



**THE PROS AND CONS OF ELECTIONS: KENYA GENERAL ELECTIONS (AUGUST 2022)**

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**ABSTRACT**

*The birth of 1992 democracy in Kenya called for a multi-party participation in Kenya's electoral system. This also marked the emergence of the fourth republic, the longest republic after the attainment of independence in 1963. To have a successful administration of elections in Kenya, there are some key processes followed by the Electoral Commission in the administration of the free, fair and transparent elections. This study looked at Kenya General Multi Party Electoral Processes and Electoral Challenges, with regards to past seven general elections. This article asked what Kenya's 2017 general elections tell us about the capacity of a new constitution to reduce the stakes of political competition and prospects of political instability. Three constitutional changes are particularly important: the adoption of a 50% + 1 threshold for the presidential election; the devolution of power to 47 county governments; and the introduction of a Supreme Court with the right to hear presidential electoral petitions. We found that the impact of the 2010 constitution had been mixed. The 50% plus 1 threshold encouraged coalition formation, but this dynamic had long been evident. Devolution had given a wider set of Kenyans a stake in the system, but also created new structures that can be used to channel dissent against the state. The Supreme Court demonstrated its capacity to act as an independent institution, but did little to sustain electoral legitimacy. Indeed, while the 2010 constitution was clearly reshaped the political landscape, it was a personal deal that ended the post-election impasse. The elections therefore demonstrate how formal institutions alone cannot change political logics and revealed the continued significance of individual politicians and informal institutions that may compete with or complement their formal counterparts.*

**Keywords:** Elections, Ethnic politics, Kenya

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## INTRODUCTION

### Kenya's Historical Inheritance

Kenya straddles the Equator on the east coast of Africa, and has a number of climatic zones. Much of the country is arid or semi-arid, only supporting low-density subsistence farming. Other areas, however, are suitable for intensive agriculture (Chinsinga, 2004). The coastal strip along the Indian Ocean is one such region, but it is the highlands either side of the Great Rift Valley, and the shores of Lake Victoria, that have proved to be especially productive. Kenya can also boast the bustling cities of Nairobi, Mombasa and Kisumu.

Archaeological evidence shows present-day Kenya to have been one of the first hosts to human life. Human remains have been found near Lake Turkana dating back two to three million years. An equally significant event in the peopling of Africa was the Bantu migrations. These Bantu people, originating from West Africa, over centuries would eventually inhabit all of Tropical Africa, pushing down into what is now South Africa. As they travelled south and east, they colonised many of the societies they came across. The Kikuyu, Embu, Mbere, Kamba, Tharaka, Luhya and Gusii of present-day Kenya are the descendants of these Bantu migrants. Their ancestors reached the Rift Valley approximately 1,000 years ago (Atieno, 2004).

Another significant migration arrived later, in the fifteenth century. Niolithic and Cushitic groups came from the north, and produced lines of descent that formed today's Masai, Kalenjin, Luo and Somali ethnic groups. In addition to these African peoples, Arab traders have also been visiting Kenya since the seventh century, while Europeans settled here from the end of the nineteenth century onwards. Adding to this diverse population, Asians originating from the Indian subcontinent have been a significant part of Kenya's society since the twentieth century. Political organization in pre-colonial Kenya rested largely on stateless societies. The most sophisticated of these could be found in the highlands, and westwards towards Lake Victoria. Although each of the African groups mentioned in

the previous paragraph had its own identity, social, economic and cultural boundaries were permeable, and coexistence (as well as war) existed between these various parties (Kriegler & Waki Reports, 2009). The 'Lords of the Rift', the Masai, for example, were the 'bankers of the highlands'. They were a purely pastoral people, but benefited from residing close to other, mixed farming, ethnic groups. This was so that they could profit from providing cattle to their neighbors: cattle being the primary form of currency and exchange among these communities (used for trade and paying social debts, such as the marriage bride-price). This region was also well connected with both the rest of Africa and the wider world. Coastal trade existed from early times, while Arab caravans entered the interior regularly throughout the nineteenth century. Largely trading for ivory and slaves, these caravans operated between Mombasa (on the Indian Ocean coast) and Lake Victoria. This commercial activity was controlled from the island of Zanzibar, from where Omani Arabs exerted authority over the whole region (Mwangi, 2008).

The British gained influence in this part of Africa towards the end of the nineteenth century. In 1888, a royal charter for what would become Kenya was granted to the commercial Imperial British East Africa Company. Company rule, however, proved something of a disaster. London had to take direct control itself when the company became bankrupt (Närman, 2003). The British government established its East African Protectorate in 1895. Kenya became a formal crown colony 25 years later, by which time white settlement was firmly entrenched. In the space of these 25 years, Kenya had been transformed from a region that provided a home for numerous stateless societies into a single modern colonial state. The territory now had powerful central administrative structures, defined borders and a significant white settler community (Throup, 2003). Kenya reflects the rest of Africa in that it inherited arbitrary state boundaries from its colonial past. To the south, for example, Kenya's ruler-straight border with Tanzania suddenly

changes course at Moshi. It is as if a mistake has been made, and the mapmaker's pen has slipped temporarily, before continuing its geometrically correct journey to the Indian Ocean. Queen Victoria wished to make a gift of Mount Kilimanjaro to her grandson, the future Kaiser Wilhelm II. The border between German and British East Africa was thus moved accordingly (Benjamin, 2011). In this respect, and illustrating the irrational nature of African borders, the reality of whether thousands of Africans are today citizens of Kenya or Tanzania was decided by the bestowing of a birthday present (Chege, 2008). Although this is an extreme case, it is obvious that African states were not created with local necessities in mind. Instead, they were shaped to meet the demands of imperialism and the interests of its managers. This is a fact also reflected in Kenya's western border with Uganda. This boundary, despite being moved in 1926, still cuts across the territory of 10 cultural groups (Tarus, 2004).

It is Kenya's north-eastern boundary, however, that has created most problems in the post-colonial era. As discussed above, the Somali people were divided among five colonial states as a result of imperial partition. Consequently, north-eastern Kenya has a large ethnic Somali population, many of whom identify more with their ethnic origins rather than the Kenyan state. Across the border, the Somali Republic itself, before its collapse in the 1990s, certainly wished to see this part of Kenya become Somali sovereign territory. During the First World War, the British government partially addressed this situation (Ogot, 2000). The UK government came to a secret agreement with Italy to transfer 94,050 square kilometers of its East African protectorate to Italian Somaliland. This was Italy's reward for allying with Britain during its war with Germany (Branch, 2009). The treaty was honoured, and Jubaland was ceded in 1924. Many ethnic Somalis, however, were still left living on Kenyan territory, even after this boundary change. The issue was thus revisited just before independence, in 1963. Britain negotiated with Somalia, and was apparently willing to give up

further territory. Somalia demanded the whole of Kenya's Northern Province, however (Kyle, 2008).

This was much more than Britain would cede, and the talks ended in stalemate. Kenya's independent government inherited this boundary dispute, and an irredentist guerrilla war was fought in this province. Relations improved between Kenya and Somalia from 1967, however, and the war faded out (Frank, 2002). The fact remains, though, that there are still many Somalis living in Kenya who owe their political loyalties more to kin across the border than to the Kenyan government.

Kenya's economic inheritance from its colonial rulers was equally problematic (Niall, 2002). Evidence supporting the underdevelopment thesis can certainly be found. Land was alienated in the most fertile areas (the 'white highlands') from Africans and used to settle European farmers instead; labour was also exploited, with Africans being taxed, forcing them into the cash economy; and economic development concentrated largely on cash crops (tea and coffee), denying the Kenyan economy the chance to diversify. Even today, after 40 years of 'independence', relatively industrialized Kenya is still buying the vast bulk of its imported goods from the old metropolitan state of Britain, rather than from neighboring, local markets in East Africa (Figaro, 2013). The result of this 'underdevelopment' would be that post-colonial administrations would inherit a land problem: how should the land owned by European settlers be returned to the farmers it was taken from? There was also the difficulty of producing development from an economy based primarily on agricultural exports. The Kenyan economy would indeed suffer each time the price of coffee or tea fell (Mynott, 2008).

The economy was not completely underdeveloped, however. Kenya inherited a good communications infrastructure from the colonial state, a basic health service and an education system (Ogot, 2000). What is more, by comparison with the rest of Africa, Kenya had a significant industrial sector. Based on a nucleus that developed to serve white settlers,

manufacturing grew during the post-colonial period. Kenya has consequently profited from sales to the rest of East Africa and beyond (Abraham, Persson & Themnér, 2019). Although it still relies heavily on its cash-crop farming, the Kenyan economy is also active in the chemical industry, in producing cement, manufacturing consumer goods, and is particularly successful in refining petroleum products (from imported oil). Tourism also attracts considerable sums of foreign exchange each year.

Although Kenyan labour and resources had been exploited by imperial interests before independence, and it had inherited an economy seriously skewed towards the export of primary produce, it would seem that the economy was not 'underdeveloped' beyond hope. The present-day economy still has massive obstacles to overcome, but it has reaped limited successes through diversification (Hassan, 2016). Organized opposition to colonial rule in Kenya, especially amongst the Kikuyu, can be traced back to the 1920s. It was the so-called Mau Mau uprisings, however, that finally forced the British into the negotiations that led to Kenya's independence. Some 13,000 Africans and 1,000 Europeans died in this unrest that centred on land rights in the highlands. The Kikuyu wanted access to their land, and threatened to take this by force.

Over 80,000 Africans were detained in 're-education' camps by the colonial authorities. When the level of violence rose sharply in 1952, a state of emergency was declared (Kasara, 2016). Nationalist leaders were imprisoned (including future president Jomo Kenyatta), and British troop reinforcements deployed to quell the rebellion. Once this had been achieved, the colonial authorities sought to foster a political class with which it could build a collaborative partnership of government (Branch, 2009). The nationalist leaders that the imperial authorities sought to engage certainly did not represent a cross-section of African society in Kenya. They were an urban educated elite, who often already had close associations with the state (as employees or business partners). When, for

example, Africans were allowed to sit alongside European representatives in the Legislative Council for the first time in 1957, the employment of the candidates standing was revealing. Most were teachers; others included veterinarians, journalists, businessmen, civil service union leaders, an army warrant officer, a social worker and a lawyer.

The vast majority of these had a secondary school education; a sizeable proportion were university graduates; and several had studied or worked abroad (Kramon, 2017). They shared few social characteristics with the peasants who sustained the Mau Mau rebellion. It would be this elite, however, that would inherit the Kenyan state from the imperial authorities at decolonization. As will be shown later in the book, it can be argued that this elite subsequently formed an exploitative 'bureaucratic bourgeoisie'. Kenya's independence came in 1963, rather more quickly than Britain had planned. Nationalists were looking for complete independence and self-rule, rather than just a junior partnership with the imperial administration (Chinsinga, 2004). Power-sharing formulae were swept aside, and with this, colonial rule perished. Before departing, however, the British government did leave Kenya with a liberal democratic constitution, drawn up during pre-independence negotiations.

With the benefit of hindsight, it was obvious that the political institutions created by this constitution would be incredibly weak. Like the colonial state itself, they were imposed. They had not grown, over time, out of society, but had been ushered in overnight. For example, the new constitution instigated multi-party democracy for Kenya (Uguru, 2019). In reality, such pluralism had never previously existed. There had not been a single African national political party established prior to the Second World War; and after the war, organizations of this nature were often banned. Nor had there been a representative parliament in Kenya under colonial rule. In short, liberal democracy had no historical foundations in Africa. Yet this was the legacy that imperial rule left. Kenya

was expected instantly to create a political culture that could support these pluralist political institutions (Cheeseman *et al.*, 2018). The Westminster constitutional model of politics soon broke down in post-colonial Kenya.

Within a year of decolonization, the smaller of two parties that had contested the independence elections, the Kenya African Democratic Union, merged with the victor, the ruling Kenya African National Union (KANU) (Abraham *et al.*, 2019). KANU governed Kenya without an opposition from this point in 1964, right through until electoral reforms were forced upon the state, and it lost elections in 2002. The most serious challenge to the ruling party came in 1966, when the Kenya People's Union was formed. President Kenyatta promptly banned this organization. Other moves to centralize state power were also undertaken by KANU. In 1964, for example, the Office of the Prime Minister was abolished, with a more powerful and centralized presidential office being established instead. Similarly, in 1966, Kenya's second chamber was dissolved, creating a unicameral system, further centralizing the state. Also in that year, the Preventative Detention Act became law, bypassing the independence constitution's Bill of Rights (by permitting detention without trial in the interests of 'public security') (Chiriyankandath, 2007). Power was systematically being taken away from Parliament and given to Kenyatta's Office of the President, and his allies in the civil service and army. Kenya was reverting to a style of bureaucratic authoritarianism familiar in the colonial era.

The accession to the presidency of Daniel arap Moi in 1978, following Kenyatta's death, promised a programme of political liberalization (Mamdani, 1996). Moi did indeed release a number of political prisoners and start to tackle issues of corruption, but this did not last. Consolidating his own position of power after an attempted air force coup in 1982, Kenya became a formal one-party state. The last vestiges of liberal democracy were thus removed (Maxon & Ndege, 1995). The independence constitution that had tried to usher in pluralist,

multiparty competition, but had been built on the shaky historical foundations of colonial bureaucratic autocracy, was now itself history.

### **Political development and electoral history**

Kenya gained internal self-government from Britain on 1 June 1963. It attained political independence on 12 December 1963 and became a republic on 12 December 1964. The country has, since independence, been under civilian rule, except for an attempted coup on 1 August 1982 that was swiftly put down by the army (Barkan & Mutua, 2010). With 11 general elections since it obtained political independence, Kenya has a long history of holding elections and using elections as a legitimating tool for governments. The current EMB, the IEBC, is nevertheless a fairly recent creation in the close to 50-year post-independence history of elections in Kenya (Chege, 2008). When it presided over the country's historic 2013 general election, the first after the promulgation of a new Constitution with enlarged freedoms and a dramatic re-organization of governance structures, the IEBC was in its second year of existence. The EMB began its life with the appointment of the chairperson and nine commissioners, on 9 November 2011. However, it was the second time since 2007 and the fourth after the country attained political independence in 1963 that the country was re-establishing its EMB (Muigai, 2014).

### **Early political changes and the colonial legacy**

Representation in Kenya can be traced to 1905, when the Legislative Council (LEGCO) was established. Members of the LEGCO were appointed by the Governor, who could dismiss them at will. Although the LEGCO represented only European interests in the beginning, a member was appointed in 1909 to represent Asian interests (Dercon & Gutiérrez-Romero, 2012). A second Asian representative was appointed in 1919, and a member to represent Arab interests named in 1920. In 1925, the number of Asian representatives was increased to four. The first elections for the LEGCO were held in 1916, following the promulgation of a

Legislative Council Ordinance<sup>156</sup> that provided for full adult European male suffrage to elect 11 European members. In 1925, an additional four elective seats were created for Asians. In the same year, a European member was appointed to represent African interests. A second member to represent African interests, another European, was appointed in 1934 (Kiarie, 2004). Eliud Mathu, the first African member named to represent African interests, was appointed in 1944. He was joined by Walter Odede, who was appointed a temporary member in 1946. This number was increased to four elected African representatives in 1948 and, following the Mau Mau insurgency, six in 1952 (Hassan, 2015).

In 1956, the Legislative Council (African Representation) Act, 1956 (No. 10) was passed, providing for the first six African elected members (Gettleman, 2007). In the same year, the law was amended to increase this number to eight. In the following year, the first elections in which Africans were elected were held. Following these elections, Ronald Ngala (Coast), along with Tom Mboya (Nairobi), Oginga Odinga (Nyanza Central), Lawrence Oguda (Nyanza South), Masinde Muliro (Nyanza North), Daniel arap Moi (Rift Valley), Bernard Mate (Central) and James Miumi (Southern/Ukambani) formed the African Elected Members Organization (AEMO) to pursue African interests in the LEGCO. Since they were pushing for even more far-reaching reforms, they later issued a press statement declaring Kenya's Lyttelton Constitution, on which they had been elected, void, and declared that none of the African elected members of the LEGCO would take any ministerial office. The 1958 Lennox-Boyd Constitution would later provide for an equal number of elected representatives between the European and African communities. Each racial group had 14 elected seats. The March 1958 elections brought six more African representatives to the LEGCO (Gichuki, 2016).

The first elections on the basis of universal suffrage were held in 1961. They were made possible by the

First Lancaster House Conference in London. The conference was held in 1960 to discuss Kenya's future as an independent country, after a softening of Britain's stance in regard to the Kenya Colony, under pressure from the United States, the Soviet Union and a growing bloc of non-Western states. It was attended by 37 Africans, 14 Europeans, 11 Asians and three Arabs. At the conference, held under the chairmanship of Secretary of State for the Colonies, Ian Macleod, the African delegation argued that Kenya needed a new Constitution (Gichuki, 2016). There was no agreement on the country's new Constitution, and Macleod issued an interim Constitution that, among other provisions, provided for 33 members elected on the basis of a common register of voters, with ten seats reserved for Europeans, eight for Africans and two for Arabs. The members of the LEGCO would, in turn, elect 12 special seat members. All Africans over 40 years of age were allowed to vote, as was any other person over the age of 21 who was literate in any language, or with a yearly income of 75 pounds and above (Gichuki, 2016).

A majority of the African delegation accepted these proposals, through which the British government showed, for the first time, that it accepted majority rule, since Africans would consequently make up the majority in the LEGCO and Council of Ministers. The ban on political parties, imposed at the height of the emergency, was lifted and two political parties came into existence by the end of 1960: the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU). While KANU came to represent the interests of the two largest ethnic groups, the Agikuyu and Luo, as well as the Akamba and Abagusii, KADU came into being to protect the interests of the smaller tribes, the coastal tribes, the Kalenjin and Abaluyia.<sup>165</sup> In the March 1961 elections, KANU won 61% of the votes and 19 seats, while KADU won 16% of the votes and 11 seats. However, KANU leaders refused to form a government until their leader Jomo Kenyatta was released from detention and allowed to return to politics. KADU then formed a government under

Ronald Ngala. Kenyatta was eventually released in August 1961 and, after failing to persuade the two parties to unite under him, became president of KANU after James Gichuru stepped down for him. He was thereafter elected unopposed to the LEGCO on a seat vacated for him by Kariuki Njiri (Orobator, 2008).

The Second Lancaster House Conference commenced in February 1962, to plot the course for Kenya's path to self-government. It was chaired by the new Secretary of State, Reginald Maudling, and attended by a KANU delegation led by Kenyatta and a KADU delegation led by Ngala. At this conference, the stickiest issue turned out to be KADU's vision of federalism and KANU's unitary approach. It resulted in a complicated framework for self-governance – the Maudling Constitution – to satisfy the latter's fears. It consisted of seven regions with entrenched local powers and a bicameral legislature at the center. It was agreed to later thrash out further details and hold elections (Orobator, 2008).

In April 1962, with the active encouragement of the British (who were keen to minimize ethnic tensions and establish a multiracial state), KANU and KADU formed a coalition government to oversee the final stages of devolution by Britain, in which Kenyatta became Minister for Constitutional Affairs and Economic Planning. Immediately preceding independence, the Regional Boundaries Commission divided Kenya on the basis of either ethnic homogeneity (one tribe per district) or compatibility (more than one tribe per district or province, where they were happy to coexist). Elections for the seven regional assemblies were held on 19 May 1963, followed by the Senate elections on 22 May, after which the elections for members of the House of Representatives were held on 25–26 May (Lijphart, 2012).

The Third Conference was held in September/October 1963. The delegations to this conference were the two governments of Kenya and Britain. The conference finalized constitutional arrangements for Kenya's independence as a dominion, and adopted the Independence

Constitution, bringing to an end more than 70 years of colonial rule (Orobator, 2008).

### **Elections in post-independence Kenya**

After independence, a number of problems confronted Kenya's politics and its elections. Though the Independence Constitution was strongly federalist, a series of political schemes and constitutional amendments resulted in the abolition of the federal system (which came to be known as *majimbo*) by the time Kenya became a republic in 1964 (Orobator, 2008).

First, negative ethnicity (which began in the pre-independence competition for supremacy among African elites) progressively developed and ultimately became a major factor in national politics. Ethnic tensions particularly affected the structure of access to economic opportunities and redistribution of some of the land formerly owned by white settlers (Holland, 2008). Gradually, instead of elections being merely a contest for political power, they became an arena for either settling ethnic scores or a device through which political protection for ethnic groups could be assured or gained (Wolf, 2006). At the resumption of multi-party politics in the early 1990s, state-sponsored ethnic clashes were part of the official response to political competition. This cycle was repeated in the 1997 general election and, ultimately, the 2007 elections and the post-election violence in early 2008 in which nearly 1,300 people lost their lives. As the country tries to come to terms with the structural causes for its violent elections, it will be important to interrogate the extent to which electoral reforms also provide a structural solution to the realities of a deeply divided society (Weber, 2009).

The country's electoral system, which has all along been first-past-the-post, also gradually entrenched winner-take-all politics in which winning was a zero-sum game. Coupled with the fact that the presidency eventually became the highest position of political patronage, this further worsened inter-ethnic rivalry over the highest political office in the



land. Remarkably, as various analyses and successful election petitions show, Kenya's elections have also been historically polluted by electoral vice and have been problematic in terms of both substantive electoral justice and public trust in the electoral process. It is these political problems that, over the years, constitutional, legal and administrative reforms have sought to either remedy or balance somewhat (Anderson, 2005).

### **Evolution of election management reforms**

Kenya's current EMB has evolved over time and is the result of fairly recent electoral reforms arising from a lengthy post-independence struggle for democratic change, culminating in the adoption and promulgation of the Constitution of 2010. Further electoral reforms received fresh impetus from the implementation of the new Constitution. (Kramon & Posner 2011).

The members of the commission had a term of five years and security of tenure, while the commission was not subject to the 'direction or control of any person or authority' in the exercise of its constitutional functions. Over time, however, this legal provision for functional independence was flouted with impunity. After independence, the country underwent profound political upheaval and changes from a multi-party system in 1963 to a de facto single-party state in 1969, and then a de jure single-party state in 1982, before reverting to de jure multi-partyism in 1991 (Barkan & Mutua 2010).

In the post-independence period of political and legal changes, the Electoral Commission's role was limited to boundary demarcation. The management of elections was unconstitutionally bestowed on the Supervisor of Elections, a relatively junior official under the office of the Attorney-General, who in turn used members of the provincial administration as election officials. District commissioners, for example, were appointed as returning officers, responsible for electoral operations at the

constituency level. As all these officers were answerable to the President, who was invariably an incumbent in the successive elections in the absence of term limits on the office holder, they were patently partisan and lacked the kind of independence that would inspire public trust in the electoral process (Hassan 2015).

### **The Electoral Commission of Kenya (1992–2007)**

With the resumption of multi-party politics in 1991, this state of affairs became untenable, owing to a deep-seated mistrust of the provincial administration from the single party days. Establishing an autonomous body became inevitable and led to the Election Laws Amendment Act, 1991 (Adar & Munyae 2001). This Act abolished the position of Supervisor of Elections and reinvested all election management powers in the Electoral Commission. The Electoral Commission of Kenya (ECK), as it eventually came to be known, was at first not trusted to act impartially and competently, since its chairman and all its ten commissioners were appointed by the President, himself an incumbent and a candidate (Bannon, 2006).

Initially chaired by Justice Chesoni, a former judge who had been retired from the judiciary on bankruptcy grounds, the commission did not enjoy much public trust through the first three general elections in 1992, 1997 and 2002 (and the numerous by-elections in between) that it presided over. Many of its early decisions were contested on the basis of the commission's perceived partiality to the President as the sole appointing authority: it entrenched gerrymandering in the 1997 boundary review, hardly tackled electoral vice head-on, including infractions by its officials, and was a veritable den of corruption. With 22 commissioners, from 1997 onwards, it was also an unwieldy public body in which the lines between board and management were often unclear (Gichuki 2016).

**Table 1: Evolution of Kenya's EMB**

1963	Kenya's first Electoral Commission established with the speaker of the Senate as chairman. Independence elections held on 19 May 1963 (regional assemblies); 22 May (Senate); and 25–26 May (House of Representatives)
1966	'The Little General Election', by-elections for 38 seats in the Senate and House of Representatives, held after the formation of the Kenya People's Union (KPU) and the requirement for members changing parties to seek a fresh mandate from the electorate
1969	First general election held after the proscription of the KPU, in a de facto single-party political system.
1974	General elections held; five seats including that of President Jomo-Kenyatta uncontested/Unopposed
1979	General election held; President Daniel arap Moi and Vice-President Mwai Kibaki elected unopposed.
1983	First general election held under a de jure one-party system; President Moi elected unopposed.
1988	The infamous mlolongo (queue-voting) party nomination and general election held; massive electoral irregularities cited.
1991	Election Laws Amendment Act abolishes position of Supervisor of Elections and reinstates Electoral Commission's power to supervise elections.
1992	Justice (Rtd) Zacchaeus R Chesoni and ten others appointed as ECK commissioners
29 Dec. 1992	First general election after the resumption of competitive party politics.
1997	Justice (Rtd) Chesoni and 11 others appointed as ECK commissioners.
31 Oct. 1997	President Moi appoints ten new ECK commissioners nominated by opposition political parties.
29 Dec. 1997	Second general election after the resumption of competitive party politics
12 Nov. 2002	Samuel Kivuitu and 21 others appointed as ECK commissioners
27 Dec. 2002	Third general election after the resumption of competitive party politics
21 Nov. 2005	First referendum on a new Constitution supervised by ECK
3 Dec. 2007	Samuel Kivuitu and 21 others appointed as ECK commissioners
27–28 Dec. 2007	Fourth general election after the resumption of competitive party politics.
4 August 2010	Second referendum on a new Constitution supervised by IIEC.
9 Nov. 2011	The IEBC chairman and eight commissioners appointed by the President.
4 March 2013	The IEBC conducts the first election under the new constitution the fifth after the resumption of the competitive party politics
8 <sup>th</sup> Aug 2017	The IEBC conducts the second election under the new constitution the sixth after the resumption of the competitive party politics
26 <sup>th</sup> Oct 2017	Presidential elections were held following the Supreme Courts annulment of the results of the presidential vote in the August 2017 general elections
26 <sup>th</sup> Oct 2020	Building Bridges Initiative (BBI) report Launched at Boas of Kenya in Nairobi
21 Aug 2021	Court of Appeal upheld the illegality of the BBI Constitutional Amendment Bill's unconstitutional process after 10 hours of deliberation.
31 <sup>st</sup> Mar 2022	Supreme court nullifies the BBI
9 <sup>th</sup> Aug 2022	The IEBC conducts the third election under the new constitution the seventh after the resumption of the competitive party politics

**Source: Various reports and publications on Kenyan elections**

### **Pre-2010 Political Structure in Kenya**

Between 22 August 1978 and 30 December 2002, Kenya had one single president – Daniel Moi – who had managed to strengthen the office of the president through several amendments of the constitution and presidential decrees and declarations (Nepstad 2011; Wolf 2006: 198–199; Khapoya 1980: 17). The president had control over parliament, judiciary, and electoral commission. The president had powers to dissolve the parliament and appoint commissioners of the judicial service commission and high court judges and also had full control over the national budget (Nepstad 2011; Branch and Cheeseman 2008: 3). This system resembled the British colonial regime state structure that saw most of the state powers concentrated in the hands of one person, the governor who was the representative of the Queen of England based in Kenya.

Similar to the colonial structure, the president was responsible for the appointment district and provincial commissioners who were responsible for overseeing the distribution of various state resources functions such as health, education, security, and transport (Berman 1976). This means that at the time, the political system was highly centralized with little independence for local government authorities and even less participation by the citizens on policy and decisionmaking processes. Similar sentiments are echoed by the director of the African Studies Centre at Oxford University, David Anderson, who opines that the situation in Kenya at that time could be best described as “a shadow government entirely in the control of the president” (Sonoia 2018: 3). Systematic targeting of regions perceived to be supportive of the opposition parties, or with opposition parliamentarians, would tend to receive fewer resources than those controlled by the ruling party. Such practices jeopardized the democratic nature of the country.

Public institutions in Kenya before 2010 were seen not responsive enough to the people’s needs, perhaps due to the excessive control by the

executive and in particular the office of the president. For example, although the members of the parliament were directly voted for by the people, the institution of the parliament was under the control of the executive, with the president having the power to dissolve the parliament at his digression. A Kenyan professor at Harvard University’s international development department, Calestous Juma, puts it as “when voters realize elected officials aren’t going to address their concerns about social and economic inequality, it leads them to distrust institutions and produces a sense of disempowerment and disillusionment” (Juma 1998). The loss of trust in public institutions widened the gap between the government and the governed.

Corruption, which was widespread in the political sphere, further worsened the trust levels in public institutions. President Obama described the extent of corruption in Kenya during his ancestral home visit in Kenya (2006). He stated that “corruption has eroded the state from inside out, sickening the justice system so that no justice can be found; poisoning the police forces so that their presence becomes a source of insecurity rather than a source of security” (Gettlemanaug 2006). Indeed, a report published by the Transparency International corruption report in 2007 ranked Kenya number 150 out of 180 in the international corruption index (Transparency international report 2007). Due to corruption, Kenyan institutions were weakened to the extent that democratic values such as independence of the judiciary or the legislature, minority representation, free and fair elections, as well as human rights could not be achieved.

Consolidation and excessive control of power by the executive arm of the government have been facilitated by the election system of winner-takes all in Kenya. This raised the stakes at the ballot that forced aspirants and their supports to seek or condone electoral malpractices. Although there have been periodic elections, they were never free or fair according to post-election reports by domestic and international observer groups,

particularly in 1992, 1997, and 2007. Alleged interference by the executive on the outcome of election results not only compromised the basic tenets of democracy but also often resulted in violence, destruction, and loss of life and property (Kagwanja 2001: 547–550). Since 1992, there has been plurality in election processes in Kenya where several political parties would participate. However, after losing elections, the opposition parties had very little participation in public affairs. Losing the election means being alienated from development projects, employment, and even justice. Elections have been seen as a high stakes issue in Kenya, and therefore politicians have resulted in using several means to win the election, including corruption, manipulation of results, violence, and intimidation (Kagwanja 2003: 25–29). The passing of the 2010 Constitution was a landmark step in the democratization process in Kenya. In the next section, Kenya, under the new constitution, will be examined.

### **Post-2007 reforms and the Independent Electoral and Boundaries Commission**

The stage for a new EMB, following the 2008 post-election violence, was set by the Independent Review Commission of the 2007 Elections (IREC). IREC was appointed as part of the 2008 post-election settlement to inquire into all aspects of the general election held on 27 December 2007, with particular emphasis on the presidential election. In its report, IREC was withering in its findings and conclusions on the ECK, while it also criticized a diversity of other election role players, including the state. It found a number of faults with the 2007 general election and recommended a number of far reaching reforms aimed at improving Kenya's electoral practice" (Soniya, 2018: 3).

IREC concluded that the institutional legitimacy of the ECK and public confidence in the professional credibility of its commissioners and staff had been gravely and irreversibly impaired by the manner in which it had bungled the 2007 general election. It therefore recommended radical reform of the ECK, or the creation of a new EMB – with a new name,

image and ethos, committed to administrative excellence in the service of electoral integrity, composed of a lean policy-making and supervisory board, selected in a transparent and inclusive process, interacting with a properly structured professional secretariat (Roberts, 2009).

IREC also found Kenya's constitutional and legal framework relating to elections weak and inconsistent in ways that, in turn, weakened its effectiveness. It deplored the pollution of the electoral process by the conduct of many public participants, especially political parties and the media (Kanyinga, 2009). It also found serious defects in the voters' register that impaired the integrity of the 2007 elections. The commission concluded that there were serious anomalies in the delimitation of constituencies that impaired the legitimacy of the electoral process. The investigation found generalized abuse of polling, characterized by widespread bribery, vote-buying, intimidation and ballot-stuffing, and determined that there had been defective data collation, transmission and tallying, and ultimately the electoral process failed for lack of adequate planning, staff selection/training, public relations and dispute resolution (Gettleman 2007).

Fundamentally, it found that the integrity of the process and the credibility of the results were gravely impaired and irretrievably polluted. It recommended, therefore, a range of appropriate executive, legislative and political measures to enable the reconstituted or new EMB to initiate, popularize and sustain a national commitment to electoral integrity and respect for the inalienable franchise rights of Kenyan citizens – including the compilation of a new voters' register. IREC also stated that the ECK lacked functional efficiency and independence, and was incapable of properly discharging its mandate. It therefore recommended the empowerment of the EMB to conduct the delimitation of boundaries, elections and associated activities (Nepstad, 2011).

Later that year, Parliament passed the Constitution of Kenya (Amendment) Act, No. 10 of 2008,

dissolving the ECK and creating the Interim Independent Electoral Commission (IIEC), as the successor to the ECK for an interim period of two years, pending the conclusion of the Constitution review process, with enhanced election management powers and security of tenure. Strangely, in reconstituting the EMB, all former ECK staff were removed and re-deployed elsewhere in the public service, robbing the new body of critical institutional memory (Hassan, 2015). The IIEC not only had fewer commissioners than its predecessor (nine compared to the previous 21), but they were appointed through a competitive process that was tailored to engender public trust in the successor institution.

To address past gerrymandering, the Constitution of Kenya (Amendment) Act No. 10 of 2008 conferred the politically sensitive task of boundary delimitation on the Interim Independent Boundaries Review Commission (IIBRC), comprised of a chairperson and eight members, also appointed through as competitive a process as the IIEC, with security of tenure either up to the time it completed its task or when a new Constitution was adopted (Hassan, 2016). The IIBRC was required to review Kenya's administrative and electoral boundaries and make recommendations to Parliament for alterations. Unlike the IIEC, the IIBRC ended its term in relative ignominy, with internal divisions over the final boundary proposals generating wide political controversy. This also poisoned the process of adopting the report of the parliamentary committee that received the IIBRC's proposals on the new boundaries. In the end, it was agreed that the successor institution established after the conclusion of the Constitution review process would address issues left pending from the first review (Nyadera & Kisaka 2019).

### **The Independent Electoral and Boundaries Commission**

The Constitution of Kenya, 2010 (hereinafter, the Constitution), which was promulgated on 27 August 2010, established the Independent Electoral and Boundaries Commission (IEBC) as the responsible

agency for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament in Kenya (Githongo, 2010). A year later, Parliament passed the Independent Electoral and Boundaries Commission Act, 2011, as the commission's enabling law. While the initial Bill had proposed five commissioners, including the chairman, the final law provided for a chairman and eight commissioners. The chairperson and eight commissioners were subsequently appointed in a process resembling that of the predecessor IIEC – a selection panel appointed by the President and the Prime Minister invited applicants, shortlisted and conducted interviews, then forwarded the names of the successful applicants to the National Assembly, which vetted them and submitted the approved names to the President, who then appointed them following consultations with the Prime Minister. Before March 2013, the IEBC managed four by-elections while preparing for the general election.

Since it is a constitutional body, the IEBC institutional framework is expected to accord with constitutional and legal requirements, as well as commonly accepted norms of public administration and corporate governance (Akech, 2010). In light of past institutional challenges in the management of elections, the legal framework sought to create a body with integrity, one that is efficient in the management of election resources, has a service orientation and a high degree of professionalism (Francois *et al.* 2015).

The Kenyan general elections of 2017 were the second to take place under a new constitution introduced in 2010 that, among other things, sought to devolve power away from the president by creating 47 new county governments. They were also the first to take place in a context in which politicians and voters had practical experience of the powers of the new devolved elected posts and operations of the new political dispensation (Sonoiya 2018). As a result, the 2017 elections represent the first real opportunity to take stock of

whether the 2010 constitution has effectively reduced the stakes of political competition and thus the prospects for political instability. In the wake of the 2007 post-election violence – in which over 1,000 people lost their lives and almost 700,000 were displaced – peace negotiators, international donors, political leaders, civil society groups, academics and ordinary citizens turned their attention to the question of how such events could be prevented from ever happening again. One of the most common analyses to evolve out of this process of political soul searching was that political violence in Kenya was rooted in communal narratives of injustice and the country's 'top-heavy' constitution, which together conferred great power on the president and encouraged a divisive form of 'winner-takes-all politics'. This, combined with a history of political corruption and election-related violence, weak institutions, and close elections, was said to have created a 'perfect storm'. The implication of this analysis was clear: only by changing the political system could Kenya prevent something similar from happening again (Sonoiya 2018).

To many commentators' surprise, the 2010 constitution included meaningful reforms to address these concerns. Many of the appointment powers previously enjoyed by the president were made subject to parliamentary review, political rights and civil liberties were protected by a new bill of rights, and the government was mandated to facilitate public participation in political decision making (Hassan, 2015).

In order to address the impact of the 2010 constitution and frame this special issue, we focus on three particularly important and high profile constitutional changes that appeared to have the greatest potential to reshape the nature of political competition: the adoption of a 50% + 1 threshold for winning the presidential election, with the potential for a second round run-off; the system of devolution, complete with 47 new counties each with a directly elected governor, senator, women's representative and assembly; and, the introduction

of a Supreme Court with the right to hear presidential electoral petitions (Coppedge *et al.*, 2011). The latter was designed to encourage aggrieved parties to take a petition before the Court, rather than to the streets as the opposition did in 2007; with a more independent judiciary also envisaged as able to validate results and thus boost public confidence in the electoral process. Taken together, these reforms were designed to weaken the presidency and thus reduce the stakes of national elections, and to simultaneously encourage political leaders to form broader multi-ethnic alliances and adopt more inclusive campaigns (Lijphart, 2012).

Our analysis of the effectiveness of these reforms is based on long periods of fieldwork conducted by all five authors. This includes research on the 2017 elections, which began a year before the elections and ended six months afterwards, as well as more long-standing research on Kenyan history and politics. It also draws upon a series of nationally representative surveys and a careful reading of the media as well as of the other articles included in this special issue. Perhaps unsurprisingly given the partial way in which the formal rules of the game have been implemented in Africa's new democracies we find that the impact of the 2010 constitution on political dynamics has been mixed (Kisaka & Nyadera 2019). Following a hotly contested presidential election in which there were only two serious contenders – President Uhuru Kenyatta of the Jubilee Party and opposition leader Raila Odinga of the National Super Alliance (NASA) – the election rapidly descended into acrimony. After a tense and disputed counting and tallying process, Kenyatta was declared the winner with 54.2% of the vote. Odinga challenged Kenyatta's victory in court and for the first time in Kenya, and indeed in Africa, the election of a sitting president was nullified on 1 September 2017 when a majority of Supreme Court judges ruled that the presidential election was illegal, null and void, and ordered a repeat poll. This 'fresh' election was held on 26 October but was boycotted by Odinga and NASA who argued that –

with the same officials and many of the same procedures in place – the repeat election would be stolen from them once again.<sup>8</sup> In the resulting poll, Kenyatta was declared the winner with 98.3% of the vote on an official turnout of just 39%. NASA once again alleged that the poll was flawed, which – together with low or no voting across the opposition strongholds – undermined the credibility of yet another election in the eyes of many Kenyans (Kanyinga, 2019).

The complex legacy of the 2010 constitution is also revealed if we take a more fine-grained approach to the elections and look at the impact of the three high-profile reforms outlined above. The 50% + 1 threshold has provided further incentive for coalition formation, but this pattern was clearly evident in Kenya well before the 2010 reforms and has been driven as much by what Cheeseman and Tendi (2018) have referred to as a ‘politics of collusion’ between the country’s political elite as any specific feature of the electoral process. In turn, devolution provided a wider set of Kenyans a stake in the system because opposition leaders won many governor and senator races. Leaders who then had strong motivations to guard against violence in their own areas. However, in 2017 the victory of the ruling party in many lower level elections, including the capital Nairobi, meant that the rebalancing effect of county elections was less pronounced than it had been in 2013. Moreover, the aftermath of the polls demonstrated that devolution has also generated new political structures that can be used to channel dissent against the state, most notably when some opposition governors raised the prospect of their counties seceding from Kenya (Makana, 2017). Finally, the Supreme Court demonstrated its capacity to act as an independent institution to defend the quality of democracy when it became only the third court ever to annul the election of a sitting president. However, this ultimately did little to sustain the legitimacy of the election because the court immediately faced criticism from the government and was unable to

ensure the implementation of much needed reforms ahead of the ‘fresh’ poll (Mboya, 2020).

Indeed, while it is clear that the 2010 constitution has reshaped the political landscape in profound ways, it was not changes to the formal – i.e. written and codified – rules that ended the political impasse, but a personal deal struck between President Kenyatta and Odinga. In other words, the resolution of the 2017 electoral crisis was rooted not so much in the niceties of constitutional reform, but in a long history of elite-level pacts, a classic informal – i.e. unwritten and uncodified – institution. As a result, Kenyan politics is less ‘winner-takes-all’ than it may at first seem, but this is not simply a result of the introduction of a new political dispensation. Instead, the 2017 elections in Kenya serve as an important reminder of how formal institutions alone cannot change political dynamics (Sonoia, 2018).

Given this, one of the most important lessons to take from the recent polls is the extent to which the effects of formal institutions are shaped by their informal counterparts. As Cheeseman (2020) has recently argued, ‘efforts to understand political institutions and democratization in Africa will be dangerously incomplete unless they address the informal foundations of formal institutions.’ To date, the literature on African studies has typically focused on the way in which informal institutions such as patrimonialism may undermine their formal counterparts, leading to weak parties and parliaments. However, this is not inevitable. Instead, informal institutions may supplement and complement formal institutions. As Douglas North (2015) has argued, no formal institution is truly consolidated until it is underpinned by a set of supportive informal norms and practices. In the Kenyan case, informal institutions such as clientelism and patrimonial politics have undermined the effectiveness of many of the reforms introduced in 2010.

However, the same informal institutions also underpin the high degree of elite cohesiveness and informal deal making in Kenyan politics, which – as

with previous elite pacts, such as that forged between President Kibaki and Odinga following the post-election violence of 2007/8 – is what enabled Kenyatta and Odinga to reach a political compromise and avert a deeper political crisis (Bouka *et al.*, 2019). In this way, informal institutions both compete with, but also help to shape and compensate for, their formal counterparts. But while the elite deal struck between Kenyatta and Odinga boosted short-term political order, it had very different implications for other democratic virtues such as accountability. Press coverage suggests widespread support for the way that the ‘handshake’ between Kenyatta and Odinga returned the country to something like normality, but also reveals wider concern that it has done little to address underlying issues and has also undermined the evolution of a more effective and credible opposition (Shilaho, 2014).

#### **The 2017 elections: a summary**

Before analyzing the meaning and impact of the 2017 elections it is important to briefly set out some of the main events and controversies of the polls. Kenya’s 2017 election had eight presidential candidates but only two mattered. The incumbent president, Uhuru Kenyatta – with his deputy, William Ruto, as his running mate – stood on the ticket of the Jubilee Party. This party, the successor to the Jubilee Alliance of 2013, brought together several allied parties, including Kenyatta’s The National Alliance (TNA) and Ruto’s United Republican Party (URP) (Mutahi, & Ruteere, 2019). The second candidate was Raila Odinga – the flagbearer for NASA. This coalition, formed in January 2017, expanded the Coalition for Reform and Democracy (CORD) on whose ticket Odinga had run in 2013. Thus, while CORD had included Odinga’s Orange Democratic Movement (ODM), Kalonzo Musyoka’s Wiper Democratic Movement (WDM) and Moses Wetang’ula’s Forum for the Restoration of Democracy-Kenya (FORD-Kenya), NASA also included the Amani National Congress (ANC) headed by Musalia Mudavadi and *Chama Cha*

*Mashinani* (CCM) headed by Isaac Ruto (Cheeseman, 2018)

Kenyatta, and many lower-level Jubilee candidates, benefited from the powers of incumbency in multiple ways (Cheeseman, 2018). This included the use of state resources and officials and interference with media freedoms. Odinga and his supporters also accused Kenyatta and Jubilee of manipulating the polls in multiple other ways, both during the campaigns and after. These accusations were informed by bitter memories of the 2007 and 2013 elections, which many opposition supporters believed that Odinga had won; by a longer history of malpractice that stretches back to the single-party era; and by ongoing developments (Willis & Gona, 2013).

Following a sustained campaign by Odinga and his supporters, which reached a peak in mid-2016, the previous commissioners of the electoral management body – the Independent Electoral and Boundaries Commission (IEBC) – had been forced to resign, with new commissioners only coming into office in January 2017. However, the opposition continued to challenge every aspect of the process, including the updating of the electoral register, the printing of ballot papers, and the relationship between paper and digital results. Some inexplicably bad decisions on procurement and chronically poor communication from the IEBC heightened suspicions further. So too did the abduction and murder of the IEBC’s acting head of information technology, Chris Msando, less than a week before the polls – a crime which remains unsolved (Kanyinga & Odote, 2019).

On Election Day itself, 8 August 2017, the process seemed at first to go very well. The new biometric voter identification kits worked smoothly in the vast majority of cases, while initial comments from electoral observation teams were positive, even buoyant. However, in the hours after the polls closed, things began to go wrong (Kanyinga & Odote, 2019). Polling stations had been expected to transmit the results of the presidential poll electronically, and to follow this up by sending a



digital image of the paper results form, which would then be taken physically to the tallying center for verification. Many results did come in electronically, and Kenyatta took an early lead. But the number of rejected ballots seemed unrealistically high, and Odinga gave a press conference at which he alleged that the electronic figures were bogus and that the IEBC servers had been hacked. Worse still, some polling stations could not transmit the results and/or were unable to send the digital image (Kanyinga & Odote, 2019). Three days of accusations and rumor followed; the electronic tally crept up, but around a quarter of the digital scans remained unavailable. Amidst growing uncertainty and confusion, NASA produced what they claimed was evidence of hacking, though independent scrutiny did not confirm this. NASA also released what they claimed to be the real results, giving Odinga victory, but these generated no more confidence than the official tally.

To make matters worse, the IEBC gave inconsistent explanations of the problem with the results transmission, creating uncertainty as to whether they had all the paper forms. Then, on the evening of 11 August, the IEBC declared Kenyatta the winner of the presidential election, despite the fact that not all of the forms had been accounted for and the official timeline meant that they had two more days in which to iron out any problems. NASA immediately denounced the outcome and – after a tense few days of uncertainty and intermittent demonstrations that were violently suppressed with significant loss of life lodged a petition against the result (Lockwood, 2019).

In court, NASA's case rested on the allegation of digital fraud; the presidential results, they said, had been altered through interference with the IEBC's servers, and the paper record subsequently adjusted to fit these. Out of court, they continued to insist that they were in possession of the real results, and that Odinga had won. Since NASA, due to problems with their own system of party agents, did not have reliable copies of all polling station results, and since copies of all forms were not

available on the IEBC website, their claims were hard to either prove or disprove. The IEBC denied NASA's allegations. However, senior electoral officials struggled to explain the problems and discrepancies in the process and failed to give access to the servers to allow the allegations to be thoroughly investigated (Lockwood, 2019). To the great surprise of most commentators, the Supreme Court – by a majority verdict of four-to-two – made the bold decision to annul the presidential election on the basis of multiple irregularities in process and the failure of the IEBC to allay its concerns. The judgment offered no opinion as to whether those irregularities had changed the outcome and ordered that a fresh presidential election be held within sixty days.

This verdict appeared to be a victory for Odinga, and he and his supporters celebrated it as confirmation that the election in August – as well as those in 2007 and 2013 – had indeed been rigged. By contrast, Kenyatta officially accepted the judgment but also made no attempt to hide his anger at the Supreme Court, while a number of Jubilee politicians openly called for the Court's powers to be reduced and/or its members replaced (Lockwood, 2019). But while NASA supporters celebrated the outcome, the opposition was left with a major challenge. Jubilee had outperformed NASA in the other electoral races, securing a majority in both the National Assembly and the Senate, and gaining control of a majority of counties. NASA claimed that this was also the result of 'computer-generated results,' but while challenges to the results were heard in court, Jubilee could call on more elected politicians to help campaign for Kenyatta in the fresh polls. With fewer elected politicians, more limited resources, serious challenges of internal cohesion – as some who had lost in the August elections switched their support to Kenyatta – and the same electoral management body and rules in place, NASA was in a difficult position. As a result, when the second campaign began it was more uneven than the first (Lockwood, 2019).

The quality of the 're-run' was also called into question by the government's decision to force through revisions to electoral legislation that were explicitly intended to prevent the annulment of another election on procedural grounds. This represented a significant break with precedent; the changes pushed through parliament during the campaign against protests by NASA, civil society activists and some members of the international community (Bleck & Van de Walle, 2018). Amidst these developments, Odinga abruptly announced his withdrawal from the election in early October on the grounds that the minimum reforms to the electoral process that he had demanded an extensive list, which could not practically have been managed in the time limit set by the court – had not been met. This decision was also informed and justified with reference to the very public turmoil within the IEBC, whose commissioners were deeply divided. One commissioner resigned and fled the country a week before the fresh polls citing security concerns, after which the chair made an extraordinary speech in which he seemed to teeter on the brink of resignation (Lockwood, 2019).

Against a backdrop of growing intimidation by government supporters, which included the use of excessive force against periodic protests, the Supreme Court called a session to consider a challenge to the timing and organization of the fresh election (Bleck & Van de Walle, 2018). However, five of its seven members failed to appear – including one whose driver had been mysteriously shot at the day before. As a result, the session was inquorate and the election went ahead according to the timetable favored by the government. When the fresh election was finally held on 26 October it thus took place in an atmosphere of confusion and controversy. Given that Kenyatta was the only real candidate, the official turnout of 39% was far from the clear legitimation that Jubilee had sought, but was not insignificant. Ultimately, Kenyatta officially secured 7.5 million votes against 8.2 million in August, although both figures continue to be disputed. The geographical distribution of the vote

and fact that polling stations across four counties in Luo Nyanza were unable to open due to protests by opposition supporters also revealed a deeply divided country (Cheeseman, 2018).

### **Winner-takes-all politics and the 2010 constitution**

The controversy surrounding the outcome of the 2017 elections demonstrates that political competition in Kenya remains high stakes (D'Arcy & Nitstotskaya, 2019). Does this suggest that the 2010 constitution has failed in its bid to make Kenyan politics more inclusive, address past grievances, change political culture, and hence render electoral contests less divisive? Perhaps the strongest evidence for such an interpretation is that in addition to the violence and disputes that surrounded the polls the government introduced legislation into the National Assembly that sought to amend the country's electoral regulations to prevent the Court from invalidating an election on procedural grounds alone by requiring judges to demonstrate that any electoral irregularities were large enough to have changed the result (Mutahi & Ruteere, 2019).

Although the Supreme Court retained the right to rule the legislation unconstitutional, the episode highlighted the precarity of Kenya's democratic gains. In this sense, the contestation over the election not only demonstrated the limited impact of some areas of the constitution, but also its vulnerability. However, while there are many reasons to be cautious about the transformative impact of constitutional reform, to conclude from this that the reforms introduced in 2010 have simply failed would be to oversimplify the complex impact of the multifaceted constitution. There is instead a need for careful counter-factual analysis to demonstrate the effect of new institutional arrangements; for example, it could be that in the absence of a new constitution the political violence and instability surrounding the 2017 elections would have been substantially worse (D'Arcy & Nitstotskaya, 2019).

### **The 50% + 1 clause and the presidency**

Prior to 2010, what critics called Kenya's 'imperial presidency' gave the incumbent a potent bundle of powers, combining formal control over an enduring administrative framework (known as the provincial administration) with the ability to make appointments to multiple public and parastatal offices and extensive (often informal) influence over a wide range of resources – from government procurement contracts to the distribution of development projects. Control over such resources made the president Kenya's apex patron – the point of convergence for all networks of clientelism (Hornsby, 2013).

The 2010 constitution sought to remedy this in multiple ways (Harrington & Manji, 2015). In addition to devolving considerable power away from the presidency, the country's electoral framework was changed. Since 1992, the presidential election had been decided by a plurality, though with a requirement that the winning candidate must also win at least 25% of the vote in at least half of Kenya's provinces, failing which there would be a run-off. In the 1992 and 1997 elections, Daniel arap Moi of the ruling Kenya African National Union (KANU) had won the presidential vote with less than half of the total votes cast – 37% and 40%, respectively. In contrast, the 2010 constitution demanded an absolute majority to secure victory, with a run-off between the two candidates with the largest popular vote to be held if no one secured over 50%+1 vote (Kanyinga & Odote, 2019)

This new requirement was part of a wider architecture of laws aimed at encouraging the building of national political parties, which, collectively, have not been very successful (Ghai, 2019). Since 2010, political parties have continued to be mostly ephemeral and linked to particular politicians who are seen, more or less explicitly, as ethnic patrons. The partial exceptions have been ODM and Jubilee, each of which has been the focus of some efforts to create a wider national organization and membership, though they still rely

heavily on key ethnic spokesmen to help mobilize support and remain rooted in particular areas and ethnic groups. The requirement for an absolute majority has however encouraged a tendency, already apparent before 2010, that makes presidential elections more than 'winner-takes-all' events (Harrington & Manji, 2015). The presidency has emerged as the focus of a prolonged process of negotiation, in which elections appear not as decisive moments that settle the distribution of power, but rather as markers that confirm the terms of one set of elite pacts, while immediately opening a whole new phase of deal-making over the next election cycle.

Notably, between 1963 and 1964, Jomo Kenyatta of KANU became the first black Prime Minister of Kenya, and the Queen of England (Queen Elizabeth II) remained as the Head of State. KANU had supported a presidential system during the constitution-writing process in London, while KADU was supporting the parliamentary system (Hodder-Williams 1980: 477–479). Less than 1 year (1964) after winning the elections, the KANU-led government changed the constitution of the Westminster model to a presidential system (Muigai 2004: 201–203; Malhotra 1990: 7). Kenya remained under a presidential system until 2007 when a crisis broke out following a disputed general election (Francois *et al.*, 2015). There was a consensus even in the early 1990s that the country needed a set of new rules (constitution) since the existing constitution, which was put in place at independence, had undergone several amendments that gave rise to a dictatorial regime that ruled for 27 years under one president

However, it is not clear that this aspect of Kenyan politics can solely be attributed to the formal political changes made in 2010, in large part because it has been an occasional feature of Kenya's presidential politics since the single-party era. Moi's succession to the presidency on the death of Jomo Kenyatta was the product of an elite pact made with an eye on ethnic constituencies. During these years, informal backroom negotiations

were even more apparent in lower-level races where competition could be intense (Hornsby, 2013). The unsuccessful challenger to an established regional 'Big Man' could catch the eye of a patron if they secured enough votes: a losing campaign could launch a political career, leading perhaps to appointed office and then back into electoral politics. In presidential politics, both Jomo Kenyatta and Moi, while they had cabinets that were skewed towards their own co-ethnics, also ensured that they had ethnically diverse cabinets that brought in key point-men from across the country. In turn, in the face of increasingly competitive multi-party politics in the 1990s and a small parliamentary majority, Moi brought various opposition leaders into KANU; most notably, Raila Odinga and his National Development Party (NDP) in the wake of the 1997 elections. Such negotiations became even more significant from 2002, when the presidential election in December was preceded by an intense period of deal-making that produced the broad National Rainbow Coalition (NaRC) behind Mwai Kibaki. The results of the election were – uniquely in recent Kenyan history – accepted by all major players; but the immediate consequence was a renewed period of negotiation amongst an elite whose eyes were set on the next election, and on their need to reassure their support base (in every case largely an ethno-regional one) that their patrons were looking after their interests. In short, the 2002 election results provided a bargaining tool – evidence of a leader's ability to mobilize ethnic voters in future and a sign of their ability to make the government legitimate in the eyes of their distinctive constituency (Kramon & Posner, 2013).

However, the most far-reaching deal-making followed the 2007 elections, which pitted the incumbent President, Mwai Kibaki, now in the Party of National Unity (PNU), against Raila Odinga and ODM. While Kibaki was announced the winner by a narrow margin, multiple and egregious malpractices made a majority of Kenyans and analysts believe that Odinga had actually won. Combined with the dramatic violence of the post-election period, this

crisis of confidence prompted a negotiated settlement and the formation of a Government of National Unity (GNU) in February 2008 that ushered in an uneasy peace (Cheeseman, Nic, & Murray, 2017). When that settlement fractured, the subsequent manoeuvring again looked both back and forward. Voting patterns from 2007, new dynamics introduced by the International Criminal Court's intervention, and considerations of who would get to be the presidential candidate in future polls, all formed the basis for alliance-building ahead of the next elections in 2013. Against that background, the exclusion of Odinga and his allies in the wake of the 2013 elections might be the exception rather than the rule – an exception based on the confidence of Kenyatta and Ruto that they had a deal that would endure for another electoral cycle, and perhaps made bearable for Odinga by the extent of the CORD coalition's wins at lower-level elections (Ghai, 2019).

Viewed in this context, the 'handshake' between Odinga and Kenyatta that brought an abrupt end to months of political brinkmanship in March 2018 seems to emerge out of a long-term pattern of elite deal making. While this has been encouraged by the 50% + 1 rule, it has its roots elsewhere and is likely to continue to be a major feature of Kenyan politics into the future. Term limits mean that Kenyatta cannot stand again; so the 2017 election results immediately became the basis for negotiations to put together an alliance that can deliver a majority in 2022. The immediate rewards to Odinga (and subsequently to Odinga's ally, Kalonzo Musyoka, when he endorsed the deal) were much less significant than those of 2008 (Lynch, 2011). The new constitution has made it difficult to give much more than some relatively minor appointments, and Odinga and his allies have struggled to insist that his appointment as an African Union special envoy on infrastructure development is a significant post. Yet perhaps more important is the evident sense that Odinga is somehow back in the networks of influence and patronage, appearing with the president at some events, and with some access to

power, and that he may be supported by Kenyatta and others in 2022. As a result, the declared winners of the election have not quite taken all – because they have good reason to reach out to at least some losers (Hassan, 2015).

The handshake was also important in a broader sense, because it brought an end to public demonstrations against the result and to the multiple other activities through which Odinga and his allies had sought to bring the legitimacy of the government – and indeed, of the state – into question (EUEOM, 2017). As discussion of secession and the setting up of a parallel government were dropped, the focus of politics switched immediately to the 2022 presidential election. At the time of writing, in November 2018, preparations for that election have once again taken the form of elite negotiations. Kenya's ability to come back from the brink of another electoral crisis perhaps had less to do with the formal constitutional changes introduced in 2010, and more with an established set of informal institutions through which elites have managed, and to an extent shared, power since independence (Lockwood, 2019).

### **Devolution and making national losers local winners**

For devolution to reduce the stakes of political competition by giving marginalized groups a stake in the political system (at least) two conditions need to hold. The first is that devolution generates a robust system of government that is not simply an extension of central control and therefore represents a credible opportunity for a broader range of leaders and communities to play a role in the political system. The second is that these positions are genuinely competitive and that opposition parties are able to win significant representation. Only when both conditions are met will parties and communities that lose national level elections feel that they still have a stake in the political system as a result of their representation at the county level (Lockwood, 2019).

Despite the controversies that have surrounded the introduction of devolution in Kenya, there are good

reasons to think that the first condition holds, at least to a significant extent. Immediately after devolution was introduced in 2010, opposition leaders, governors and journalists fretted that the government – known for resisting efforts to devolve power – would find ways to stifle and ultimately suffocate the new political system. There has been some evidence of that. Just before the new constitution came into force, Kibaki pushed through legislation to re-structure the provincial administration as a parallel administrative structure under the Office of the President, vitiating what some saw as a major aim of devolution. Devolved powers over the allocation, use and registration of land – again, a core and highly charged issue in the debate over devolution – remain limited and contested (Gadjanova, 2019).

However, while important, central government encroachment on county level politics has been far less effective than Kenya's history of decentralization would have suggested: governors have shown 'both the motivation and the capacity to resist capture by central government'. As a result, the proportion of government revenue given to the counties has consistently exceeded the constitutionally mandated minimum of 15%, hovering around 21% of the annual budget. This is also a product of broad support. The 2010 constitution was passed by public referendum with a sizeable majority of the vote (69% to 31%), while, according to a national survey conducted in August 2014, 70% of Kenyans still supported the principle of devolution, with this increasing to almost 80% in opposition strongholds (Gadjanova, 2019).

One significant indicator of the vibrancy of devolution, and the meaning of the devolved positions within the wider body politic, is that those who hold these posts enjoy control over significant resources. In this respect, the impact of devolution has been largely felt through two layers of elected officials: governors and MCAs. Governors enjoy a budget that far exceeds that of MPs and are able to construct their own patronage networks through their control of contracts and appointments. They

are also located at the local level in the counties and are therefore not 'distant' from voters as is the case with the national executive. With local presence, they have emerged as prominent regional spokespeople willing to protect and promote local interests to maintain support.<sup>51</sup> They are capable of airing regional grievances on behalf of a far greater number of people than MPs, whose constituencies are much smaller. Moreover, unlike the councilors who represented the wards in local government under the previous constitution, most MCAs have a ward office, and some have control of a ward development fund despite uncertainty over the legality of the same. Precisely because they control resources and are more available than other elected politicians, MCAs have become an increasingly important cog in the Kenyan political machine (Gadjanova, 2019).

While this has not led to a dramatic change in the way that campaigns are conducted, or the capacity of women to get elected, it has led to a genuine shift in how Kenyan voters view the importance of different political positions. While the attention of aspirants and voters had tended to focus on presidential and legislative races in the past, the contests for governors and MCAs have become more prominent since 2013 (Ghai, 2019).

While the number contesting gubernatorial seats fell slightly, public attitudes reveal the importance of that position, as well as that of MCA. Significantly, while the MCA position is officially perhaps the least prominent and significant of the roles discussed here, it is seen by many citizens to be one of the most important. But tellingly 14% identified MCAs as the most important – the second highest figure overall – while 11% selected governors. MPs, once the critical cog in the Kenyan political machine, polled just 3%. Moreover, the most historically marginalized part of the country, North Eastern Kenya, actually rated the MCA as the most important post. It is therefore clear that devolution has established a robust tier of government that Kenyan politicians and voters are deeply invested in (Cheeseman, 2018).

The second criteria was also clearly met in 2013, and again in 2017, although to a lesser extent. In the first election to be held under the new devolved system, Odinga's CORD alliance won around half of all governorships, including the capital city, Nairobi, and the strategically important county of Mombasa, home to the country's main port. Indeed, in 2013, candidates from Odinga's own ODM (one component of CORD) won 26 governorships, double that of Kenyatta's TNA (one component of Jubilee), and elected 377 MCAs – more than any other single party. It was therefore clear that in many parts of the country, Odinga supporters were national losers but local winners and that this was one of several reasons that the controversy surrounding the 2013 elections did not generate a greater degree of unrest and instability (Cheeseman, 2018).

However, in 2017, the consolatory power of local wins was significantly diminished for two reasons. The first, was a sense that the presidency remained the ultimate prize and one that had once again been stolen from the opposition. The second was the weaker performance of opposition candidates in these lower level races (Cheeseman, 2018). Many of these outcomes were disputed by the opposition, but in contrast to the presidential election relatively few of the results have so far been overturned. If the results are largely legitimate, they are most likely explained by two factors. First, Kenyatta's incumbency ensured that Jubilee had effective control over state resources and officials, and was therefore able to outspend the opposition at both the presidential and the county level. Second, in between 2013 and 2017 Jubilee transformed itself from a coalition into the Jubilee Party, which, as Elena Gadjanova shows, 'was able to solve intra-party infighting and put forward single candidates.' For example, by being able to compensate individuals that lost out in the party primary elections held to select candidates – for example, by offering alternative positions or forms of employment to those not selected – the Jubilee Party suffered relatively few damaging defections. In turn, this led to a more cohesive campaign:

whereas in 2013 candidates from different parties within the Jubilee Alliance had competed against each other, dividing the vote in some parts of the country, this did not happen in 2017. Even though Jubilee candidates often still faced competition from 'friendly' parties, which supported Kenyatta's re-election, or from Independents (Cheeseman, 2018).

By contrast, while Odinga was able to secure a greater degree of unity among NASA leaders than CORD had done in 2013, the opposition alliance was not able to agree on a common slate of candidates. As a result, candidates from different components of NASA competed against one another in many sub-national elections (EUEOM, 2017). Along with the fact that opposition candidates tended to have less funding and fewer opportunities to co-opt state resources and officials, this helps to explain why Jubilee won a greater proportion of sub-national contests than it had done previously (Mutahi & Ruteere, 2019). Most notable in this regard was the victory of Jubilee's Mike Sonko in the symbolically important gubernatorial race in Nairobi. This diminished opposition success in lower level races reduced the extent to which devolution was able to sustain public support for the wider political system. However, the victory of opposition candidates in NASA strongholds such as Nyanza and the Coast also meant that they still controlled considerable resources in their own back yard and so continue to benefit from devolution. It is therefore unsurprising that opposition leaders continue to call for devolution to be strengthened rather than abandoned (Willis & Gona, 2013)

However, while there is evidence that the introduction of county government has softened the blow of losing national elections, and thus contributed to political stability, the aftermath of the 2017 elections demonstrates that the consequences of constitutional change are not always predictable or desirable (Kanyinga & Odote, 2019). In the weeks before and after the re-run of the presidential election in October, it became clear that decentralization may also reinforce patterns of

ethnic politics and facilitate challenges to the prevailing constitutional order in at least two ways: first, through the ability of disgruntled leaders to use the county administration to fund efforts to subvert the political system; and second, by fostering sub-national identities that may ultimately undermine efforts to build a cohesive national polity. For example, when Odinga announced the formation of a 'People's Assembly' to represent opposition viewpoints and contest Jubilee's victory in November 2017 – effectively calling into question the legitimacy of the government and challenging the primacy of the National Assembly – he turned to the counties to make his plan operational. Several opposition-controlled county assemblies passed bills in support of the formation of assemblies, and also helped to raise funds for opposition activities – for example, by helping to ferry supporters to Nairobi for Odinga's unofficial swearing-in in January 2018. This county support, together with contributions from the diaspora and wealthy individuals, enabled the cash-strapped opposition to remain active (Mutahi & Ruteere, 2019).

County-level structures were also used to threaten the possible break-up of Kenya as a national unit. For example, at the Coast – which has voted for Odinga in the last three elections by a ratio of about 2 to 1 – it was Mombasa Governor Ali Hassan Joho who made headlines by stating that, along with a number of other elected politicians in the region, he would campaign for secession from Kenya (Lockwood, 2019). In the process, Joho apparently – if only briefly – offered endorsement to a secessionist movement that has been intermittently active since independence. The implication – as Hannah Waddilove argues in her contribution to this volume – is that a political framework that forces governors to be responsive to the hopes and fears of their supporters may generate centrifugal pressures as well as integrative ones when popular opinion turns against the political system (Mutahi & Ruteere, 2019).

The talk of secession and alternative governments elicited a strong reaction from the government, with dramatic threats of legal clampdowns, and the withdrawal of funding from counties. These were not followed through, nor did parts of Kenya actually secede. Instead, the rhetoric of both secession and recentralization subsided, as governors and central government stepped back from confrontation in the wake of the 'handshake' between Kenyatta and Odinga. Given this, the 2017 election suggests that although the new political structures introduced under devolution have the potential to moderate 'winner-takes-all' politics – the continued prevalence of presidentialism notwithstanding – they may also exacerbate sub-national identities in a way that generates new challenges for the political system. While the decision to divide Kenya into 47 smaller counties – as opposed to, say, 7 larger provinces – has reduced the capacity of any one county or group of counties to break away, it is also important to note that the situation remains fluid, and further opposition losses at the sub-national level in future elections could undermine the stabilizing effects of devolution (Mutahi & Ruteere, 2019).

### **The Supreme Court and electoral fairness**

The final constitutional innovation for discussion is the creation of a Supreme Court with the exclusive mandate to hear and determine presidential petitions. The 2007 election descended into widespread violence, in part, because the opposition did not trust the judiciary – which had been packed with the president's allies – to make a fair ruling and thus took their dispute to the streets (EUEOM, 2017). Together with long-standing claims of judicial bias and corruption, this ensured that judicial reform was of central concern for the architects of the 2010 constitution, which, among other things, established an independent Judicial Service Commission to recommend judges to the president and established a new Supreme Court with exclusive jurisdiction to hear and determine presidential election disputes. The constitution also 'set a strict time line of 14 days during which the

Supreme Court should hear and rule on a presidential election dispute' and 'did away with the requirement for personal service in election petition matters' (Cheeseman, 2018).

These developments, together with the public vetting of judges and magistrates between the 2007 and 2013 elections, were seen to play a positive role in 2013 when Odinga again rejected the presidential result, but opted to take an election petition to the Supreme Court. However, while the petition helped to bring various irregularities to light – and thus shed further doubt on Kenyatta's slim first-round victory with 50.07% of the vote – the Court ruled that the petitioners had not shown that the results had changed the outcome and that Kenyatta's victory should thus hold. Odinga begrudgingly accepted this decision, but continued to insist that the election had been stolen (Lynch, 2014). The decision also attracted broader criticism for having been swayed by a desire to maintain stability and order; disallowed evidence on petty technical grounds to the detriment of the public interest; and thus reinforced 'the powers of the executive and the model of a unitary state beyond the reach of the law'.

With the memories of 2013 in mind, NASA suggested ahead of the 8 August polls that they would not bother to bring a presidential petition before the Court in 2017. But just before the deadline, NASA filed a petition (Hassan, 2016). Leaders argued that they had been forced to do so by Jubilee who 'had started a campaign of muzzling civil society and the media' and that they wanted to give the Court 'a chance to redeem itself'. However, once the petition began, it became clear that NASA had likely been preparing to go to Court for some time (Waddilove, 2019). Partly because Odinga kept his cards so close to his chest, and partly because of the decision of the Court in 2013, Jubilee leaders appeared to be complacent, assuming that Kenyatta's victory – which was much clearer than it had been in 2013 – would be upheld. However, in a landmark ruling on 1 September 2017, the Supreme Court declared in a majority decision of 4 to 2 that,



while the impact on the final results was unknown, the IEBC had not conducted the presidential election of 8 August in accordance with the constitution and applicable laws and that the election should be re-run.

However, while this landmark decision was widely acclaimed at home and abroad as a sign of judicial independence and 'democratic maturity', it prompted a backlash from President Kenyatta and his allies as the president castigated the judges as 'criminals' who he would 'fix' for having 'overturned' the will of the people. At the same time, and as discussed above, Jubilee pushed through new legislation that would make a future petition more difficult, whilst public infighting within the IEBC brought the electoral commission into further disrepute. As Karuti Kanyinga and Collins Odote (2019) outline in this volume, Jubilee's response formed part of a broader pattern of the politicization of the judiciary over the course of the electoral cycle as politicians from across the political divide sought to use the courts to advance their own agendas. As part of this process, judicial decisions were consistently criticized by the losing side.

The experience of the judiciary in 2017 points to both its strengths and limitations: the courts displayed a willingness to make decisions independent of, and against, both the government and opposition; but proved unable to ensure that those decisions were accepted by the losing side, or to ensure that the electoral process itself enjoyed broad credibility (Ghai, 2019). This is for two key reasons. First, like most judiciaries around the world, the Supreme Court lacks the power of the purse or the sword. In the absence of financial resources, enforcement capacity, and legislative power, the impact of the Court's rulings thus largely depends on how others respond to them. This was evident in the government's response to the Court's nullification of the first presidential election, which included a vilification of the judiciary, a refusal to discuss electoral reform, the implementation of new laws that would make a future petition more

difficult, and a clear lack of concern as to the IEBC's crisis of legitimacy (Lockwood, 2017). It was also evident in NASA's decision to boycott the 'fresh polls' that were ordered by the Supreme Court, to refuse to bring a second petition before the Court, and in its rejection of the Court's ruling in this second petition as the result of political pressure.

Second, the courts operate within a wider political system in which their operations are not grounded in a set of supportive informal norms – instead, their independence is consistently undermined by persistent patron-client politics and breaches of the rule of law. This is critical as it helps to explain how and why politicians were able to respond in the ways that they did and not lose the support of the majority of their constituents. The outcome is a judiciary that can – and did – make important decisions that influenced the electoral process, but which could not determine the course of political debate or ensure the credibility of the polls (Gadjanova, 2019).

#### **Institutions and the process of democratization**

As in all countries, political stability and democratization in Kenya depend on the interaction of formal and informal institutions. As Helmke and Levitsky (2019) have argued, formal and informal institutions may compete, with the latter undermining the former, but customs and norms may also support strong democratic institutions and compensate for weak ones. It is easy, given Kenya's history of corruption and electoral controversies, to assume that the relationship between formal rules and informal norms is always problematic. Indeed, many of the formal provisions in the country's new constitution and electoral regulations, such as rules regarding the regulation of political parties, have been undermined by contradictory informal processes that are often described as 'patrimonial', such as patron-client leadership and handouts. This dynamic is particularly challenging as a result of its interactive nature: as we have seen, the introduction of new political structures designed to devolve power has had the unintended

consequence of breathing fresh life into a divisive form of ethnic politics at the county level.

This tension between formal and informal institutions is evident in each of the submissions to this volume (Kanyinga & Odote, 2019). The contributions show how devolution has created important new positions that have changed political dynamics in Kenya, without fundamentally changing the norms, values and expectations that animate electoral competition. Politicians still mobilize support through patronage politics and along ethnic lines by seeking to present themselves as those best positioned to protect and promote the interests of their constituencies in ways that disadvantage women aspirants. Incumbents seek to maintain control of key sources of patronage such as land and still benefit from skewed powers and resources. Important police reforms between 2007 and 2013 were undermined by a failure to address an institutional culture that supported the use of excessive force. A better prepared judiciary was able to deal more efficiently with both the pre-election cases and post-election petitions that were brought before it, yet was not immune to politicians' efforts to use the courts for their own ends. At the same time, legal decisions revealed ideological and political divisions within the judiciary, while the Supreme Court was able to act as an important election management body, but not to ensure the polls' credibility (Mutahi & Ruteere, 2019).

However, the contributions to this volume also reveal how formal and informal institutions do not always compete, and are sometimes complementary. In this vein, patronage politics in the context of devolution is shown to help guard against ethnic violence as politicians seek to ensure stability within their own counties (Hassan, 2015). Moreover, as this Introduction has demonstrated, the political stability achieved in Kenya through the 'handshake' was only possible because of the existence of strong and historically rooted informal institutions of patron-client ties and elite collusion, which enabled once bitter rivals to negotiate their

way out of a political crisis. In other words, informal institutions help to explain both why Kenyan elections so often take the country to the brink of disaster, *and* why it has yet to fall into the abyss (Lockwood, 2019).

As we have argued, the fact that political leaders ultimately found a way to avoid further unrest speaks to the relatively high level of elite cohesion in Kenya, which means that despite pronounced 'winner-takes-all' tendencies, losers do not always 'lose-all'. Indeed, it is precisely the willingness of elites to take the interests of some of their rivals into account that has consistently brought Kenya back from the brink of a deeper and more irreparable political crisis. Most notably, it was this capacity to compromise across ethnic lines at critical moments that underpinned a peaceful transfer of power from Kenya's first president, Jomo Kenyatta, to his vice-president from a different ethnic group, Daniel arap Moi. And it was the same process of negotiation and accommodation between Moi and the leader who replaced him as president, Mwai Kibaki, that facilitated the country's first peaceful transfer of power via the ballot box in 2002. The creation of a power sharing government to end the post-election violence in 2007 – and indeed the cross-party movement in support of the 2010 constitution – rested on similar foundations. But just as these prior processes have often seen stability achieved at the expense of genuine political and economic transformation, the 'handshake' of 2017 also came with costs (Mutahi & Ruteere, 2019).

The agreement between Kenyatta and Odinga was a relief to many because it ended a dangerous period of instability. However, it did little to resolve the factors that gave rise to it. Odinga cannot erase his statements about Kenyatta's lack of legitimacy as president, or NASA's decision to swear him in as the people's president. Similarly, Kenyatta cannot walk back his threats to the judiciary, or the way the security forces were used for partisan ends. Instead, these actions have further entrenched existing grievances and divisions, which means that it will be

even harder to persuade voters that the next elections will be free and fair (Mutahi & Ruteere, 2019). Turning this situation around will require the institutionalization of the reforms introduced in 2010 – a process that will require much greater political will than has so far been available. However, we should not underestimate the way in which elite pacts have underpinned the emergence of a more dynamic, competitive and democratic political system in Kenya, if only by preventing it from falling apart (Bleck & Van de Walle, 2018).

### **Building Bridges Initiative: a catalyst for shifting political alliances and divisions**

The handshake in March 2018 between President Uhuru Kenyatta and his political opponent and former Prime Minister, Raila Odinga, was intended to signal an end to the acrimony which followed the 2017 presidential elections. It was hailed as a landmark in the Building Bridges Initiative (BBI), which sought to lay the foundations for national healing, including pledges to end historical and electoral injustices and unite Kenya's citizens. However, the outcome of the BBI process – a report launched in October 2020 that proposed to amend various aspects of the Kenyan constitution to address issues of political inclusivity and electoral injustice received a mixed reactions from Kenyans (Anyango, 2019).

Following the launch of the BBI report, the “handshake principals”, Kenyatta and Odinga, convened rallies across the country to popularize the document. Many of their supporters called for the proposed amendments to be voted on in a referendum. However, supporters of the Deputy President, William Ruto, regard the BBI proposals as a means of blocking his own run for the presidency in 2022. Ruto and his allies publicly criticized the BBI process, condemning it as designed to secure positions for current leaders in an expanded executive, rather than as a systematic reform to make the political system more inclusive. They also claim it will undermine the judiciary's independence, and marginalize sparsely populated areas of the country. Ruto argues that Kenyans have

a civic duty to interrogate the report, iron out contentious issues, and then hold a 'non-contested referendum'. Ruto's supporters launched various petitions in relation to the legality and validity of the proposed amendments, and in May, Kenya's high court overturned the President's bid to amend the constitution (Chege, 2017).

In what has been lauded as a sign of judicial independence in Kenya, on 20 August 2021 the court of appeal upheld the High Court ruling following four separate appeals made by President Uhuru Kenyatta, Orange Democratic Movement (ODM) Leader Rt. Hon Raila Odinga, the Independent Electoral and Boundaries Commission (IEBC) and the BBI national secretariat (Branch, 2019). In response, MPs aligned to the President are expected to take forward the constitutional amendment agenda to Parliament, having identified 52 clauses in the BBI proposals that they say do not require a referendum to effect. Odinga on the other hand has made public his acceptance of the Court of Appeal ruling. According to him, it is time to move on in pursuit of the bigger goal of addressing the issues facing the country. This statement aligns with recent political developments seen as aimed at laying the ground for Odinga's Presidency, including recent political gatherings and the unveiling of a new slogan *Umoja Inawezekana – Azimio La Muungano* (Unity is Possible – Our desire to unite our people and the country). The big question now is: will the spirit behind the handshake and the Kenyatta–Odinga pact hold? Could this be the beginning of a new political movement and coalition?

### **Constitutional tussles: parallels with 2007**

The power struggle over the proposed constitutional amendments has ominous parallels with events prior to the 2007 elections, which set the scene for unprecedented election violence. The 2007 elections followed a divisive constitutional referendum in 2005, which played out as a contest between the incumbent president, Mwai Kibaki, and the then Opposition leader Raila Odinga, along with their respective ethnic bases. The currently

proposed referendum is similarly seen as a forerunner of next year's electoral contest between Odinga and Ruto (as current President Kenyatta is barred from running for a third term). The cost of a referendum – on top of the impacts of COVID, which has gutted major economic sectors, such as tourism, and increased Kenya's debt burden – is seen as an unnecessary drain on the economy (Anderson, 2015).

Communities for and against the BBI and a constitutional referendum can be found across the country. The President's own Kikuyu ethnic group appears split, with many confused and suspicious of the current political friendship between Odinga and Kenyatta. In some places, such as Nairobi's informal settlement of Kibera, inter-ethnic tensions and violent incidents between the historically antagonistic ethnic groups of Luo and Kikuyu have reduced since the 'handshake'. This suggests that the BBI process may have contributed to a positive shift in the relationship between divided ethnic communities in certain areas. The rapprochement appears fragile, however. In recent Saferworld consultations about conflict concerns with communities in Nairobi and Kisumu, respondents expressed fears that should Kenyatta and Odinga fall out – and the 'handshake' is only a gentleman's agreement rather than a binding commitment – there will likely be a resurgence of violence between ethnic groups (Benson, 2015).

### **Shifts in the political narrative from inter-ethnic to inter-class competition**

At the same time, a new political dynamic seems to be emerging in Kenya, triggered by COVID and its impacts, but underpinned by decades of socio-economic inequality. It is based on the fact that successive Kenyan political leaders (whether in the State House or in Opposition) have come from a handful of families, and it re-frames the contest away from one of ethnic identities and alliances towards one of the downtrodden masses against the elites. It is often characterized as a contest between 'hustlers' – Kenya's vast underclass typically working in the informal economy – and the

'dynasties' of the Kenyattas, Odingas and other political families (Court & Durham, 2014).

Many analysts regard this new narrative about the political contest as a shrewd move by Deputy President Ruto to redefine identity politics in Kenya (Ferree, 2014). The dynasties are deliberately conjoined in the public imagination with the far-reaching, all-powerful 'Deep State' – echoing rhetoric deployed, and fears evoked, by Trump in the US and populist leaders elsewhere. Given widespread poverty and entrenched socio-economic inequalities, this narrative of 'hustlers v. dynasties' resonates strongly with many Kenyans (Cheeseman, Lynch, & Willis, 2016). Combined with the restrictions that have had such a damaging impact on the livelihoods of the many young people who depend on the informal sector, it speaks to growing discontent with the government. The corruption that permeates many aspects of Kenyan public life has also thrived during the pandemic, giving rise to the so-called 'COVID millionaires' and reinforcing the appeal of the hustler/dynasty narrative (Champion, 2009).

### **Inflammatory rhetoric by political leaders fueling conflict**

Meanwhile, for the first time in the history of Kenya, the president and his deputy are openly pulling in different directions (Hassan, 2015). This has led to shifting loyalties and clear rifts within the ruling coalition, causing tensions in various parts of the country, notably at political rallies convened by the deputy president's allies. In September 2020, a Kenyan court charged MP Oscar Sudi with two counts of hate speech and one of offensive conduct for remarks that the National Cohesion and Integration Commission (NCIC) stated could have led to a breach of the peace. Sudi's comments echoed those made by his colleague, MP Johanna Ng'eno, who also faced hate speech and incitement charges. The arrests of these two leaders sparked public protests, especially in areas considered Ruto's support bases. In apparent response to these incidents, the NCIC proposed a new law ahead of the 2022 general election that seeks to outlaw

discrimination and incitement of Kenyans along ethnic, religious or racial lines and give the commission powers to bar politicians cited as 'hate-mongers' and individuals charged with incitement from contesting political positions (Nyadera & Kisaka, 2019)

Despite such initiatives to pre-empt inflammatory political behaviour, as well as ethical safeguards in the constitution, the political temperature continues to rise. Ruto's incendiary rhetoric about the hustler nation v. the dynasty/Deep State taps into the need for a target for the months of pent-up fear and anger that have been simmering during the COVID era. The concern is that grievances about class inequalities are being instrumentalised to serve the interests of political leaders in much the same way that grievances based on ethnic identity have been mobilised in the past. Many Kenyans fear widespread class conflict fuelled by the hustler v. dynasty narrative. *Bodaboda* (motorcycle taxi) riders, for example, are seen as hustlers, while car-owners are associated with the 'dynasty'. Thus a deputy Governor had his car torched by *bodaboda* riders following an accident that involved his vehicle and a motorcycle. In Kibera, Mathare and other informal settlements, business owners and those living in more accessible areas are also regarded as representatives of the dynasty. This rhetoric threatens to rekindle historic urban violence between tenants and landlords, which has had far-reaching consequences (Sonoiya, 2018)

**Rising insecurity and violence during the pandemic**  
COVID has not only exposed Kenya's socio-economic divides but also aggravated a range of other sources of insecurity and violence. As in so many other countries, there has been a sharp rise in sexual and gender-based violence, with Nairobi recording significantly higher case numbers than before the pandemic (Githongo, 2010). The pandemic has increased the vulnerability of women dependent on the informal sector who are either not able to access these livelihood opportunities due to the restrictions in place, or whose contribution is no longer necessary due to work-

from-home arrangements (for example washer-women). The decline of job and livelihood opportunities as a result of the pandemic has also led to an increase in petty crime. As the country experiences a 'fourth wave' of the pandemic following a short period in which restrictions were eased, many are blaming the government, with fears that economic recovery will be impossible for people who have only just started re-engaging in livelihood activities (Gichuki, 2016).

Linked to this are the repercussions of the government initiative to cushion citizens from the economic impacts of COVID through the *Kazi mtaani youth initiative*. The initiative was designed to protect youth in informal settlements from the loss of livelihood opportunities (Hassan, 2015). It sought to provide a form of social protection for workers whose prospects for daily or casual employment were disrupted by COVID restrictions. While the initiative was lauded for contributing to a state of calm and reduced criminality in parts of the country, there is considerable skepticism about the skills-training component. Many perceive it as a short-term pacification gesture targeted at unemployed youth but with little serious commitment to develop skills that will enable long-term employment. Furthermore, the dependable cash-flow it has provided for these young people ended in June, at a time of heightened political activity as Kenya is preparing for next year's elections. This could have grave ramifications for peace and security as, without this economic safety net, unemployed youth will be all the more easily mobilized to violence (Lockwood, 2019).

#### **Securitization of COVID response has deepened historical distrust of the police**

As elsewhere in the world, the role of Kenya's security sector has also been in the spotlight for repressive and sometimes violent behaviour to enforce lockdowns intended to halt the spread of COVID. Kenya's police are reported to have used heavy-handed tactics, with the government's own Independent Policing Oversight Authority (IPOA) receiving numerous complaints of police violence

since the first curfew was imposed in March 2020. These include allegations of extra-judicial killings, shootings, assault, general harassment and sexual assault. There were also reports of police breaking into homes and businesses, and carrying out looting and extortion. The IPOA described 35 of these as 'watertight' cases of police brutality related to curfew enforcement, 15 of which resulted in death. According to a recent report entitled '*The Brutal Pandemic*' published by the Kenyan organization, Missing Voices, a total of 157 people were killed or 'disappeared' in 2020 against the backdrop of COVID enforcement measures (The Daily Nation News, 2020).

Kenya has a long history of excessive and disproportionate use of force by law enforcement officers. The experience of past elections has reinforced the view that the Kenyan police are instruments of political actors – *utumishi kwa waniasia* – as opposed to an impartial body that protects the rights of citizens and provides service to all Kenyans, as their *utumishi kwa wote* ('service to all') logo implies. The country is therefore preparing for elections in a context where there is deep distrust and high levels of animosity between the police and the public (Kenya Police Report, 2020).

#### **Lack of confidence in impartiality and capacity of electoral institutions**

Distrust of Kenya's police reflects a wider distrust of the state, especially among youth, and a profound sense of political disenfranchisement. This is compounded by persistent concerns about the credibility and political independence of Kenya's electoral institutions and their capacity to manage the electoral process. The results of Kenya's 2007 and 2017 elections were widely contested, leading to post-poll violence, and the role and conduct of the main electoral management body, the Independent Electoral and Boundaries Commission (IEBC), was criticized in both cases. The reforms proposed to restore public confidence in the integrity and legitimacy of the IEBC have still not been fully implemented, which raises serious

concerns about a peaceful transition of power in next year's election (Daily nation September 2020)

#### **Tensions over constituency boundaries**

The IEBC is also centrally involved in another contentious political issue – and another long-standing source of conflict – namely the demarcation of constituency boundaries. The demarcation exercise, which is due to take place before the 2022 general election, is likely to cause further political fragmentation. It is expected that the IEBC will base the process on the 2019 national census results; however, some political leaders have disputed the accuracy of this census. The IEBC is empowered to merge or disband constituencies that do not meet the threshold of 170,000 people per constituency. This process, however, is likely to inflame tensions, especially in areas where boundaries are already in dispute – such as Mt. Elgon constituency in Bungoma County – and could be a trigger for violence during the election period (Kagwanja, (2021).

#### **Key Tenets of Democracy in Kenya**

Political scientists have over the last two decades or so set out to provide a more comprehensive measurement and conceptualization of democracy (Munck and Verkuilen 2002; Coppedge et al. 2011; Schedler 2001; Treier and Jackman 2008; Beetham 1994). This has increased the scope and quality of democracy. Several indicators are today being used to examine the status of democracy in different countries. These include assessing issues such as elections, freedoms, and separation of power, among others. While pointing out these indicators, some are difficult to measure even among advanced democracies accurately. For example, measuring press freedom or corruption is very difficult not to mention the increasing diversity in different parts of the world and how "outsiders" such as migrants are treated. That said, it is undoubtedly that most African countries are struggling to achieve good scores on these indexes. governance, free and fair elections as well as inclusivity are just but few examples of these challenges. In Kenya, predictable postelection

violence has persisted since the return of multiparty politics in the early 1990s. With clear indicators of democracy, the persistent debate as to whether democracy is good for non-western countries or not can be addressed.

Two different arguments can be put forth in this debate for the case of Africa. First, a majority, if not all, African countries have adopted a “western” model system and political structure that seems not to be efficient in the continent. The answer to this may lay deep in the question of whether African democracy should be compared with that of the west. To state our position on this rather complex question, we believe that if African countries are to sufficiently judge if the western political structure is compatible or can efficiently serve the people, then each component of the system, including “western democracy,” needs to be implemented. It falls short of any logical conclusion only to borrow the structure (hardware) and not the values (software) that make these structures function. Particularly issues such as freedom, transparency, accountability, meritocracy, and justice remain problematic in many developing countries.

The second argument is that while the debate as to whether Kenya/Africa’s democracy can mirror that of western countries remains divisive and controversial, one thing that is not disputable in their comparison is that the challenges faced by governments in Africa are not as severe as they are in the majority of the western countries. Of course, democracy alone cannot explain the progress in the west and lack of progress in Africa; however, while the governments in the west are able to meet the challenges that may affect their people, in Africa this seems to be an uphill task as the continent fails to meet national, regional, and international goals set to improve economic and political welfare of their citizens. Indeed, it would be simplistic to argue that Kenya and other African countries have not made any progress with regard to the indicators mostly used by scholars of comparative politics to gauge the status of a country’s democracy, but more efforts need to be made. Kenya has had a

mixed experience in achieving democracy as seen below.

### **Right to Vote**

The right to vote in Kenya is enshrined in the constitution, and any adult citizen above the age of 18 years has the right to vote in the local, parliamentary, and national elections, with no alarming instance of individuals being denied the right to vote between 1964 and 2017. However, there have been few instances of complaints by some people that the government is delaying providing them with the relevant documents needed to register as voters. There have been instances where some found their names missing on the voter register. Some efforts have been achieved in the last decade, such as the introduction of electronic voter registration as well as the efficient provision of necessary to vote document to every citizen above 18 years.

### **Right to Be Elected**

In 1964, the ruling party changed the constitution from Westminster parliamentary system to the presidential system; during the process, the opposition party leader (Daniel Moi) was coerced to join the government and given the position of vice president (Widner 1993). The government then banned any opposition political party, thus making it difficult if not impossible for those outside the ruling party (KANU) a chance to be elected. In 1982, the National Assembly, under the influence of the executive, amended the constitution to make Kenya a de facto one-party state denying any other political party the right to participate in elections (Cheesman 2003). In some cases, political leaders were detained without any trial until an election period has passed. After strong local and international pressure, the government was forced to repeal the contentious Section 2A of the Constitution of Kenya in 1992, paving the way for the reintroduction of the plural party system in Kenya. Subsequent general elections saw the participation of different political parties in the elections, but allegations of rigging in 1997, 2007, and 2017 still raise the question of whether

participating in an election with predetermined results amount to satisfy this clause.

### **Right for Political Leaders to Compete for Support and Votes**

The right to compete and seek support from voters in an election is an important practice in a democracy. Indeed, there has not been any direct cases an individual has been denied the right to seek support and votes. Indirectly though, there were cases where political parties were banned, which means it was impossible for leaders to get a political party to use as a vehicle to seek support and votes. The new constitution (2010) gave powers and autonomy to the Registrar of Political Parties, and today there are over 70 registered political parties in Kenya, but they form two dominant coalition political parties (NASA and Jubilee Coalition). The post-2010 constitution has seen an influx in the number of aspirants in various political positions countrywide. This principle is, however, undermined by ethnic-based political parties and voter bribery (Ndegwa 1997; Bratton and Kimenyi 2008).

### **Elections that Are Free and Fair**

The extent to which a country is able to conduct free and fair elections is an important measure of democracy. Indeed, Kenya has conducted elections periodically after every 5 years. However, these elections were seen as simply procedures to legitimize the leadership of the day. The system of the electoral system had a lot of loopholes, for example, the Mlolongo method used in 1988 is a good example of an election that was not conducted freely or fairly (Shilaho 2014; Katumanga 1997). It required voters to stand behind the candidate of their choice, and headcount was conducted; this scandalous method had a lot of downsides. There were reports of people who had been counted in front running behind to be recounted; in some cases, hot water or bees were thrown on the line with the most people, and as the people ran for their lives, the one with the shortest line was declared the winner. Because there were no cast votes, there was no proof of how many

votes were cast for a particular candidate. In 2007 the presidential election was conducted in a messy manner that the chairman of the Electoral Commission of Kenya, Mr. Kivuitu, who announced the disputed presidential results, admitted that he did not know who exactly won the elections. The events saw people who never won the election becoming leaders, and, in both cases, the results of the elections sparked violent protests across the country. In 2013 and 2017 and 2022 several election petitions were filed by contestants in various courts with a good number of the seats being nullified, including the August 2022 presidential election. The extent to which free and fair elections are conducted remains a contentious issue in Kenya to date.

### **Freedom of Association**

Between the 1970s and late 1990s, the freedom of association was abused by the government through various state agencies and coercive powers. It is remembered that the Kenya Police Special Branch and the Police force ensured that a gathering of more than three people was not possible. This began after a failed attempted coup in 1982 that was carried out by junior officers of Kenya Air Force. However, since the beginning of the year, 2000, much has been achieved with the 2010 constitution reaffirming the same giving power to associate, membership to trade unions, organizing conventions, and others to the people

### **Freedom of Expression**

Reform crusaders in the 1990s were preoccupied with, among other issues, the demand for freedom of expression to be respected in Kenya. Specifically, during the single-party rule, there was little space for one to freely express themselves with the government using various agencies such as the infamous special branch to crack down on government critics. With the repeal of Section 2A and reintroduction of pluralism in the party system, many thought that freedom of expression would have been equally achieved. However, as Kiarie (2004: 55) points out, there was very little achieved as government operations to secretly silence critics



continued. Many people ended up in prison and charged with malicious counts that included being members of illegal groups, treason, as well as the illegal use of communication gadgets. Since 2002, this has reduced significantly, with many people being able to express themselves freely and demand more accountability from the government. There are, however, more efforts needed in the long run to secure this freedom.

### **Alternative Sources of Information**

According to Dahl, people living in society need to have access to alternative sources of information at all times to make informed decisions. Kenya's information sector was characterized by the state-run television network and radio services throughout the 1960s to 1990s. This was used to spread state propaganda and silence any whistleblowers who intended to expose state misdeeds. From 2002, there have been substantial changes partly as a result of amendments in information and communication laws, which allowed the private sector to own broadcasting stations. Also, the spread of social media platforms has opened up a new window for information to spread fast and wide. Sometimes this has been counterproductive, as was seen with the spread of fake news during the 2022 elections in Kenya.

### **The 2022 General elections**

#### **IEBC Clearance**

IEBC registered all aspirants expected to run for the various elective seats between 29<sup>th</sup> May to 7<sup>th</sup> June 2022. William Ruto and Raila Odinga were cleared on 4 and 5 June respectively, in an event that would see them present their nomination papers. In June 2022, reports began to emerge that Sakaja Johnson presented a fake certificate to IEBC from a Ugandan university; that he never graduated from the University of Nairobi (UoN). Initially, Sakaja had stated in interviews that he was an alumnus of UoN, where he purportedly pursued a bachelor's degree in Actuarial Science (Daily Nation, 2022).

It would later emerge, Sakaja was yet complete his studies at UoN since his enrollment in 2003. He

admitted in a radio interview that he did not graduate from the city's university, blaming President Uhuru Kenyatta of plotting to destroy his political ambitions. At the time of clearance, he had presented a Bachelor of Science in Management certificate from Uganda's Team University, where he alleged he was an external student. In 29 June 2022, the Commission for University Education revoked his degree, pending investigations. The IEBC declined to revoke Sakaja's clearance, stating it can only disqualify the UDA candidate if issued with a court order. Uganda's Inspector General ordered a probe into the legislator's degree saga (Standard, 2022). In 12 July 2022, the High Court dismissed petition over Sakaja's degree, faulting the petitioner, Dennis Gakuu Wahome, for failing to discharge the burden of proof that the gubernatorial candidate degree certificate was fake.

By the end of clearance, Independent Electoral and Boundaries Commission (IEBC) gazetted a total of 16,098 candidates contesting 1,882 elective slots. IEBC received first batch of ballot papers on 7 July 2022. The ballot papers were printed by a Greek firm known as Inform Lykos, situated in Athens, which was awarded the tender worth Ksh3 billion. The Kenya Integrated Election Management System (KIEMS) will be used as the primary mode of voter verification, while the manual used as a supplementary when three KIEMS kits fail. This led to a vast discussion across the political spectrum on the possibility of KIEMS are subject to manipulation, then a manual register was important; noting that Smartmatic International, the supplier of the digital register is not short of controversy (Star News Kenya, 2022).

In 21 July 2022, three Venezuelan nationals were intercepted at the Jomo Kenyatta International Airport (JKIA) with what was believed to be sensitive election materials. IEBC released a statement on their social media platform decrying the detention of Smartmatic International staff. The Directorate of Criminal Investigations (DCI) boss George Kinoti released an official statement

claiming the two Venezuelan nationals traveled with expired passports, were in possession of 'questionable' material and were on a business trip. Among them, the foreigners had stickers that were to be used in election. IEBC explained that the stickers had information on the polling station, polling centre, ward, constituency and county. In 28 July 2022, following their public spat, DCI and IEBC ended their row, amicably agreeing that the issue with the stickers had been solved (IEBC, 2022).

### **Voting Day**

On 8<sup>th</sup> August 2022, IEBC suspended the gubernatorial election in Kakamega and Mombasa counties, as well as the parliamentary polls for Pokot South, Rongai and Kacheliba constituencies ((IEBC, 2022). Chebukati noted that the ballot papers for affected areas had errors, including pictures for candidates and details. Apart from the aforementioned counties and constituencies, IEBC also suspended elections in five wards over candidates' deaths. Voters in the affected areas will head to the ballot on 23 August 2022. On Election Day, voting exercise was postponed elections in Eldas Constituency in Wajir County to 10 August 2022, due to security concerns (IEBC, 2022).

The voting exercise was greatly affected by the failure of the Kenya Integrated Elections Management Systems (KIEMS) kits failed to pick voters' fingerprints. IEBC allowed the use of manual register in parts of Kakamega and Makueni counties after a blight of hitches from the KIEMS kits. Some polling stations opened later than the stipulated time of 6 am, leading to delayed voting (IEBC, 2022).

By midday of Election Day, 6,567,859, constituting to 30% of registered voters had cast their ballots. An hour to closure of polling centers at 5 pm, the electoral commission reported a voter turnout of 12,065,803 equating to 56.17% of registered voters. On 10th August 2022, IEBC announced 14 million Kenyans, who were identified electronically, had voted bringing the total percentage to 65.4%. Member of Parliament for Kimilili

Constituency Didmus Barasa has been accused of shooting dead his rival's security guard, fleeing from the scene following the event (IEBC, 2022).

### **Vote Counting**

The 9th of August 2022 marked an important milestone in the democratic and constitutional history of the country. Kenyans exercised their civic responsibility of voting in their leaders. They had their say in a peaceful and orderly manner. The general atmosphere of peace and tranquility that characterised the campaigns, the polling day and in most cases, during the tallying, is indeed a sign of a maturing democracy (IEBC, 2022).

Late on Thursday, the chairman of Kenyatta's Jubilee party, which has backed Odinga, issued a statement alleging "massive subtle rigging" and claiming the "electoral process was highly compromised" after Ruto's new party made a strong showing in an area traditionally dominated by Kenyatta. The statement alleged voter intimidation, bribery, illegal display of campaign materials in polling stations, mishandling of party agents and incorrect use of election materials. It provided no evidence and did not explain why the allegations had been made so late (IEBC, 2022).

The electoral process certainly produced winners and losers. That is democracy. Some seasoned politicians were shown the door while new entrants were ushered into elective positions. It is in order to congratulate the winners, as well as lauding the other 'winners', for having given a good account of themselves. They will live to fight another day (IEBC, 2022).

### **Close presidential poll**

A good leader is one who embraces both those who have had their say and those who have had their way. A closer scrutiny of the results in many elective positions reveals that it is was a really close call. This is especially so in the presidential polls. So, from a national perspective, no one candidate can chest thumb and claim an overwhelming victory. William Ruto was declared the winner of Kenya's presidential election by a razor-thin margin after

seeing off a challenge from five-time contender Raila Odinga, whose campaign officials and supporters rejected the official results (IEBC, 2022).

Ruto, 55, garnered 50.5% or 7.1 million of the valid votes cast on Aug. 9, and his main rival Odinga 48.9%, the Independent Electoral and Boundaries Commission said at a ceremony in the capital Nairobi, on Monday. Ruto has pledged to rein in debt, spend 500 billion shillings (\$4.1 billion) to support entrepreneurs and farmers, create jobs for millions of unemployed youths and give half the posts in his cabinet to women. Chaos erupted shortly before the results announcement, as four of the nation's seven electoral commissioners rejected the outcome. A short while later, gunshots rang out as Odinga supporters stormed the podium where the IEBC officials were gathered, and denounced the counting and verification process. Their rejection of Ruto's victory bodes ill for political stability in East Africa's largest economy, where previous disputed votes were marred by violence (IEBC, 2022).

"We cannot take ownership of the results that are being announced because of the opaque nature with which the results have been handled," IEBC Vice Chairwoman Juliana Whonge Cherera told a televised briefing at a separate venue. Wafula Chebukati, the IEBC's chairman, said he stood by the results despite being subjected to intimidation and harassment. "I've done my duty according to the constitution," he said after the security forces restored order. The election was held against the backdrop of soaring living costs and a crippling drought. Public debt totaled 8.56 trillion shillings by the end of May -- servicing it is projected to eat up more than half of the state revenue, and the International Monetary Fund has warned the nation is at high risk of debt distress. Ruto has ruled out restructuring the debt, an option favored by his rival (IEBC, 2022).

### **Supreme Court**

Kenya's Supreme Court on Monday upheld the election of William Ruto as the country's president-elect in a unanimous ruling that sharply rejected

arguments made by opposition candidate Raila Odinga and his supporters, who had sought to overturn the election results. The verdict marks a likely final blow to the presidential ambitions of Odinga, a 77-year-old veteran opposition leader, and means that Ruto, 55, the country's populist deputy president, will in coming weeks be inaugurated. In an opinion read by Chief Justice Martha Koome, the court lambasted allegations made by Odinga's legal team as "just another red herring" and "hearsay." (IEBC, 2022).

The Supreme Court of Kenya on Monday, September 5 upheld the election of William Ruto as the country's fifth president. Chief Justice Martha Koome, who read out the judges' summarised judgment, said a comprehensive verdict will be released in 21 days' time. The judges unanimously ruled that Ruto was validly elected as president during the August 9, 2022 presidential election. The United Democratic Alliance (UDA) candidate, Ruto, as per the IEBC, got 7.18 million votes (50.49 per cent) to be declared the winner of the August 9 polls. Odinga, who ran on the Azimio la Umoja-One Kenya Coalition Party ticket, got 6.94 million (48.85 per cent) of the votes to emerge second in the contest. Following the decision, Ruto will be sworn into office on September 13, 2022, which is the first Tuesday after the court delivers its verdict following a presidential petition (IEBC, 2022).

Article 141 (2) (b) of the Constitution says: "The president-elect shall be sworn in on the first Tuesday following the seventh day following the date on which the court renders a decision declaring the election to be valid, if any petition has been filed." Raila Odinga, who was Ruto's main challenger in the polls, led a consolidated petition that sought to overturn Ruto's victory, alleging electoral malpractice by the Independent Electoral and Boundaries Commission (IEBC). Odinga, who was the lead face in the seven accepted petitions, argued that the technology used in transmitting presidential results was infiltrated by people who intercepted forms 34A and changed results in Ruto's favor (IEBC, 2022).

On this claim, the Supreme Court judges found that the technology deployed by the IEBC was transparent, saying the petitioners did not produce evidence to suggest any wrongdoing. Cementing his argument in court that the polls were unfair, Odinga said four IEBC commissioners broke away from the team that announced results on August 15, led by Chairperson Wafula Chebukati. The breakaway commissioners were Juliana Cherera (Vice-chairperson), Justus Nyang'aya, Irene Masit and Francis Wanderi. In their response, IEBC said the commissioners only took off at the last minute after being compromised, saying the four had been televised reading presidential results from the constituencies in turns. Commissioner Abdi Guliye, who stuck by Chebukati, said in his affidavit that Cabinet Secretary (CS) Raphael Tuju and former Attorney-General Amos Wako attempted to entice the commissioners with goodies to "massage" the presidential results in favour of Raila Odinga. Guliye said he, Chebukati and Commissioner Boya Molu rejected the proposed gifts, while Cherera, Wanderi, Masit and Nyang'aya entertained the thought (IEBC, 2022).

### **Key issues**

At the centre of the election dispute, were nine key issues including the role of the commissioners in verifying and tallying the results? The petitioner asked the court to overturn Ruto's win, saying the technology deployed by the IEBC did not meet the standards of integrity, verifiability, security and transparency, an argument quashed by the judges. In the consolidated petition, the challengers of the election results also argued that there was interference with the uploading and transmission of forms 34 from the polling stations to the IEBC's portal. The judges said the petitioners did not raise any evidence to support this allegation (IEBC, 2022).

The court was also put to task to rule on whether forms 34A on the public portal had different results from those physically taken to the national tallying centre at the Bomas of Kenya. Chief Justice Martha Koome said there was no evidence produced in court to prove this claim. The seven Supreme Court

judges also made their ruling on whether the IEBC's decision to postpone elections in Kakamega, Mombasa and six other areas suppressed voter turn-out. The judges found that there was no evidence to show that this move disenfranchised Raila Odinga only. Odinga's team also sought a ruling on whether the votes cast for president exceeded those polled for other elective seats. The judges said the variances in these two sets of votes were within allowable margins as argued by the IEBC in court. Odinga had also questioned whether Ruto indeed got the constitutional threshold of 50 per cent plus-one vote to be lawfully declared the winner. The judges agreed with the IEBC that Ruto indeed secured enough votes to be declared the presidential race winner (IEBC, 2022).

*"We find that the petitioners did not provide watertight evidence to warrant the setting aside of the results announced by the IEBC," said CJ Koome. "The declared-president elect attained 50 per cent-plus one of all the votes cast in accordance with Article 138 (4) of the Constitution," she added. The judges were also put to task to establish whether the divisions among the IEBC commissioners affected the conduct of the August 9, 2022 presidential election. On this, the judges ruled that the IEBC conducted the election in compliance with the Constitution. In their judgement, read out by Chief Justice Martha Koome, the judges said: "The power to verify and tally results vests in the Commission, and not the chairperson of the IEBC. The chairperson cannot allocate himself or herself sole powers to verify and tally the results. We, however, take cognizance of the fact that the four commissioners actively participated in the verification and the tallying exercise from the beginning up to nearly the end of the result declaration. "The events of August 15, 2022 [in which four commissioners broke away from the commission], came as a surprise." The judges also said the four disgruntled commissioners did not produce evidence to suggest that the results in their possession differed from those announced by the Chairperson of the IEBC Wafula Chebukati. The CJ*

Martha Koome-led bench concluded that the malpractices and irregularities highlighted by the petitioners were “not of such magnitude to warrant nullification of the presidential election”. On the issues raised, that formed the foundation of the petition, the judges observed that there were no major discrepancies and variances to warrant a nullification of the August 15 presidential results.

### **Petitions and the Rulings**

The eight petitions challenging the elections were all dismissed.

The court found some were based on forged documents and "sensational information", Chief Justice Martha Koome said in a unanimous decision on behalf of the seven judges. No credible evidence that the electronic voting transmission system had been tampered with by a supposed "middle man" was presented, she said. Ms Koome also said that Mr Ruto had met the constitutional threshold of garnering 50%+1 of votes cast. The ruling ends a protracted election dispute that started after polls closed last month, leading to widespread uncertainty across the country, in case of a repeat of previous outbreaks of election violence. Mr Odinga's team had used the dissent of four of the seven electoral commissioners - who disowned the poll results because they had fallen out with the chairman - to bolster his case. But while noting the "dysfunction" of the commission in managing its internal affairs, the court said it was not convinced

that the claims of the chairman running a one-man show was enough to undermine the election.

"Are we to nullify the outcome of an election on the basis of a last-minute boardroom rupture whose details remain scanty?" the judges asked. The judges also reprimanded lawyers and petitioners who filed falsified documents in court - a rebuke meant to deter spurious petitions in the future. The ruling prompted celebrations in Mr Ruto's home area of the Rift Valley and parts of the Central Province where his running mate hails from. In Mr Odinga's stronghold of Kisumu, there was a subdued atmosphere. Streets were deserted and some businesses closed for the day.

Kenyans will now be watching the political repercussions of Mr Ruto's win for the main players.

Mr Odinga has now lost five elections. At 77 it's hard to see how he will run again or even if he will remain active in opposition politics, though his statement lambasting Monday's ruling says he will continue with the "struggle for transparency, accountability and democracy".

As for outgoing President Kenyatta, who worked hard to prevent his deputy from succeeding him, it will be interesting to see if their relationship remains strained. Most importantly, Kenya has shown that it can resolve elections disputes without resorting to the violence we have seen in the past.

## Ruto makes history



Figure 1: President Elect Dr. William Samoei Ruto (PhD)



Figure 2: President Uhuru hands power to Dr. William Samoei Ruto (PhD)

This becomes the first time in Kenya's electoral history that a presidential candidate wins the presidency at the first attempt. William Ruto, who turns 56 years old on December 21, 2022 will be Kenya's fifth president. He campaigned on economic relief pledges and policies that appeal to the low-income earners in the society, including offering to establish a Sh50 billion annual hustlers' fund that would allow small-scale business owners to borrow capital from the government. His key challenger Odinga, who is 77 years old, has unsuccessfully vied for president on five occasions – 1997, 2007, 2013, 2017 and 2022. In this year's general election, he ran on an anti-corruption campaign and a promise to offer Sh6,000 monthly stipend to low-income households, in what he described as a social protection programme.

Despite being the current deputy president, Mr Ruto was not backed by the outgoing President, Uhuru Kenyatta, who instead campaigned for his former rival, Mr Odinga. But Mr Ruto said he would be speaking to both men shortly and promised that his government would look after them in retirement. "We are not enemies, we are Kenyans. Let us unite to make Kenya a nation of which everyone shall be proud to call home," he said. In a recorded message, Mr Kenyatta congratulated the leaders who had been elected in the general elections but didn't mention Mr Ruto by name. The

president, who has clashed with the judiciary several times in the past, expressed his misgivings about the Supreme Court ruling, but said he would abide by it.

#### **A Triumph for Kenya's Democracy**

After weeks of uncertainty, Kenya's Supreme Court has unanimously upheld Deputy President William Ruto's win in the 9 August presidential election. On 5 September, the judges rejected allegations of irregularities presented by lawyers for Raila Odinga, the long-time opposition figure who was runner-up to Ruto. They said Odinga had failed to support his claims of ballot stuffing and external interference with the tally, concluding that Ruto's election was valid. The highly anticipated judgment capped a peaceful and transparent campaign that, despite shortcomings, represents a significant achievement in a country where violence has marred previous polls and where public trust in electoral institutions has historically been low. The decision also cemented the Kenyan judiciary's role as an arbiter of electoral disputes and underscored its independence. Kenya should now build on this election's high standard to further strengthen the electoral commission and bolster its credibility, so that electoral turmoil may become nothing but a distant memory.

The presidential vote was a hard-fought contest involving three of Kenya's political giants. It pitted Odinga, who was hoping to prevail after four unsuccessful previous attempts, against Ruto, making his first stab at the presidency. The third protagonist was outgoing President Uhuru Kenyatta, who, following a bitter falling-out with Ruto in 2018, had spurned his long-time ally to strongly support Odinga. That shuffling of political cards and the new alliances it brought meant that the outcome was especially unpredictable. Many were concerned that the electoral season could once again be turbulent, given the acrimony between the president and deputy president.

A second worry was that the Independent Electoral and Boundaries Commission (IEBC) would not be up to the tasks of running smooth polls and ensuring a credible vote count. The body's weaknesses had been on display in past elections. After the last vote in 2017, the Supreme Court had annulled the presidential poll and ordered a fresh election, arguing that "irregularities and illegalities" had compromised the vote's integrity. Independent audits pointed out other deficiencies and suggested remedies that the commission, parliament and state have yet to apply. On top of these issues, this time around, the IEBC's budget allocations were delayed and the electoral laws it needs to do its job properly were passed only weeks before voting, all while state authorities subjected it to various untoward pressures.

As it happened, there was little fear on either count. Both the electioneering and the vote went off peacefully, with a few disturbing exceptions, in a welcome break from the past. One reason for the relative calm was likely that both of the main presidential candidates mounted issue-based campaigns rather than trying to marshal support primarily along ethnic lines, as their predecessors have often done. Unemployment and the rising cost of living – and the candidates' ideas about how to tackle those problems – took centre stage during this electoral cycle.

The elections were also much more transparent than previous ones. Final tallies showed a narrow victory for Ruto. He polled 50.49 per cent of the vote, while Odinga garnered 48.8 per cent. Observers from several outside institutions, including the African Union and the European Union, hailed the IEBC's conduct in running the polls. In one measure that earned it plaudits – and boosted the count's transparency – the IEBC uploaded the results forms from each of the 46,229 polling stations to an online portal for all to see.

The process was not perfect, however. Following a mix-up of ballot materials, the IEBC postponed some local elections, including gubernatorial contests in Kakamega and Mombasa, two of the subnational units known as counties. These polls eventually took place on 29 August. Police also recorded a dozen security incidents related to the elections: an electoral official was shot and injured during an attack on a tallying centre in Wajir county in northern Kenya, forcing the commission to halt the count. Another IEBC official, Daniel Musyoka, was found strangled after having disappeared in the Embakasi East district of Nairobi. His murder is a particular blot: it remains unexplained, with no suspect identified. At Musyoka's burial on 26 August, electoral commission Chairman Wafula Chebukati condemned the persistent attacks on commission staff, citing also the brief detention by police of several senior officials in the course of counting votes.

Confusion marred the final presidential result declaration on 15 August, even though the IEBC had posted the results forms online and announced each constituency tally on television after verification by the rival presidential campaigns. As Chebukati was preparing to name Ruto the winner, Odinga allies at the national tallying centre tried to prevent him from doing so. A brawl erupted, though security forces swiftly restored order. At the same time, four of the seven IEBC commissioners – all recently appointed by Kenyatta – walked out of the tallying centre. They held a press conference questioning the results, notably accusing the IEBC



chairman of sidelining them while the vote totals were compiled. The commissioners' assertions were undermined by the fact that they had played a prominent role in relaying earlier provisional tallies on television, before staging their last-minute protest. Chebukati eventually announced the results, but the walkout cast a pall over the proceedings.

The next day, Odinga officially rejected the final tally, citing the divisions among the IEBC commissioners as proof of malfeasance. He and several other individuals and NGOs filed petitions on 22 August, laying out a raft of claims against the electoral commission. In particular, they questioned the integrity of the technology used to identify voters and transmit results, and the probity of the foreign firm that supplied it. They also alleged that hackers had penetrated the IEBC's servers and tampered with the forms uploaded on its portal. A key contention by the petitioners was that Ruto may not have won enough votes to hit the 50 per cent mark. The Kenyan constitution mandates a run-off if no candidate gets half the votes in the first round.

Following days of televised proceedings that transfixed the country, the Supreme Court upheld the election. The seven judges led by Chief Justice Martha Koome dismissed all of Odinga's complaints, arguing that his legal team had failed to provide sufficient evidence to call the election's validity into question. Court-ordered scrutiny of the IEBC's servers found no evidence of intrusion. A recount at 41 stations identified by the petitioners returned an exact match with official tallies, although it found minor errors, including missing signatures and misfiled forms. The court concluded that the IEBC had complied with laws demanding that elections be "simple, accurate, verifiable, secure, accountable and transparent". The judges did, however, pinpoint areas where the IEBC could improve, highlighting the divisions and mistrust among commissioners, and urging the commission to follow through with the recommendations from past audits.

All parties accepted the judgment. Odinga and his running mate, Martha Karua, indicated that they would respect the decision, though they disagreed with it, a stance echoed by the IEBC officials who had walked out of the tallying centre. President Kenyatta, whose stony silence since the results were announced had raised questions among the public about whether the presidential transition would be smooth, committed in a televised address on 5 September to "executing the orders" of the court. He did not mention Ruto, however, or acknowledge his victory. For his part, Ruto welcomed the judgment, appealing for peace and unity. He also pledged to accord Kenyatta a dignified retirement, following a precedent set by all of Kenya's past presidents. On 7 September, Ruto said on Twitter he had spoken to Kenyatta by telephone to discuss the next steps in the transition. The president-elect will be sworn in on 13 September.

Kenya's 2022 electoral exercise is an important achievement in many respects. It builds on the lofty aspirations of the 2010 constitution, one of the most progressive in Africa, which was adopted following the weeks of communal violence and police killings that marked the controversial 2007 presidential election. The walkout by four IEBC commissioners was lamentable, but overall, that body and other institutions, notably the security forces, performed their duties with a high degree of autonomy. In 2017, the Supreme Court, although featuring two different judges, had showcased this quality when it annulled Kenyatta's win, ordering a rerun. This time around, its unanimous decision reinforced the Kenyan judiciary's reputation as a ferociously independent institution that consistently resists political pressure. In issuing their televised decision, the judges indicated that unnamed individuals had attempted to influence them as they deliberated on Odinga's petition.

The stars of the electoral cycle were the Kenyan public. Despite moments of high tension, notably on 15 August, when agents and politicians clashed at the tallying centre, there were no reported

instances of communal violence. Most people went about their ordinary business, ignoring the pitched elite quarrels in a departure from the past, when many viewed electoral contests in existential terms. On social media, many in the Horn of Africa reflected on the lesson for other countries in the troubled region – that free and fair elections, even when they are intensely competitive, can pass off peacefully and help anchor stability.

Still, as noted by the Supreme Court, Kenya's electoral process has room for improvement. Authorities should in particular strive to carry out recommendations to complete electoral laws and put in place electoral officials well in advance of the vote. On this occasion, the IEBC secretariat's top official was appointed just months before balloting and, as noted above, electoral laws were not final with weeks to go. The courts issued numerous judgments on voting procedures, even in the last days ahead of the election. Predictable budgeting for the IEBC could further strengthen the institution. Such changes would allow the electoral commission to continue building trust among the public.

With the election season coming to an end, the incoming Ruto administration must quickly turn to the many challenges it needs to address. These include dealing with an economic downturn that has fed social discontent. Importantly, the president-elect should stick to his promise to work with rivals across the political divide. The 2022 Kenyan elections have been a success and an example to the region. For Ruto, however, given sky-high popular expectations and an economy in dire straits, governing may well prove tougher than campaigning.

## **Key Takeaways**

### **1. Independent Monitoring Enhances the Legitimacy of the Outcome**

The results validated by the Supreme Court were widely accepted, in part, because they were corroborated by the Nairobi-based Elections Observation Group (ELOG), Kenya's largest election

monitoring coalition. Its parallel vote tabulation (PVT) produced almost similar results to that of the Independent Electoral and Boundaries Commission (IEBC) with a margin of error of between 0.1 and 2.1 percent. ELOG deployed 5,000 observers in all 47 counties, covering 47,000 polling stations. An additional 1,000 PVT monitors crunched incoming data from the IEBC portal in real time.

Complementing the PVT, for the first time in Kenya—and possibly Africa—IEBC data released from the polling stations was accessible to the public. This allowed Kenyan media to run their own tallies and release provisional results 72 hours before the IEBC. Armed with this data, they also provided 24-hour analysis of the polls, setting a new norm worth emulating. The steady stream of data allowed the political parties, civil society organizations, and ordinary citizens to concurrently track the unfolding results. In other words, the public was kept informed of the seesaw nature of the contest and the factors that were shaping the outcome—facilitating its credibility.

### **2. Candidates Set Tone by Disavowing Violence**

To their credit and despite the tight race, both leading candidates showed restraint from invoking their supporters to violence during the electoral process. Raila Odinga, in particular, demonstrated leadership and a commitment to the democratic process when, in the days after the election results were announced by the IEBC and his supporters were ready to take matters into their own hands, he said he would take his case to the courts. Rather than opting for violence to enhance his leverage or distract from the electoral math, he told his partisans to go home while he worked through the judicial system. Odinga invoked the same principle by accepting the court's unanimous verdict, even though he disagreed with it. This courageous leadership must not be taken for granted. Kenyans of all political persuasions should honor this act of public service where the interests of the nation are put ahead of those of the individual. It is a standard to be upheld in future elections.

***“Rather than opting for violence to enhance his leverage or distract from the electoral math, Odinga told his partisans to go home while he worked through the judicial system”***

Similar acts of political magnanimity were observed down the ticket. Concession speeches by those who lost gubernatorial or local races, similarly, came in early and often. This created what Kenyan political commentator Patrick Gathara called “an un-Kenyan election,” a sharp contrast with previous elections that were filled with glaring malpractices.

### **3. The Courts Can Be a Force for Stability**

“Beginning with the adoption of a new constitution in 2010, Kenya has slowly and purposefully been reinventing itself and its democracy,” says Patrick Gathara. He contends it also demonstrated a high degree of democratic maturity as Kenyans opted to litigate their differences over the election, rather than resort to force.

Much of this heightened trust in the courts can be traced to the 2010 Constitution which strengthened the independence of Kenya’s judiciary and other oversight institutions. Odinga’s decision to pursue legal channels to address his grievances was motivated, in part, by a renewed sense of confidence in the judicial system. For courts to play a similarly stabilizing role across Africa, this judicial trust must be earned, however.

A pivotal step in this evolution of judicial independence was the historic Maina Kiai Petition of 2016, a civil society-led petition introduced ahead of the 2017 election by legal scholar Maina Kiai. In agreeing with it, the High Court issued a ruling that overhauled Kenya’s electoral laws by introducing groundbreaking standards of transparency, ownership, integrity, and accountability—the outcomes of which were visible in the recently concluded polls.

Among other changes, the Court ruled that election results at each polling station are final and cannot be altered in any way. This overturned the practice of vesting sweeping powers in the IEBC Chair to alone “confirm, alter, vary, and/or verify the

presidential election results.” The Kiai Petition was upheld in its entirety in August 2017 by the Court of Appeals, Kenya’s highest court, rejecting a government appeal. The Supreme Court decision to overturn the 2017 elections was based on this petition.

While doubts over the autonomy of Kenya’s judiciary persist, with many Kenyans saying at least some of the country’s judges are corrupt, Kenya’s upper courts have painstakingly established institutional traditions of independence irrespective of their composition. Supporters cite the March 2022 landmark Supreme Court ruling that declared the controversial Building Bridges Initiative (BBI) illegal and promptly stopped the government-backed referendum that would have endorsed it. This initiative would have brought back the “imperial presidency” model of the Daniel Arap Moi era, which the 2010 Constitution abolished.

Another benefit from the enhanced transparency of the electoral process is that the Supreme Court will continue to be under heightened scrutiny in future elections. Since the public had access to all the IEBC polling data, citizens are in a better position to assess the court’s performance than they have been in the past.

### **4. The Need to Further Technocratize the IEBC**

The election was not problem-free, to be sure. In their petition, Odinga’s Azimio La Umoja party alleged that the IEBC bungled the verification of results from the polling stations, especially during the final stages of tallying. Four of the seven IEBC commissioners, including Deputy Chair Juliana Cherera, disowned the results moments before they were released on August 15 by IEBC Chair Wafula Chebukati. The dissenting IEBC commissioners say they were excluded from verifying and aggregating results. According to Cherera, “We [IEBC] have improved our processes...we upped the bar but there was opaqueness in the last phase.”

This points to a key area for further reform. Leading jurists are now debating how the problems that beset the final phase of the election might be

addressed. One recommended fix is to expand the provisions of the Maini Kiai Petition. Kiai observes that his eponymous petition can be improved by empowering the polling stations to announce their results after capturing them on the hardcopy Form 34 A, the primary record of Kenya's polls. "With hindsight, there is still room for manipulation because anything can happen during the electronic transmission of Form 34 A to Nairobi for verification. Think of it, why should the final results be verified away from their source? It leaves room for the kind of disputes we saw within the IEBC itself."

Kiai adds that manual entry of results at the polling station need not be electronically transmitted for "verification" in Nairobi. "We have learned with hindsight that electronic transmission can be manipulated even in more perfect settings. We are looking at a few external precedents that can be written into our electoral laws such as the Netherlands which reverted to manual entries across the board" to safeguard against potential foreign interference.

Enhancing the technocratic dimensions and strictures on the IEBC may also lead to a more secure environment for election workers. Chairman Chebukati lamented that his senior staff and commissioners had faced intimidation, threats, arbitrary arrests, and enforced disappearances during the tallying. A chilling illustration of this was the murder of senior IEBC officer, Daniel Mbolu Musyoka. He was abducted from a tallying center in the battleground of Embakasi on August 11 as he prepared to announce results. Two days later his body was found dumped near a forest with signs of torture and strangulation. Deputy Chair Cherera, similarly, has alleged multiple threats against her.

Kenya's security services are facing pressure to investigate these and other serious complaints—a stark reminder of the still unfinished work Kenyans face to consolidate their hard-earned democratic gains.

## **5. Ethnicity Need Not Define Voter Motivations**

Contrary to widely held expectations, Kenya's largest and most economically influential community, the Kikuyu, voted overwhelmingly for William Ruto, a Kalenjin, handing him a victory in his rivalry with Uhuru Kenyatta, his former close ally of over 20 years. This is significant given the fresh memories of the infamous 2007 polls, when elite rivalries among both communities and the Luo, from which Odinga hails, exploded into bursts of violence that brought Kenya to the brink of civil war.

In turning up for Ruto this time around, Central Kenyans also effectively repudiated the powerful Kikuyu Council of Elders—the region's unofficial but powerful kingmakers—who told their followers to vote according to wishes of the Kenyatta family. Notably, Ruto secured landslides in the home constituencies of President Kenyatta and Odinga's running mate, Martha Karua—one of Central Kenya's most formidable politicians. According to Kenyan political scientist Macharia Munene, "people are turning away from that [ethnicity], saying they are no longer going to be taken for granted."

To illustrate this, both Ruto and Odinga ate aggressively into their respective strongholds, pockets of which became fiercely contested battlegrounds—far from the "safe zones" they had been assumed to be. Simply put, the old politics of undisputed ethnic kingpins and dominant political families seems to have lost resonance among Kenyan voters.

## **6. Incumbent Presidents Do Not Always Secure Their Preferred Successor**

Raila Odinga's loss has been widely interpreted as a major humiliation for President Kenyatta. Kenyatta had thrown his weight behind Odinga following their "handshake" in 2018 that put their enmity aside and further isolated William Ruto. Some say that the voting patterns were an attempt by voters to hold Kenyatta and Odinga accountable for trying to institute BBI, an initiative that proved to be hugely unpopular.

Others say the Odinga brand was invariably damaged as the Ruto ticket pushed a narrative that the veteran opposition leader was merely Kenyatta's "project." This harkened back to the equally consequential election of 2002 in which a younger Kenyatta, then President Daniel Arap Moi's hand-picked successor, garnered only 31 percent of the vote in what turned out to be a massive opposition landslide against the regime. His portrayal as "Moi's project," proved to be a major liability as even his own constituency channeled its votes to the opposition.

Kenya's increasingly unpredictable and competitive elections buck the general trend in the region where predetermined electoral outcomes and poll-fixing are the often norm.

### **7. Sustained Civic Engagement on Institutional Reforms Can Have a Strategic Impact**

Ruling parties in much of Africa often go to great lengths to keep electoral commissions on a tight leash to maintain themselves in office. In Kenya, the ongoing shifts toward more credible elections were rooted in sustained public interest litigation aimed at breathing new life into the IEBC and bringing electoral laws in line with constitutional requirements.

The tenacity and forward-thinking by civil society and professional groups—particularly the Law Society of Kenya—was key to all this, as shown by the history of ground-breaking constitutional petitions dating back to the 2017 elections. This, in turn, benefited greatly from a judicial branch that has demonstrated an increasing willingness to assert its independence and rule in the public interest. Collectively, these advancements underscore the value of institutional reform, as painstaking as the process may be.

### **CONCLUSION**

The results of Kenya's general election can make for gloomy reading. If upheld by the Supreme Court, the country will have elected as President William

Ruto who, along with outgoing President Uhuru Kenyatta, was indicted for crimes against humanity by the International Criminal Court in 2012. Ruto, who was eventually discharged by the ICC, is also viewed by many Kenyans, including by some of his own supporters, as among the most corrupt figures in the country's political firmament.

Raila Odinga, who was declared to have narrowly lost to Ruto in the election, has challenged the result in the country's top court. Odinga too has faced corruption accusations. Meanwhile, at least a dozen people among those elected to the country's parliament or holding offices in the devolved Kenyatta administration face a variety of serious charges in local courts, ranging from murder to fraud.

Kenya's 2022 general election has not followed the familiar script of voters exercising their civic duty only to helplessly sit back and watch their votes be manipulated. Kenyans have attempted to correct this through comprehensive constitutional reforms, an active and vigilant citizenry, and an increasingly independent judiciary. In the process, Kenyans have carved out a roadmap for themselves and democratic reformers across the continent to follow to enhance the integrity and legitimacy of their electoral processes.

*"Kenyans have carved out a roadmap for themselves and democratic reformers across the continent."*

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