Implementing a New Constitution in a Competitive Authoritarian Context: The Case of Kenya*

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Introduction

Between its independence in 1963 and the inauguration of multi-party politics in 1991, Kenya experienced many years of authoritarian rule. Since 1991, Kenya has held multi-party elections. In 2002, a united opposition successfully won the Presidency, but the ruling economic and political elites quickly regrouped and re-captured the new government. In 2010, a new Constitution laden with liberal democratic values came into force after an overwhelming endorsement in a referendum. Notwithstanding these reforms, the opposition has had little confidence in the integrity of the electoral system that in two electoral cycles since the enactment of the 2010 Constitution has produced a dominant party in Parliament. Rather than play a role in checking the Executive, Parliament has acquiesced to if not supported the Executive’s muzzling of the press, in repressing civil society groups and weakening independent accountability institutions such as the anti-corruption authority and the office of the auditor general.

In assessing the extent to which the short history of Kenya’s 2010 Constitution has been an agent of change or of continuity, this paper places the election cycle at the center of its analysis. While formal rules and institutions like the Judiciary are examined, this paper argues that to understand whether or not Kenya’s 2010 Constitution has been an agent of change or continuity, one has to look beyond the formal rules and institutions it created. This means looking at informal sources of influence and power such as the salience of ethnicity and how networks of patronage are preserved or created to forestall state power passing on to new political actors.

The liberal guarantees such as those relating to free and fair elections in the 2010 Constitutional order unleashed heightened political competition. This competitive environment has in turn been accompanied by accentuation of identities such as ethnicity, religion as well as regional affiliations.¹ In this context, I argue that one has to look beyond the fact that the 2010 Constitution creates new democratic processes, rights, and aspires to create new patterns of economic and social life in the country. Thus, electoral politics in the post 2010 Constitutional order are a major lens through which an appreciation of the extent to which this new constitutional order has been an agent of change or of continuity. Using elections as our prism also acknowledges that voters and

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candidates regard elections as important for the distribution of national resources and therefore take them seriously.2

How elections are conducted also provides an opportunity to examine the impact of strategies of the leading Presidential contenders and their political parties in the two election cycles on whether or not the aspirations of 2010 Constitution have been met. By examining this political behavior particularly the incentive structures that have come to define Kenyan elections as a zero-sum game become visible. After all, electoral victory is a gateway to accessing state resources and the patronage opportunities it opens up, while electoral loss is seen as and indeed results in shutting out losers from these resources and opportunities. This do or die attitude to elections in turn becomes the staging ground for organizing political parties along ethnic lines or ethnic alliances with politicians making appeals to particular ethnic communities to ensure they win and therefore do not get excluded from the resources and opportunities that result from electoral success. It is in this context, the significance of formal rules and institutions as provided for in the 2010 Constitution must be seen.

Elections also provide a good window into whether or not the promises of horizontal and vertical accountability are at play or not and whether individuals and civil society groups enjoy freedoms such as expression, association and assembly. In addition, elections are a good moment to examine whether there is free media, whether courts fairly determine disputes, particularly electoral ones and importantly whether Parliament keeps the Executive in check as well as the extent to which the Executive allows the existence of a vibrant opposition party.

One limit in primarily examining elections and political parties as a lens through which to assess the implementation of the 2010 Constitution is that it zeroes in on the intra-elite politics of politicians seeking the Presidency, and not necessarily on the many important goals of the 2010 Constitution such as achieving gender balance in state institutions and offices as required by the two-thirds gender rule.3

Ultimately, this paper shows that instead of ensuring the liberal guarantees of the 2010 Constitution are ensured, protected and safeguarded, successive governments have undermined them as part of their strategy of maintaining party and political dominance in the country. In particular, this paper shows how the Jubilee party’s acquisition of political party dominance since 2013 has given it a platform against which to delegitimate, harass and weaken the opposition.4 Other independent institutions have also been deliberately weakened to undermine their ability to provide checks on the government in power.

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2 This insight dates to the one-party era in Kenya and is attributable to Barkan, Joel D., ed. Legislative Power in Emerging African Democracies. Boulder, CO: Lynne Rienner Publishers (2009). Barkan however recognized that manipulated elections particularly during one party era undermined the competitive nature of elections).
4 A frequent refrain of the President is that the opposition leader is a perennial losers, a line the New York Times picked up on in urging him to accept electoral defeat following the 2017 Presidential election.
I proceed as follows. In part one, I examine how patronage politics have stymied Parliament’s role to check the Executive as envisaged in the 2010 Constitution. In part two, the paper examines how the dominant and opposition parties in Kenya have resorted to the Judiciary to resolve election related cases.

**Part One: Elections, Patronage Politics and Parliamentary Checks on Executive Power After 2010**

The 2010 Constitution introduced far-reaching reforms to make Parliament a more representative institution and to facilitate its ability to check the Executive. It did so in a number of ways. First, to make Parliament even representative it introduced a new Chamber, the Senate to represent the interests of the 47 County governments established by the 2010 Constitution. Second, the 2010 Constitution expanded parliamentary membership to include nominated and elected members of parliament representing special groups like women. Third, it gave Parliament the power to approve Presidential appointees such as Judges and other high-ranking governmental officials that were previously appointed solely by the President. Fourth, government ministers are no longer members of parliament. This means they can no longer use their membership in the house to do the bidding of the government. These reforms were arguably anchored on the premise that a strengthened Parliament would be the basis of enhanced horizontal accountability. The Kenyan Parliament’s institutionalization had began prior to the 2010 Constitution particularly with the establishment of the Parliamentary Service Commission in 2000 that gave Parliament more control over its affairs by shrinking the Executive’s formal controls over it such as its legislative calendar, their remuneration and access to funding to support constituency activities. Changes in the electoral system, particularly the establishment of an Independent Electoral and Boundaries Commission, freed the electoral process from the direct control of the Executive, a feature that in theory promised the legislators would more easily develop electoral autonomy upon which legislative independence and power would be built. Further, the 2010 Constitution entrenched majoritarian provisions for Presidential elections that were designed to encourage inter-ethnic alliances. However, these electoral and parliamentary reforms to the extent that they were designed to enable Parliament to play its role to check executive power have not fully realized their potential. A major reason for this outcome is

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5 Parliamentary Service Act No. 10 of 2000. As a result of these changes Kenyan Parliamentarians became some of the best well paid in the world in per capita and in real terms. They also established a Constituency Development Fund that each Member of Parliament controlled that became a slush fund of sorts for the members to reward their most loyal supporters while dipping into it for their personal needs including their for their campaigns.

6 To win the Presidential candidate, a candidate must win 50% plus one of the vote and at least 25% of the votes cast in at half of Kenya’s 47 counties as well as a second round of elections if none of the candidates in round one achieve these thresholds. These majoritarian provisions are critical in ethnically divided countries like Kenya to give elected President’s broad-based legitimacy and public confidence. On the importance of majoritarian provisions in ethnically divided countries, see Posner, D., ‘The colonial origins of ethnic cleavages: the case of linguistic divisions in Zambia’, Comparative Politics, 35/2 (2003), pp. 127–46
that the Jubilee Party has continued to be a dominant power. The legacy of one-party control over Parliament and individual members of Parliament of the incumbent party in the multi-party era has proved difficult to overcome even with the kind of far-reaching constitutional and legislative changes noted above.7

A major strategy that the Jubilee Alliance has employed to win electoral success has been extensive patronage to reward key regional supporters; rewarding loyal ethnic voting blocks with key national projects; designating opposition politicians and their regional voting blocks as enemies that their supporters should unite against; using state resources to build the capacity of the dominant political party that controls Parliament, in addition to selecting loyal parliamentary leadership. This in turn means the dominant party has near total control of the public policy agenda in the country.

As Cherry Gertzel argued in 1970, political parties in Kenya come to life during the electoral cycle. 8 That is still true in today’s competitive electoral environment as it was in the early 1970’s when Kenya was a de facto one party state. In fact, the 2010 Constitution was enacted following post-election violence in early 2008. Further, prior electoral cycles had been followed by violence as a result of rigged or stolen elections. Thus, whether or not a Presidential election candidate opted to pursue legal redress in Court or not as required by the 2010 Constitution has become a real test of whether the 2010 Constitution inaugurated a new electoral environment.9 Two successive Presidential Election Petitions in the Supreme Court of Kenya since the enactment of the 2010 Constitution tested the extent to which the 2010 Constitution has succeeded in wielding out electoral authoritarianism – i.e. – whether elections in Kenya promise “a meaningful transfer of national power.”10

If elections merely legitimate authoritarian regimes, which entrench themselves in power, then the 2010 Constitution has only weakly succeeded in institutionalizing competitive politics. Thus while formal rules and institutions are playing a more prominent role in the politics of African states11 and in Kenya in particular12, formerly dominant political

10 http://bostonreview.net/politics/aziz-rana-kenyas-new-electoral-authoritarianism Larry Diamond refers to regimes like Kenya as pseudo-democracies which are regimes that “have multiple parties and many other constitutional features of electoral democracy but that lack at least one key requirement – an arena of contestation sufficiently fair that the ruling party can be turned out of power,” Larry Diamond, 1999b page 15
11 Daniel N. Posner and Daniel J. Young, “The Institutionalization of Political Power in Africa,” Journal of Democracy 18 (July 2007): 126–40. Indeed, Kenya is not anywhere near what B.O. Nwabueze, Constitutionalism in Emergent States (1973) decreed accounted for the demise of constitutionalism in Africa: coups; counter-coups; military governments; permanent states of emergency. However, corruption and rigged elections are a feature of Kenyan politics notwithstanding a written constitution making both illegal.
parties are still finding ways of continuing to dominate national legislatures in the era of multi-party politics. In this sense then, Kenyan Presidential elections in the post-2010 era, ruling party dominance has stifled democratic consolidation rather than resulting in ‘democratization by elections.’\textsuperscript{13} This does not mean that institutions do not matter, they do. However, they cannot be understood without taking into account the informal rules operate alongside formal rules and institutions. For example, Members of Parliament and regional and ethnic leaders, connected voters to the Presidency and therefore to access to the resources of the state.

In the era of competitive electoral politics particularly since the enactment of the 2010 Constitution, bottom-up pressure continued necessitating the creation of political linkages between voters for delivery of goodies from the center. At the same time, African states particularly in the era of competitive politics engaged in coercive control of opposition voters and politicians.\textsuperscript{14} In the one party era, Joel Barkan referred to this type of politics as competitive authoritarianism.\textsuperscript{15} Competitive politics in the post 2010 period have only accentuated the need by voters to strengthen their links to their representatives to assure their access to resources and patronage to keep political parties that would exclude them from having access to these resources from assuming political power, particularly the Presidency. In short, informal networks and channels between voters and the Presidency, mediated by Members of Parliament, ethnic kingpins and other intermediaries are key to understanding the functioning of formal institutions and rules. This is particularly the case in ethnically homogeneous constituencies where the absence of competitive elections focused the minds of voters on whether they had delivered on their promises.\textsuperscript{16} Further, because members of Parliament want to be re-elected they have incentives to deliver on their promises.

In ethnically homogeneous opposition constituencies and in opposition strongholds generally, voters have a large incentive to vote for the opposition without breaking their voting patterns as the road towards opposition victory in Presidential elections. Even more, elections give hope to opposition political parties and their voters to defeat a dominant party. This is particularly so since the 2010 Constitution which provides a constitutional basis for free and fair elections, as well as an equal political playing field for all political parties, as I note at greater length below. Thus, since 2010, the opposition has hoped that it was possible to defeat a sitting President whose regime had been responsible for massive corruption; stifling of the civil society; extra-judicial killings, weakening independent institutions and police brutality particularly against opposition supporters.

\textsuperscript{14} Henry Bienen, Kenya: The Politics of Participation and Control, Hardcover (2016)
Even when elections do not produce electoral victory for the Presidency, it gives opposition voters the opportunity to repeatedly send vocal critics of the government to Parliament to challenge its authoritarianism. The total effect of these voting patterns is to further consolidate ethnic voting patterns and blocs established under one-party rule rather than establish new ones not based on a patronage system and political linkages between the State and constituencies as an avenue for resource distribution from the State. This type of political competition and largely ethnic mobilization has continued to persist notwithstanding the introduction of an extensive constitutional and legislative framework under the 2010 Constitution for party behavior and discipline that discourages patronage and ethnic based political mobilization. This continuation demonstrates the prevalence of informal norms of political behavior established under one-party rule, and the continuing difficulty of fully implementing the promises of political party reform.

To insulate itself against electoral defeat, the ruling party has sought dominance through political party coalition building prior to each electoral cycle. Ahead of the 2013 general elections, the United Republican Party of Deputy President William Ruto formed an alliance with President Uhuru Kenyatta’s The National Alliance. The two parties then brought several parties together in an election alliance. Before the 2017 general elections, the United Republican Party and the National Alliance formed the Jubilee Party together with 10 other smaller parties that agreed to dissolve and join the Jubilee Alliance. By cobbled up a large alliance of parties and crushing small parties out of existence, the ruling party has in two election cycles managed to secure comfortable parliamentary majorities. The ruling party was even more successful in the 2017 election cycle than it was in the 2013 election cycle. Unlike in the 2013 election cycle, the incumbent party required the parties within its coalition to fold shop, dissolve and become part of the Jubilee Party. This created more electoral success with its 2013 electoral majority in the National Assembly increasing from 47.85 % to 48.94% in 2017, and from 48.75% in the 2013 Senate to 48.75 in 2017. This increased degree of disproportionality between the

17 In the current Parliament are members like James Orengo who has been a vocal critic of the government of the day from the one party era to the present. In the 2017 election, he won his seat by 98% of the vote.
18 There was to be an eleventh party to comprise the Jubilee Party, the Party of National Unity (PNU) which refused to dissolve ahead of the 2017 election. Its leadership however supported the Jubilee Party. The dissolution was not without controversy as evidenced by suits filed in the High Court and before the Political Parties Dispute Tribunal. See for example, PNU and another vs Registrar of Political Parties and 2 others http://www.capitalfm.co.ke/news/2016/09/registrar-political-parties-barred-dissolving-pnu/ and R v. Registrar of Political Parties & 6 others Exparte Edward Kings Onyancha (Judicial Review Application 47 of 2017) . http://kenyalaw.org/caselaw/cases/view/135472/
19 The High Court has found that it is not unconstitutional for political parties to merge and in turn create political dominance, in the words of the High Court, “It is good practice for Political Parties to merge or form coalitions to attain political strength and dominance and as long as no law prohibits the practise but in fact that the law encourages them, this Court will not interfere with the right,” John Harun Mwau v. The Independent Electoral and Boundaries Commission & another (2013) eKLR. http://kenyalaw.org/caselaw/cases/view/91940/
Parliamentary seats between the dominant and opposition party in Kenya will likely to further reduce legislative checks on executive power.

The formation of the Jubilee Party and the dissolution of many smaller parties that are now part of it means that once elected these Members of Parliament would owe their electoral seats and therefore their allegiance to the ruling party. Having no ‘institutional cover to act as dissenters,’ these Members of Parliament would then be easily coopted to the desires and plans of the ruling party. This has in effect meant that numerically weak opposition parties in Kenya are unable to effectively compete against a dominant party with large majorities in Parliament. This is particularly so because politicians, such as those in the opposition, who fall outside the favor of the State do not have access to its resources and cannot therefore become financial providers for their communities. This strategy of dissolving political parties, even those in the opposition, to merge with a dominant political party, dates back to the very first few years of independence in Kenya. Within a year of Kenya’s independence in 1963, the ruling party, the Kenya African National Union (KANU), merged with the opposition party, the Kenya African Democratic Union. In 2002, well into the era of Kenya’s return to multiparty democracy, KANU again merged with the then main opposition party, the National Democratic Party. Thus, a critical informal mechanism that dominant parties have resorted to in Kenya is seeking the merger of numerically smaller political parties to shore up their dominance and to reduce and fizzle out opposition.

As a result of being outnumbered in Parliament, the CORD opposition alliance has since 2013 pursued extra-parliamentary options to re-draw election rules and institutions. It is notable that the CORD opposition alliance has resorted to using the referenda provisions of the Constitution to re-draw election rules and institutions they argued were biased and implemented in favor of the government, rather than using parliamentary processes. CORD’s decision to use extra-parliamentary processes to reform election laws and institutions is also demonstrated by its decision, together with civil society groups, to extensively litigate election rules in the judiciary where they hoped to get a fairer hearing than in Parliament ahead of the 2017 elections. Over thirty election disputes were filed against the Independent Boundaries and Election Commission ahead of the 2017 General Elections.

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22 For a brief overview of these early mergers, see Republic v. Registration of Societies &. 5 Others Ex-Parte Uhuru Kenyatta & 6 Others (2007) eKLR. http://kenyalaw.org/caselaw/cases/view/38945/
23 Ahead of the 2017 President election, the opposition formed the National Super Alliance, (NASA), a coalition of four main parties that declined to dissolve themselves into one party. The main partners of the NASA coalition are the CORD Alliance that comprises the following parties, The Orange Democratic Movement; the Orange Democratic Movement-Kenya; the Forum for Restoration of Democracy-Kenya; together with the Wiper Democratic Movement-Kenya, Amani National Congress and Chama Cha Mashinani. Thus the NASA alliance had affiliate parties that competed amongst themselves in the election primaries and again in the general elections. The strategy on the Jubilee Party of dissolving parties avoided these intra-alliance competition. Losers in the primaries were promised positions by the President and Deputy President if the Jubilee Party won the election.
The CORD alliance found these suits necessary because governments, since the enactment of the 2010 Constitution, had figured out ways of evading restrictions on their power; by using its legislative dominance – in Kenya referred to as the tyranny of numbers – to steam-roll its agenda as well as to insulate and protect it against allegations of corruption and abuse of office. 24 In short, since the enactment of the 2010 Constitution, the government in power has used its legislative majorities as well as its ability to distribute patronage and state resources to key supporters and constituencies as an insurance mechanism against being held accountable in Parliament. Deprived of such access to resources and patronage, opposition parties in Kenya have therefore not fared as well as the political parties under the control of incumbent governments both in their organizational and institutional development.25 This choice to use extra-parliamentary processes questions the resilience of the post-2010 constitutional order, particularly the ability of Parliament to act as a check against Executive abuse of power.26

Significant changes introduced by the 2010 Constitution protecting the rights of opposition political parties, requiring political parties to have a national character,27 and not to engage in violence by, or intimidation of, their members, supporters, opponents or anyone else. Bribery or corruption by political parties is also prohibited and they are required not to accept and use public resources, including public servants, to promote their interest or those of its candidates in elections. However, Kenya still lacks an institutionalized political party system in which voters’ choices are predominantly based on the policies of the parties in the election, rather than their appeals that if they do not vote for them, they will be shut out from access to state resources and its patronage opportunities.28 Many of the prohibitions on political party conduct such as bribery and ethnic mobilization during the elections were openly violated, both in the run-up to the 2013 and 2017 elections.29

Another factor that has weakened opposition political party ability to successfully contest Presidential power is the rise of independent candidates. The rise of independent candidates in Kenya, particularly in the 2017 General Election, is related to legislative reforms supported by the incumbent government and its control of Parliament requiring candidates who lost in the political party nominations or primaries, not to switch political parties thereafter. Sold as a reform to introduce party discipline, the effect of this rule in a system with a dominant political party has had the effect of reducing the discretion of

27 The 2010 Constitution also proscribed political parties established on the basis of religion, language, race, ethnicity, gender or region or to promote hatred on any of these grounds.
28 Of course I am not suggesting that voter choices are exclusively defined by narrow ethnic considerations.
political parties (particularly weaker ones) over candidate selection.\(^{30}\) This is because candidates who lost in the primaries overwhelmingly decide to run as independent candidates instead of remaining to strengthen the party that sponsored their initial primary run. Once elected, independent candidates are more likely than not to caucor strike a deal with the dominant party in Parliament from which they are likely to receive goodies and benefits in return for their support, further weakening opposition party strength in Parliament.\(^{31}\)

Thus, although the 2010 Constitution largely de-concentrated Presidential power, there has been a re-accretion of this power through legislative dominance. In other words, although the President no longer enjoys exclusive authority to exercise important powers such as the appointment of State officers, because this is now subject to legislative approval, having a legislative majority assures the President’s preferences prevail. Elections are therefore a significant opportunity for a Kenyan President to acquire a comfortable Parliamentary majority as an insurance mechanism against being held accountable by an effective opposition.

Weakened legislative checks on Executive power will likely allow a continuation of authoritarian governance in the country. This is precisely why elections in Kenya, have come to be regarded as the best chance to tilt the governance not only in a more democratic direction, but also in a direction acceptable by half the country that has never produced a President nor benefitted as the other half of the country from the largesse of the State. As a leading critic of the dominant party argued recently:

Elections in Kenya are always about the sense of exclusion for many communities; the reality of marginalisation including of those in dire poverty, and about moving towards a nation-state from diverse tribal communities. This was not and is not about Raila Odinga. Mr Odinga is simply, at the moment, the symbol of that exclusion, that marginalisation and the desire of many tribes to for recognition and respect.\(^{32}\)

From this perspective, the promises of the 2010 Constitution have not resulted in inclusive governance. On electoral matters in particular, the values of the 2010 Constitution that encourage consultation, negotiation and compromise have not changed the dominant party’s willingness to run roughshod over the opposition.\(^{33}\) The Constitution, on this account, has not been an agent of transformation. Rather, it has been

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\(^{32}\) Maina Kiai, For how long will the Kenyans seeking inclusion have to wait? Daily Nation, August 18, 2017. [http://mobile.nation.co.ke/blogs/Kenyans-seeking-inclusion-have-to-wait/1949942-4062454-item-1-10k6j28/index.html](http://mobile.nation.co.ke/blogs/Kenyans-seeking-inclusion-have-to-wait/1949942-4062454-item-1-10k6j28/index.html)

\(^{33}\) For example, the opposition unsuccessfully argued in the courts that they had a right to be consulted by the Independent Electoral and Boundaries Commission before it entered into a contract to procure the firm that printed ballot papers, see Independent Electoral and Boundaries Commission (IEBC) v. National Super Alliance(NASA) Kenya & 6 others (2017) eKLR. [http://kenyalaw.org/caselaw/cases/view/138741/](http://kenyalaw.org/caselaw/cases/view/138741/)
an instrument of continuation and entrenchment of the control of the Kenyan state by an alliance dominated by two ethnic groups. The two ethnic groups are the Kikuyu and the Kalenjin, the only ethnic groups that have produced a President since Kenya’s independence since 1963. Uhuru Kenyatta’s victory in the nullified Presidential election of August 2017 made it even more likely that a President could be elected from outside the Kikuyu/Kalenjin alliance. This is because it is not a secret that the Jubilee Party will in 2022 nominate Deputy President William Ruto for the Presidency. That would lock in a Kikuyu-Kalenjin alliance over control of state resources, something the opposition centered around the Luo-Kamba-Luhya ethnic alliance would be shut out from in the foreseeable future.

It has not been sufficient, from this perspective for a large part of the country and its population to be in the opposition for the foreseeable future. It seems that in a low income country with 42% of its 44 million population living below the poverty line, consolidating democracy under a Constitution faces particular difficulties when elections do not promise an opposition party representing the aspirations of half of the population that their party leader would be elected President.

The high rates of regional inequalities that largely track Jubilee Party regions as more wealthier than opposition regions, in large part accounts for one of the major campaign strategies adopted by the opposition in the 2017 election. By appealing to voters by emphasizing class and ethnic differences as well as by making appeals of economic nationalism – in fact dubbing the election as the unga (maize meal a staple Kenyan food) revolution, opposition politicians sought to convince their supporters that by voting for them, there was a real possibility of reversing how national resources were shared in their favor. Class, ethnic and nationalist appeals were also successfully made by weak political parties in Zambia (by Michael Sata’s Patriotic Front) and in Gambia by Larent Gbabgo’s Ivorian Popular Front to unseat incumbents. Such appeals compensate for the weaknesses that opposition parties in Africa face.

Ultimately, the Kenyan experience shows that even when Presidential powers are clipped, and greater horizontal and vertical accountability mechanisms are put in place, legislative dominance does not necessarily guarantee the elimination of patron-client politics and even prebendal politics. In this system, Parliament has become the new

36 In fact, there have been increasing calls for secession from Kenya by communities outside the Kikuyu and Kalenjin.
37 UNICEF, Kenya at a Glance, available at https://www.unicef.org/kenya/overview_4616.html Kenya had over USD 76 GDP in 2016 and has had over 5% GDP growth in each of the last two years.
40 Van de Walle, N., “Meet the New Boss, Same as the Old Boss?” The Evolution of Political Clientelism in Africa’ in Patrons, Clients and Policies: Patterns of Democratic Accountability and Political Competition, Cambridge University Press, (2003) (defining patronage as ‘the use of state resources to provide jobs and
locus of influence peddling and insulating the Executive from being accountable. Access to state resources, and a national administrative structure to support its campaigns and the organization and mobilization required gave Uhuru Kenyatta’s party Jubilee Coalition in 2013 and Jubilee Party in 2017 a huge advantage over the opposition. For example, following post-election violence in 2013, the Kenyatta government engaged in uneven accountability for post-election violence perpetrators. In other words, “the government negatively sanction[ed] officers who perpetuated violence that harmed the government while rewarding officers who perpetuated violence that was in support of the government’s political interests.” By engaging in such politicized bureaucratic management of institutions of accountability such as the police, the government has been able to build a loyal police service to serve its interests into the future. This loyalty results from the politicization of rewarding police officers who engage in violence against opposition supporters while punishing those who engage in election violence against government supporters. Bureaucratic management not only of the police force but the former provincial administrative structures that the government retained even with the establishment of a regional (federal) system of government under the 2010 Constitution, is a pervasive feature of how the central government controls far flung areas around the country. These officials engage in all sorts of behavior sanctioned by or acquiesced to by the government including “beating local opposition supporters or preventing them from registering to vote, denying rally permits to opposition candidates.” Further, intimidation of low-level government officials perceived to be aligned with the opposition was conducted openly public meetings by the incumbent President in the 2017 August Presidential cycle. The government also engaged in providing public resources to its strongholds, swing voting areas as well as in some opposition strongholds in what the opposition termed as bribery.

From this perspective, it becomes clear why President Uhuru Kenyatta opposed the abolition of what was formerly the Provincial administrative system controlled from the center as the 2010 Constitution’s mandate of establishing 47 independent counties began being rolled out.

As the authors further explain “Bureaucratic chiefs whose jurisdictions saw violence against the government’s co-ethnic Kikuyus were more likely to be fired from their positions than other chiefs within the same district whose jurisdiction did not see violence. But we find the exact opposite result in areas hit by violence that favored the government: chiefs whose jurisdictions saw Kikuyu-instigated violence against opposition supporters were far less likely to be fired in comparison to other chiefs within the same district whose jurisdiction did not see violence. Our results indicate that the government only viewed officers who misused their authority in service of the opposition, as opposed to all officer who misused their authority, as disloyal, dangerous agents that had to be dismissed,” id. at 3

Use of public resources in campaigns is prohibited by Section 14 of the Kenyan Election Offences Act.
nullified by the Supreme Court, the Jubilee government continued using state resources to publicize its achievements ahead of the repeat election until the High Court intervened.\(^{46}\) By manipulating bureaucratic processes, the Jubilee coalition has prevented the emergence of an impartial and professional bureaucracy that may not be used against it in future should the opposition win an election.

Dominant political parties can therefore more effectively compete for votes than opposition political parties who do not have established access to such organizational and mobilization capabilities or the authority to politicize bureaucratic processes such as rewarding or punishing state officials depending on the roles they play during elections. This in turn undermines the incentives these officials have to exercise their authority fairly and more importantly consistently with the Constitution and laws\(^{47}\), rather than in favor of government voters and against opposition voters. For this reason, a major claim the opposition made in challenging the 2017 Presidential Election was precisely this abuse and misuse of state resources and state officers, and the growing fusion between the apparatuses of the central government controlled by the Executive, on the one hand, and Parliament, on the other. This fusion in turn means that Parliament adopts the priorities of the ruling party with the consequence that those did not vote for the ruling party would have no faith in a government that does not take into account the opposition’s priorities. Indeed, after the August 2017 General Election, the President is reported to have told Jubilee Party politicians in a Parliamentary Group meeting that he would brook no opposition to his agenda in Parliament. To make his point, he without consultation of the Parliamentary Group, handpicked the lineup of Parliamentary leadership which rewarded his most loyal supporters in the previous Parliament and during the campaign\(^{48}\) while dropping from the lineup the speaker of the previous Senate who had not fully supported the dominant party’s agenda in the previous Parliament or during the campaigns.\(^{49}\)

It is against the foregoing backdrop that a ruling party, such as Kenya’s Jubilee Party, acquires additional power and authority that without checks such as by independent civil society organizations and opposition parties, becomes the backwater against which its corruption and authoritarianism thrives. The Jubilee Party’s clampdown on civil society organizations, including concerted efforts to close them down; intimidation of opposition politicians; the harassment of independent journalists including threatened passage of media restrictive laws; political violence meted against those opposed to the dominant


\(^{47}\) The 2010 Constitution with regard to responsibilities of public officers provides at Article 73(2)(b) that officers should make decisions with “objectivity and impartiality” and should ensure “that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices,” id. This provision is part of Chapter 6 of the 2010 Constitution which provides extensive provisions on leadership and integrity.


party; and criticism of the judges who make decisions inimical to its interests are a hallmark of its authoritarian traits. These interventions in the political and electoral environment amount to authoritarian manipulation that influences electoral outcomes alongside popular preferences. If these authoritarianism tendencies continue to grow, they will likely further endanger accountability through competitive democratic elections as well as through horizontal accountability mechanisms such as those in parliament. Ultimately, the promises of strong horizontal accountability mechanisms embodied in the 2010 Constitution will likely be undermined by a Parliament that can hardly be a check on an authoritarian Executive.

Part Two: Testing the Resiliency of the Judiciary: Election Dispute Resolution

In the 2007 Presidential election, Raila Odinga urged his supporters to engage in mass action to protest what he believed was a stolen election. Over 1,000 were killed in the violence. It was that violence that set the stage for the enactment of the 2010 Constitution. In the closely contested 2013 Presidential election, the first under the 2010 Constitution, Raila Odinga lost the election by less than a percentage point. He opted to challenge the result in the Supreme Court as required by the 2010 Constitution. Raila Odinga argued that he lost that petition unfairly. The Supreme Court declined to accept a 900 page affidavit because it was filed out of time. The rejection of this affidavit on a technicality, was seen as an unwillingness on the part of the Supreme Court to disrupt the country’s stability that would likely have resulted from nullifying what the opposition argued was a rigged election. In the 2013 Petition, the Supreme Court also overwhelmingly sided with President Uhuru Kenyatta’s lawyers on a broad variety of interlocutory applications Raila Odinga’s lawyers filed during the course of the case.50

In yet another example of a judiciary hesitant to take the country through electoral uncertainty prior to the 2017 Presidential election, the Court of Appeal reversed a three judge High Court decision that had ordered Kenya’s electoral body to stop the printing of Presidential ballot papers because there had been a constitutional violation.51 In reversing the High Court, the Court of Appeal signaled that the uncertainty that would have been created by postponing the Presidential election was unwarranted. These two decisions signaled to the opposition that the Judiciary was too timid to nullify a Presidential election. Therefore, the opposition’s initial hesitancy to resorting to the Judiciary to challenge the August 2017 election result was informed by their past experience.52 After

the August 2017 elections, church, business leaders and many election observers from within and outside Africa also encouraged the opposition NASA alliance to avoid using extra-judicial alternatives such as street protests to contest the election outcome. The NASA opposition eventually agreed to turn to the Courts to challenge the outcome of the 2017 Presidential election. 53

In an unprecedented decision, the Supreme Court nullified the 2017 electoral victory of Uhuru Kenyatta’s Jubilee Party. 54 The Supreme Court held that the illegalities and irregularities that characterized the Presidential failed to meet the 2010 Constitutional requirements of an election being conducted and administered in a transparent and impartial manner that ensured that the results were accurate and verifiable. The Supreme Court in particular found that the Independent and Electoral Boundaries Commission bungled the electronic transmission of the results inconsistently with electoral law.

For the opposition, the nullification renewed confidence in the Judiciary as a viable institution for resolving political disputes that were only otherwise resolvable through other means such as street protests and picketing with likely violent outcomes as protestors and picketers, on the one hand, and police, on the other confront each other on the streets, in neighborhoods and elsewhere.

However, for the Jubilee Party, the nullification of the election was seen as a judicial coup. Thus although the President and Deputy President have accepted the nullification of the election 55, they have harshly criticized the judges of the Supreme Court and promised to dress down the judges and reduce the power of the Supreme Court once the repeat election is over. 56 The Jubilee Party has also initiated legislative reforms to address the legal openings the Supreme Court used to nullify the Presidential election.

Notwithstanding these skirmishes between the judiciary and the Executive, the decision to accept the nullification on the part of President Uhuru Kenyatta was in part because he


urged Raila Odinga to take his complaints about the Presidential election to the Supreme Court. Hence, both the Jubilee Party and the NASA coalition ultimately accepted the Supreme Court as the arbiter of disputes surrounding the Presidential election. A lot of informal leverage was put on Raila Odinga by foreign governments, election observers particularly from the US and the EU, as well as those within his own coalition who wanted to go to Court, rather than engage in street protests. The choice of using the Court process served the opposition’s goal of exposing how the informal norms of dominant political party control subverted the conduct of a free and fair election. The election Petition laid bare for all to see how the patronage system of the State had been deployed to support the incumbent party; how state resources were mobilized to campaign for the incumbent party; and how this conduct was inimical to the requirements of conducting a free and fair election under the 2010 Constitution.

Notwithstanding the lopsided results in favor of the incumbent party in the August 2017 general election, the National Super Alliance (NASA) coalition has exhibited strong independence particularly from international pressures by rejecting their appeal to concede the election and to move on. This included pressure from former US Secretary of State John Kerry who led the Carter Center’s Election observation team, the Secretary General of the United Nations; a group of Western Ambassadors in Kenya; editors of the largest circulating daily in Kenya; as well as in the Washington Post; the New York Times; as well as many of the election observer teams including local groups like ELOG, sub-regional ones like EAC, COMESA, and IGAD, regional groups like

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the African Union; as well as international observers, including the European Union. Kofi Annan who led the peace-making process following the post-election violence in 2008 has also praised the election results of the 2017 Presidential Election. In the country, there were vigorous calls by church, business and others for opposition politicians to resort to the ‘legal process,’ the ‘rule of law,’ and to the process laid down by the 2010 Constitution to resolve their dispute about the 2017 Presidential election. This is an important point – that even though Kenya has a dominant political party system, the current opposition has refused to play a role opposition parties in some countries play – that of stabilizing, system-legitimizing and system maintenance of the dominant party system.

In a demonstration of its resilience as a political party NASA rejected the findings of these election-monitoring groups and pointed out how the political foundations of the ruling party’s incumbency allowed it to influence the election outcome. NASA has also advised its supporters not to tune in to some of the Television broadcasting stations in the country because they had muzzled much like the institutions in the country in a manner that disabled them from fairly reporting on NASA’s grievances arising from the 2017 election. The intense internal and external pressure for the opposition to accept the results of the election was justified to avoid a repeat of the post-election violence in early 2008. The potential consequences of mass action or street protests were regarded as likely to be violent and to result in death and destruction. This therefore spurred these extensive calls for the opposition to resort to the processes and institutions laid down in the 2010 Constitution to resolve their Presidential election grievances.

Further, the opposition resisted calls to participate in the repeat Presidential election in October 2010 until all their demands to ensure a free and fair election were met. By

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71 Rawlings Otieno, “NASSA leader Raila Odinga declares no election if demands are not met” Read more at: [https://www.standardmedia.co.ke/article/2001254356/nasa-leader-raila-odinga-declares-no-election-if-demands-are-not-met](https://www.standardmedia.co.ke/article/2001254356/nasa-leader-raila-odinga-declares-no-election-if-demands-are-not-met), Standard, September 13, 2017 available at
refusing to easily acquiesce to such pressure, the opposition did not want to easily give up the opportunity that elections gave it and its supporters – the opportunity to engage in collective protest against a dominant party. In this sense, elections have become a focal point for the opposition to air their grievances, to question the democratic legitimacy and credentials of the dominant party and even to expose how the dominant party has or may have stolen an election. Scholars have studied how electoral loses resulting from stolen elections become a focal point for coordinating and mobilizing outraged citizens motivated to engage in mass protests against the robbing of their votes leaving an authoritarian state with at least three choices: first, surrender power, second crack down on the opposition or third, disregard the election results and lose power.

The fact that the decision to resort to a judicial process to address their electoral grievances took several days to be made, and was in fact initially rejected, demonstrates the difficulties in building confidence in constitutional processes and institutions. It also reveals the difficulty an opposition that believes an election was stolen yet again has for abandoning protest movements against the electoral outcome. The nullification of the August 2017 Presidential election by the Supreme Court can therefore be regarded as an effort to shore up the credibility of the judiciary, not merely by demonstrating its independence from the political branches, but also winning the acceptance of those in the opposition.

Further, prior to the 2017 election when cases were brought before the Courts in what was a very conflictive electoral environment between a dominant and an opposition party, judges were caught in the crosshairs between the dominant and opposition party as they harangue over the rules of the election. Politicians heavily criticized individual judges in what they perceived were biased decisions against their side. The President criticized the Judiciary in one important case relating to the alleged unconstitutional procurement of ballots for the 2017 Presidential election. Politicians in the government’s party made personal attacks on one of the High Court judges linking his decision perceived to be in favor of the opposition as having arisen by virtue of his marriage to an opposition politician’s family. The opposition fared no better when they lost any of the election related cases they brought ahead of the 2017 election. As a result, Judges who

https://www.standardmedia.co.ke/article/2001254356/nasa-leader-raila-odinga-declares-no-election-if-demands-are-not-met
73 Mark R. Thompson, Philipp Kuntz, “Stolen Elections: The Case of the Serbian October” 15 Journal of Democracy, 159-172 (2004) (noting that “A social movement emerging in the wake of a stolen election may be powerful enough to enforce the outcome denied to the people through the ballot box,” id. at 161).
had the slightest potential of conflicts arising when they were appointed to a bench dealing with the election cases began recusing themselves from such appointments. Clearly the criticism the judges suffered had a chilling effect on their willingness to serve in politically charged election related cases.

Contests Over the Rules of the Election Game

The Kenyan opposition has not been satisfied with the mere holding of regular multi-party elections even when the opposition did in fact win votes and seats. In addition to participating in each election cycle, the opposition has sought to challenge non-democratic access to power of by the dominant political party. They have done so by contesting the election environment ahead of each electoral cycle because the dominant party has manipulated the political environment in which such elections are held to its advantage. Thus, the opposition has focused on reforming the electoral environment to reduce if not blunt dominant party manipulation of the environment to enable it to control the outcome of the elections. Thus we see in every electoral cycle since 1992, the continuity of struggles for reform led by the opposition seeking to unseat an incumbent government, and manipulation of the electoral environment by the incumbent regime.

The run-up to the 2017 Presidential election was also characterized by charges by the opposition that the dominant party intended to use the military to rig the elections. The opposition succeeded in getting assurances from the government that had no such plans. Major institutional and legislative changes were also undertaken prior to the 2017 Presidential Elections to ensure their fairness. These changes included the removal of the Commissioners of the Independent and Electoral Boundaries Commission prior to the end of their constitutional terms of office. In addition, over thirty cases litigating a variety of election disputes. These cases culminated in a Court of Appeal decision on the finality of Presidential election results at the constituency level only a couple of days prior to what was seen as a horse-race between the incumbent President and his challenger Raila Odinga. By litigating a broad variety of legal provisions relating to the elections, the opposition has engaged in a competitive struggle over the rules of the election.

This struggle of the rules that govern elections reflects the reality that systematic election fraud has characterized Kenyan elections even before the inauguration of multi-party democracy in 1991. It is therefore hardly surprising that the opposition in a dominant party system was interested in ensuring that the rules of the game did not in any way

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77 Thus in authoritarian elections, political competition does not occur in an established legal and institutional framework agreed by all parties, but rather an environment that the competing players try to define and redefine to their advantage. George Tsebelis, Nested Games: Rational Choice in Comparative Politics (1990) calls these ‘nested games’ in which there is strategic interaction within rules occurring alongside a strategic competition over rules.
inhibit its chances of a free and fair election. Opposition parties that face dominant ones like the Jubilee Party, seek to strengthen the formal rules of political competition enshrined in large part to deal with the informal sources of incumbent power. This is because informal norms of incumbent party behavior undermine rather than uphold the formal rules of the Constitution. In light of this repeated cycle of promoting or preventing more democratic outcomes, institutional forms and indeed rules, perhaps including the Constitution, “do not represent stable equilibria, but temporary truces.”

Conclusion

The 2010 Constitution of Kenya and the legislative framework that was rolled out to implement it resulted in a weakened presidential system, the contested and uneven but continuing empowerment of the judiciary as well as a growing regional system of governance. A new legal and institutional framework to discipline political parties so that they can focus on developing and implementing policy or be effective opposition parties were also established. Further new electoral institutions and laws to guarantee free and fair elections were established. However, political parties have continued to mobilize their voters by promising allocation of resources from the center. These linkages that Members of Parliament develop to able to deliver resources from the State make these members dependent on the Executive. This in turn diminishes the ability of Members of Parliament to be truly independent and to act as a check on the Executive. Even more, since 2013 the Jubilee Party has accumulated majorities in Parliament that insulate the Executive from opposition accountability. The political linkages that elected members of parliament establish with their constituents affects the way in which politics in Kenya is organized. These linkages and their relentless pursuit particularly during elections in turn shape the way in which political institutions in Kenya operate. This larger context therefore shapes how the reforms of the 2010 Constitution should be understood.

The opposition has often disengaged from Parliament to hold the government accountable and to reform institutions such as the electoral body, which the opposition regards as acting for and on behalf of the government. Underlying the pursuit of extra-parliamentary routes to seek accountability, evidences the futility with which the opposition regards using Parliament as an avenue of ensuring horizontal accountability. Kenya lacks elite consensus among its politicians in and out of government to strengthen independent institutions. This lack of consensus on investing in and building strong independent institutions in turn means that these elites cannot make credible commitments to each other, both within and across also across political, ethnic and other divides. Ruling party politicians have in particular focused on weakening accountability institutions. The President has used the dominant party in Parliament to make it less able

to undertake its role to check the Executive branch. The opposition has more often than not decided not to use Parliament as its main forum to demand legislative and constitutional changes to ensure free and fair elections for example. A weak Parliament in the context of a history of weak institutions of accountability and nominal separation of powers signals the persistence of vestiges of authoritarianism in an era of increase political competition.

When the Judiciary has exercised its independence to check Parliament and the President for violating the Constitution and the law, the ruling party has reduced judiciary funding and publicly harshly criticized individual judges and the entire judiciary.\(^81\) Parliament has also emasculated the anti-corruption authority making it unable to undertake its oversight role over corrupt offenders. The Executive, using Parliament, has also put the Auditor and Controller General under enormous pressure for fearlessly disclosing corruption within the government. By undermining independent institutions, the implementation of the 2010 Constitution has been contested and uneven so much that it was quite clear that the government could not wait for the end of the five year tenure of the Commission for the Implementation of the Constitution which played an important role in ensuring the government faithfully implemented the promises of the 2010 Constitution. As I have argued elsewhere, the judiciary continues to be the one bright beacon of successful transformation.\(^82\) There is no better evidence of this autonomy than the nullification of the August 2017 Presidential election as a result of irregularities and illegalities in the manner it was conducted. Such an unprecedented assertion of judicial power over an incumbent President will come at a cost. In the next few years, the incumbent party in Parliament will undertake a program that they argue will cut down the judiciary to size. This backlash evidences a primary claim in this paper. Faithful implementation of a new Constitution is a contested process. So far, it appears that the judiciary, perhaps unlike in Parliament has a leadership faithful to the rules and values of the 2010 Constitution. However, the independence of the Judiciary will depend in large part on whether Parliament, which is politically dependent on the President, will continue to fund the Judiciary or will choose to starve it of funding as part of a larger effort to undermine its independence. Given that the Judiciary is the only arm of the Government that does not owe its loyalty to the President or the party system, it is not surprising that it has demonstrated a significant and consistent commitment to hold the political branches accountable even though the risks of legislative reversals of judicial independence are not an unlikely possibility. Fortunately, the judiciary enjoys widespread public support and confidence particularly among civil society groups, in opposition strongholds in a large swath of the professional. A vigorous opposition and civil society movement that defends the judiciary when it acts independently, and is critical of it when it apparently toes the wishes of the President and Parliament give the reforms achieved in the judiciary a measure of insulation from easy reversal even in a Jubilee Party dominated Parliament. Such contestation is not merely the rough and tumble of politics, but how hard won gains

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such as judicial independence must be cultivated and defended to survive political backlash from powerful forces.