Entrenching the right to participate in government in Kenya's constitutional order: some viable lessons from the African Charter on Human and Peoples' Rights

Morris K Mbondenyi
Entrenching the right to participate in government in Kenya’s constitutional order: Some viable lessons from the African Charter on Human and Peoples’ Rights

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1 Introduction

The chronic condition of human rights violations in Kenya has over the years provoked serious political, social and economic consequences. Such violations often either include or result in the denial of the citizens of full participation in the formulation and implementation of vital policies affecting them and their country.¹ Eventually, this has culminated in a vicious circle of repression, economic stagnation and political instability. Like many other African countries, Kenya is on record for jailing opposition activists without trial, for daring to seek a level playing field in politics; detaining journalists for exposing corruption in high places; threatening academics with arrests for writing about poor governance; and for dismissing workers for attempting to unionise or to ask for better remuneration in the face of currency devaluations and inflation.²

The prevailing human rights situation in the country has made it exceptionally difficult for citizens to participate in their government as guaranteed under the African Charter on Human and Peoples’ Rights (hereafter the ‘African Charter’ or ‘Charter’).³ Although the country has a constitutional order, the same cannot be relied upon to protect citizen participation in government. This is primarily because, shortly after independence, a practice of frequent constitutional amendments started, which has served as an

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endorsement of authoritarian politics. Consequently, the country has witnessed a confusion of systems of governance, ranging from single-party autocracy to virtual multi-party democracy. In the process, citizens have unabatedly been denied the enjoyment of many of their fundamental rights and freedoms, including the right to participate in their government.

The main thrust of this contribution, therefore, is to propose the entrenchment of the right to participate in government in Kenya’s constitutional order. The article begins with a review of the nature and scope of this right in the light of the relevant provisions of the African Charter. It then analyses Kenya’s constitutional order to determine the extent to which it guarantees this right. Before conclusion, the article discusses the causes and effects of the ‘politics of exclusion’ in Kenya.

2 The right to participate in government: Its nature and scope within the context of the African Charter

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. Its 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 government, 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. Noteworthy, whereas the right to ‘equality of access to public property and services’ could be enjoyed by every individual residing within a particular state, only citizens are entitled to the enjoyment of the rights to ‘political participation’ and ‘equality of access to the public service’.4

It has been argued, and rightly so, that the expression “public service” as used in Article 13(2) is synonym with “civil service”, which denotes a public office concerned with national administration.5 Thus, a distinction could be drawn between Article 13(2) and (3) in that, while the former is concerned with the holding of public office, the latter focuses on access to public services. In other words, Article 13(2) precludes state parties to the Charter from adopting adverse measures that would hinder some of their deserving citizens from holding public office. Such measures could be, for example, unfair legislation, policies or practices that are discriminatory in their form, substance or effect. Essentially, appointments to the civil service should strictly be on merit and not on any other subjective criteria.6 In effect, Article 13(2) outlaws situations where certain ‘privileged groups’ monopolise the public service.

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 (UDHR)7, Article 25 of the International Covenant on Civil and Political Rights (ICCPR), Article 23 of the American Convention on Human Rights (ACHR)8 and Article 3 of Protocol 1 of

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4 See this argument also in Mbondenyi, M ‘Improving the substance and content of civil and political rights under the African human rights system’ (2008) 17/2 Lesotho Law Journal 92.
7 The Universal Declaration on Human Rights, G.A Res. 217 (III), adopted on December 10, 1948.
the European Convention on Human Rights and Fundamental Freedoms (ECHR). 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 ECHR Protocol, for example, requires states to hold “free elections at reasonable intervals by secret ballot.” Article 21(3) of the UDHR 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.

The essentials of free and fair elections as a prerequisite for democratic governance cannot be over-emphasised. Elections enable citizens to participate in their government. However, as Nzongola-Ntalaja correctly argued, it would be too simplistic to identify democratic governance with the holding of elections. Rather, the question of democratic governance goes beyond elections to the realisation of democratic principles of governance and to the balance of social forces in the community.

In this regard, 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 individuals 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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11 As above.
It is imperative to note that governance relates to the manner in which responsibility is discharged.\textsuperscript{12} In the public domain, such responsibility may be acquired through, \textit{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.\textsuperscript{13} 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.\textsuperscript{14}

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 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 on citizens.

The drafters, however, failed to define the full scope of the right to participate in government, or at least bring Article 13 of the African Charter to par with equivalent provisions of other international human rights instruments, such as the UDHR and ECHR. In the main, the 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, even when “elections are the only means by which the people can elect

\footnotesize{\textsuperscript{12} Hope K ‘The UNECA and good governance in Africa’ Paper presented at the Harvard International Development Conference 4-5 April 2003, Boston, Massachusetts, 2.}
\footnotesize{\textsuperscript{13} As above.}
\footnotesize{\textsuperscript{14} As above.}
democratically the government of their choice”. Further, it does not expressly prohibit single-party rule, a practice that is not appropriate to the proper working of democracy.16

Again, the ‘claw back’ clause in Article 13(1) limits the enjoyment of the right to participate in government to “the provisions of the law.” If caution is not taken, such a law could at best be too restrictive, or at worst, discriminative. There is the imminent danger that this clause could be abused by some states to unreasonably restrict the enjoyment of this right. The incorporation of a ‘claw back’ clause in Article 13(1) also tends to conflict with Article 20(1), which gives people the liberty to “freely determine their political status” and to pursue “their economic and social development according to the policy they have freely chosen.”17 Whereas Article 13 suggests that governmental authorities wield the ultimate power to determine how this right should be enjoyed, Article 20(1) vests such responsibility to the ‘people’.

The inadequacy of the Charter’s provisions on the right to participate in government defeats logic, given that Africans have been perpetual victims of poor governance where democracy, the rule of law and human rights are deliberately undermined.18 Military rule and unconstitutional changes of government have also taken 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 such circumstances, it cannot be understood how the drafters of the Charter could have failed to concretise this right.

15 Ouguergouz, F (note 5 above) 177.
16 As above.
17 Art 20(1).
18 For a detailed discussion on this, see generally, Mangu, A ‘The road to constitutionalism and democracy in Africa: The case of the Democratic Republic of Congo’ (2002), LLD Thesis University of South Africa Chapter 3.
In all fairness though, it is encouraging to note, the drafters intended that this right be construed beyond the limited scope of ‘political participation’, to envisage other relevant rights, such as equal access to public office, property and services. This is quite innovative because, as shall be elaborated below, there is a close nexus between this right and some other rights in the 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.\(^\text{19}\) It has also hinted that unconstitutional changes of government could adversely affect the enjoyment of the right to participate in government.\(^\text{20}\)

In *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*\(^\text{21}\), the Commission attempted to outline the parameters of the ‘right to political participation’ as recognised in Article 13(1). In this regard, it emphasised that:

> To participate freely in government entails, among other things, the right to vote for the representative of one’s choice. An inevitable corollary of this right is that the results of [the] free expression of the will of the voters are respected; otherwise, the right to vote is meaningless …\(^\text{22}\)


\(^{22}\) Para 49.
The Commission has also emphasised the relationship between the right to nationality and the right to participate in government, although the former is not stipulated in the Charter. Towards this end, it has condemned political tactics such as the 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 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 the opportunity to participate in the affairs of their government.\(^{23}\) However, although the communication alleged violation of Article 13(1), it is not encouraging at all that the 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 would be demystified, at least within the context of the African human rights system.

In *John K. Modise v. Botswana*, also cited above, the complainant alleged that although he was a national of Botswana by descent, the government declared him an ‘undesirable immigrant’ and subsequently deported him because of his political involvements.\(^ {24}\) After many years of contesting for the recognition of his right to citizenship by descent, the government of Botswana only granted him citizenship by registration.\(^ {25}\) 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.\(^ {26}\) Based on the evidence adduced before it, the Commission concluded that:\(^ {27}\)

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\(^ {23}\) See para 46 of the communication.


\(^ {25}\) As above, para 95.

\(^ {26}\) As above.

\(^ {27}\) As above, para 96.
his right of equal access to the public service of his country guaranteed under Article 13(2) of the Charter.

The Commission has also observed 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 Charter. 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.” The said amendment—*Constitution of Zambia Amendment Act of 1996*—effectively excluded persons, other than those whose both parents were Zambians by birth or descent, from contesting for the presidency of the country. In finding a violation of Article 13 of the Charter, the Commission reasoned as follows:

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 pertinent for two reasons. First, the 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 he or she intends to represent in accordance with Article 13(1). Secondly, the Commission’s pronouncements serve a warning to those governments that are fond of using their legal systems and other state machinery to frustrate a section of their citizenry.

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28 Communication 211/98, *Legal Resources Foundation v. Zambia* (n 19 above) para 64.
29 As above, para 2.
30 As above, para 3.
31 As above, para 72.
Thus, it is clear that laws ought to be promulgated to regulate and not to violate the rights of individuals.

The 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 most recent 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.’ Odinkalu correctly contended that the use of exclusionary bars by 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. 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, “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.” It 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. It also emerges from the Commission’s jurisprudence that massive human rights violations coupled with the denial of the right to political participation could justify secession.

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33 As above.
With regard to unconstitutional changes of government, the 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.\footnote{Communication 147/95, 149/96, \textit{Sir Dawda K Jawara v. The Gambia} (note 19 above) para 67.} Although the Commission’s jurisprudence on this issue is remarkably shallow, it is encouraging to note that even the Constitutive Act of the African Union\footnote{The Constitutive Act of the African Union, adopted by the 36\textsuperscript{th} 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.} (hereafter the ‘CAAU’ or ‘Act’) unequivocally condemns unconstitutional changes of government.\footnote{As above, Art 4 (p).} The Act is categorical that a government that seizes power through unconstitutional means shall not be allowed to participate in the activities of the Union.\footnote{As above, Art. 30.} Additionally, the Union has a variety of options on how to deal with such governments.\footnote{Article 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”.}

It is clear that both the African Charter and the CAAU lack a precise definition of what might constitute an unconstitutional change of government. The \textit{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\footnote{See \textit{Declaration of the Framework for an OAU Response to Unconstitutional Changes of Government} AHG/Decl.5 (XXXVI) adopted by the 36\textsuperscript{th} Ordinary Session of the Assembly of Heads of State and Government of the OAU.}:

\begin{itemize}
  \item (i) military coup d’état against a democratically elected government;
  \item (ii) intervention by mercenaries to replace a democratically elected government;
  \item (iii) replacement of democratically elected governments by armed dissident groups and rebel movements; and
  \item (iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.
\end{itemize}
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.\textsuperscript{43} For instance, it fails to appreciate the unconstitutionality of a government that refuses to call for elections at the end of its tenure, or the one that 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 the entire governmental or state authority to be based on the sovereignty and the will of the people. It places obligations on states to, not only ensure a level political field, but also to guarantee other rights that would 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 be ensured as of necessity.

It is rather unfortunate that the realisation of the right to participate in government has remained very 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 still largely 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 office, resources and services are no longer a major concern. At the same time, political contests are intense because of what is at stake; those wielding political power benefit from widespread abuses and misappropriation of public office, resources and services.

\textsuperscript{43} For a more detailed definition of this phrase, see OAU, \textit{Report of the Sub-Committee of the Central Organ on Unconstitutional Changes in Africa} (2000) 25 (v) - (vi).
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 of Kenya’s constitutional order and its approach to the right to participate in government.

3 Kenya’s constitutional order and the right to participate in government

3.1 The pre-independence constitutional order

The origin of Kenya’s constitutional order has closely been linked with the declaration of the British East Africa Protectorate of 1895. Prior to this period, the country had no formal legal system or government as recognised today. However, like every other pre-colonial African society, the traditional communities that lived in the territory, now called Kenya, had peculiar forms of socio-political arrangements that could loosely be termed as ‘government’. Although these communities differed in a number of ways, there is ample evidence to the effect that most of them gave credence to human rights, especially ‘participatory rights’. It cannot be disputed, however, there were certain barbaric practices in these societies, which could lead one to presume the absence of human rights, or even law. This state of affairs was nevertheless not unique to pre-colonial Kenya as human rights violations were a common feature in all human societies the world over.

Before we examine the emergence of Kenya’s constitutional order, it is imperative to point out that prior to foreign intrusion, the subsisting traditional societies were mainly governed by customary law and traditions. Foreign intrusion later led to the decline and subsequent demise of the then subsisting kingdoms and chiefdoms. Nevertheless, some

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47 As above.
aspects of customary law survived the onslaught of foreign invasion even after vehement attempts to obliterate it. The coming of foreigners into the country, however, did have a direct and decisive impact on customary law. In the first place, with the coming of Arab slave traders and later the European colonialists, African customary law no longer evolved according to African needs. Having been effectively disarmed, African societies easily became subjects of political, economic and social domination as their cultures were either ignored or supplanted with foreign ones. It was within this context that Kenya’s constitutional order evolved and developed over the years.

Throughout the second half of the nineteenth century, some European states brutally jostled one another for influence and control over trade of certain valued commodities in Africa. So intense was the competition that in 1884 Chancellor Bismarck of Germany convened a conference of European nations “to establish rules for recognising spheres of commercial suzerainty.” Eventually, Africa found itself under the control of European colonialists. The major colonial powers at that time were France, Britain and Belgium. Portugal, Germany, Italy and Spain exerted some measure of colonial authority as well, though they had no great impact as the other three. Thus, Kenya came under the British rule in the aegis of British East Africa Protectorate.

The declaration of protectorate status vested authority on Britain to govern the territory that had all along been occupied by ‘stateless’ communities with distinct political and social traits. Faced with such a challenge, it was needful for the colonialists to establish a workable system of government. The first signs of organised administration therefore emerged with the promulgation of the East Africa Order in Council in 1897. Among other things, the Order defined the jurisdiction of the British monarch over the

50 As above.
protectorate and provided for the establishment of the Office of the Commissioner who was to administer the territory on behalf of the monarch.\textsuperscript{52} Since the protectorate had no legislature, all its laws emanated from Britain and were conveyed as royal instructions known as Orders-in-Council.\textsuperscript{53}

The first Commissioner to administer the East Africa Protectorate, Sir Charles Elliot, was appointed in 1900 and served until 1904. During his tenure, the white settlers formed a loose political-cum-welfare group— the Colonialists Association— which could be seen as a precursor of political parties in Kenya. The association, though not ideally a political party, advocated for the recognition of the liberties of its members as afforded to every British citizen.\textsuperscript{54} For instance, in 1905, it remitted a petition to the British Secretary of State for the Colonies, demanding representation in the administration of Kenya. The transfer of the protectorate’s administration from the British Foreign Office to the Colonial Office orchestrated this move.

In response, Britain promulgated the 1906 Order in Council, which provided for the establishment of an Executive Council, headed by the Governor, to assist in the administration of the country.\textsuperscript{55} In accordance with its mandate, the Council passed legislation until mid-August 1907 when the Legislative Council (Legco) was incepted.\textsuperscript{56} Despite the fact that Africans constituted the most predominant racial group in Kenya, only ‘whites’ were until then permitted to participate in the administration of the country. Indeed, it is unfortunate that Africans were not appointed to the Legco and very disappointing that all appointments were made by the Governor in total disregard of the peoples’ right to choose their representatives. The idea of the Governor ‘hand-picking’ members of the Legco did not auger well with both African’s and Europeans.

\textsuperscript{52} As above.
\textsuperscript{53} See this observation from Kenya’s Parliamentary website available at http://www.bunge.go.ke/parliament/history.php (last accessed on 09 May 2009).
\textsuperscript{54} As above.
\textsuperscript{55} As above.
\textsuperscript{56} As above.
As the settler population grew, the Colonialist Association formed branches throughout the country. In 1910, the branches united to form a countrywide organisation called the Convention of Associations. In the main, the Convention was intended to prevail upon the Secretary of State for the Colonies to make provision for the election of unofficial members to the Legco. Although the demand was initially resisted, it was not long before the Secretary conceded. In 1919, the Legco Elections Ordinance was enacted, providing for the creation of eleven constituencies in the country.

The first elections were held in 1920 at a time when European settlers were pushing for the creation of a ‘white man’s country’ in the colony. Consequently, membership of the Legco was restricted to European representation. The aspirations of a ‘white man’s country’ were, however, thwarted by the Devonshire White Paper of 1923 which declared Kenya an African territory in which the interests of the ‘natives’ would reign supreme. Through the paper, the British government was to exercise trusteeship over the colony, the objective of the trust being to protect and advance the interests of Africans.

Following the issuance of the White Paper, the Elections Ordinance was amended in 1924 to legalise the election of five Indians and one Arab to represent their communities in the Legco. Meanwhile, provision was made for the nomination of a clergyman to represent African interests in the Council. This decision was informed by the belief that Africans were incapable of governing their own affairs and could therefore not be entrusted with any responsibility in the Legco or elsewhere at the national level. It was felt that Africans could only participate at the ‘reserve’ level, hence the introduction of the Local Native Council Ordinance which provided for the creation of Native Councils in every reserve. It was not until 1944 when the first African, Eliud Mathu, was appointed to the Legco. This came only after the African masses violently rebelled against racial discrimination, whose aftermath necessitated serious legislative reforms.

57 Munene, A W (note 51 above) 138.
58 As above.
59 Kenya’s Parliamentary website (note 53 above).
60 Ojwang (n 9 above) 33; Singh (n 8 above) 892).
The journey towards equal participation in government by all races begun in 1954 when the Lyttleton Constitution was enacted.\textsuperscript{61} This Constitution was the first public endorsement by colonial authorities of multi-racial participation in government as it established a Council of Ministers consisting of 12 persons from all races.\textsuperscript{62} In spite of these developments, Africans were becoming increasingly unhappy with having their representatives chosen for them. To avert further racial tensions, the colonial administration appointed a Commission of Inquiry in 1955 to look into ways of increasing African participation in government. In response to the findings of the Commission, the Legislative Council (Amendment) Ordinance of 1924 was amended to effect the election of eight African representative members. The first elections of African representatives to the Legco were held in 1957, amidst great dissatisfaction and protests stemming from African leaders.\textsuperscript{63}

The disquiet expressed by African leaders provoked the promulgation of the Lennox-Boyd Constitution in 1958 that ushered in more changes to the existing constitutional order. The Constitution provided for an expanded Council of Ministers comprising of 16 persons. This time, half of the Ministers were to be elected members of the Legco.\textsuperscript{64} Moreover, African representation in the Legco was increased to 14 members, a number that was equal to that of elected Europeans. However, the framework introduced by the Lennox-Boyd Constitution did not find support from the Africans leaders. Specifically, they were not pleased with the provisions regarding Specially Elected Members and the general policy of multi-racialism that was the main objective underlying the Constitution.\textsuperscript{65}

This disquiet led to the formation of the Kenya Independence Movement, a political organisation intended to champion the rights of Africans and their political


\textsuperscript{62} Munene, AW (note 51 above) 138.

\textsuperscript{63} Kenya’s Parliamentary website (note 53 above).

\textsuperscript{64} Muigai, G (note 61 above) 113.

\textsuperscript{65} Kenya’s Parliamentary website (note 53 above).
independence.66 Through this movement, African representatives in the Legco declined to co-operate in government, arguing that representation still weighed heavily in favour of the settlers who constituted a minority of the population.67 They demanded a constitutional conference to map their political destiny, forcing the new Secretary for the Colonies, Mr. Ian Macleod, to convene what came to be known as the First Lancaster House Conference in January 1960. This resulted in the adoption of the Macleod Constitution.

The Macleod Constitution, inter alia, expanded membership of the Legco to 65 persons and provided for the protection of minority interests by reserving 20 seats for racial minorities.68 It also provided for a Council of Ministers with an African majority, and drastically opened up the country’s democratic space by allowing the formation of multiple political parties by people of all races. Until then, it was unlawful for ‘blacks’ to form political organisations.69 Accordingly, two national African political parties— the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU)— were formed. Subsequently, a General Election was held in February 1961 to implement the provisions of the Macleod Constitution.70

It appears that the outcome of the First Lancaster House Conference fell short of the expectations and demands of both the Africans and Europeans. Whereas the Africans accepted to work within the framework of the Macleod Constitution, they had strong reservations on the requirements they were to fulfil in order to be registered as voters, their proportion in the Council of Ministers and the distribution of the Legco seats among the three races. On their part, the Europeans were opposed to the entire package of the Macleod Constitution, allegedly because it did not adequately safeguard their interests.71

66 As above.
67 Munene, AW (note 51 above) 139.
68 As above.
69 Mungai, G (note 61 above) 115.
70 KANU garnered 16 seats in the Legislative Council with 67% of the votes, whereas KADU won 11 seats and 17% of the votes.
71 Kenya’s Parliamentary website (note 53 above).
Because of this, the African representatives intensified the struggle for their rightful share of power, occasioning the Second Lancaster House Constitutional Conference in February 1962. The conference resulted into an agreement on a firm framework for a new constitution.\(^{72}\)

Notwithstanding the fact that the conference was held amidst deep-seated mistrust and differences between KANU and KADU, the Constitution that evolved from the negotiations was more representative than its predecessors. With minor modifications, this Constitution later formed the basis of the Independence Constitution. In its substance, it established a form of Westminster government and provided for a bi-cameral legislature. Perhaps with the intention to enhance citizen participation in government, the country was divided into seven regions, each with its own legislature and executive.

The final pre-independence constitutional negotiations were held in 1963, during which an agreement was reached for an internal self-government on 01 June 1963 and full independence six months later. Negotiations for the Independence Constitution commenced soon after the establishment of the internal self-government and were climaxed by the final constitutional conference later that year. The Independence Constitution was agreed upon without much difficulty and with minimum changes to the previous one. It should be recalled that the central theme that permeated the promulgation of this Constitution was the quest for equality amongst all races represented in the country. Simply put, its drafters sought to restore racial equilibrium in the governance of the country and in the distribution of its resources.

### 3.2 The post-independence constitutional order

When Kenya attained independence on 12 December 1963, the British government transferred power to Africans through the Kenya Independence Act and the Kenya Independence Order in Council of 1963.\(^{73}\) The Independence Constitution was set out in schedule two of the Order in Council. The document was long, detailed and complex, and

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\(^{72}\) As above.

\(^{73}\) As above.
was strongly based on the principles of parliamentary government and the protection of minorities.\textsuperscript{74} The nature and content of this Constitution was largely influenced by the then prevailing political circumstances.

To begin with, awareness that the colonial authorities were about to relinquish governance to Kenyans sparked off acrimonious debate on the modalities of distributing political power among the subsisting political parties. At that time, the country’s politics were dominated by KADU and KANU. KANU was essentially an alliance between politicians from Central and Nyanza Provinces, and a staunch proponent of a centralised system of government.\textsuperscript{75} KADU, on the other hand, represented the interests of numerically and politically weaker ethnic groups and expressed, among other things, its preference for a federal system of government. Its insistence on this system of government was motivated by the need to consolidate the weaker economic and numeric bargaining power of its supporters.\textsuperscript{76} KANU was disinterested in such a system because it had much to gain from centralised control of economic and political resources courtesy of its numerical strength.\textsuperscript{77} The political differences between the two parties, however, were resolved when their leaders decided to merge them in 1964.

Another factor that influenced the nature and content of the Independence Constitution was the minorities’ desire for self-preservation. The numerically smaller groups, such as the Asians and Europeans, became increasingly aware of their precarious position in the newly independent state.\textsuperscript{78} Therefore, the attendant fear of reprisals compelled them to lobby for constitutional safeguards and other means of power sharing. In summary, three broad themes characterised the Independence Constitution: regionalism to safeguard

\textsuperscript{74} Munene, AW (note 51 above) 141.


\textsuperscript{76} As above.

\textsuperscript{77} As above.

\textsuperscript{78} Ghai, YP ‘Constitutions and political order in East Africa’ (1972) 21 \textit{International and Comparative Law Quarterly} 410.
KADU, protection of minorities and the control of the exercise of political power.\textsuperscript{79} The interplay between these factors resulted in the establishment of a weaker form of government than that of the colonial administration.\textsuperscript{80}

All the same, the emergence of the independent state revived the hopes and aspirations of the African masses, which were at the time impoverished and taken aback by the brutish colonial legacy. This was especially because political power had passed from the hands of colonialists to indigenous leaders who were expected to understand and appreciate the problems of their people. It was equally expected that the ‘lost glory’ and traditional values that were undermined by colonialism would be restored, of course with some reforms that would accommodate the socio-economic and political diversity of the country. This, however, turned out not to be the case. Instead, the emerging state adopted a Constitution and legal system similar to that of her former coloniser, notwithstanding the fact that the new Constitution could not adequately redress the woes of the people.

The Constitution came with a flowery package of guarantees, including a multiparty system of government, independence of the judiciary, rule of law, and protection of human rights.\textsuperscript{81} It however failed to entrench certain crucial rights which now pose a threat to national unity. Whereas the document contains a Bill of Rights that guarantees the traditional civil and political rights as set out in the UDHR, it does not expressly guarantee the right to participate in government. The Bill of Rights, therefore, cannot be said to be representative of a set of higher values emanating from, and subscribed to, by the Kenyan people. Rather, it was meant to be nothing more than a bulwark against political power in the hands of ‘natives’, primarily to protect the interests of European settlers.\textsuperscript{82}

\textsuperscript{79} Muigai, G (note 61 above) 116.
\textsuperscript{80} Ghai, YP (note 78 above) 411.
\textsuperscript{81} The Constitution has a Bill of Rights included as Chapter V and is entitled ‘Protection of Fundamental Rights and Freedoms of the Individual’.
\textsuperscript{82} Munene, AW (note 51 above) 142.
It is ironical to note that, while the pre-independence struggle was informed by the desire for Africans to have greater participation in government, the same was not entrenched in the Independence Constitution. It would be pretentious to suggest that the provisions relating to freedom from discrimination under section 82 of the Constitution are sufficient to protect the right to participate in government. Likewise, it would be gullible to believe that sections 34, 35 and 43, which regulate the election of Members of Parliament and the registration of voters, guarantee this right. The only provision that comes close to guaranteeing the enjoyment of this right is section 75, which protects individuals from the deprivation of property. But unlike Article 13(3) of the African Charter, this provision

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83 Section 82 of the Constitution partly provides as follows: “1. Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect; 2. Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority; 3. In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description …; 7. Subject to subsection (8), no person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public; 8. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of a description mentioned in, subsection (3) may be subjected to a restriction on the rights and freedoms guaranteed by sections 76, 78, 79, 80 and 81, being a restriction authorized by section 76 (2), 78 (5), 79 (2), 80 (2), or paragraph (a) or (b) of section 81 (3). …”

84 Section 75 provides, *inter alia*, “1. No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied— (a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilisation of property so as to promote the public benefit; and (b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and (c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”
is concerned more with guaranteeing the right to property than with ensuring equality of access to public property.

Under the prevailing state of affairs, one would definitely agree with Odinkalu’s argument that the situation in post-colonial Africa necessitated a re-orientation of states away from the institutional infrastructure and attitudinal orientation inherited from the colonial period. This process, however, was never undertaken let alone achieved. In fact, in some countries, such as Kenya, most of the archaic laws, institutions and attitudes that underwrote colonialism did not just survive independence; they prospered thereafter.

The consequences of failing to entrench the right to participate in government in Kenya’s constitutional order have been severe. This is evidenced by the fact that since independence, Kenyans have been subjected to political regimes that have sought to implement democracy and human rights within the context of violence, intimidation, corruption and a general lack of transparency and accountability. Such a context has encouraged continued plundering of public resources and abuse of state institutions. Again, the country has found it exceptionally difficult to manage the conflicts arising from its ethnic diversity. Indisputably, the country’s multi-ethnicity, coupled with its weak constitutional framework, has contributed to its fluid national identities. This partly explains why ethnocentrism is one of the key challenges to the realisation of national unity and integration. What follows is a detailed discussion on some of the issues highlighted here.

4 The causes and effects of the ‘politics of exclusion’ in Kenya

Compared with her neighbours, who are in a perpetual state of 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 include strong ethnic divisions, polarised politics, political manipulation, socio-economic

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85 Odinkalu, C (note 32 above) 2.
disparities, deepening levels of poverty and endemic corruption. The factors are examined below in detail under four major themes, namely, socio-historical, ethno-political, socio-economic and legislative factors.

4.1 Socio-historical factors

A number of socio-historical factors have contributed to the undermining of the right to participate in government 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.

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. The colonial government focussed 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. Indeed, 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. Consequently, regional inequalities between Nairobi, the former ‘white highlands’, Coastal, Northeast and Western provinces are still evident today.

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88 African Peer Review Mechanism (note 86 above) 46. The areas in question were in Central province, the Rift Valley highlands and parts of Western province.
89 As above.
Similarly, the GDP per capita between the various regions of the country is very wide, while about 45% of the country’s modern sector employment is concentrated in less than 15 towns.91

The resultant disconnection between the various ethnic communities and regions of the country has provided the ethno-regionalised basis for political and economic discrimination of 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 these inequalities. 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 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

91 As above.
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.\(^\text{92}\) 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.\(^\text{93}\) 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.\(^\text{94}\) 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 to the worst when Daniel arap Moi ascended to the presidency after Kenyatta’s demise. 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.\(^\text{95}\) Ironically, in his formative years as the 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 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.\(^\text{96}\)

\(^\text{92}\) African Peer Review Mechanism (note 86 above) 49.
\(^\text{94}\) As above.
\(^\text{95}\) Sjögren, A & Karlsson P (note 73 above).
\(^\text{96}\) As above.
His pledge notwithstanding, Moi soon became so engrossed in suppressing his perceived opponents. Corruption, ethnicity and human rights became his distant concerns as he began to centralise and personalise power. This he achieved through tactics such as populating the civil service and state-owned institutions with members of his tribe. He also criminalised competitive politics and criticism of his leadership.

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 ways was to limit the country’s democratic space by allowing only one political party— the Kenya African National Union (KANU)— to operate freely. The party soon became the ‘mama na baba’ (Swahili phrase for ‘father and mother’) of the nation, wielding the ultimate political authority in the land. Sadly, though, 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 professed convert of political sycophancy. At the same time, political power was personalised through 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 community to win the presidency in order to have unrestricted access to

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97 Korwa, A & Munyae, I (note 93 above).
98 As above.
state resources, office and services.\textsuperscript{100} Hence, governmental authority, particularly the presidency, is perceived, more or less, as the preserve of the person in office and his tribe-mates, and could therefore be abused without any serious repercussions. This explains why every tribe in the country 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 fact in that, even the self-styled ‘national parties’ have tribal or regional undercurrents.

It is disturbing to note that even the re-introduction of multi-party politics in the country did not fully ensure citizen participation in government. When Kenya entered the multiparty 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 expectation, most of the 1990s were a continuation of the undemocratic practices birthed at independence. In the early 1990s, for example, the KANU government went as far as instigating ethnic-based violence in order to portray that a multiparty political system was not suitable for a multi-ethnic country like Kenya.\textsuperscript{101}

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.\textsuperscript{102} 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 evident that the 1992 and 1997 ethnic violence was politically motivated by the government.\textsuperscript{103}

\textsuperscript{100} African Peer Review Mechanism (note 86 above) 49.

\textsuperscript{101} Korwa, A & Munyae I (note 93 above).


\textsuperscript{103} See National Council of Churches of Kenya ‘CPK/ARCH: Synod Committee Report’ April 1992; and Abuom A ‘The Role of Kenyan Churches in democratisation’ Paper Presented at a Conference on the
Specifically, a report compiled by the *Amnesty International*, implicated certain pro-government politicians with the 1997 clashes in Coast Province. ¹⁰⁴

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, Kibaki is roundly accused of perpetrating ethnicity. ¹⁰⁵

It is rather unfortunate that the ethnic factor in Kenya’s politics has often 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 contemporary times.”¹⁰⁶ True to Rothchild’s words, the governance crisis in Kenya and the attendant undermining of democracy and human rights could not have reached its present high intensity had the underlying ethno-political factor been timeously resolved.

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4.3 Socio-economic factors

Kenya’s is the largest economy in East Africa and the third largest in Sub-Saharan Africa. The country’s economic performance has, however, been below potential. The country’s poverty index is escalating, as the number of poor increased from 12.5 million in 1997 to 15 million in 2005. 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. Poverty in the country is also quite structured, with certain regions being disproportionately affected due to political and historical reasons.

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. The government has also sought to expand the tax base via policies that, among other things, encourage investment, improve tax administration, and enhance the efficiency of financial markets and institutions.

Despite noticeable progress in key socio-economic reforms, the country still faces many challenges which have negative implications on citizens’ participation in government. These challenges concern, inter alia, improving the efficiency of public sector service delivery; building new infrastructure and rehabilitating existing ones; high unemployment rates especially among the youth; poverty eradication; maintaining sound

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107 African Peer Review Mechanism (note 86 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.
108 As above.
109 As above.
111 African Peer Review Mechanism (note 86 above) 17.
112 As above.
economic policies; and implementing various structural reforms so as to reverse the slow economic growth rate. The country also lacks effective anti-corruption policies.

Kenya has had, and continues to have, a worrisome problem of corruption. Decades of endemic corruption have fundamentally deprived 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 the 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.\textsuperscript{113}

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.\textsuperscript{114} 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 use land to induce patronage and build political alliances.\textsuperscript{115} Thus, much of the land has ended up in the hands of the political class, members of their families,

\begin{footnotes}
\item[113] See Hope, K (note 12 above) 6.
\end{footnotes}
friends and tribe-mates rather than the communities from which the colonialists had taken it. A recent investigation on unfair allocation of land found that:

the 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 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 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.

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. Some of the unresolved issues include the question of streamlining the

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116 As above.
117 As above, 146.
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.\(^\text{120}\) Unfortunately, Kenya’s current Constitution was written without much input from the citizens, and in spite of relentless efforts to amend it, there is consensus that the document is now outmoded.\(^\text{121}\) In fact, some of the amendments eventually undermined the legal sanctity of the document, rendering it more as a powerful tool in the hands of the executive 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.\(^\text{122}\) Additionally the president can hire and fire the Vice-President and Cabinet Ministers\(^\text{123}\); enjoys immunity from criminal and civil proceedings\(^\text{124}\); appoints Permanent Secretaries\(^\text{125}\), the Attorney-General\(^\text{126}\), the Chief Justice and other Judges\(^\text{127}\), the Controller and Auditor General\(^\text{128}\), Commissioner of Police\(^\text{129}\) and Chief of General Staff of the Armed Forces of the Republic.\(^\text{130}\) Moreover, he or she can summon, prorogue and dissolve parliament at whims\(^\text{131}\); must assent to

\(^{120}\) African Peer Review Mechanism (note 86 above) 16.
\(^{121}\) As above, 24.
\(^{123}\) Ss 15 & 16.
\(^{124}\) S 14.
\(^{125}\) S 111.
\(^{126}\) S 109.
\(^{127}\) S 61.
\(^{128}\) S 110.
\(^{129}\) S 108.
\(^{130}\) As above.
\(^{131}\) S 59.
legislation before it becomes law\textsuperscript{132} and appoints members of the Electoral Commission.\textsuperscript{133}

It is clear that apart from vesting enormous powers on the presidency, the Constitution also grants the institution overwhelming influence over the executive, judicial and legislative functions of government. As correctly emphasised in the African Peer Review Mechanism report on Kenya\textsuperscript{134}:

\begin{quote}
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.
\end{quote}

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 is deliberately suppressed. The first major attempt towards comprehensive constitutional reforms was in 1998, when the \textit{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 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 Prime Minister with ‘executive powers’. The wrangling between the government and opposition parties saw the country going for the 2002 elections with no substantial legislative reforms.

\textsuperscript{132} S 46(2).
\textsuperscript{133} S 41.
\textsuperscript{134} African Peer Review Mechanism (note 86 above) 50.
Expectedly, the constitutional review process is still hampered by divisive politics, animated by high levels of political posturing and discord. More often than not, national interests have been traded-off for the sectarian interests of politicians and other decision makers.

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 creation of the office of Prime Minister to share executive powers with the President. 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 mostly in those areas dominated by Kibaki’s Kikuyu tribe. It was within this context of ethnic divisions and animosity and the lack of legislative reforms, that the country’s 2007 polls were conducted, whose outcome nearly consigned the country to a civil war.

The country was engrossed in months of civil unrest and political bickering, following the declaration of Mwai Kibaki as the winner of the presidential elections conducted in December 2007. The wave of atrocities caught the eye of the international community,

135 As above, 24.
136 As above.
137 According to estimates, at least 1,000 people were killed and 350,000 internally displaced. See The Standard Team ‘New dawn as MPs convene’ available at www.eastandard.net (accessed 12 April 2009).
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 on-set, the mediators constituted the Kenya National Dialogue and Reconciliation (KNDR) team, comprising of representatives of the wrangling political parties— the Orange Democratic Movement (ODM) and Party of National Unity (PNU).138

It came to the attention of the team that the 2007 post-elections 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 her independence. Endemic failures in governance and the lack of appropriate legislative and institutional reforms were at the pinnacle of such unresolved issues.139

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.140 Some citizens therefore have regarded elections as an opportunity to vent their anger and frustration over poor governance. On the other hand, some political elite 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 unabatedly been denied the

enjoyment of many of their rights, including the right to participate in government. Such a scenario could easily be averted had the issue of comprehensive institutional and legislative reforms been taken seriously.

Other than allowing the constitutional reform process to be the forum for all Kenyans to collectively determine the destiny of their nation, politicians and other people with sectarian interests have always usurped the process to settle their scores. It is needless to emphasise, through comprehensive constitutional and legislative reforms, sound democratic principles can be entrenched in a multi-ethnic country like Kenya. Ultimately, this will present to every citizen the opportunity to participate in government.

5 Conclusion

Although Kenya’s constitutional order does not sufficiently guarantee citizens the right to participate in government, the 2007 post-elections chaos may have changed the country’s political landscape irreversibly. Slight progress towards the realisation of this right has been evident since the signing of the power sharing agreement between PNU and ODM in February 2008, and the subsequent formation of the Grand Coalition Government (GCG).141 The four-item agenda formulated by the KNDR team at the beginning of the mediation talks has partly been fulfilled, although other 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.142

141 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 (note 137 above).
Among other milestone achievements of the talks was the establishment of the Department of Reconciliation and National Cohesion, resettlement of some Internally Displaced Persons, establishment of a Truth, Justice and Reconciliation Commission and disbandment of the Electoral Commission of Kenya in line with recommendations of an independent review commission on the presidential elections. Investigations have also been concluded on the causes of the post-elections violence and recommendations made on the prosecution of those who were most responsible for the same. Beyond that, nothing much has been done to address some of the long-term issues that have plagued the country since independence. Apparently, 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 deserved urgency.

The imperatives of a constitutional order that is sensitive to the country’s diversity cannot be ignored. It is needless to emphasise that Kenya is in desperate need of a ‘watertight’ system of governance 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. Secondly, it should provide for effective transfer of power and periodic renewal of political leadership through representative and competitive elections. 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, omissions, and decisions. Fifthly, it should ensure effective public sector management, stable economic policies, effective resource mobilisation and efficient use of public resources. Lastly, it should adhere to the

143 Hope, K (note 12 above) 8.
144 As above.
rule of law in a manner that would protect human rights and democracy and ensure equal access to justice for all.\textsuperscript{145}

\textsuperscript{145} As above.