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The right to participate in the government of one's country: An analysis of article 13 of the African Charter on Human and Peoples' Rights in the light of Kenya's 2007 political crisis

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Summary

The article analyses the right to participate in the government of one's country under article 13 of the African Charter on Human and Peoples' Rights within the context of the post-election crisis experienced in Kenya in December 2007. It is argued that the crisis was a culmination of poor governance and undemocratic practices successively handed down from one political regime to another, from when the country attained its independence. The article maintains that since 1963, many Kenyans have been denied the enjoyment of the right to participate in government through political manipulation, corruption, intimidation, vote rigging, ethnicity and other related vices. Hence, the undermining of democracy and diverse citizenship rights have contributed extensively to the country's governance crisis, the labyrinth of which was exposed by the 2007 post-election events.

1 Introduction

Kenya opened a new chapter in her history when two contesting political parties — the Party of National Unity (PNU) and the Orange Democratic Movement (ODM) — signed a power-sharing agree-

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ment in February 2008.[1] The agreement brought to an end months of civil unrest and political bickering, following the declaration of Mr Mwai Kibaki (PNU's presidential candidate) as the winner of the 2007 presidential elections.[2]

The wave of atrocities that resulted from the declaration of Kibaki's disputed victory caught the eye of the international community, which stepped in to restore order and peace in the country. The African Union (AU) appointed a team of international experts to mediate over the crisis. At the onset the mediators constituted the Kenya National Dialogue and Reconciliation (KNDR) team, comprising of representatives of both the ODM and PNU.[3]

It was evident to the team that the post-election crisis was a culmination of both long-term and immediate causes. Behind the façade of alleged election fraud were decades-old tensions that instigated the national pandemonium. The long-term causes of the crisis therefore encompassed many unresolved issues, some dating way back to the time the country attained its independence. Endemic failures in governance were at the pinnacle of such unresolved issues.[4]

Indeed, the widespread violence experienced in Kenya in every election year could best be understood within the context of long-standing grievances and failures of governance that run deeper than electoral politics.[5] Some citizens therefore have regarded elections as an opportunity to vent their anger and frustration over poor governance. On the other hand, some political elites in successive governments have regarded elections as an opportunity to settle scores with their opponents. Thus, although elections are conducted periodically, there has been no guarantee that they would be, and in most cases they have not been, free and fair. In the process, citizens have been denied the enjoyment of many of their rights, including the right to participate

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1 The deal was contained in two documents, namely, the Agreement on the Principles of Coalition Government and the National Accord and Reconciliation Act 2008. See The Standard Team 'New dawn as MPs convene' http://www.eastandard.net (accessed 6 March 2008).

2 According to estimates, at least 1 000 people were killed and 350 000 internally displaced. See The Standard Team (n 1 above).

3 See B Namunane 'Annan pleads for grand coalition government' http://www.nationmedia.com (accessed 13 February 2008).

4 Human Rights Watch 'Ballot to bullet: Organised political violence and Kenya's crisis of governance' (2008) 20/1 (A) 3.

5 Africa Watch 'Divide and rule: State sponsored ethnic violence in Kenya' (1993) http://hrw.org/reports/1993/kenya1193.pdf (accessed 29 March 2008); Human Rights Watch 'Playing with fire: Weapons proliferation, political violence and human rights in Kenya' (2002) http://www.hrw.org/reports/2002/kenya/ (accessed 29 March 2008). See also the *Report of the Judicial Commission Appointed to Inquire into the Tribal Clashes in Kenya* (1999) http://marskenya.org/pages/stories/Akiwumi_Report/ (accessed 29 March 2008).

in government, as guaranteed in the African Charter on Human and Peoples' Rights (African Charter).[6]

Against this background, the article analyses the right to participate in the government of one's country under article 13 of the African Charter in the light of the political crisis experienced in Kenya in December 2007. In the main, the article argues that the crisis resulted from the undemocratic practices and poor governance successively handed down from one political regime to another, from when the country attained its independence.

The article begins with a review of article 13 of the African Charter. It proceeds to explore the jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) relating to this right. After conducting an exposition of the nature and causes of Kenya's long-term governance crisis, the article concludes with some recommendations on the way forward.

2 Article 13 of the African Charter revisited

The African Charter is the main normative instrument of the African human rights system. It consists of 68 articles clustered into four chapters. The Charter entails all the three generations of rights, namely, civil and political rights, economic, social, and cultural rights, and peoples' rights. Article 13, which guarantees the right to participate in the government of one's country, stipulates as follows:

1 Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2 Every citizen shall have the right of equal access to the public service of his country.
3 Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

From the wording of the above provision, it may be argued that the right to participate in the government of one's country, at least within the context of the African Charter, entails three distinct but related guarantees. These are: (i) the right to political participation; (ii) equality of access to the public service of one's country; and (iii) equality of access to public property and services. It is worth noting that, whereas the African Charter confines the enjoyment of the rights to 'political participation' and 'equality of access to the public service' only to citizens, the right to 'equality of access to public property and services' could be enjoyed by every individual residing within a particular state.

6 See African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, 21 (1982) 58 *International Legal Materials*, entered into force 21 October 1986.

A distinction could be drawn between articles 13(2) and (3) in that, while the former intends to guarantee citizens the right to participate in the public service of their country, the latter guarantees every individual access to public services without discrimination. In other words, article 13(2) appears to preclude state parties to the African Charter from adopting measures that would hinder some of their citizens from participating in the public service of their countries. Such measures could be in the nature of unfair legislation, policies or practices that are discriminatory in their form, substance or effect. A cursory glance at articles 13(2) and (3) would, however, not reveal the distinction between these two provisions.

The African Charter is by no means the only international human rights instrument that seeks to protect the right to participate in government. This right is also expressly guaranteed under article 21 of the Universal Declaration of Human Rights (Universal Declaration),[7] article 25 of the International Covenant on Civil and Political Rights (CCPR), article 23 of the American Convention on Human Rights (American Convention) [8] and article 3 of Protocol 1 of the European Convention on Human Rights and Fundamental Freedoms (European Convention).[9] Some of these provisions suggest that the holding of periodic and genuine elections is the main way the right to participate in government may be enjoyed. The European Convention Protocol, for example, requires states to hold 'free elections at reasonable intervals by secret ballot'. Article 21(3) of the Universal Declaration is equally emphatic that:

> The will of the people ... shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

As shall be shown elsewhere below, it would be detrimental to confine the meaning and scope of the right to participate in government within the narrow parameters of political participation or, worse still, the holding of periodic and genuine elections. This right is quite broad and envisages various facets which link up to form the requisite framework for the realisation of the rights of all who reside within a country. Simply put, the right serves as an important bridge between three key elements that define the benchmark of good governance in any civilised society — the rule of law, democracy and human rights.

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7 Universal Declaration on Human Rights, GA Res 217 (III), adopted on 10 December 1948.

8 See art 44 American Convention on Human Rights, OAS Treaty Series No 36, 1144 UNTS 123, entered into force 18 July 1978.

9 Arts 25-34, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222, entered into force on 3 September 1953, as amended by Protocols 3, 5, 8 & 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990 and 1 November 1998, respectively.

It is imperative to note that governance relates to the manner in which responsibility is discharged.[10] In the public domain, such responsibility may be acquired through, *inter alia,* election, appointment or delegation. Therefore, good governance should be understood to mean the process where such responsibility is discharged in an effective, transparent and accountable manner.[11] By extension, it entails the establishment of efficient and accountable institutions — whether political, judicial, administrative or economic — that would promote, among other things, human rights, the rule of law and democracy. Ultimately, it should ensure that people are free to participate in, and be heard on, decisions that affect their lives.[12]

Arguably, the inclusion of the right to participate in government in the African Charter is partly in recognition of the fact that most egregious violations of human rights on the continent occur in conditions of political dictatorship and poor governance. The gross violations of human rights registered during the despotic reigns of dictators Idi Amin of Uganda, Macias Nguema of Equatorial Guinea, Jean-Bedel Bokassa of the Central African Republic and Kamuzu Banda of Malawi, just to mention a few, could be cited to vindicate this argument. Hence, in framing article 13, the drafters of the African Charter might have been compelled by the desire to wrest political power and governmental authority from the hands of the emerging post-colonial despots and vest it in citizens.

The drafters, however, failed to define the full scope of the right to participate in government, or at least to bring article 13 on par with equivalent provisions of other international human rights instruments, such as the Universal Declaration and the European Convention. In the main, the African Charter recognises the right to political participation in a very superficial way. For instance, it does not expressly guarantee the holding of periodic and genuine elections. The inadequacy attached to this right defeats logic, given that Africans have been perpetual victims of poor governance where democracy, the rule of law and human rights are deliberately undermined.[13]

Military rule and unconstitutional changes of government have also taken its toll on the continent. Moreover, politicians almost literally 'purchase' the right to vote from their citizens and once voted, they personalise governmental power and authority for their own benefits. Political power is abused to reward cronies and sycophants, on the one hand, and on the other, to punish 'dissidents' and opponents. Under

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10 K Hope 'The UNECA and good governance in Africa' paper presented at the Harvard International Development Conference 4-5 April 2003, Boston, Massachusetts, 2.

11 As above.

12 As above.

13 For a detailed discussion on this, see generally A Mangu 'The road to constitutionalism and democracy in Africa: The case of the Democratic Republic of Congo' unpublished LLD thesis, University of South Africa, 2002 ch 3.

such circumstances, it cannot be understood how the drafters of the African Charter could have failed to concretise this right.

In all fairness, though, it is encouraging to note that the drafters intended that the right to participate in government should be construed beyond the limited scope of 'political participation', to incorporate other relevant rights, such as equal access to public property and services. This is quite innovative because, as shall be shown below, there is a close nexus between this right and some other rights in the African Charter, to the extent that the violation of the one would most certainly lead to the violation of the others.

Indeed, even the jurisprudence of the African Commission confirms the foregoing observation. For instance, the Commission has emphasised the connectivity between this right and, among others, the rights to nationality, freedom of assembly and expression and self-determination.[14] It has also hinted that unconstitutional changes of government could adversely affect the enjoyment of the right to participate in government.[15]

3 The African Commission's jurisprudence on article 13

Although the African Charter does not expressly guarantee the right to nationality, the African Commission appears to treat this right as essential to the realisation of the right to participate in government. It has therefore condemned political tactics such as unlawful deportation of citizens and the invention of 'exclusionary bars' to prevent political opponents from participating fully in the affairs of their governments.

In the *Amnesty International v Zambia* case cited above, the African Commission was persuaded that the deportation of two senior members of a Zambian opposition party was not only unlawful, but was also politically motivated to deprive them of the opportunity to participate in the affairs of their government.[16] However, although the communication alleged the violation of article 13(1), it is not encouraging at all that the African Commission neither gave requisite attention to this claim, nor expressly found a violation of this provision. An opportunity was therefore lost where the content of this right could be demystified, at least within the context of the African human rights system.

In *Modise v Botswana,* also cited above, the complainant alleged that, although he was a national of Botswana by descent, the government

14 See generally *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999); *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001); *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

15 See generally *Jawara v The Gambia* (n 14 above).

16 See para 46 of the communication.

declared him an 'undesirable immigrant' and subsequently deported him because of his political involvement.[17] After many years of contesting the recognition of his right to citizenship by descent, the government of Botswana granted him citizenship by registration.[18] He contended that this latter form of citizenship was in several ways inferior to the former. One of its shortfalls, he argued, was that it precluded him from vying for the highest elected political office in the land, that is, the presidency of the Republic of Botswana.[19] Based on the evidence adduced before it, the Commission concluded that:[20]

> [g]ranting the complainant citizenship by registration has ... gravely deprived him of one of his most cherished fundamental rights, to freely participate in the government of his country, either directly or through elected representatives. It also constitutes a denial of his right of equal access to the public service of his country guaranteed under article 13(2) of the Charter.

The African Commission has also emphasised that any measure which seeks to exclude a section of the citizenry from participating in the democratic processes of their country is discriminatory and therefore a violation of article 13 of the African Charter.[21] In *Legal Resources Foundation v Zambia,* it was argued that the Zambian government had amended its Constitution deliberately to 'take away' 'the accrued rights of other citizens, including the first President, Dr Kenneth Kaunda'.[22] The said amendment — Constitution of Zambia Amendment Act of 1996 — effectively excluded persons, other than those of whom both parents were Zambians by birth or descent, from contesting the presidency of the country.[23] In finding a violation of article 13 of the African Charter, the Commission reasoned as follows:[24]

> The Charter makes it clear that citizens should have the right to participate in the government of their country 'directly or through freely chosen representatives ...' The pain in such an instance is caused not just to the citizen who suffers discrimination by reason of place of origin but that the rights of the citizens of Zambia to 'freely choose' political representatives of their choice, is violated. The purpose of the expression 'in accordance with the provisions of the law' is surely intended to regulate how the right is to be exercised rather than that the law should be used to take away the right.

The above reasoning is very important for two reasons. First, the African Commission establishes an important principle to the effect that the imposition of exclusionary bars with the intention to check political opposition affects both the discriminated individual and the people

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17 See *Modise v Botswana* (n 14 above) para 2.

18 *Modise v Botswana* (n 14 above) para 95.

19 As above.

20 *Modise v Botswana* (n 14 above) para 96.

21 *Legal Resources Foundation v Zambia* (n 14 above) para 64.

22 *Legal Resources Foundation v Zambia* (n 14 above) para 2.

23 *Legal Resources Foundation v Zambia* (n 14 above) para 3.

24 *Legal Resources Foundation v Zambia* (n 14 above) para 72.

he or she intends to represent in accordance with article 13(1). Secondly, the Commission's pronouncements serve as a warning to those governments that are fond of using their legal systems and other state machinery to frustrate a section of their citizenry. Thus, it is clear that laws ought to be promulgated to regulate and not to violate the rights of individuals.

The African Commission's viewpoint might have been informed by the fact that many post-colonial African governments have in the past resorted to 'exclusionary bars' to lock out their perceived erstwhile opponents from clinching the highest political office in the land. A notable example is Côte d'Ivoire, where a former Prime Minister, Alassane Ouattara, was barred from participating in the country's presidential elections held in 2000, on grounds that he was not a 'real Ivorian'.[25] Odinkalu correctly contended that the use of exclusionary bars by a post-colonial elite does not only restrict access to political office and processes, but also reinforces a widespread sense of illegitimacy of some African states.[26] At the same time, exclusionary bars undermine citizenship and instigate undue political contestations and instability.

Besides linking the enjoyment of the right to participate in government with the guarantee of the right to nationality, the African Commission has also sought to interplay this right with freedom of expression, self-determination and the prohibition of unconstitutional changes of government. It has, for example, observed that 'freedom of expression is a fundamental human right, essential to an individual's personal development, political consciousness and participation in the public affairs of his country'.[27] The Commission has also held that to participate freely in government entails, among other things, the right to have the results of free expression of the will of voters respected.[28] It also emerges from the African Commission's jurisprudence that massive human rights violations coupled with the denial of the right to political participation could justify secession.[29]

With regard to unconstitutional changes of government, the African Commission found the imposition of a ban on leaders of a former government after a *coup* to be a violation of their right to participate in the government of their country.[30] Although the Commission's jurisprudence on this issue is remarkably shallow, it is encouraging

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25 See C Odinkalu 'Back to the future: The imperative of prioritising for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 18.

26 As above.

27 *Amnesty International v Zambia* (n 14 above) para 46.

28 *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 50.

29 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995).

30 *Jawara v The Gambia* (n 14 above) para 67.

to note that even the Constitutive Act of the African Union (AU)[31] unequivocally condemns unconstitutional changes of government.[32] The Constitutive Act is categorical that a government that seizes power through unconstitutional means shall not be allowed to participate in the activities of the AU.[33] Additionally, the AU has a variety of options on how to deal with such governments.[34]

It is clear that both the African Charter and the Constitutive Act lack a precise definition of what might constitute an unconstitutional change of government. The Declaration of the Framework for an OAU Response to Unconstitutional Changes of Government is instructive in this regard in that it intimates situations such as:[35]

> (i) military *coup d'état* against a democratically elected government; (ii) intervention by mercenaries to replace a democratically elected government; (iii) replacement of democratically elected governments by armed dissident groups and rebel movements; and (iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.

The above list of situations, however, is not conclusive because it overlooks certain paramount circumstances that could as well infer an unconstitutional change of government.[36] For instance, it fails to appreciate the unconstitutionality of a government which refuses to call for elections at the end of its tenure, or the one which manipulates the Constitution to prevent a democratic change of government. It also ignores the effects and implications of vote-rigging and other electoral malpractices that could possibly lead to the violation of the values and principles of good governance.

The foregoing discussion therefore explains why it is not prudent, yet uncommon, to confine the scope of the right to participate in government within the narrow prism of 'citizen participation in periodic elections, either as candidates or voters'. Actually, this right demands governmental or state authority to be based on the sovereignty and the will of the people. It places obligations on states not only to ensure a level political field, but also to guarantee other rights that would

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31 The Constitutive Act of the African Union, adopted by the 36th ordinary session of the Assembly of Heads of State and Government, 11 July 2000, Lomé, Togo, CAB/LEG/23 15, entered into force 26 May 2001.

32 n 31 above, art 4(p).

33 n 31 above, art 30.

34 Art 23 partly provides as follows: '2 ...any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other member states, and other measures of a political and economic nature to be determined by the Assembly.'

35 See Declaration of the Framework for an OAU Response to Unconstitutional Changes of Government AHG/Decl 5 (XXXVI) adopted by the 36th ordinary session of the Assembly of Heads of State and Government of the OAU.

36 For a more detailed definition of this phrase, see OAU *Report of the Sub-Committee of the Central Organ on Unconstitutional Changes in Africa* (2000) 25 (v)-(vi).

safeguard the interests of all in society. In other words, although the enjoyment of this right starts with the guarantee of political participation, it by no means ends there. This is because other factors that are important in safeguarding fair political participation must also necessarily be ensured.

It is rather unfortunate that the realisation of the right to participate in government has remained controversial and complicated in Africa for reasons ranging from legal complexities, vested political interests, corruption and extreme poverty. This situation is exacerbated by the fact that some countries largely still rely on laws and policies promulgated during the colonial era, which in many respects prevent the most disadvantaged groups in society from fully enjoying this right. Due to such archaic policies and laws, important issues such as equitable access to public resources and services are no longer a major concern. At the same time, political contests are intense because of what is at stake; those who wield political power benefit from widespread abuses and misappropriation of public resources and services.

Consequently, many Africans have become victims of governments of exclusion such as dictatorships, military rule, or single-party autocracies. Ethnicity, corruption and vote-rigging have also had a hand in derailing the democratic process on the continent. What follows therefore is a discussion on how some of the factors listed above could have contributed to the post-election violence witnessed in Kenya in 2007.

4 An exposition of the nature and causes of Kenya's long-term governance crisis

Compared with her neighbours, who are often besieged by civil unrest, Kenya has for long been a hub of socio-economic and political stability. However, in spite of its success in containing an outbreak of civil war, the country is still largely plagued with many of the factors that undermine citizens' participation in government. These factors, which also instigated the 2007 post-election crisis, include strong ethnic divisions, polarised politics, political manipulation, socio-economic disparities, deepening levels of poverty and endemic corruption.[37] These factors are examined in detail below under four major themes, namely, socio-historical, ethno-political, socio-economic and legislative.

4.1 Socio-historical factors

A number of socio-historical factors have contributed to the undermining of the right to participate in government and by extension, the 2007

[37] See African Peer Review Mechanism 'Country Review Report of the Republic of Kenya' http://www.polity.org.za/article.php?a_id=99422 and http://www.nepad.org/aprm-not accessible (accessed 4 February 2009) 14.

post-election violence in Kenya. In the main, colonialism perpetuated and subsequently left behind an undesirable legacy on inter-communal interactions in the country in that the notion of statehood was imposed on communities that historically lacked inter-communal coherence. By forcing ethnic communities that previously lived independently of each other to live together, the British colonisers did not give a thought to the possibility of the emerging state being ethnically polarised.[38]

Further, through its policies that favoured the investment of resources in only high potential areas that had ample rainfall and fertile lands, colonialism spawned asymmetrical development in Kenya.[39] The colonial government focused on developing infrastructure and social services in 'productive' areas at the expense of the rest of the country, and this inequality remains largely unaddressed in the policies or practices of independent Kenya.[40]

Soon after independence, the government reiterated the colonial position that public resources would only be invested in areas where they would earn the highest return.[41] Consequently, regional inequalities between Nairobi, the former 'white highlands', Coastal, Northeast and Western provinces are still evident today. Similarly, the gross domestic product (GDP) *per capita* between the various regions of the country differs widely, while about 45% of the country's modern sector employment is concentrated in less than 15 towns.[42]

The resultant disconnection between the various ethnic communities and regions of the country has provided the ethno-regionalised basis for political and economic discrimination against some citizens. It is rather unfortunate that this trend has found support from a class of post-colonial political elite who prefer it, both as a bargaining chip to bolster their political influence and as a tool to lock out of government their perceived opponents. Although successive post-colonial governments were expected to dispel the problems that had been evolved by the colonial legacy, this has gone largely unaddressed. For various reasons, the political class in successive governments opted to entertain and nurture this inequality.

It is therefore not surprising that the underlying regional imbalances and the attendant inter-ethnic inequalities easily inform the persistent struggles over the country's resources, such as land and access to public services. This socio-historical reality has had a negative effect on

38 For a similar argument, see generally K Hopkins 'A new human rights era dawns on Africa' (2003) 18 *South African Public Law* 350.

39 African Peer Review Mechanism (n 37 above) 46. The areas in question were in Central Province, the Rift Valley Highlands and parts of Western Province.

40 As above.

41 See African Socialism and its Application to Planning in Kenya, Sessional Paper No 10, Government Printer, 1966.

42 As above.

democracy and human rights, and in particular the realisation of the right to participate in government.

4.2 Ethno-political factors

Since independence, Kenya's political system has demonstrated overt weaknesses and inherent inequities that have had significant ramifications for citizenship rights. First, ethnocentrism transpires throughout the country's political substratum. Secondly, because of vested ethnic interests, presidential power has been personalised. These two factors have posed certain challenges to the effective realisation of the right to participate in government.

It is important to note that Kenya, like many other African countries, has been guilty of deliberately defining citizenship within the narrow prism of ethnic belonging. Consequently, one of the most acute problems the country has been facing is the endless struggle to integrate its different communities into a democratic modern nation, without compromising their respective ethnic identities. Generally, ethnocentrism has had manifold implications: One, it has encouraged the politicisation and manipulation of ethnic identities to extreme measures and two, it has led to the exclusion of some communities from government affairs.[43] A few illustrations need to be given to unravel the magnitude of these problems.

During the reign of the country's first President, Jomo Kenyatta, a small elite group called 'Kiambu Mafia' dominated Kenya's politics, resulting in the emergence of a class of capitalists from his Kikuyu tribe.[44] This class enjoyed unlimited economic prosperity and political influence and repressed any resistance against it. As a result, other ethnic groups as well as many non-conforming members of the Kikuyu tribe were alienated from government affairs.[45] Participation in government was somehow a preserve for those who either belonged to the President's tribe or were his pledged loyalists.

The situation took a dramatic turn for the worst when Daniel Arap Moi ascended to the presidency after Kenyatta's death. This could easily be understood, given that Kenyatta's loyalists sidelined even Moi (then the country's Vice-President), because he belonged to a small tribe — the Kalenjin.[46] Ironically, in his formative years as President Moi posed as the possible 'political messiah' who would save the country from the curse and blemish of ethno-politics. In fact, that was one of

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43 African Peer Review Mechanism (n 37 above) 49.

44 A Korwa & I Munyae 'Human rights abuses in Kenya under Daniel Arap Moi 1978-2001' (2001) 5 *African Studies Quarterly* http://web.africa.ufl.edu/asq/v5/v5i1a1.htm (accessed 3 February 2008).

45 As above.

46 A Sjögren & P Karlsson 'Kenyan politics 1963-2007: A background to the elections' http://www.nai.uu.se/policy_activities/articles/sjogren_and_karlsson/background-1/ (accessed 3 February 2008).

his pledges when he took over the presidency. Towards this end, he banned all the subsisting ethnic-centred welfare associations, such as the Luo Union, Gikuyu, Embu and Meru Association (GEMA) and the Abaluhya Union.[47]

His pledge notwithstanding, Moi soon became engrossed in suppressing his perceived opponents. Corruption, ethnicity and human rights became distant concerns as he began to centralise and personalise power.[48] This he achieved through tactics such as populating the civil service and state-owned institutions with members of his tribe.[49] He also criminalised competitive politics and criticisms of his leadership.[50]

In order to secure the interests of their respective ethnic communities, both Kenyatta and Moi therefore resorted to political gerrymandering, which at best fettered the right to participate in government. One such way was to limit the country's democratic space by allowing only one political party — the Kenya African National Union (KANU) — to operate freely. In fact, KANU was under the effective control of the sitting President, who also sanctioned the appointment of its members and officials. In effect, there was no clear demarcation between party and state authority. Thus, for one to participate in government in whatever capacity, he or she had to be a convert of political sycophancy.

Political power was personalised around the presidency, courtesy of unilateral constitutional and legislative amendments. By 1991, for example, the country's Constitution had been amended about 32 times in order to afford more comfort and power to the incumbent Presidents, their tribe-mates and cronies. Among the amendments was the insertion of section 2A, which made Kenya a *de jure* one-party state until that provision was repealed in 1991.

Generally, Kenya's ethno-politics have led to the misplaced assumption that it is essential for one's ethnic group to win the presidency in order to have unrestricted access to state resources and services.[51] Hence, governmental authority, particularly the presidency, is more or less the preserve of the person in office and could be abused without any serious repercussions. This explains why every tribe covets the presidency and why losing it is so costly and therefore unacceptable. It is also understandable why, since the re-introduction of multi-party politics in 1991, the country's political parties are mainly regional, ethnic-based and poorly institutionalised. The nature and composition of the political parties founded in 1992 and thereafter attest to this

47 As above.

48 Korwa & Munyae (n 44 above).

49 As above.

50 Amnesty International 'Kenya: Torture, political detention and unfair trials' (1987) AI Index AFR 32/17/87 and Amnesty International 'Kenya: Torture compounded by the denial of medical care' (1995) AI Index AFR 32/18/95.

51 African Peer Review Mechanism (n 37 above) 49.

fact in that even the self-styled 'national parties' have tribal or regional undercurrents.

When Kenya entered the multi-party era, there was an earnest expectation that the government would create an enabling environment for its citizens to exercise freely their constitutionally-guaranteed rights. Contrary to this popular belief, most of the 1990s were a continuation of the un-democratic practices birthed at independence. In the early 1990s, for example, the KANU government went as far as instigating ethnic-based violence in order to show that a multi-party political system was not suitable for a multi-ethnic country such as Kenya.[52]

It was during this period when 'ethnic cleansing' occurred in many parts of the country, aimed at expelling certain communities from areas believed to be the 'native reserves' of other communities. This happened in, for example, the Rift Valley Province between 1991 and 1993, when the Kalenjin community attempted to expel other communities living in the area.[53] The same could be said of the violence reported in parts of Coast Province prior to and after the 1997 general elections. There is ample evidence that the 1992 and 1997 ethnic violence was politically motivated by the government.[54] Specifically, a report compiled by Amnesty International implicated certain pro-government politicians with the 1997 clashes in Coast Province.[55]

It may be argued that Kenya's third multi-party elections, held in December 2002, presented the best opportunity for the realisation of an ethnically-integrated country. This is mainly because, for once, ethnicity was at its barest minimum, courtesy of the formation of an inter-ethnic party called the National Rainbow Coalition (NARC). This opportunity was nonetheless lost as NARC's promise to end ethnicity was forgotten the moment Kibaki was sworn in as the country's third President. Like his predecessors, the President is roundly accused of perpetrating ethnicity.[56]

It is rather unfortunate that ethnicity as a factor in Kenya's politics has been dismissed, overlooked and considered secondary, while it is one of the staunchest challenges to citizens' participation in government. Rothchild rightly warned against such an attitude by emphasising that 'as long as observers cavalierly dismiss ethnicity as an irrational relic of the past, they will be unable to recognise its force and attraction in con-

52 Korwa & Munyae (n 44 above).

53 C Sicherman 'Kenya' (1998) 57 *Race and Class* 63.

54 See National Council of Churches of Kenya 'CPK/ARCH: Synod Committee Report' April 1992 and A Abuom 'The role of Kenyan churches in democratisation' paper presented at a Conference on the Christian Churches and Africa's Democratisation, Leeds, 1993, cited in Korwa & Munyae (n 44 above).

55 See generally Amnesty International 'Kenya Annual Report for 1997' (1998).

56 See Standard Team 'A blot on the talks' http://www.eastandard.net (accessed 13 February 2009).

temporary times'.[57] True to Rothchild's words, the governance crisis in Kenya and the attendant undermining of democracy and human rights could not have reached the intensity it did in 2007 had the underlying ethno-political factor been timeously resolved.

4.3 Socio-economic factors

Kenya's is the largest economy in East Africa and the third largest in sub-Saharan Africa. Its economic performance has, however, been below potential.[58] The country's poverty index is escalating, as the number of poor increased from 12,5 million in 1997 to 15 million in 2005.[59] An alarming 56% of the population lives in absolute poverty. This has been attributed to a combination of factors, including natural calamities, corruption, deteriorating infrastructure, weak implementation capacity and low levels of donor inflows.[60] Poverty in the country is also quite structured, with certain regions being disproportionately affected due to political and historical reasons.[61]

From another perspective, though, the country's economy displays some positive attributes, namely, reduced dependence on foreign aid, good domestic resource mobilisation efforts and a vibrant agricultural export sector.[62] The government has also sought to expand its tax base via policies that, among other things, encourage investment, improve tax administration and enhance the efficiency of financial markets and institutions.[63]

Despite noticeable progress in key socio-economic reforms, the country still faces many challenges which have negative implications for citizens' participation in government. These challenges concern, *inter alia,* improving the efficiency of public sector service delivery, building a new infrastructure and rehabilitating existing ones, high unemployment rates, especially among the youth, poverty eradication, maintaining sound economic policies and implementing various structural reforms so as to reverse a slow economic growth rate. The country also lacks effective anti-corruption policies.

Kenya has had, and continues to have, a worrisome level of corruption. Decades of endemic corruption have fundamentally deprived

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57 D Rothchild 'Ethnic insecurity, peace agreements and state building' in R Joseph (ed) *State, conflict and democracy in Africa* (1999) 320.

58 African Peer Review Mechanism (n 37 above) 17. This report indicates that the country's Gross Domestic Product (GDP) fell precipitously from an annual growth rate of 7,5% in 1971-80 through 4,5% in 1981-90, to a mere 1% in 1997-2002.

59 As above.

60 As above.

61 See generally UNDP *Fourth Human Development Report for Kenya*, 2005; and Society for International Development (2004) 'Pulling apart facts and figures on inequality in Kenya'.

62 African Peer Review Mechanism (n 37 above) 17.

63 As above.

citizens of their right to participate in government. The vice has exacerbated the country's socio-economic crisis to such a magnitude that the rules of fair play are either simply ignored or have been replaced with influence peddling and nepotism. This has eventually affected the competence, integrity and output of government. Moreover, it has entrenched socio-economic inequality as well as inequitable access to public resources and services among citizens.

Whereas the government has established the Kenya Anti-Corruption Commission (KACC) and enacted the Anti-Corruption and Economic Crimes Act, there is the general lack of political will to end this vice in all spheres of society. In fact, grand corruption is becoming prolific in some government ministries, departments, corporations, the judiciary and even local authorities. This is not an attribute of good governance because corruption and related vices fail to ensure the most efficient utilisation of resources in the promotion of development, enhancement of citizen participation in government and accountability.[64]

Another disturbing socio-economic issue currently affecting the country pertains to land allocation and distribution. Statistics indicate that more than half of the arable land in the country is in the hands of only 20% of the population.[65] This is partly because the post-colonial land redistribution policy was deliberately designed to favour the ruling class and not the landless masses. With the aid of such a policy, politicians in successive governments have used land to induce patronage and build political alliances.[66] Thus, much of the land has ended up in the hands of the political class, members of their families, friends and tribe-mates, rather than the communities from which the colonialists had taken it.[67] A recent investigation on the unfair allocation of land found that:[68]

> [t]he practice of illegal allocations of land increased dramatically during the late 1980s and throughout the 1990s ... and land was ... granted for political reasons or [was] ... simply subject to 'outright plunder' by a few people at the expense ... of the public.

The practice of the illegal allocation and distribution of land has led to a general feeling of marginalisation among some communities as well as the ethnicisation of the land question. While the Constitution permits individuals to own land in any part of the country without any form of discrimination, this, in reality, has not been the case. Many areas outside the major cities and towns are ethno-geographically demarcated, a phenomenon that has led to the emergence of 'ethnic

64 See Hope (n 10 above) 6.

65 See generally G Njuguna 'The lie of the land evictions and Kenya's crisis' (2008) 2 *African Policy Brief* 1.

66 Kenya National Commission on Human Rights *Unjust enrichment* (2004) 1.

67 As above.

68 n 66 above, 146.

reserves'. Besides being a source of corruption in terms of illegal or irregular land allocation, this phenomenon has also been tapped by politicians to instigate ethnic violence, especially during electioneering periods.[69]

4.4 Legislative factors

As argued elsewhere above, Kenya's legal system has been the government's handmaiden for undemocratic tendencies such as ethnic polarisation, electoral malpractices and uneven access to public resources. The country still prides itself in a Constitution drafted at independence in 1963 and a legal system aped from its former coloniser. Although the Constitution came with a flowery package of guarantees, it failed to address certain crucial issues of national importance, which now pose a threat to good governance.[70] Some of these unresolved issues include the question of streamlining the three arms of government — executive, legislature and judiciary, land acquisition and distribution, reform of the electoral system, and improving ethnic integration.

Good governance is influenced by the existence of a sound democratic constitution that enables the government to manage the affairs of the state effectively, while at the same time empowering the citizenry to participate in government.[71] Unfortunately, Kenya's current Constitution was written without much input from the citizens of the country and, in spite of relentless efforts to amend it, there is consensus that the document is now outmoded.[72] In fact, some of the amendments eventually undermined the legal sanctity of the document, rendering it rather a powerful tool in the hands of the President than an agreement between the government and its citizens. A closer look at some of its provisions would confirm this position.

The Constitution empowers the President to be the head of state and Commander-in-Chief of the armed forces of the Republic.[73] Additionally, the President can hire and fire the Vice-President and Cabinet Ministers,[74] enjoys immunity from criminal and civil proceedings,[75] appoints Permanent Secretaries,[76] the Attorney-General,[77] the Chief

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69 See generally Republic of Kenya *Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Pubic Land*, Nairobi: Government Printer, June 2004 (Ndungu Report).

70 See the Constitution of the Republic of Kenya, adopted in 1963, as amended in 1999.

71 African Peer Review Mechanism (n 37 above) 16.

72 African Peer Review Mechanism (n 37 above) 24.

73 See art 4 of the Constitution of the Republic of Kenya.

74 Arts 15 & 16.

75 Art 14.

76 Art 111.

77 Art 109.

Justice and other judges,[78] the Controller and Auditor-General,[79] Commissioner of Police[80] and Chief of General Staff of the armed forces of the Republic.[81] Moreover, he or she can summon, prorogue and dissolve parliament at whim,[82] must assent to legislation before it becomes law[83] and appoints officials of the Electoral Commission.[84]

It is clear that, apart from vesting enormous powers in the President, the Constitution also grants him overwhelming influence over the executive, judicial and legislative functions of government. As correctly emphasised in the African Peer Review Mechanism report on Kenya:[85]

> The subordination of parliament to the executive in law making and parliamentary oversight functions, the failure of the executive to heed parliamentary recommendations, executive interference in appointments to the judiciary, do not conform to the accepted norms of democracy and are a source of disquiet in certain segments of Kenyan society. The traditional democratic notion of checks and balances is seen as a safety net that can best ensure that government organs work in a perfect equilibrium to deliver to the citizen an acceptable governance package.

Democracy, strictly so-called, has therefore not been tenable in Kenya, much due to an 'authoritarian Constitution' that vests enormous powers on the presidency. Constitutional reform has been a central talking point for decades, but to date every attempt to realise this goal has stalled. The first major attempt towards comprehensive constitutional reforms was in 1998, when the Constitution of Kenya Review Act was enacted to provide the framework for substantial review.

This, however, did not materialise because the KANU government was not comfortable with the scope of the potential reforms. Most contentious were the proposals on the devolution of powers through a federal system of government and the limiting of the powers of the President through the creation of the office of a Prime Minister with 'executive powers'. The wrangling between the government and opposition parties saw the country going into the 2002 elections with no substantial legislative reforms. Expectedly, the constitutional review process is still hampered by divisive politics, animated by high levels of political posturing and discord.[86] More often than not, national interests are traded off against the sectarian interests of politicians and other decision makers.[87]

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78 Art 61.
79 Art 110.
80 Art 108.
81 As above.
82 Art 59.
83 Art 46(2).
84 Art 41.
85 African Peer Review Mechanism (n 37 above) 50.
86 African Peer Review Mechanism (n 37 above) 24.
87 As above.

The NARC government promised a new Constitution within its first 100 days in office, but could not deliver due to persistent wrangling within the party. By 2002, the Constitution of Kenya Review Commission (CKRC) had compiled a Draft Constitution, (popularly known as the 'Bomas Draft') from the views it collected from the public. The Draft provided for, among other things, the sharing of executive power between the President and Prime Minister. Due to disquiet from certain quarters, a parliamentary committee was constituted in 2004 to amend the Draft. The new Draft compiled by the committee (known as the 'Wako Draft') was not acceptable to some members of parliament from the Liberal Democratic Party (LDP) and KANU, since it sought to retain the enormous powers of the President.

The Wako Draft was later subjected to a referendum in November 2005, but was rejected by an overwhelming majority. Other than the general dissatisfaction with the content of the document, ethno-politics once again determined the outcome of the vote. The Wako Draft gained widespread support only in those areas dominated by Kibaki's Kikuyu tribe. It was within this context of ethnic division and animosity and the lack of legislative reforms that the country's 2007 polls were conducted.

Other than allowing the constitutional reform process to be the forum for all Kenyans to collectively determine the destiny of their nation, politicians have always usurped the process to settle their scores. It is needless to emphasise that, through comprehensive constitutional and legislative reforms, that sound democratic principles can be entrenched in a multi-ethnic country like Kenya.

5 Conclusion

The 2007 post-election chaos may have changed Kenya's political landscape irreversibly. Remarkable progress has already been registered since the signing of the power-sharing agreement between PNU and ODM and the subsequent formation of the Grand Coalition Government (GCG). The four-item agenda formulated by the KNDR team at the beginning of the mediation talks has been partly fulfilled, although other more crucial concerns are still pending. The items in the agenda were (i) measures to end the violence and restore fundamental rights and freedoms; (ii) immediate measures to address the humanitarian situation and promote reconciliation, healing and restoration; (iii) how to end the political crisis; and (iv) critical long-term issues including land reform, poverty, inequity, transparency and accountability.[88]

Among other milestone achievements of the talks were the establishment of the Department of Reconciliation and National Cohesion, the

[88] See Standard Team 'It's up to you, Annan tells House members' http://www.eastandard.net (accessed 13 February 2009).

resettlement of some internally displaced persons, the establishment of a Truth, Justice and Reconciliation Commission and the disbandment of the Electoral Commission of Kenya in line with recommendations by an Independent Review Commission on the presidential elections. Investigations have also been concluded on the causes of the post-election violence and recommendations made on the prosecution of those who were responsible.

Beyond that, nothing has yet been done to address the long-term issues that have plagued the country since independence. Comprehensive constitutional, legislative, judicial and institutional reforms, as well as other reforms necessary to address the root causes of the conflict are not being treated with urgency. As the way forward, therefore, a system of governance that is sensitive to the country's diversity is imperative.

Kenya is in desperate need of a 'watertight' system that would ensure greater citizens' participation and promote accountability and transparency in public affairs. Such a system should first provide equal opportunities for all citizens by creating conditions that would encourage their input in governance and development.[89] Secondly, it should provide for the effective transfer of power and periodic renewal of political leadership through representative and competitive elections.[90] This would mean establishing an accountable and transparent electoral mechanism.

Thirdly, the system should strengthen legislative and administrative institutions, such as parliament, the judiciary and other state institutions. Fourthly, it should empower citizens to hold public officials accountable for their conduct, actions and decisions. Fifthly, it should ensure effective public sector management, stable economic policies, effective resource mobilisation and the efficient use of public resources. Lastly, it should adhere to the rule of law in a manner that would protect human rights and democracy and ensure equal access to justice for all.[91]

89 Hope (n 10 above) 8.
90 As above.
91 As above.