita-Taveta

Kwale   Mombasa
27

LAKE VICTORIA

| ■ | Capital - over 3 million inhabitants | ● | Cities with over 300,000 inhabitants |
| ■ | Cities with over 100,000 inhabitants | • | Cities with over 50,000 inhabitants |

1 Trans Nzoia
2 Elgeyo-Marakwet
3 Uasin Gishu
4 Bungoma
5 Busia
6 Siaya
7 Kakamega
8 Vihiga
9 Kisumu
10 Nandi
11 Kericho
12 Bomet
13 Nyamira
14 Kisii
15 Migori
16 Homa Bay
17 Nakuru
18 Nyandarua
19 Nyeri
20 Murang'a
21 Kiambu
22 Nairobi
23 Machakos
24 Embu
25 Kirinyaga
26 Tharaka-Nithi
28 Mombasa

Designed by Dorian Ryser, March 2018

0   50   100   150 km

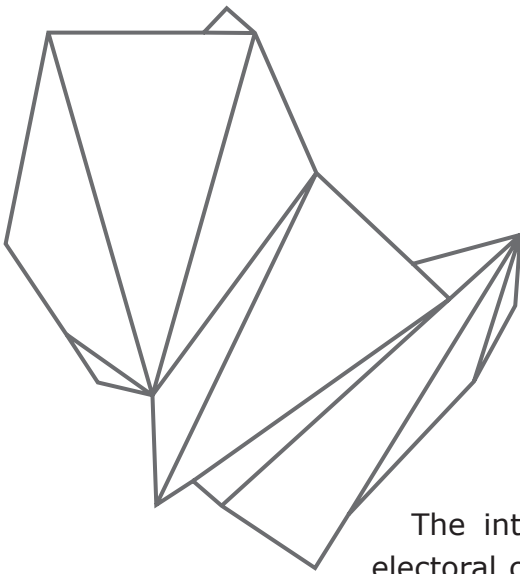© d-maps.com

Abstract

The intense drama that has characterised Kenya's 2017 electoral cycle has generated a debate over whether Kenya has slid back to authoritarian rule or is a resilient democracy firmly on the path to democratisation. This briefing wades into this debate arguing that, neither a democracy nor an authoritarian regime, Kenya remains a competitive-authoritarian regime. While electoral contest is real, and widely accepted as the only means of acquiring power, the playing field remains heavily skewed in favour of the incumbents through superior organisational capacity, access to resources and command of a strong and cohesive state security apparatus. The overriding theme of the paper is that democratisation is not inevitable; sometimes history stagnates. Marked by unbridled optimism one day and secessionist disenchantment the next, it appears that, per Dan Branch, Kenya is still stuck somewhere between hope and despair.
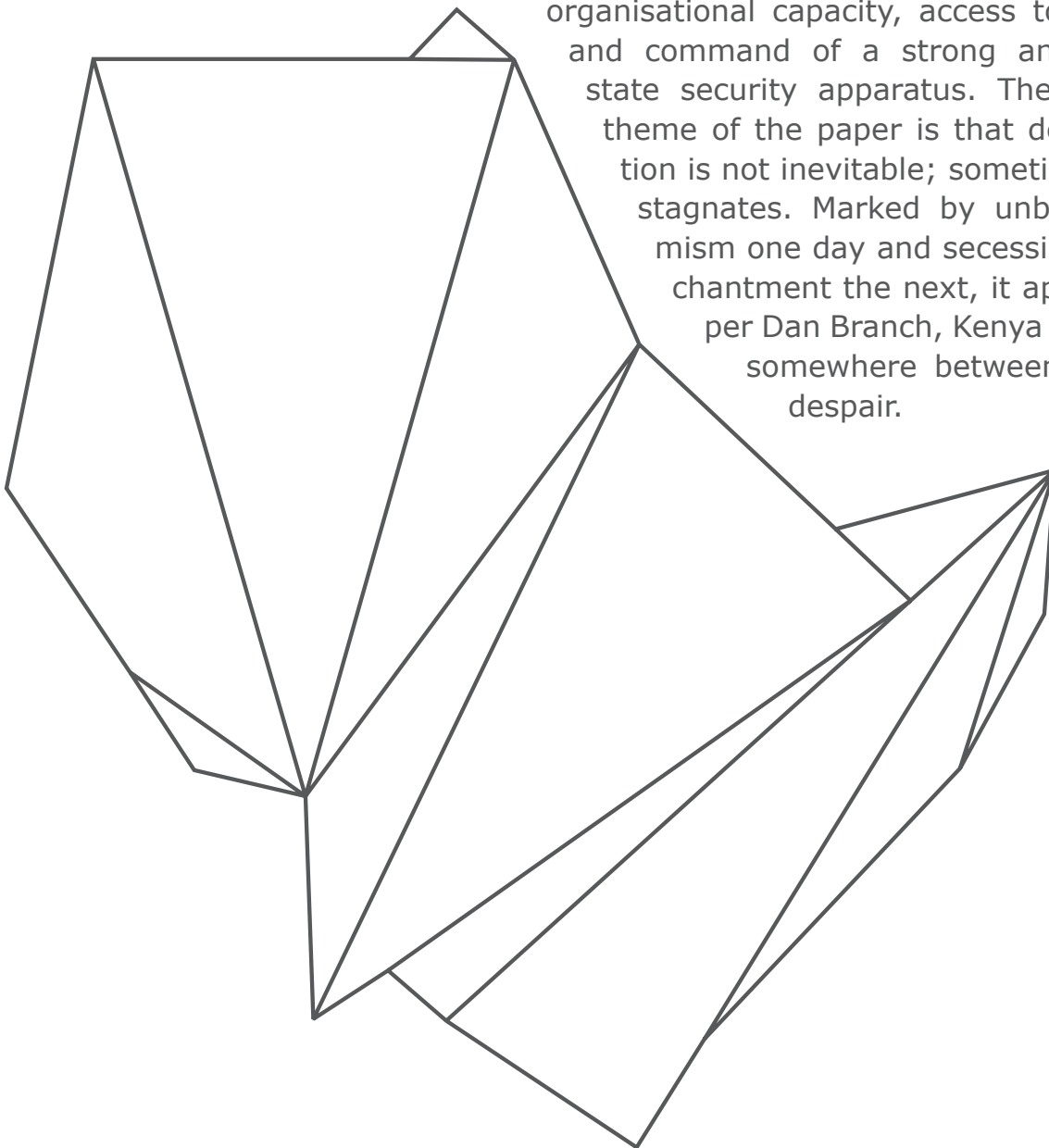
Introduction

One moment you appear to be riding the crest of a wave, only to have the rug pulled away from you, bringing you back down to earth with a sickening thud.
John Barrow

The intense drama that has characterised Kenya's 2017 electoral cycle has led to two antithetical positions about the extent of the country's democratisation project. The first position - anchored on the transgressions of the Jubilee government against the opposition, the media and civil society organisations - holds that Kenya has slid back to authoritarian rule, or is at best a second-rate democracy.[1] Unsurprisingly, this position is widely held amongst supporters of the National Super Alliance (NASA), the opposition coalition. The second view that Kenya is a resilient democracy, held mainly by supporters of the incumbent Jubilee regime, is based on the holding of regular competitive elections and an independent Judiciary that can constrain executive initiative.[2]

This briefing is a humble and preliminary assessment of these discourses and the still evolving situation which will undoubtedly attract much attention. The analysis presented here nonetheless offer some insights into the changes and continuities that can help us better understand Kenyan politics. The briefing situates Kenya's politics in the debate on democratisation in Africa pitting Staffan Lindberg who argues that elections have a self-re-enforcing power that promotes increased democracy[3] versus Levitsky & Way who contend that transitions do not always lead to democracy but sometimes lead to the emergence of competitive-authoritarian regimes.[4] A detailed theoretical examination of the interesting scholarly debates on democratisation in Africa falls outside the remit of this paper and are therefore not explored. Nonetheless, the paper follows Levitsky & Way's critique of the 'democratisation bias' [5] that has characterised the study of democratisation in Africa.[6] The analysis cautions

---

1. Aziz Rana, 'Against Second Rate Democracy in Kenya', *Boston Review*, 12 October 2017.

2. Uhuru Kenyatta, 'Acceptance Speech by His Excellency, Hon. Uhuru Kenyatta, CGH, President of the Republic of Kenya and Commander-in-Chief of the Defence Forces During the Announcement of the October 26 Fresh Presidential Election on 30 October 2017' (Nairobi: The Presidency, 2017).

3. S Lindberg, *Democracy and Elections in Africa* (Baltimore, Maryland: THe John Hopkins University Press, 2006).

4. Steven Levitsky and Lucan A Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (New York: Cambridge University Press, 2010).

5. Levitsky and Way. They provided good examples of this bias.

6. See, for instance, Nic Cheeseman, Gabrielle Lynch, and Justin Willis, 'Democracy and Its Discontents: Understanding Kenya's 2013 Elections', *Journal of Eastern African Studies 8*, no. 1 (2014): 2–24, https://doi.org/10.1080/17531055.2013.874105.

against the view of individual changes in the political system, such as sustainability of elite alliances, strengthening of the independence of the judiciary, constitutional protections of rights and the advent of devolution as indubitable evidence of democratization.

Competitive-authoritarian regimes are political regimes in which formal democratic institutions are widely viewed as the primary means of gaining power, but in which incumbents abuse of the state power places them at a significant advantage against their opponents.[7] Therefore, while elections are conducted regularly and present opportunities for the opposition to gain power, they are usually unfair – marred by irregularities, fraud, harassment of government critics, violent repression of protest and legal harassment where regulatory agencies are used to harass the opposition and civil society groups. In such political regimes, elections serve an ambivalent role being both pivotal points for the advancement of the democratisation process but also accentuating the violation of the rules by the incumbents. Contra-Lindberg, my analysis here shows that the independent democratising effect elections he proposes is not inevitable; but rather, depends on the ability of democratising forces to overpower the authoritarian tendencies of the incumbency. [8] Neither a dictatorship nor a democracy, as has been argued, my analysis here shows that Kenya remains a competitive authoritarian regime.[9] I argue that Kenya's competitive-authoritarian regime is sustained in 2017 by the ability of the incumbents to build a stronger and broader political alliance and employ violence to limit the space for political expression even as the opposition's reliance on the courts as an arena of political competition proved useful for constrain executive initiative but inadequate to dislodge the incumbents. Though superior organisational and resource capacity enabled the incumbents to resist an onslaught by the opposition, the playing field remains undoubtedly unfair.

Post-2013 election analysis doubted Uhuru Kenyatta's victory in the 2013 election[10] and predicted the collapse of his alliance with William Ruto before the 2017 election.[11] Closer to the 2017 election, predictions that the opposition would reject the results and employ extra-judicial means to resolve the electoral dispute sparked fears of a repeat of the 2007/8 post-election violence.[12] However, events in 2017 did not unfold exactly this way as the election was marked by the survival and strengthening of elite alliances, delivery of a an election that was seen by observers as respecting the will of the people, the entrenchment of the independence of the judiciary that nonethe-

---

7. Levitsky and Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War.*

8. Lindberg, *Democracy and Elections in Africa.*

9. Levitsky and Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War.*

10. James D Long et al., 'Kenya's 2013 Elections: Choosing Peace over Democracy', *Journal of Democracy* 24, no. 3 (2013): 140–55.

11. Cheeseman, Lynch, and Willis, 'Democracy and Its Discontents: Understanding Kenya's 2013 Elections'.

12. The fear of violence was emphasized by numerous media reports including Al-Jazeera's report: Kenyans fear post-election violence, retrieved from http://www.aljazeera.com/video/news/2017/08/kenyans-fear-post-election-violence-170805091359405.html on Nov 12, 2017. See also, DW (July 31, 2017), Kenya fears outburst of election violence, Retrieved from: http://www.dw.com/en/kenya-fears-outburst-of-election-violence/a-39910139 on Nov 12, 2017

less overturned that election and forceful response to political protests. This briefing presents a discussion of these major themes in Kenya's politics to show that rather than 'democratising' or facing 'democratic regression', Kenya has merely stagnated; it remains a competitive-authoritarian regime. The paper begins with a description of the highlights of the main events that unfolded during the 2017 electoral cycle followed by three sections which examine the persistence of ethnicity as a mobilisation tool and its linkage with longer term elite alliances and political mobilisation, of the extent of constitutionalism and the continued employment of the state's coercive capacity to respond to political disputes, respectively. The paper ends with a concluding section that presents a summary of the argument advanced here.
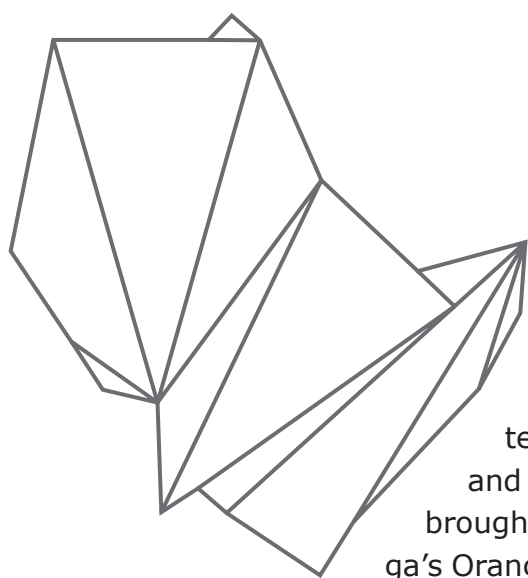
The 2017 elections: A tale of two elections

The pre-election period was marked by intense contestation on political reform through street protests and court cases. NASA - the opposition coalition that brought together five major political parties - Raila Odinga's Orange Democratic Movement (ODM), Kalonzo Musyoka's Wiper Democratic Movement (WDM), Musalia Mudavadi's Amani National Congress (ANC), Moses Wetangula's Ford-Kenya (FORD-K) and Isaac Ruto's Chama cha Mashinani (CCM) - held protests against the IEBC between April and June 2016 in Nairobi and their strongholds across the country that were marked by violent encounters with the police resulting in 88 people sustaining injuries.[13] Consequently, a joint parliamentary team set up to resolve the impasse agreed on a package of electoral reforms acceptable to both sides including changes to the electoral laws and electoral commissioners, ostensibly to level the playing field before 2017.[14] NASA, the opposition coalition, also filed several cases against the Independent Electoral and Boundaries Commission (IEBC) challenging their actions on the electoral process including procurement of ballot papers.[15] Meanwhile, Jubilee passed additional amendments to electoral laws in parliament to allow for manual transmission of the

---

13.   IPOA, 'Monitoring Report on Police Conduct during Public Protests and Gatherings: A Focus on the Anti-IEBC Demonstrations (April – June 2016)' (Nairobi, 2016).

14.   Republic of Kenya (16 Aug 2016), Report of the Joint Parliamentary Select Committee on matters relating to the Independent Electoral and Boundaries Commission (IEBC), Nairobi: Parliament of Kenya

15.   Kibe Mungai, 'Why NASA Court Cases Could Be a Plot to Nullify August Polls', *The Star*, 22 July 2017; For the ballots case see Maureen Kakah, 'NASA Ballot Suit Tests IEBC Plans', Business Daily, 12 November 2017.

results if technology failed, sparking fear of manipulation of results like in 2007.[16] Activist Maina Kiai successfully challenged the verification of election results by the IEBC Chairman at the National Tallying Centre with the court affirming the finality of the election result announced at the constituency.[17] The discovery of the tortured body of Chris Msando, a senior IT manager at IEBC, sparked further fears of technological electoral fraud that became a permanent theme in the 2017 electoral cycle.

The pre-election period was also marked by chaotic party primaries which pointed to the heightened political competition at the local level.[18] The claims of rigging and violence rocked the primaries of both major coalitions, Jubilee and NASA, as they selected their candidates for the five lower elections for Member of County Assembly (MCA), Member of National Assembly (MNA), Member of the Senate (Senator), County Women's Representative and County Governor. The particularly intense competition in the strongholds of the major parties is because capturing the ticket of the locally dominant party is often a guarantee of victory in the general election. The primaries resulted in the fallouts of the political elite as those who lost, unable to cross over to another political party due to legal restrictions, decided to run as independent candidates.[19] The prominence of some of these independent candidates - including incumbent county governors, a former presidential candidate and prominent businessmen - attracted significant attention.[20]

The Independent Electoral and Boundaries Commission's (IEBC) repeated assurances of their preparedness for the election were borne out as Kenyans elected candidates for six elective positions including the Presidency, was held on 8th August 2017. The election proceeded smoothly across the country. Most significantly, the Kenya Integrated Management Information System (KIEMS) gadgets, the electoral technology employed for voter identification and result transmission, worked effectively unlike in 2013. The IEBC received the praise of observers for their conduct of the election.[21] As results indicated an early lead for President Kenyatta, Raila Odinga's NASA coalition rejected the results claiming that the electoral system had been hacked into and the results altered.[22] Their allegations were disputed by IEBC[23] and their initial evidence

---

16. Standard Reporter, 'Jubilee Passes Law Allowing Manual Voting as CORD Moves to Court', *Standard*, 22 December 2017.

17. Maureen Kakah, 'Blow to IEBC as Appeal Court Rules on Tallying of Presidential Votes', *Nation*, 23 June 2017.

18. BBC, 'What Kenya's Chaotic Primaries Tell Us about August Election', BBC News, 2017, http://www.bbc.co.uk/news/world-africa-39730035.

19. Legal restrictions made it impossible for them to cross over to other parties as had been the practice before. In any case, candidates would still look to be in the same broader alliance rather than 'sell-out' to the other side.

20. This includes people like Peter a, presidential candidate in 2013, who was seeking Nairobi governorship and William Kabogo, outgoing governor of Kiambu, who both lost in the Jubilee primaries.

21. Thabo Mbeki, former South African President, called for the process to be emulated across Africa.

22. Nation Team, 'Raila Odinga Disputes Preliminary Results', *Daily Nation*, 9 August 2017.

23. Staff Writer, 'Kenya: Electoral Commission Disputes Hacking Allegations', itnewsafrica, 2017, http://www.itnewsafrica.com/2017/08/kenya-electoral-commission-disputes-hacking-allegations.

debunked and rejected by IT experts.[24] Nonetheless, the hacking narrative persisted and became a central theme of the contestation of the results constantly referencing Chris Msando's murder. President Kenyatta was eventually declared winner with 54 percent of the vote against Raila Odinga's 44 percent, with the six other candidates cumulatively garnering less than 1 per cent of the vote. Jubilee also won a majority in all other seats: 29 of 47 governors, 26 of 47 senators, 170 of 290 Members of the National Assembly (MPs), 31 of 47 women's representatives and 800 of 1,500 MCAs.[25]

NASA initially refused to file a petition at the Supreme Court, instead calling their supporters to protest President Kenyatta's victory in the streets. The street protests in NASA strongholds especially in Kisumu and Siaya Counties and parts of Nairobi resulted in fatalities and injuries – though the tallies are disputed.[26] Meanwhile, government agencies attacked civil society organisations ostensibly to prevent them from filing petitions against the presidential election. For instance, Africa Centre on Governance (AFRICOG), which had filed a petition against a Jubilee win in 2013, was raided on accusations of not being duly registered.[27] Citing the attacks on the NGOs as one of the reasons for change of heart, NASA eventually filed a petition at the Supreme Court which on 1st September 2017, nullified the presidential election by a 4-2 majority. The court noted that the process had been marred by illegalities and irregularities and ordered a fresh election to be conducted within 60 days. Ultimately, two issues proved pertinent to the ruling of the case: the reluctance of the IEBC to grant NASA access to their servers even after being ordered by the court to do so and the declaration of results by the IEBC without having received all the forms from the polling stations. President Kenyatta reacted angrily to the ruling terming it an affront to democracy, stating nonetheless that he respected it and would subject himself to the electorate again in the fresh election.[28]

The Supreme Court ruling dealt a big blow to IEBC's credibility with questions of what transpired during the transmission of the results lingering in the minds of many. Additionally, their preparations for the repeat election faced several different challenges. First, presidential candidate Ekuru Aukot challenged the IEBC's decision to exclude him on the ballot for the fresh election.[29] Second, NASA demanded the removal of some of the IEBC commissioners and staff, recruitment of new returning officers and

---

24. See K24 TV interview with Mr George Njoroge, CEO EA Data Centre, an IT Forensic Audit Expert unpacking the allegations made by NASA on electoral system hacking. Debunking the NASA hacking myth Retrieved from: https://www.youtube.com/watch?v=RPiGLvFEOaQ on Nov 21,2017

25. Geoffrey Mosoku, 'President Uhuru: How I Painted Kenya Red and Won the Big Race', *The Standard*, 26 August 2017.

26. The reports of the incidences of violence were also the subject of propaganda and fake news

27. Mercy Asamba, 'Government Suspends Clampdown on NGOs after the Police and KRA Officers Raid AfriCOG Offices in Lavington', *The Standard*, 16 August 2017.

28. Patrick Vidija, 'I Disagree with Supreme Court Ruling but Respect It, Uhuru Says', *The Star*, 2017.

29. Walter Dzuya, 'Aukot Moves to Court over Fresh Poll Exclusion', *CitizenTV*, 6 September 2017.

selection of a different firm to print ballot papers.[30] IEBC acceded to many of their demands, explaining that they would not be able to meet some due to time constraints.[31] Third, on 10th October 2017, Raila Odinga announced his withdrawal from the presidential election citing failure of the IEBC to meet NASA's demands.[32] The withdrawal which was calculated to precipitate a crisis and force the IEBC to start the process afresh, was however thwarted by the High Court ruling the following day ordering the inclusion of Ekuru Aukot – and all other candidates – on the ballot. In any case, since Raila had not signed the statutory forms for formal withdrawal, his name would remain on the ballot. Fourth, IEBC commissioner Roselyne Akombe who resigned and fled the country, indicated in media interviews that the IEBC could not conduct a free, fair and credible election.[33] Raila Odinga called on his supporters to boycott the election, announcing that the opposition would transform into a resistance movement to fight for Kenya's democracy and ensure a fresh election within 90 days.[34] NASA called an economic boycott on some companies while pushing for people's assembly and a secessionist drive.

The October 26 repeat election went ahead but it was marked by a low turnout of nearly 39 percent compared to over 79 percent for the August 8 election,[35] and failed to take off in Raila Odinga's stronghold counties of Kisumu, Homa Bay, Migori and Siaya due to security concerns. President Kenyatta was declared winner with 98 percent of the vote.[36] Two civil society activists and a retired politician filed petitions at the Supreme Court to have the election of President Kenyatta nullified for a second time.[37] This time the court upheld Kenyatta's victory and he was subsequently sworn in for his second and final term in office.[38] NASA announced that they would not recognise Kenyatta's victory and announced plans to swear in Raila Odinga as the 'People's President' on 12t[h] December 2017 which were later postponed indefinitely.[39]

This overview of the 2017 electoral period highlights some of the critical development that characterised political contestation along the themes identified earlier of elite behaviour, electoral competition and political violence. What follows is an analytical discussion of each of these topics in more detail.

---

30. NASA expressed concern over two Commissioners and the CEO Mr Ezra Chiloba even though the Supreme Court was unable to find any culpability on individuals in the electoral commission

31. Kamau Muthoni, 'IEBC Replies to National Super Alliance on Its Demands', *The Standard*, 11 October 2017.

32. Titus Waweru, 'Raila Odinga Withdraws from Repeat Presidential Election', *The Standard*, 10 October 2017.

33. Fredrick Obura, 'IEBC Commissioner Flees Kenya, Resigns from New York', *The Standard*, 18 October 2017.

34. Raila Odinga, 'Speech at the #NoOctoberElection Rally Held at Uhuru Park', *Facebook*, 25 October 2017.

35. Wafula Chebukati, 'Chebukati Announces Results for 48 Counties', Daily Nation, 30 October 2017; Carole Kimutai and Peter Okumu, 'Uhuru Kenyatta Got 8.2 Million Votes against Raila's 6.7 Million', *The Standard*, 12 August 2017.

36. Standard Team, 'Uhuru Kenyatta Wins Repeat Election with 7.4 Million Votes', *The Standard*, 30 October 2017.

37. Sam Kiplagat, '4 Petitions Filed against Uhuru Kenyatta Win', *Daily Nation*, 7 November 2017.

38. Jeremiah Wakaya, 'Uhuru Kenyatta Sworn-in as Kenya's President for Second Term', *Capital FM*, 28 November 2017.

39. James Mbaka and Luke Awich, 'Sorry, Raila Swearing-in "postponed"', *The Star*, 11 December 2017.
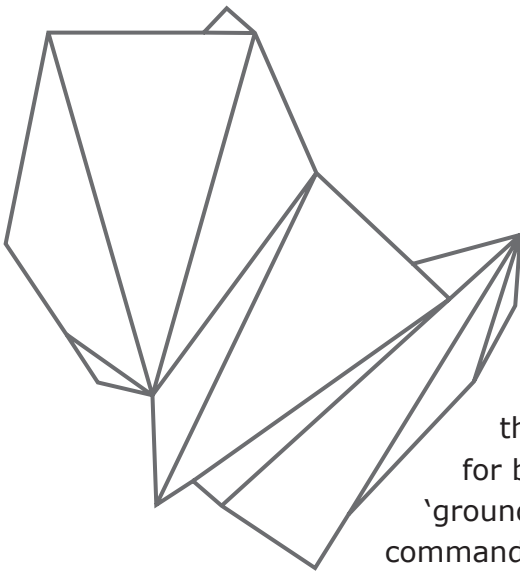
Elite alliances and political mobilization

The 2017 election was intensely competitive. To win, the two major coalitions relied on different strategies for building elite alliances and the voter mobilisation (the 'ground game'). Eventually, Jubilee demonstrated a superior command of the vote hunt, while NASA faltered. The political strategies employed by the two coalitions are greatly shaped by the requirements of the constitution, expectation of voter behaviour and access to resources for voter mobilisation.

Kenya's constitution requires that presidential candidates select a running mate, necessitating pre-election alliances.[40] Further, the winning ticket must garner more than fifty percent of the vote and at least 25 percent of the vote in at least 24 counties; more than half the 47 counties.[41] The pool of candidates with significant vote blocks to influence the presidential ticket is small and remained the same as in 2013: with Uhuru Kenyatta and Raila Odinga as the most senior, and William Ruto, Kalonzo Musyoka and Musalia Mudavadi. Realignments of the existing tickets would have been complex and costly; neither Uhuru nor Raila could have changed their running mate without losing their credibility, since each had made a deal with their running mate, and, a significant vote block, which would be hard to replace. They both sought to be strengthen their alliances for the 2017 contest rather than change them, especially because attaining the 25 percent vote in 24 counties requires a much broader coalition. On this front, the difference between the strategies pursued by Jubilee and NASA were clear. On the one hand, seemingly persuaded by the importance of ethnic kingpins to political mobilisation, NASA focussed on strengthening its top layer. The 2013 Coalition on Reforms and Democracy (CORD) that brought together Raila Odinga, Kalonzo Musyoka and Moses Wetangula joined with Musalia Mudavadi, the third presidential candidate in 2013, to form NASA. They were joined by Isaac Ruto, the vocal governor of Bomet, who had decamped from Jubilee and formed his own party, Chama cha Mashinani (CCM). To accommodate these elite, the NASA Coalition agreement included the creation of the position of Chief Minister and two deputies. On the other hand, Jubilee focussed building a broader base of lower level political elites, transforming itself into a party, merging Uhuru Kenyatta's The National Alliance (TNA), William Ruto's United Republican Party (URP) and eleven other parties headed by key local elites from across the country.[42]

---

40. Article 138, 4(a) of the Constitution of Kenya

41. *Ibid*,

42. Some of the parties did not join the Jubilee Coalition but remained affiliated and supported President Kenyatta's re-election. These include independence party KANU (led by Gideon Moi) and NARC-Kenya (led by Martha Karua) and the new Economic Freedom Party (EFP).

However, building a strong coalition is not enough; the political elite must be able to bring numerical and symbolic value to the alliance. Votes count. For instance, Mudavadi was sought after by the coalitions because they believed that he would deliver a basket of votes from his Luhya community. It is rumoured that he had been offered a cabinet position by Jubilee which he rejected; eventually joining the opposition, where he would have more negotiating power.[43] Meanwhile, his political survival depended on joining one of the major coalitions especially after his failed Presidential bid in 2013. As the foremost leader of the Luhya community, and a potential president, he needed to re-signal his viability. Little wonder that he formed NASA and invited the other opposition leaders to join him rather than join the existing CORD. The ability to convene national political elite is a potent signal for demonstrating viability to other political elite and to voters.

However, the support of the voters for a candidate from their ethnic community is not to be taken for granted. In cases where there are several candidates from the same community, only one receives the full backing of their community. In the 2013 election, for instance, Uhuru Kenyatta received the major backing of his Kikuyu ethnic block even though there were two other candidates – Peter Kenneth and Martha Karua. Voters, even when mobilised as ethnic groups, chose to support the most viable candidate to mediate their interaction with the state; shaping their grievances into effective demands and secure development in the form of schools, roads or hospital and provision of jobs (Rothchild, 1983; Bates, 1983). The ascendancy of a community leader is mediated by other elite from the community as shown by the endorsement of Musalia Mudavadi as the spokesman for the Luhya community by the community's elders.[44] Once chosen, the electorate support their leader to embolden him in the negotiations with the other political elite. Other politicians from the community are expected to be loyal to their community champion – or at least not to threaten their ascendancy; otherwise, they are punished by voters. In part, this might explain the failure of those who went against the wishes of their community leaders to run as independent candidates after losing in the party primaries such as Peter Kenneth (Nairobi, Jubilee) and Jack Ranguma (Kisumu, NASA) or those who 'sold-out' to the other side such as Ken Lusaka (Bungoma), a Luhya, who run on a Jubilee ticket.

Nonetheless, the 'sell outs' serve an important purpose for the elite alliances. Accommodation of political elite from many ethnic communities gives these alliances a national outlook. The elite alliances are keen to avoid being branded as ethnic outfits and to demonstrate national appeal. This is not only an expectation of the electorate but it is entrenched in Kenyan electoral laws that require parties to have a national character. Coalitions will therefore accommodate leaders from across the country,

---

43.   Personal communication, Kenyan political analyst, London, 11 Nov 2017. Some analysts speculate that he could not have joined Jubilee as he was still too bitter after the botched 2013 alliance where he feels he was conned out of the presidency by Kenyatta and Ruto.

44.   Uhuru Kenyatta was similarly by the late John Michuki, then a powerful Minister in Kibaki's government and respected Kikuyu leader

even those who may not add much value in terms of votes, for the optics; their symbolic value. Paradoxically, this has meant that ethnic mobilisation of voters and recruitment of ethnic elites into political coalitions has become more – not less – important in Kenya's politics. Notably, these logics are replicated in the devolved units, especially as gubernatorial candidates select their running mates. For instance, the winning gubernatorial candidates for Nakuru County, Lee Kinyanjui (a Kikuyu) chose Eric Korir (a Kalenjin) as his running mate to consolidate the vote block.[45] Ethnic outfits are frowned upon but ethnic logics continue to undergird Kenyan politics. *Plus ça change…*

Beyond the elite alliances, the mobilisation of voters - the 'ground game'- also proves to be critical. On this front, Jubilee was evidently stronger than NASA; and better resourced. For one, Jubilee presented the highest number of candidates for election at all levels compared to the other parties. Jubilee had 1,801 candidates compared to ODM's 1,289.[46] Even though the NASA affiliates presented over 3,000 candidates,[47] their approach was counter-productive as their candidates competed against each other, splitting votes and therefore increasing Jubilee's chances of victory.[48] Jubilee's representation was more cohesive across the country. Secondly, unlike NASA, Jubilee did not appear to be satisfied that the ethnic kingpins would be able to deliver the vote blocks. As such, they (especially Uhuru Kenyatta and William Ruto) campaigned aggressively across the country, attracting massive crowds to their rallies. It has been estimated that they held more than 600 rallies across the country, more than triple the number of rallies that NASA was able to hold.[49] Third, Jubilee invested heavily in political lobby groups that were targeted at various segments of voters Which were better funded and coordinated that the NASA lobby groups.[50]

45. Lee Kinyanjui, 'Announcement of Running Mate', *Facebook*, 12 November 2017.

46. Walter Menya, 'Jubilee Has Highest Number of Nominees, IEBC Analysis Shows', *Daily Nation*, 19 May 2017.

47. Menya.

48. Erick Oduor, 'A Clear Majority in Parliament Paves the Way for Kenya's Jubilee Agenda', *The East African*, 12 August 2017; John Wanjohi, 'Kalonzo Warns NASA Ahead of August Polls', *Mwakilishi.com*, 7 July 2017.

49. Paul Ogemba and Kamau Muthoni, 'Uhuru Blow-by-Blow Response to Raila's Petition against Win', *The Standard*, 25 August 2017. Some estimates indicate that NASA held only 105 rallies across the country

50. Protus Onyango, 'Season of Political Lobby Groups Sweeps over the City', *The Standard*, 6 June 2017.
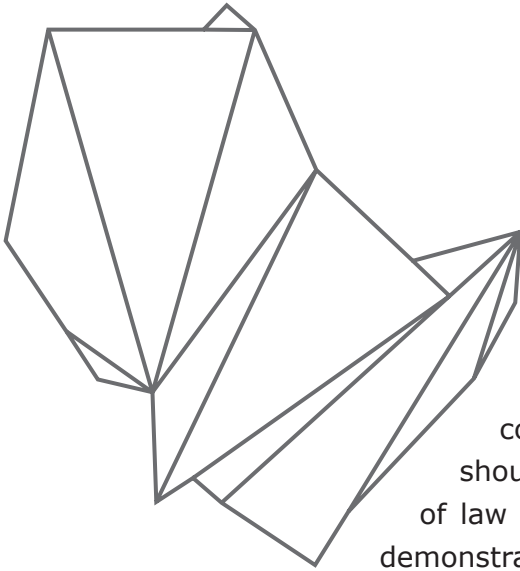
Constitutionalism: Are we there yet?

The idea that the behaviour of the political elite is constrained by constitutional responses outlined above should not be taken to indicate full acceptance of the rule of law in political contests. Rather, the 2017 electoral cycle demonstrated the continued instrumentalisation of the law as an instrument of power even as courts emerge as an arena for political competition. This is the plague of our past, which has been referred to as having a 'constitution without constitutionalism'.[51]

The ascendancy of the so-called 'alliance of the accused' to the presidency in 2013 dampened the hopes of those who saw the 2010 constitution as a silver bullet and a quick fix to all of Kenya's governance problems. As a result, pathologies of the judiciary's failure to stop the Jubilee government from power overshadowed the nullification of several election results, including the Nairobi gubernatorial election, by the High Court that signalled changing times.[52] Even though most of these decisions were overturned by higher courts, with bribery accusations levelled against some judges, the courts signalled commitment to the new constitutional quality of elections. By entrenching the independence of the judiciary, the 2010 constitution has boldened the opposition while constraining governmental action and shaped the survival ambitions of the electoral commission leading to the pursuit of better elections. Nonetheless, the flouting of the rules by the political elite continues.

In the 2017 electoral cycle, the opposition and activists relied on the judiciary to constrain incumbency by filing cases at the High Court, particularly the constitutional court, and ultimately the petition at the Supreme Court. NASA and civil society groupings, seen as sympathetic to the opposition's cause, filed at least 19 cases in the High Court challenging numerous aspects of the election including procurement of ballot papers and deployment of returning officers.[53] The government has suffered several humiliating defeats including the quashing of government orders banning street protests, and most significantly, the nullification of the presidential result. The most notable here are: the already noted Maina Kiai case and the Ekuru Aukot case. Many of these cases have

---

51.   H astings Okoth Ogendo, 'Constitutions without Constitutionalism: An African Political Paradox', in *Constitutionalism and Democracy: Transitions in the Contemporary World*, ed. S N Kartz Greenberg, B Oliviero, and S C Wheatley (New York: Oxford University Press, 1993), 60–66.

52.   Wahome Thuku, 'Court of Appeal Nullifies Evans Kidero's Election as Nairobi Governor', *The Standard*, 14 May 2014.

53.   Moses Kuria, 'List of Cases Filed by NASA and Its Surrogates This Election Cycle', *Facebook*, 18 July 2017.

revolved around levelling the playing field - making elections free, fair, transparent and verifiable - as required by the constitution. This has entrenched the view of elections as processes, rather than events, which has expanded the scope of contestation to all processes related to voting including voter registration, procurement of electoral materials, voting, counting and tallying of votes and transmission of results. As such, the scrutiny of elections has expanded beyond the numbers. However, this has evidently not stopped the authoritarian tendencies threatening the independence of institutions such as the Judiciary and the IEBC and withdrawal of security for opposition leaders. The courts may have served to constrain incumbency but the ground is far from levelled. This has nonetheless led to a belief amongst Jubilee supporters that the opposition has gained 'too much power' through the courts and therefore threaten to make the country ungovernable.

The intensified scrutiny of electoral processes has motivated compliance by the IEBC as it has sought to guarantee its survival. To avoid the fate of previous commissions that have been disbanded for failing to meet the expectations of key electoral stakeholders, IEBC has been keen meet legal requirements and build the confidence of Kenyans in their ability to deliver a credible election.[54] Most notably, the IEBC went to the Supreme Court to seek clarity on handling of results, before the October 26 election and only declared the results after having received all the forms.[55] Most critical here however, is their reliance on electoral technology to enhance their credibility with the KIEMS becoming the centre piece of the electoral process. This technology was designed to address would deal with the troubles that have plagued Kenyan elections from ballot stuffing to dead voters to the alteration of vote tallies. The trust that Kenyans placed in this electoral technology was evidenced by the heightened suspicion that met amendments to electoral laws to allow for 'manual transmission' of results if technology failed. Though the KIEMS gadgets worked well on election day, claims of hacking during the results transmission have reduced confidence in the technology and in the commission. Furthermore, IEBC's unwillingness to open their servers for scrutiny anchored doubts about the results.

However, the ability of independent institutions to constrain executive initiative remains limited. For instance, Jubilee has relied on its numerical strength – popularly termed as the 'tyranny of numbers' in parliament to pass laws to constraint judicial initiative. Amendments to the electoral laws before the second presidential petition aimed to introducing a threshold for the nullification of an election are a case in point.[56] Additionally, President Kenyatta's comments terming the nullification of the presidential election as 'nothing short of a coup' and stating that this issue would be revisited, was widely interpreted as a veiled threat to the Judiciary.[57] Furthermore, the security forces responded ruthlessly, to protests. It is this that I turn to next.

---

54. The Electoral Commission of Kenya (ECK), after the 2007 election debacle, and the dismissal of the first commissioners of the Independent Electoral and Boundaries Commission (IEBC),

55. Sam Kiplagat, 'IEBC Seeks Clarity on Chebukati's Leeway in Conflicting Results', *Business Daily*, 11 October 2017.

56. Business Daily, 'Kenya Parliament Passes Bill to Amend Electoral Laws', *The East African*, 11 October 2017.

57. Al-Jazeera, 'Kenyan Judges Criticise Kenyatta over "Veiled Threats"', www.aljazeera.com, 3 September 2017.
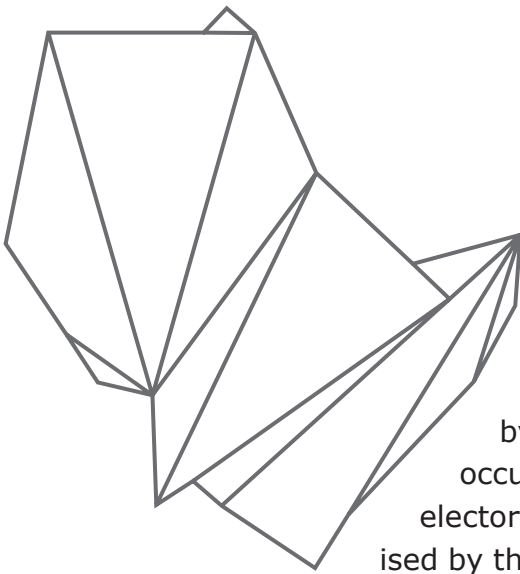
Street protests versus 'the ideology of order'

Kenya's 2017 electoral cycle has been characterised by frequent street protests. The first wave of protests occurred in 2016 as the opposition coalition demanded electoral reforms. The second wave of protests was organised by the opposition after the declaration of the presidential results for the August 8th election which they rejected. The protests quietened after the Supreme Court victory by NASA against Jubilee. The third wave of protests followed the withdrawal of Raila Odinga from the October 26 election geared to demand postponement of the election. street protests are an important arena for the contestation of the rules of the political game in Kenya having succeeded in compelling President Moi to allow a return to multi-party democracy and electoral reforms in the 1990s. In my view, the success of street protests emanates from disruption of the state's cherished idea of 'order' through burning of tyres, destruction of property and loss of life. In a sense, by creating disorder and instigating violent responses from the state security agencies, street protests expose the contradictions inherent in the idea of the state, which project its raison d'être as protection of life and property. The Kenyan state has ever projected itself as an orderly and peace-loving polity, in a troubled region, that is open for, and protects, investment.[58] Little wonder that street protests (read: disorder) are met with strong and forceful responses from the police. Protestors are often branded as looters, sources of threat to the safety of other people's investments, to justify the forceful response.

Among the three waves of protests organised by the opposition, the 2016 protests to push for electoral reforms and exit of IEBC commissioners were the most obviously successful. This wave of protests forced the government to accede to these reforms through a joint parliamentary committee. Nonetheless, not all protests are equally successful in the same way. For instance, street protests failed to stop the October 26 election. My view is that those protests whose agenda threatens the survival of the regime are repressed more aggressively than those which are seen a mere political nuisance'. Failure of IEBC to conduct the fresh elections on October 26 would have created a survivability crisis for the Kenyatta regime. Facing a formidable threat, the heavy deployment of security personnel to meet the NASA challenge indicated the commitment of the regime to its own survival. Similar ruthless responses

---

58. Branch, *Kenya: Between Hope and Despair*, 1963-2011

have been seen in the in the initiatives of the state security forces against vigilantes, criminal gangs and separatist movements such as Mungiki, Sabaot Land Defence Force (SLDF) and Mombasa Republican Council (MRC) that seek to establish separate localised orders.

The forceful responses by the state security apparatus had already been signalled in the pre-election period by discourse of mapping 'hot spots' of political violence. As the 2017 election was frequently likened to the 2007 election, predictions of a seemingly inevitable doomsday scenario became prevalent. A plethora of reasons for such predictions were presented, ranging from the possible rejection of election results to the often undefined 'historical grievances'[59] To the reduced credibility of key institutions responsible for managing the elections including the IEBC and the Judiciary.[60] Some even argued that the mere fact that the incumbent was seeking re-election was a predictor of violence.[61] The National Cohesion and Integration Commission (NCIC), the agency responsible for improving inter-ethnic relations, identified more than one-third of the counties as being at the risk of violence; that is, 'hotspots' of violence.[62]

Per Levitsky & Way, coercive capacity is central to the competitive authoritarian stability because strong and cohesive state security apparatus enhance the capacity of the incumbents to crackdown on opposition protests.[63] Noteworthy, the Inspector-General of the police consistently reassured on the preparedness of the police to deal with any disturbances in the aftermath of the election.[64] The police had already invested heavily in anti-riot equipment that had already been deployed in quelling protests during the 2016 protests against the IEBC.[65] In all subsequent protests, the police predominantly relied on tear gas and water cannons to disburse the crowds. In many cases, the protests escalated into violent riots where the police used live ammunition resulting in serious, often fatal, injuries.

At the ideological level, the defence for police action is anchored on what renowned Kenyan historian Atieno-Odhiambo termed as the 'ideology of order'- constant holding up of order and stability because it is key to economic growth and development.[66]

59. There is a common perspective that high levels of electoral competition are often accompanied by higher prospects of violence; as candidates and their supporters seek to get ahead of their opponents, they may resort to violence to intimidate or displace some voters. The process of competing for political power often exacerbates existing tensions and escalates them into violence. See: Rao, S. (2014). See: *Dealing with election-related violence in fragile and conflict-affected states.* GSDRC Helpdesk Research Report 1126. Birmingham, UK: GSDRC, University of Birmingham; Sisk, T. (2008). *Elections in Fragile States: Between Voice and Violence*. Paper prepared for the International Studies Association Annual Meeting San Francisco, California, March 24-28, 2008.

60. Kamau Wairuri, 'Mitigating Electoral Conflict in Kenya ' S 2017 General Election' 1992, n°. 3 (2017): 1–8.

61. David Ndii, 'Kenya Is a Cruel Marriage, It's Time We Talk Divorce', 26 March 2016.

62. S Letoo, 'NCIC Identifies 19 Counties at Risk of Violence in 2017', *The Star,* 26 April 2016.

63. Levitsky and Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War.*

64. Cyrus Ombati, 'Police Ready for August Elections, Says Inspector General Joseph Boinnet', *The Standard,* 5 July 2017.

65. Cyrus Ombati, 'Polls: State Acquires More Anti-Riot Gear', *The Standard,* 30 July 2017.

66. E.S. Atieno-Odhiambo, 'Democracy and the Ideology of Order in Kenya', in *The Political. Economy of Kenya,* ed. Schatzberg (New York: Praeger, 1987).

The police often argue term the victims of their forceful responses as 'looters'. The logic being that those who disrupt order, and therefore pose a threat to the lives and livelihoods of peace-loving Kenyans ought to be punished, and shown no mercy. However, this narrative loses its power when innocent victims such as young children, who cannot fit the image of the violent protestor and looter, are injured or killed by the state police. For instance, the teargassing of young children in Kisumu[67] and killing of 10-year-old girl in Mathare,[68] provided grounds for the opposition and civil society groups to critique the political regime.[69] These provide fodder to opposition groups to discredit the state. Additionally, and somewhat paradoxically, the running battles between the police and protestors serve to further disrupt order. Police presence and violence is regarded as an essential element of the protests as evidenced by emergent discourses – in jest, perhaps - about protestors suspending their demonstrations when police run out of teargas: *Hakuna maandamano bila teargas* (No protest without teargas).[70] Thus, street protests become a potent tool for the opposition partly due to the states own actions and its public imaginary. However, even as the police – and the political regime – lose the ideological battle, they win the physical battle for space through superior command of instruments of the violence, effectively thwarting the ability of the opposition groups to gain victory

67. Elizabeth Osina, 'Police Tear-Gas Nursery Pupils in Kisumu's Nyalenda Slums', *Daily Nation*, 3 October 2017.

68. Reuters, '10-Year-Old among 11 Shot Dead as Mathare Post-Election Anger Boils', *The Star*, 12 August 2017.

69. Leonard Onyango, '37 Died in Post-Poll Chaos - KNCHR Report', *Daily Nation*, 9 October 2017.

70. TrendingVideosKe, 'Maanadamo Sio Successful Bila Teargas', TrendingVideosKe, 2017, *https://www.youtube.com/watch?v=hH1TGK8gxZU*.
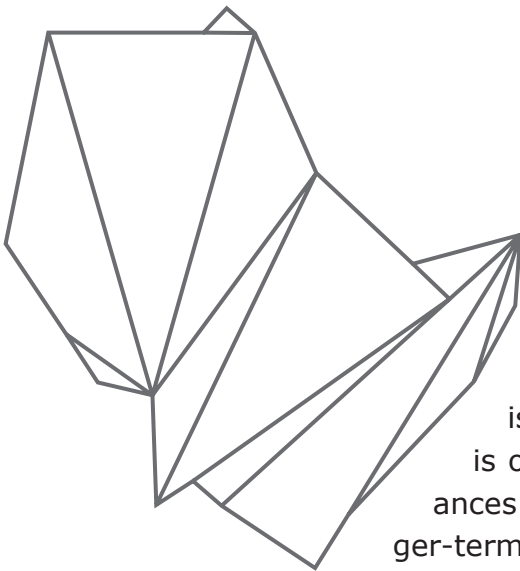
Conclusion

It is often said that history does not proceed in a straight line and that the democratisation process is a non-linear, complex and messy process. What is often left unsaid is that sometimes, despite appearances to the contrary, history stagnates. Even as longer-term elite alliances have emerged and the courts have become an important arena of political competition pointing towards a gradual process of democratisation, it is evident that the opposition and the civil society have been outwitted and overpowered by incumbency that has flouted the rules of the game. No doubt, the 2017 elections have been the focal point around which the clamour for electoral reform has revolved. This challenges Lindberg's hypothesis that holding regular multi-party elections in which opposition parties take part has an independent self-reinforcing democratising effect. The nature of elite alliances and logics of political mobilisation, the willingness of the political elite to play by the rules of the game, the conduct of elections and the state response to political challenge are important determinants of the democratisation process. Rather than marking steady progress, Kenya's 2017 electoral cycle, in the history of multi-party elections since 1992, feels more akin to Barrow's quote on riding the crest of the wave, where every so often, the rug pulled away with the country coming back down to earth with a sickening thud. Unbridled optimism one day and secessionist politics the next. Perhaps, to borrow Dan Branch's phrase, Kenya is still stuck somewhere between hope and despair.