

THE RESILIENCE OF THE PAST: GOVERNMENT AND OPPOSITION IN KENYA*

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Abstract

The article discusses government and opposition in Kenya over the last 100 years. Major democratic changes have occurred, but legacies from the colonial period and Kenya's one party state endure. Pushback efforts to perpetuate the status quo continue. Subverting formal legal changes, using violence, and polarizing ethnicity are among the means used to consolidate the past. The focus is on the interplay between stasis and change, using comparative political economy theories and similar examples from other times and places. The analysis highlights the resilience of the past and historic barriers to change. It thereby raises broader questions and issues that are not well understood.

Keywords: democratization, government, opposition, repression, stasis, change, comparative political economy, ethnicity, violence, political parties, elections, colonialism, post-independence, Kenya, Africa

*"Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brains of the living."*¹

Introduction

Kenya has displayed a remarkable ability to reinvent the status quo. Amidst the legal architecture of a multi-party democracy, many of its practices are throwbacks to its one party past. Much has changed since colonialism and independence, but much persists. Challenging the state continues to invite intimidation and repression. Earlier legacies continue to haunt the present. The state and its enforcers still use the carrot and the stick to entice away and punish their opponents. Going against the grain remains costly. Hence, many conform, either cowed by threats or bought off. This

* This paper was written for a conference on "Kenya at 50", Johns Hopkins, School for Advanced International Studies (SAIS), September 26–27, 2013.

¹ Karl Marx, *Eighteenth Brumaire of Louis Napoleon*. See <http://www.marxists.org/archive/marx/works/1852/18th-brumaire/> and <http://www.marxists.org/archive/marx/works/1852/18th-brumaire/ch01.htm>.

tendency reinforces the existing system, jeopardizes the rule of law, and thwarts change.

The resilience of Kenya's past is not unique; similar tendencies exist elsewhere. The initial glee accompanying multi-party elections in Africa, the "color revolutions" in the former Soviet Union and the "Arab Spring" has turned to skepticism, if not despair. Old undemocratic ways have reasserted themselves and the past has proved more resilient than anticipated. This syndrome has not gone unnoticed, but is poorly understood most everywhere.

While Proust longed to recapture the past and used his "petit madeleine" to invoke it,² Marx bemoaned its resilience,³ noting that "all previous history tends to repeat itself."⁴ North explains why:⁵ informal norms or "rules of the game" along with their enforcement mechanisms of sanctions and rewards tend to undermine changes in formal rules, including new laws. Decision makers are guided by incentive structures that perpetuate the status quo. This is why old ways persist. This makes change difficult, particularly taking new formal rules from established systems that are democratic and developed and expecting they will produce similar results elsewhere. Normally, this is not the case and the past continues.⁶ Acemoglu and Robinson concur, noting that "de facto political power" often "partly or entirely offsets de jure changes brought about by reforms in specific political institutions."⁷ Levitsky and Way agree, characterizing African and former Soviet states that hold multiparty elections, but cling to their old ways as engaging in "competitive authoritarianism."⁸

² Marcel Proust, *Swann's Way: A Remembrance of Things Past*, <http://www.authorama.com/remembrance-of-things-past-3.html> (last accessed August 4, 2013).

³ Ibid. Marx particularly bemoaned the resilience of pre-capitalist modes of production as a fetter on the development of capitalism.

⁴ Marx, *Eighteenth Brumaire of Louis Napoleon*.

⁵ Douglass C. North, "Economic Performance Through Time," *American Economic Review* 84, 3 (1994), 359–68.

⁶ As North correctly notes "[E]conomies [and political systems] that adopt the formal rules of another economy will have very different performance characteristics than the first economy because of very different informal norms and enforcement". Ibid, 366. .

⁶ Daron Acemoglu and James Robinson, "Persistence of Power Elites and Institutions," *American Economic Review* 98, 1 (2008), 267–93.

⁸ Stephen Levitsky and Lucan A. Way, "Elections without Democracy: The Rise of Competitive Authoritarianism," *Journal of Democracy* 13, 2 (April 2002), 51–75. Also see Katya Kalandadze and Mitchell Orenstein, "Electoral Protests and Democratization: Beyond the Color Revolutions," *Comparative Political Studies* 42, 11 (2009), 1403-25.

Other authors, including Carothers, Joseph, and van de Walle use different words to make similar points.⁹

In contrast, Posner sees some hope in the compliance of numerous African countries with new formal rules such as term limits.¹⁰ Arriola also finds promise in the financial liberalization of the 1990s in Africa, including Kenya. He notes that with the weakening of formal state controls, it is far easier for businesses to support opposition parties and for these parties to use this patronage to build coalitions to effectively compete with government.¹¹ However, liberalization is not total or without problems. The private sector still depends on the state for a variety of licenses and permits, making it potentially vulnerable to threats of state sanctions and rewards.

Furthermore, once in power, many opposition parties and figures often display similar repressive tendencies to those of the governing parties that preceded them. Consequently, in Kenya and elsewhere, rulers have not shed the past. They often hark back to their old repressive ways in spite of new formal legal changes. This is not altogether surprising. In his discussion of nineteenth-century Germany, Ziblatt found that socioeconomic inequalities facilitated the ability of an entrenched landed elite to use a variety of “push back tactics” to undermine democratic procedures, including capturing key state institutions and endowing them with “the coercive and material resources to disrupt free and fair elections in order to defend the countryside from oppositional mobilization efforts.”¹² His arguments resonate for Kenya, where a small political and socioeconomic elite tends to recirculate in new parties and different expedient alliances. They shape both the formal and informal rules of the game. They also squabble over them, increasingly using violence, particularly when one ethnic group replaces another and tries to gain or retain political power to control the state.¹³ Even alleged gangsters and drug dealers now vie for political power so they themselves can change or set the formal rules with

⁹ See Thomas Carothers, “The End of the Transition Paradigm,” *Journal of Democracy* 13, 1 (2002), 5–20; Richard Joseph, “Africa: 1990–1997: From Abertura to Closure,” *Journal of Democracy* 9, 2 (1998), 3–17; Nicholas Van de Walle, “Electoral Authoritarianism and Multi-Party Politics,” in Nic Cheeseman, David M. Anderson, and Andrea Scheibler, eds., *London: Routledge Handbook of African Politics* (London: Routledge, 2013).

¹⁰ Daniel Posner and Daniel J. Young, “The Institutionalization of Political Power in Africa,” *Journal of Democracy* 18, 3 (July 2007), 126–40.

¹¹ Leonardo R Arriola, “Capital and Opposition in Africa: Coalition Building in Multi-Ethnic Societies,” *World Politics* 65, 2 (2013), 233–72.

¹² Daniel Ziblatt, “Shaping Democratic Practice and the Causes of Electoral Fraud: The Case of Nineteenth-Century Germany,” *American Political Science Review* 103, 1 (February 2009), 18–19.

¹³ As argued by Michael Cowen and Scott MacWilliam, *Indigenous Capital in Kenya* (Helsinki: Interkont Books 8, Institute of Development Studies, University of Helsinki, 1996), and Scott MacWilliam, France Desaubin, and Wendy Timms, *Domestic Food Production and Political Conflict in Kenya* (Perth: The Indian Ocean Centre for Peace Studies, University of Western Australia, 1995).

some having succeeded in the 2013 election¹⁴. Others fight back for genuine change. They include a diminishing number of civil society activists. Given the high costs of being in opposition, many have joined government or retreated from political activism. In spite of some successes, the process is long and difficult with many setbacks. This highlights the need to examine the process of institutional change over a longer time frame to explain the resilience of the past.

Below, I examine legacies of repression and government's responses to dissent in Kenya from the colonial period until the present. I look at their characteristics over time. I discuss what has persisted and what has changed. I argue that progressive changes have occurred. They include the end of the one party state, the introduction of presidential term limits, a decrease in statism, and greater freedoms of movement, association, and speech. Nevertheless, these very changes, amidst a largely unchanged political culture have led to the game changer of using organized violence against opponents to win elections and to increased ethnic polarization with one ethnic group's win seen as another's dire loss. Hence, while much has changed, much remains the same, coupled with repetitive tendencies that do not bode well for the future.

Amidst the current focus on ethnicity and elections, there are few discussions of the repression of opposition and dissent. I ask why it continues, how it works, and the reasons for its continued salience. I also look at the resilience of the past, at what has changed and what has persisted. It is an opportunity to take an admittedly limited overview of a topic that is both pertinent and interesting. It also is a chance to better understand stasis amidst change in greater detail and the wider resonance of the Kenyan experience.

Colonialism

The colonial experience in Kenya is key to understanding its political economy today as many of its key features continue.

The colonial government defined Kenya geographically, imposed its monopoly of force over the territory, and developed a system that was statist. It controlled both politics and the economy, leaving few avenues of dissent open for its subjugated population. Under colonialism, government developed a highly authoritarian set of institutions, laws, and tactics designed to administer the country and to repress

¹⁴ In 2010, George Saitoti named a number of M.P.s who involved in drug trafficking, one of whom had been named as a drug "kingpin" by U.S. President Obama. With the exception of one alleged drug baron who lost in the 2013 election the others went on to win political positions as governors and senators. See Laban Wabanisi, "Saitoti Names Drug Barons," *Capital News*, December 22, 2010.

emerging African associations opposed to its rule.¹⁵ It was characterized by a centralized administration that was the arm of the executive. It had a battery of laws and ordinances that it used to stifle emerging political groups and to make political engagement very costly. Among them were those governing the licensing of public meetings, public order, travelling to “outlying districts,” and the registration of societies, including political associations and political parties.¹⁶ Colonial civil servants were the government’s eyes and ears in the countryside organized hierarchically from top to bottom through provincial and district commissioners and appointed chiefs. They were expected to inform the executive of any “bad hats” who should be detained or subversive groups that should be banned and they did.

The colonial government banned the first African attempt at a countrywide group, the East African Association in the 1920s. From then on, Africans could only form local associations. They were told to channel all their grievances at the grassroots level through “proper channels,” meaning Local Native Councils (LNCs) and appointed chiefs. The attitude of the colonial administration was that Local Native Councils made local political associations “unnecessary,” even when they were allowed, with a District Commissioner (DC) noting that “if the Kikuyu Association can be allowed to die by agreement the sooner the better say I.”¹⁷ Africans were given the run around if they attempted to circumvent LNCs or raise generic issues such as land alienation. “Mau Mau” was in part an outgrowth of these restrictions, as well as intergenerational conflicts within Kikuyuland,¹⁸ and an inability to effectively protest against land alienation.¹⁹ Dissent was equated with subversion throughout the colonial period. Early on colonial officials told Harry Thuku

¹⁵ For in depth discussions of this, see Susanne D. Mueller, “Government and Opposition in Kenya,” *Journal of Modern African Studies* 22, 3 (September 1984), 401–407; and Susanne Dorothy Mueller, “Political Parties in Kenya: Patterns of Opposition and Dissent, 1919–1969,” (Ph.D. thesis, Princeton University, 1972), 1–73.

¹⁶ Ibid.

¹⁷ Kenya National Archives (KNA), PC/CP8/5/1, letter of 16 May 1930, p. 16, Kikuyu Association.

¹⁸ See John Lonsdale, “The Moral Economy of Mau Mau,” in Bruce Berman and John Lonsdale. *Unhappy Valley: Conflict in Kenya and Africa* (London: James Currey, 1992), 265–504.

¹⁹ See studies by David Anderson, *The History of the Hanged: The Dirty War in Kenya and the End of Mau Mau* (New York: W.W. Norton, 2005); Daniel Branch, *Defeating Mau Mau, Creating Kenya: Counter-Insurgencies, Civil War, and Decolonization* (Cambridge: Cambridge University Press, 2009); Frank Furedi, *The Mau Mau War in Perspective* (Athens: Ohio University Press, 1989); and David Throup, *Economic and Social Origins of Mau Mau 1945–53* (London: James Currey, 1987).

to “choose between his job and politics,”²⁰ and headmen were told that criticism of government “cannot be permitted and will endanger their position.”²¹

Not until 1944, after Eliud Mathu was appointed to the Legislative Council (LEGCO), were Africans allowed to form a national association, the Kenya African Study Union (KASU), to advise him. It became the Kenya African Union (KAU), but was soon proscribed under the Mau Mau emergency in 1952. Direct representation of Africans in LEGCO began only in 1957. By this time, chiefs and members of the Home Guard used to repress “Mau Mau” had already received privileges that matured into land and government jobs after independence. Those who did not play ball with the colonial government and were in opposition to it suffered, as did a number of innocent victims who were simply trying to survive.²² The ban on countrywide political associations until close to the end of colonialism effectively cemented ethnic particularism after independence. Political parties continued to be weak compared to the administration. The equation of dissent with subversion also endured.

Independence

The system the independence government in Kenya inherited from the colonialists in 1963 was highly centralized and statist. Its persistence, including the choice of its post-independence leaders to retain many of its features, paved the way for future authoritarian behavior. Access to violence and socioeconomic sanctions were concentrated in government and denied to the opposition. Dahl argues that such a situation is unfavorable to competitive politics,²³ which it proved to be after Kenya became independent in 1963. The dissonance between formal and informal rules described by North and Acemoglu did not arise under Kenya’s first president, Jomo Kenyatta, or its second, Daniel arap Moi. Instead, the new formal rules they adopted, including numerous constitutional amendments to further centralize and personalize power, consolidated statism. This facilitated repression with the carrot and the stick used as enforcement mechanisms. In both periods, the state effectively punished the opposition and dissenters and both regimes endured for many years. Under Moi, violence against dissenters escalated and became widespread while his looting destroyed the economy. The combination gave rise to pressures both internally and

²⁰ Carl Rosberg and John Nottingham, *The Myth of Mau Mau: Nationalism in Kenya* (New York: Praeger, 1966), 46.

²¹ Kenya National Archives, KNA, PC/CP3/5/1, Kikuyu Association, 1921–31, letter from Senior Commissioner to Hon. Chief Native Commissioner, 28 January 1928, 10.

²² For vivid discussions of what this meant in practice, see Bildad M. Kaggia, W. de Leeuw, and M. Kaggia, *The Struggle for Freedom and Justice* (Nairobi: Transafrica Press, 2012), and Ngugi wa Thiongo, *In the House of the Interpreter* (New York: Pantheon, 2012).

²³ Robert Dahl, *Polyarchy: Participation and Opposition* (New Haven, CT: Yale University Press, 1971).

externally from donors on whom Kenya depended. This led to a break in 1991, with Moi being forced to change the constitution and allow for multi-partyism after making Kenya a *de jure* one party state in 1982. This change in formal rules predictably gave rise to attempts to undermine these rules. Moi introduced violence as his game changer to win elections against his opposition as North might have predicted. He succeeded in two elections in the 1990s before he was forced to step down due to domestic and international pressures, following the collapse of the Soviet Union in 1991. Under Mwai Kibaki, Kenya's third president, there was an initial opening of space and an initial tolerance of opposition that then changed to the detriment of dissenters. Later, after the 2007 election, both the opposition and government tapped extra-state violence to gain and retain political power and to use to it undermine the formal architecture of multi-partyism.

The Kenyatta Period: 1963–1978

The Kenyatta government kept most of the laws and regulations from the colonial era, which had been used to stifle and repress dissent, and the provincial administration intact. It also passed numerous constitutional amendments to centralize power further and worked successfully to eliminate opposition political parties. The amendments included Kenya becoming a republic, passing the Preservation of Public Security or Preventive Detention Act in 1966 and making it a *de jure* one-party state in 1982, among others. By comparison with the provincial administration, parties were kept weak, had few resources, and were faction ridden. Even the party of independence, the Kenya African National Union (KANU) remained housed in a scruffy office on Jevanjee Street in Nairobi, in stark contrast to the headquarters of the provincial administration in the center of town.

Within one year of independence, by 1964, the regional arrangement agreed to at the Lancaster House conference disintegrated. Both opposition parties, the Kenya African Democratic Union (KADU) and the African People's Party (APP) dissolved and joined the party of independence, the Kenya African National Union (KANU). KADU and KANU were divided by different ideologies. KADU favored decentralized power, including on land, and was supported by smaller ethnic groups who feared being overpowered by the Kikuyu and the Luo, who supported KANU. KADU was starved for funds, sidelined, and soon recognized the wisdom of joining KANU where it could partake of government largesse. The APP more exclusively a Kamba party, led by Paul Ngei, also folded turning Kenya into a *de facto* one-party state.

Soon, however, splits developed within KANU between conservatives and radicals, led by Vice President Odinga Oginga and his supporters, some of whom had been in detention with Kenyatta, including J.D. Kali, J.M. Nthula, and Paul Ngei. The Odinga faction got support from other MPs from more marginal areas and from Luo MPs who felt Odinga had been sidelined by Kenyatta. The two groups disagreed about policies, with the radicals supporting a more socialist orientation.

They also were against the policy of government paying the colonial government to buy back land it had alienated.

In 1966, the Odinga group established the Kenya People's Union (KPU) and crossed the floor only to face new legislation that required anyone changing parties to recontest their seats. This was the beginning of a number of punitive measures that made it costly for individuals to join the opposition and led to suffering for those who tried.

As Mueller has discussed in detail,²⁴ both the stick and the carrot were used to destroy the KPU. On the stick side, government utilized ordinances from the colonial period to make it difficult to impossible for the KPU to register branches, hold public meetings, or travel to outlying districts to spread their message. Opposition MPs also were penalized in other ways. They were ostracized socially, lost jobs, and found it difficult to impossible to obtain trading licenses or loans from government parastatals and banks. Government labeled the opposition as communist, meaning seditious, and harassed its MPs and supporters in public meetings. A number of KPU supporters in the private sector lost their jobs. In the rural areas, where there was less anonymity than in the cities,²⁵ many residents kept their distance from the KPU, as they feared they would be punished if they were even seen with them. On the carrot side, Kenyatta expanded the size of the cabinet to induce KPU MPs to rejoin KANU. Kenyatta used ministerial and parastatal appointments as inducements to get KPU MPs to return to the fold. Many did. Kenyatta also pressed hard against KPU members in non-Luo areas, particularly in Central Province, threatening on several occasions to grind them into dust.²⁶ He also mounted an oathing campaign in Central Province, reminiscent of "Mau Mau," off-putting to both non-Kikuyu and progressive Kikuyus alike.²⁷ This was coupled with actual violence, including using KANU "youth wingers" to rough up KPU MPs and their supporters.²⁸ Simultaneously, Kenyatta continued to remind constituents of government's potential largesse and the likelihood of not having any if they elected KPU instead of KANU MPs. Both MPs and constituents got the message. Many non-Luo MPs left the KPU or got defeated in the 1968 by-election, thereby unfairly branding it as a Luo party, until government finally banned it in late 1969 and put key figures in detention.

During this period, violence also entered the arena. Pio Gamma Pinto, a Goan radical with alleged ties to the Soviet Union, was assassinated in 1965. The murders of Tom Mboya in 1969 and J.M. Kariuki in 1975 followed. Both Mboya and Kariuki had cross ethnic appeal. Kenyatta and his Kiambu clique of advisors saw

²⁴ Mueller, "Government and Opposition"; and Mueller, "Political Parties in Kenya."

²⁵ Mueller, "Government and Opposition."

²⁶ Kagia, *The Struggle for Freedom*, 219–20.

²⁷ *Ibid.*, 258.

²⁸ *Ibid.*, 233–37, 245.

them as unwanted contenders for presidential power. The banning of the KPU and the assassinations mobilized the public, particularly human rights defenders and university activists, a number of whom were detained. They protested in demonstrations. Government responded by using the paramilitary General Service Unit (GSU) to clamp down on dissent, especially at the University of Nairobi, which was constantly being closed. In addition, government engaged in extensive surveillance activities that discouraged freedom of speech and association. It also effectively controlled the press, which was mostly rote in its support of government.

The legacies of the Kenyatta period set the stage for further repression later on and were reminiscent of the past. Like the colonial period and what was to follow, government branded opposition parties as communist and seditious. Like the colonial period, government's almost total monopoly of patronage and sanctions meant that being in opposition was extremely costly. Like the colonial period, government was simultaneously repressive and bountiful: rewarding those who played ball and punishing those who defied it. Like the colonial period, government tried to keep the opposition local and tribal, to brand it as such, to marginalize it, and to put restrictions on its ability to operate nationally. As in the colonial period, violence was part of government's toolbox. It used it when it thought it was necessary. Just as under colonialism, government was both legalistic and undemocratic, using its authority and its majority in parliament to pass and implement legislation to ensure its hold on power and to deny it to others. Like the colonial period, many individuals organized to protest government clampdowns and suffered. At the same time, unlike colonial times, there was an economic trickledown effect of prosperity in the distribution of land, civil service and other government jobs, and the opportunity to take part in the agricultural boom of the Kenyatta period that many smallholders enjoyed.²⁹ The Kenyatta period illustrated the difficulties of change and the hold of the past discussed in the introduction, including an unsuccessful attempt after Kenyatta died in 1978, to bypass the legal rules and change the constitution to keep the Vice President, Daniel arap Moi, from becoming president.

The Moi Period: 1978–2002

Moi was Kenya's third Vice President after Oginga Odinga and Joseph Murumbi. Kenyatta originally appointed Moi in part as a bone to the dogs of KADU and in part to solidify his power nationally by bringing in key ethnic barons from around the country. The Kiambu clique, who supported Kenyatta, incorrectly saw Moi as a not terribly bright patsy who would keep the Kenyatta machine in place. They soon realized their mistake. They vastly underestimated Moi. While not well educated, he was politically shrewd. Moi quickly became his own man, took control of the

²⁹ Also, individuals enjoyed freedoms they had been denied under colonialism

presidency, and began to dismantle Kikuyu hegemony.³⁰ His initial populism quickly morphed into a far more draconian and repressive regime than Kenyatta's. Kenya was still statist and, like Kenyatta, Moi used the carrot and the stick to dismantle any opposition to him. However, under Moi, repression deepened.

Moi moved swiftly to consolidate his power. In June 1982, he amended the constitution and made Kenya a one party state. Later he passed other laws that increased his power personally and dismantled whatever checks and balances remained in the system.³¹ Politically, Moi was wary of the Kiambu clique in Central Province, given its unsuccessful attempt to keep him from becoming president after Kenyatta's death. This wariness increased after the failed attempted coup of August 1982, which was said to have been mounted by Luo members of the air force.³² Moi responded politically by solidifying his anti-Kikuyu base later known as KAMATUSA (an acronym for Kalenjin, Masai, Turkana and Samburu).

Politically, Moi saw demons everywhere and in everyone. Unlike Kenyatta, who had a close circle of intimates as ministers and advisors, Moi kept his cabinet off balance by constantly changing his inner sanctum and making sure no one thought they were permanent. For his deft ability in constantly rewarding new friends and punishing new enemies, who were often old friends,³³ Moi earned the title, "the professor of politics." While Kenyatta maintained the repressive colonial apparatus, he largely confined its use to political activists, although his surveillance activities went beyond this. Ex-KPU members, whom I interviewed, recall that they were kept separate from the general prison population but were not treated harshly while in detention³⁴. All this changed under Moi. There was a trickle down and expansion of repression that everyone felt from newspaper vendors selling critical periodicals, such as *Finance*, *Society*, *the Nairobi Law Review*, and other publications, to human rights and religious activists and their friends. Moi detained numerous politicians, lawyers, university lecturers and students, and their supporters. Some just disappeared. The regime killed others. Still others ended up in the notorious Nyayo

³⁰ Jennifer Widner, *The Rise of a One Party State in Kenya: From 'Harambee' to 'Nyayo'* (Berkeley: University of California, 1992).

³¹ See Korwa G. Adar and Isaac M. Munyae, "Human Rights Abuse in Kenya under Daniel Arap Moi 1978–2001," *African Studies Quarterly* 5, 1 (2001), <http://web.africa.ufl.edu/asq/v5/v5i1a1.htm> (last accessed August 1, 2013). By 2002 the constitution had been amended thirty-eight times. See Kimani Njogu, "Manipulating the Constitution," in Herve Maupeu, Musambayi Katumanga, and Winnie Mitullah, eds., *The Moi Succession: The 2002 Elections in Kenya* (Nairobi: Transafrica Press, 2005), 11–31, 12.

³² Some argue that another Kikuyu coup was also in the works.

³³ Old friends such as Archbishop Muge lost their lives in an alleged car accident while others such as Foreign Minister Robert Ouko were murdered in 1990.

³⁴ Interviews by author with ex KPU M.P.s after they were released from detention, Kenya, 1971-72.

House where they were forced to stand naked in water and were tortured in numerous horrible ways.³⁵ At great cost, human rights groups such as the Kenya Human Rights Commission (KHRC), the Law Society of Kenya (LSK), the National Council of Churches of Kenya (NCCK), Africa Watch, an offshoot of Human Rights Watch, Amnesty International, and Article 19, among others, protested. They also wrote numerous publications and pamphlets, exposing the Moi regime's venality. This included repression, land grabbing, corruption, and the murder of outspoken dissidents, including Archbishop Muge and Father Kaiser.³⁶ No one felt safe and no one knew when or if the Special Branch or the police would show up at their doorstep. Apart from the Special Branch, Moi mobilized all parts of the state in his constant hunt for subversives, including using vehicles from Kenya Power and Lighting and the Nairobi City Council to follow ordinary people. Moi's response to repression and dissent was to expand and deepen it. Even ordinary people in public places looked over their shoulder to see who might be listening.

Elections were a joke, particularly after 1986 when Moi replaced the secret ballot with queue voting and provincial administrators became election officers. The president controlled the judiciary. He appointed judges who then interfered with cases. Most judges preferred to keep their jobs rather than to uphold the law, particularly after Moi withdrew the former security of tenure for judges in 1988. The saying, "why buy a judge when you can own one," came into play. Domestic human rights groups and editors of progressive magazines courageously exposed both human rights abuse and economic corruption at great costs. Many individuals were detained and tortured; some fled the country. Others suffered and some died. This effectively put a noose on political dissent; it made it extremely costly to be in opposition or to disagree openly with Moi and his government.

Economically, Moi faced a more difficult situation than Kenyatta. Kenyatta already had distributed the ex-colonial goodies of land and jobs and the economy was facing both internal and external problems. Hence, unlike Kenyatta who could give without taking away, Moi had to take away before he could give.³⁷ Thus, his methods were cruder. Moi quickly began to dismantle the Kikuyu control of the economy, including destroying key marketing cooperatives serving Kikuyu parts of the country. He also filled the civil service, the military, parastatals, and banks with

³⁵ Adar and Munyae, "Human Rights Abuse in Kenya," and Peter Kagwanja, *Kiraitu Murungi: An Odyssey in Kenyan Politics* (Nairobi: East African Publishers, 2012).

³⁶ For a discussion of Father Kaiser's experiences, see Christopher Goffard, *You Will See Fire: A Search for Justice in Kenya* (New York: W.W. Norton & Cos, 2011).

³⁷ Susanne D. Mueller, "The Political Economy of Kenya's Crisis," *Journal of Eastern African Studies* 2, 2 (2008), 185–210.

numerous unqualified Kalenjin.³⁸ A free for all of grand and gross corruption ensued. It included land grabbing, the proliferation of new banks to launder stolen government funds, and outright theft from the state through various schemes, including the Goldenberg Scandal.³⁹ MacWilliam and Cowen argue that Moi managed to disrupt the hegemony of indigenous capital, which was Kikuyu, while only partially managing to replace it with a new layer of Kalenjin capital that was even more dependent on the state than its predecessor. They maintain that, “if the state [was] corrupted, it is because [it served] as an arena for accumulation as much as a source of agency to assert the aspiration of a new, ethnically found layer of capital.”⁴⁰

All this brought Kenyatta’s earlier vibrant economy to its knees. Laws and ordinances were abandoned in construction. Nairobi’s central business district once peppered with pristine white stucco buildings became increasingly shabby. Suburbanites found kiosks, hangers on, and thieves implanted in front of their upscale houses. Civil servants, politicians, and “con men” toyed with the law and issued fake title deeds as patronage, practices that began under Kenyatta but vastly increased under Moi.⁴¹ Basic infrastructure such as roads, water, and telecommunications fell apart. Services, including the collection of garbage, stopped. Some older civil servants at Posts and Telecommunications registered their disgust when letters disappeared or arrived opened. Other employees joined the free for all, using their equipment to climb on to telephone poles to illegally access subscribers’ phones. Subscribers were rewarded with inflated bills for “metered and untimed services” and high fake charges for water. Downtown Nairobi began to look like an emerging slum. Crime proliferated. Tap water, which always was potable in the main towns, looked brackish and people either boiled their own or bought bottled water. Nairobi, which once was called city in the sun, became more and more shady. You could no longer drive anyplace day or night. Things fell apart. The escalation in repression and looting under Moi meant that fear and ordinary corruption were the order of the day. The combination destroyed the economy. Unlike the Kenyatta period when repression mostly targeted the elite, who were the main beneficiaries of

³⁸ Adar and Munyae, “Human Rights Abuse in Kenya”; Charles Hornsby, *Kenya: A History Since Independence* (London: I.B. Tauris, 2012), 554–58; Cowen and MacWilliam, *Indigenous Capital in Kenya*.

³⁹ Michela Wrong, *It’s Our Turn to Eat: The Study of a Kenyan Whistleblower* (New York: Harper Collins, 2009); Githongo, “Cover Letter [to H.E. President Mwai Kibaki] Accompanying Report on My Findings of Graft in the Government of Kenya,” November 22, 2005, http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/09_02_06_kenya_report.pdf (last accessed September 3, 2013).

⁴⁰ Cowen and MacWilliam, *Indigenous Capital in Kenya*, 217, 202–203.

⁴¹ See Ato Kwamena Onoma, “The Contrary Potential of Institutions: The Rise and Decline of Land Documentation in Kenya,” in James Mahoney and Kathleen Thelen, eds., *Explaining Institutional Change: Ambiguity, Agency, and Power* (New York: Cambridge University Press, 2010).

corruption, the Moi era democratized both repression and corruption as it trickled down to daily life and ordinary individuals. Just as in the past, those who played ball were rewarded with land, ministerial, parastatal, and civil service appointments, and lucrative procurement contracts. The difference was that while Kenyatta supported capital accumulation amidst corruption, Moi engaged in both primary and capital accumulation to solidify the new layer of KAMATUSA capital. This involved a great deal of straight looting. It increased over Moi's twenty-four years in power, leading to pressures from the International Monetary Fund (IMF) and the World Bank to liberalize and privatize. When the IMF came to Kenya in 1991 just before cutting off fast disbursing aid, William Ntimama, one of Moi's right hand ministers, responded accordingly. He brought his Masai warriors to Nairobi, put them up at the 680 Hotel, and by the next morning the Central Bank was splattered with red paint. Reducing the size of the state just at the point when he most needed it to accumulate was Moi's nightmare. Increasingly, the Kalenjin governing class had more and more to lose. As it did not want to lose, this meant hanging on to power at all costs.

For a long time, until the end of the 1990s, there was an unusual congruence between what North has called formal and informal rules of the game. Moi changed laws to increase repression and for the most part the relevant parts of the state enforced them, reaping rewards for doing so and being punished if they did not. Human rights groups while active and courageous were on the fringe and unable to effect change for many years. They suffered for trying. However, the pressure from internal activists and donor threats to withdraw structural adjustment funds in 1991 finally forced Moi to change the constitution once again. This meant repealing section 2A of the constitution and ending the prohibition on more than one party. Along with this, the law changed in 1992 to limit future presidents to two five-year terms.⁴² However, notwithstanding these seemingly progressive changes, Moi released new armor from his bag of tricks to retain power: mass violence and the displacement of opposition supporters who wanted to run against him and KANU in the multiparty elections of 1992 and 1997.

Numerous new political parties sprung up in the wake of constitutional change.⁴³ However, attempts at unity and building a strong opposition party that could defeat Moi and his corrupt, repressive machine initially failed. Parties split along ethnic and sub-ethnic lines almost as a throwback to the colonial period when that is all that was allowed. Leaders failed to unite both because of ethnic divisions and personal squabbles over leadership. Parties often were no more than shells for individuals. The repressive apparatus of the state made organizing and holding meetings difficult just as it had under colonialism. Before the 1992 election, the Forum for the Restoration of Democracy (FORD) split into two groups: FORD Asili

⁴² Hornsby, *Kenya: A History*," 511.

⁴³ For a discussion of this period, see Branch, *Between Hope and Despair*; Hornsby, *Kenya: A History*; and David Throup and Charles Hornsby, *Multi-Party Elections in Kenya and the Triumph of the System in the 1992 Election* (London: James Currey, 1998).

led by Kenneth Matiba, a Kikuyu who was detained in 1990, and Ford Kenya headed by Raila Odinga, a Luo. By 1997, parties had splintered further often along ethnic lines, with many new names appearing. This made it difficult to displace Moi.

However, what distinguished these two new multiparty elections in 1992 and 1997 was Moi's use of extra state violence to retain power at all costs. Until then, both during the colonial period and under Kenyatta, repression and the use of violence remained mostly with the state, which had a monopoly of legitimate force.⁴⁴ Moi changed the dynamics of repression by using Kalenjin gangs who killed and violently displaced Kikuyu and other upcountry voters from the Rift Valley to ensure his own victory.⁴⁵ Gangs were mobilized with money, with threats of non-compliance, and with an ideology of ethnic solidarity, and hate against the other.⁴⁶ In the past, rigging, detention without trial, and selective murders of high level contenders for power were part of the state's repertoire. Moi's hiring of ethnic gangs changed the attitude and response towards opposition and dissent irrevocably. First, Moi legitimized the use of violence to win elections by using the state to mobilize ethnic gangs to violently displace and kill Kikuyu and other up country ethnic groups who supported the opposition in the Rift Valley. Second, Moi and his government defined particular ethnic groups as outsiders who did not belong rather than as citizens who did and could live anywhere.⁴⁷ Third, Moi's use of violence to win elections effectively cemented ethnic polarization and fear of the other. Fourth, while Kenyatta had used the carrot and the stick and occasional murders of high-level figures to repress or wean away the opposition, Moi took this to new heights by legitimizing the killing and removal of whole populations to win. Fifth, Moi's tactics had long-term effects. This included the ethnic balkanization of the country, evidenced by a 25 percent reduction of Kikuyu voter registration in the Rift as of

⁴⁴ See Mueller, "The Political Economy of Kenya's Crisis"; and Susanne D. Mueller, "Dying to Win: Elections, Political Violence, and Institutional Decay," *Journal of Contemporary African Studies* 29, 1 (January 2011), 99–117.

⁴⁵ Under a new law, winning the election required that the president win a seat, get a simple majority of the votes and receive at least 25 percent of the votes in five out of Kenya's eight provinces.

⁴⁶ For discussions of this, see *Republic of Kenya, Judicial Commission of Inquiry into Tribal Clashes in Kenya (The Akiwumi Report)* (Nairobi: Government of Kenya, 1999); Republic of Kenya, *The National Assembly Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya* (The Kiliku Report, 1992); and Africa Watch, *Divide and Rule: State Sponsored Ethnic Violence in Kenya* (New York: Human Rights Watch, 1993).

⁴⁷ The best discussion of this is by Gabrielle Lynch, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (Chicago: University of Chicago Press, 2011); and Gabrielle Lynch, "The 'Ethnic Clashes' in Western Kenya, 1991–1993: A Reappraisal," (unpublished paper, n.d.).

2012.⁴⁸ This raised the question of whether Kenya as a nation would continue to exist. It also led to a diffusion of violence away from the state that haunts Kenya until now and is routinely used, sometimes lethally, to target members of the opposition and dissenters.

By the 2002 election, the opposition finally joined hands with Kibaki in a multiethnic anti-KAMATUSA coalition of support. Moi gave Odinga, who had wanted to be KANU's presidential candidate, the brushoff. Instead, he fronted Uhuru Kenyatta to run against Kibaki. Shunned, Odinga did an about face and joined Kibaki in his NAK/NARC coalition. In a Memorandum of Understanding (MOU) with Odinga, Kibaki agreed that Raila would be his Prime Minister if he won and that ministerial appointments would be divided evenly.⁴⁹ The election went smoothly, in part because two Kikuyus were running against each other. However, Kibaki violated his agreement with Odinga. The Luo's view was that the Kikuyu were behaving according to type: marginalizing Raila Odinga just as Jomo Kenyatta had done to his father Oginga Odinga. This was part of an ongoing saga of ethnic narratives that further polarized the relations between government and opposition along ethnic lines particularly after state and extra state violence became part of Moi's toolbox and diffused further. The Luo blamed the Kikuyu and the sidelining of Odinga for their economic and political marginalization.⁵⁰ The Kalenjin viewed and treated the Kikuyu and other upcountry ethnic groups not as fellow citizens of a common nation but as uninvited land grabbers and "guests" who did not belong. According to the Kalenjin, these others resided in the Rift Valley at their pleasure, not by right.⁵¹ William Ntimama, a Masai MP ominously told the Kikuyu to lie low like envelopes before the 1992 election.⁵² The Kikuyu believed their prominent role in the independence struggle remained unacknowledged and disliked being attacked for their entrepreneurial success. They felt their success stemmed from hard work, was deserved, and was not simply the result of patronage. They saw both the Luo and the Kalenjin as jealous and backward sisters who were unfairly resentful of Kikuyu success. They were horrified by the violent attacks against them in the Rift Valley in the elections of 1992 and 1997. Their unstated view was that the electoral violence against them and Moi's decimation of the economy were examples of what would happen if other marginal groups took over political power. They, along with others,

⁴⁸ See J. Andrew Harris, "Measuring the Effect of Violence on Local Ethnic Demography in Kenya (unpublished paper, March 25, 2012), 21–29, http://web.mit.edu/posner/www/WGAPE/Harris_WGAPE.pdf (last accessed, August 4, 2013).

⁴⁹ Even though the post did not yet exist. The MOU agreement was later contested.

⁵⁰ For an analysis that challenges the Luo's own view of marginalization, see Lesa B. Morrison, "The Nature of Decline: Distinguishing Myth from Reality in the Case of the Luo of Kenya," *Journal of Modern African Studies* 45, 1 (2007), 117–42.

⁵¹ See Lynch, *I Say to You*.

⁵² See Africa Watch, *Divide and Rule*.

booed Moi at Kibaki's inauguration in 2003⁵³. A few months later, Kiraitu Murungi Kabaki's new Minister of Justice told Moi to go home and tend his cattle⁵⁴, a widely felt sentiment but one resented by the Kalenjin.

While the electoral violence of 1992 and 1997 was an elite project to gain and maintain political power, the above narratives fueled the violence by demonizing ethnic others. Hence, both these narratives and the extra state violence enlisted by the elite, became part of politicians' standard toolbox to attack the opposition and dissenters in the multiparty era. Earlier regimes had used violence themselves, but it was not on this scale, it was not carried out by hired gangs, and it did not threaten the integrity of the state or the nation. The Moi regime opened up a Pandora's Box of constantly diffusing extra state violence,⁵⁵ the likes of which had not been seen before and would recur more massively in 2007–2008.

At the same time as violence became part of the multi-party repertoire, civil society groups mobilized against the state and worked in meetings to develop a new constitution that would include a Prime Minister and devolve power to the regions. While out of power, the opposition thought this was a means of curtailing the power of the presidency, meaning Moi. Predictably, in a Northian way, once in power, the opposition changed its mind.

The Mwai Kibaki Period (2002–2013)

A great wave of enthusiasm greeted the 2002 election results. There was a general air of hope that real change was possible. The opposition united around Kibaki and won. Civil society and human rights groups supported the new government and many joined it. KANU was decimated and it seemed like there was no opposition at all. A widespread revulsion at Moi's twenty four years of rule cemented Kibaki's victory and the election mostly was peaceful.⁵⁶ Initially, there was enormous support for Kibaki, the new freedoms of speech and association that ensued, and government's attempts to revitalize the economy. Government also initiated other popular moves. This included bringing human rights groups into its fold: the formation of the Kenya National Commission of Human Rights (KNCHR) with Maina Kiai at its head; a commission to investigate the Goldenberg Scandal; and the Ndungu commission on land. Kibaki also appointed John Githongo as his anti-corruption tsar. Preventative detention and torture ended.

⁵³ Based on account of attendee.

⁵⁴ Kipkoech Komugor, "Kiraitu Wish for Retired Moi Verily Granted," *People's Daily*, September 14, 2014 (<http://mediamaxnetwork.co.ke/peopledaily/?p=103158>, last accessed September 15, 2014).

⁵⁵ For a discussion of this, see Mueller, "The Political Economy of Kenya's Crisis."

⁵⁶ Patrick Mutahi, "Political Violence in the Elections," in Maupeu, Katumanga, and Mitullah, eds., *The Moi Succession*, 69–96.

Nevertheless, Odinga and his Liberal Democratic (LDP) supporters felt Kibaki had betrayed them and had left them with a raw ethnic deal. They fought for the constitutional changes Kibaki had promised and were dissatisfied that Odinga had come away with no more than a ministerial appointment. The Kalenjin were angry at Moi's humiliation at Kibaki's inauguration and resented the sweep to clear them from the civil service, parastatals, and the military where they had been dominant.⁵⁷ Critics also were displeased by Kibaki's favoritism of his "Mount Kenya group" in government appointments and the reassertion of Kikuyu hegemony in other areas.⁵⁸

For a while it seemed that Kenya's repressive past had mostly evaporated, but it proved more resilient than expected. Kibaki used the carrot to incorporate potential opposition dissenters, vastly expanding the size of his cabinet and the salaries of both ministers and MPs.⁵⁹ The stick also reasserted itself. Government undercut constitutional change in various conferences. Odinga and his Liberal Democratic Party (LDP) cohorts then left the cabinet to form a new opposition party. The real deal breaker for the new government, however, was a giant corruption scandal known as Anglo Leasing uncovered by John Githongo.⁶⁰ Kibaki and his inner circle hounded and threatened Githongo, forcing him to leave the country. Maina Kiai's KNCHR also published unflattering pictures of the governing elite including one called "Living Large" and suffered from constant surveillance. Kiai soon escaped abroad too, albeit temporarily. Both Githongo and Kiai were Kikuyu and Kibaki's inner circle viewed them as traitors to their ethnic group. The press came in for a hit as well. It exposed the Kibaki family's relationship with the so-called Artur brothers who were said to be foreign drug barons and part of the state's long informal arm. Government then invaded *The Standard* newspaper group, owned by Moi, which was preparing an exposé on the first family and the Artur brothers' involvement in drugs. In short, government responded to internal critics, civil society activists, and critical members of the press much as previous governments had. It was clearly still costly to be in opposition even though individuals were not killed or detained, as they had been earlier. Still, the atmosphere morphed from one of initial glee to one of fear and menace. Change was proving difficult.

While repression was still effective, it was less absolute than in the past. One difference was that government's political and economic statism was no longer total. It had competitors. First, economic pressures forced Moi to make a number of political changes, including constitutional ones allowing for more than one party, to get structural adjustment funding from the IMF restored. Moi clearly detested this move. Nevertheless, this formal change in the "rules of the game" allowed dissenters

⁵⁷ Hornsby, *Kenya: A History Since Independence*, 703–707, 712–13, 717.

⁵⁸ *Ibid.*, 698. However, Hornsby notes "the cabinet was far better balanced ethnically and regionally than Moi's."

⁵⁹ *Ibid.*

⁶⁰ See Githongo, "Cover Letter"; also see Wrong, *It's Our Turn*.

to organize openly. Although Moi continued to repress and use violence against the opposition and other dissenters, the constitutional change was at least a legal advance. Government under both Kibaki and Moi nevertheless continued to wield its *de facto* sanctions against legal *de jure* changes in line with what Acemoglu and Robinson and North would have predicted. Second, apart from having had to concede new political and legal freedoms in the 1990s, government also partly lost its economic monopoly. With financial liberalization and privatization, government still wielded substantial economic power, but it was not total. Arriola notes that with liberalization, the private sector felt it could give financial support to opposition parties, as it was no longer totally dependent on government largesse.⁶¹ Furthermore, many donors under both Moi and Kibaki switched from channeling their aid to government to Non-Governmental Organizations (NGOs). According to Hornsby, the west for many became a “competing patron.”⁶² Hence, although government still had substantial political and economic clout, which should not be underestimated, it was less absolute than before.

Nevertheless, in spite of liberalization, the Kibaki government was faced with a legacy of Moi’s past violence, which reasserted itself. This included the continued diffusion of violence and the emergence of an increasing number of extra state militia for hire by politicians and others.⁶³ The most powerful of these gangs was “Mungiki.” Initially, its members came to Nairobi and Central Province as refugees from Moi’s violence in the Rift in the 1990s. Allegedly hired by Moi to support Kenyatta in 2002,⁶⁴ the Kibaki government soon went after Mungiki with a vengeance. The KNCHR exposed the existence of government’s extra-judicial police squads that murdered members of Mungiki rather than just arresting them and taking them to trial.

By the time of the 2007 election, the opposition had regrouped. In typical fashion, political party alliances were malleable. Parties were largely non-programmatic and little more than shells for ethnic barons. Miffed by having been

⁶¹ Arriola, “Capital and Opposition in Africa.”

⁶² Hornsby, *A History Since Independence*, 630–33.

⁶³ Peter Kagwanja, *Warlord Politics* (Nairobi: Kenya Human Rights Commission, 2001). His study *Warlord Politics* is the most comprehensive study of gangs in Kenya. Numerous other articles about Mungiki in *African Affairs* followed this pioneer research. Mungiki initially began as a Kikuyu cultural cum religious group representing the dispossessed before it was displaced by the violent clashes of the 1990s in the Rift Valley. However, Mungiki quickly morphed into a hierarchical Mafioso like criminal gang in Nairobi and Central Province where it shook down businesses, hired itself out to politicians to use violence against their competitors, and often attacked innocent citizens who refused to join or opposed them. To some it conjured up a revival of Mau Mau even though it had little in common with it.

⁶⁴ See Hornsby, *A History Since Independence*; and Daniel Branch, *Kenya: Between Hope and Despair, 1963–2011* (New Haven: Yale University Press, 2011).

sidelined by Kibaki, Odinga pulled his Liberal Democratic Party (LDP) out of NARC and joined William Ruto, a former Moi protégé, in the Orange Democratic Movement (ODM). This pitted the Kikuyu and their GEMA allies against the Luo and the Kalenjin. Like Moi's KAMASUTA, ODM was in part held together by a strong resentment of the Kikuyu and enormous ethnic distrust on both sides.

Contenders saw gaining and retaining political power in the 2007 presidential election as key. Violence broke out after a contested election, where Kibaki was declared the winner, amidst allegations of rigging. This was the catalyst for post-election violence, propelled by several underlying factors.⁶⁵ These included diffused violence, ethnic polarization and a zero sum view of winning, and centralization. The violence was said to have been planned, organized and financed by high-level political figures on both sides. Kalenjin “warriors” attacked, displaced, maimed and killed Kikuyus in the North Rift and Kikuyu Mungiki criminal gangs retaliated in Nakuru and Naivasha with violence also engulfing other parts of the country as well.⁶⁶ Moi's legacy of using mass violence as a political weapon to gain and retain political power in the multiparty era continued with dire results.

One result of the post-election violence was the formation of a coalition government with Kibaki as president and Odinga as prime minister.⁶⁷ With contenders for power having resorted to force to win power in multiparty elections since the 1990s, the coalition was a symbolic reversion back to a *de facto* one-party state. The opposition was temporarily incorporated. Additionally, opposition and dissent became highly polarized and ethnicized after the 2007–2008 election violence, as did residential living patterns. These tendencies continued, particularly after the International Criminal Court (ICC) in The Hague charged six individuals with crimes against humanity. Five were high-level political or state figures. The charges increased ethnic polarization between government and opposition dissenters as many Kikuyu and Kalenjin felt Odinga, a Luo should have been charged⁶⁸. It also led to numerous attacks against witnesses, victims, and civil society activists who

⁶⁵ See Mueller, “The Political Economy,” for a discussion of them.

⁶⁶ See *Commission of Inquiry into the Post-Election Violence* (The Waki Commission Report) (Nairobi: Government Printer, 2008).

⁶⁷ See Nic Cheeseman and Blessing-Miles Tendi, “Power Sharing in Comparative Perspective: The Origins and Consequences of Unity Government in Africa,” *Journal of Modern African Studies* 48, 2 (2010), 203–229.

⁶⁸ Hence, in 2014 when Odinga began holding anti-government rallies, many Luos from the North and Central Rift Valley decamped to Nyanza as they feared they might become targets and experience violence against them. Also the opinion polls by Ipsos Synovate show an increasing ethnic polarization around the ICC. See Susanne D. Mueller, “Kenya and the International Criminal Court (ICC): Politics, the Election, and the Law,” *Journal of Eastern African Studies* 8, 1 (February 2014), 12.

supported the ICC.⁶⁹ Whether by government, the defendants, or their henchmen, dissenters, including insiders who could tell the story, increasingly found themselves threatened, killed, intimidated or enticed away. Government was less statist than in the past. Also, the widespread availability of cell phones and social media made it easier to dissent anonymously. Nevertheless, government still had a considerable arsenal of sanctions and rewards that it could use against those who opposed it. Dissent still could be very costly. Formally, Kenya was a multiparty democracy and in 2010 it adopted a new progressive constitution. It introduced devolution to decrease the centralization and personalization of power around the presidency, increased checks and balances among various parts of government, necessitated the vetting of judicial and other appointees, and supported human rights. Informally, however, many actual rules of the game were throwbacks to Kenya's repressive past and attempts to undermine these formal legal changes. This included ploys to retain the provincial administration under new names, to financially strangle devolution in practice, to retain the power of the presidency, and to stymie judicial reform.⁷⁰

Kibaki stuck to the two term limit but the 2013 election became another ethnically polarized, albeit mostly peaceful, contest, nevertheless with allegations of rigging. Raila Odinga's Coalition for Reform and Democracy (CORD) alliance ran against the Jubilee Alliance headed by two ICC indictees, Uhuru Kenyatta and William Ruto. Their run was part of a broader strategy to win political power before trial to deflect and undermine the ICC.⁷¹ While Kenya's new Supreme Court denied the petitioners claims and said Kenyatta and Ruto had won, questions continued to linger about the election.

The 2013 presidential election did not lead to systemic violence unlike that of 2007. While pundits cite many factors,⁷² they fail to mention that the ICC had charged Kenyatta and Ruto with being those "most responsible" for the crimes against humanity of 2007–2008. Planning, organizing, financing, and executing

⁶⁹ Ibid.

⁷⁰ Macharia Gaitho, "Behind the Young, Fresh Cabinet Are Stern Old Faces of Central Government," *Daily Nation*, August 5, 2013.

⁷¹ Mueller, "Kenya and the International Criminal Court," 2013 and 2014 and Susanne D. Mueller, "Kenya and the International Criminal Court: Politics, the Election and the Law," Conflict, Politics and Human rights in Africa Series, CPHR 1, African Studies Center, Boston University, 2013.

⁷² The fact that Kenyatta, a Kikuyu, and Ruto, a Kalenjin were on the same ticket; the stress on peace at all costs; the police being deployed to hot spots before, during, and after the election; a belief in the neutrality of a reformed judiciary; the willingness of Odinga and the ODM to accept the results even if they did not believe them; and a population which was still fatigued by the violence of 2007–2008 and wanted peace at all costs. For a discussion of some of these factors see Nic Cheeseman, Gabrielle Lynch, and Justin Willis, "Democracy and Its Discontents: Understanding Kenya's 2013 Election," *Journal of Eastern African Studies*, 8, 1 (2014).

these crimes took high level time and power. This could not have been easily duplicated in 2013 by those charged or anyone else, even though there was an undercurrent of potential violence before the election.

Both before and after the election, the Kibaki government mobilized internal and external forces to wrest the criminal cases away from the ICC and get them back home. It also tried to undermine the ICC's investigation and did nothing to stop the attacks on ICC witnesses, victims, and their civil society supporters. Furthermore, by allowing two of the indictees to stay in office for a long time, government appeared to condone them.⁷³ Kenya's Chief Justice, Willy Mutunga, and others on the court received threats just before a decision on whether the ICC indictees would be allowed to run for president and deputy president. A junior immigration officer also attempted to keep Mutunga from flying to Tanzania on a business trip.⁷⁴ Various forms of intimidation put pressure on outspoken dissenters in favor of the ICC, especially if they had or hoped for government jobs. In short, in spite of certain legal and substantive changes and some opening of political space, both the use and the potential use of government carrots and sticks continued to fetter opposition and dissent and make it costly.

The Uhuru Kenyatta Period (2013–)

The prospect of ICC trials at The Hague has weighed heavily on Kenyatta and Ruto and has defined their response to opposition and dissent. The ICC has been harassed and vilified by the government and the indictees, with Kenyatta having called it a "toy of declining imperialist powers."⁷⁵ Increasingly, the court has become Kenya's new opposition. The court and its supporters have been treated much like previous opposition parties. More victims and witnesses have withdrawn from the trials since the two ICC indictees assumed power⁷⁶ with others having been intimidated, bribed and even murdered.⁷⁷ Human rights supporters continue to fear the long arm of the state and its backers much as they did in the past. An organization in the Rift Valley claims that activists who assist the ICC are constantly being threatened. They cite trumped up criminal charges, constant surveillance by state intelligence agents, and illegal entries into their offices.⁷⁸ Kenya's new

⁷³ See Mueller, "Kenya and the International Criminal Court," 2013 and 2014.

⁷⁴ "Kenya's Willy Mutunga 'threatened' over Kenyatta Case," BBC Africa, February 20, 2013, <http://www.bbc.co.uk/news/world-africa-21519868>; Paul Ogema, "Threats against Judiciary Futile says Chief Justice Willy Mutunga," *The Nation*, February 20, 2013.

⁷⁵ Emeka-Mayaka Gekara, "President Kenyatta's Stinging Attack on ICC and Europe," *Daily Nation*, October 12, 2013.

⁷⁶ See Mueller, "Kenya and the International Criminal Court," 2013 and 2014.

⁷⁷ *Ibid.*

⁷⁸ Francis Mureithi, "Activists in ICC Cases 'Facing Death Threats,'" *Daily Nation*, August 5, 2013.

constitution offers no protection, illustrating the way in which actual enforcement mechanisms successfully support informal rules of the game as they continue to undermine formal rules and laws.

The Kenyatta government's response to the Truth, Justice, and Reconciliation Commission (TJRC) report⁷⁹ is another example of the above syndrome. Throughout the Commission's life, government subjected commissioners to numerous pressures. The Office of the President (OOP) coerced the commissioners to hand over an advance copy of the report to the attorney general and then asked them to change five paragraphs of the land chapter. The chapter implicated former President Jomo Kenyatta, some of his family, and other high level individuals in corrupt land deals. Initially, all commissioners refused to alter the chapter, but later only the three foreign commissioners publicly dissented. They were kept from attaching their dissent to the report, contrary to the TJRC's enabling legislation. Officials from the OOP allegedly warned local commissioners that if they did not play ball they would not get any government jobs in the future. Some of those who did were rewarded with jobs. One local commissioner who originally held out for a while had to go into hiding before caving in. Others kept the report from being published by the government printer as required by law. Commissioners constantly worried about their safety. Like Harry Thuku under colonialism, the commissioners were asked to choose between their beliefs and their economic security, between sanctions and rewards. Since then, the Attorney General has introduced new legislation to revise the original law setting up the TJRC. Furthermore, it has asked parliament to "consider" the report rather than requiring government to implement its recommendations as originally required legally. Also, some of Kenyatta's relatives have filed cases suing the TJRC concerning allegations against them.⁸⁰

In addition, the hard fought for opening of political space characteristic of the late Moi and early Kibaki period, is under threat. In December 2013, government passed a draconian law that puts the media under a government controlled authority and allows it to impose crippling fines on individual journalists and owners.⁸¹

Conclusion

"In the Jubilee year, the eyes and ears of the central government still wear the colonial-era pith helmets to confirm that they were designed and employed as a part

⁷⁹ For the TJRC report, see <http://nipate.com/full-tjrc-report-for-those-interested-t28162.html> (last accessed August 7, 2013).

⁸⁰ Pamela Chepkemei, "President Uhuru Kenyatta's Kin Sue TJRC Over Report," *The Standard*, August 6, 2013.

⁸¹ "New Rules to Begin as Uhuru Signs Media Council Law," *Daily Nation*, December 24, 2013.

of the colonial force of occupation that was happily inherited by the Independent State."⁸²

*"The real winner [of the 2013 election] was a man who wasn't on the ballot; Daniel arap Moi, the country's leader who terrorized it for 24 years and destroyed all credible institutions.... [I]t was Mr. Moi who spawned the winners. The sycophancy and corruption of his era are still ingrained in the political culture and are embodied by the rise of his allies."*⁸³

A small socioeconomic elite still controls Kenya. Contests for the presidency circulate among this elite as Ngugi wa Thiongo's op ed, "A Dictator's Last Laugh" notes above. Many contenders have been part of government and opposition at different times. At all stages of Kenya's history, those in power have used the sanctions and rewards available to them to repress the opposition and to make dissent costly. Political power has become more and more of a zero sum contest. Each new ethnic elite has used its might to solidify its political and socioeconomic base as it tries to dislodge its predecessors. Over time, the prospect of losing presidential elections, particularly to other ethnic groups, congers up the fear of economic and political loss⁸⁴ as well as fear of the ethnic other. As the perceived stakes have increased, violence has become a permissible tool to gain and retain political power. The fact that it did not reassert itself in the 2013 election does not preclude it from recurring. The underlying systemic factors still are in place.

New formal rules meant to institutionalize democracy continue to be undermined. They are circumvented by old ways of behavior and are enforced with sanctions and rewards. Changes which still point the way forward include the decision in 1991 to end the prohibition on more than one party, the checks and balances in the new constitution, and an air of relative openness compared with the past. But these are only new formal rules. Against this there are serious efforts to "push back" against change, as noted by Ziblatt and tendencies that propel "path dependence" as discussed by North⁸⁵. They include, among many other possible examples, using violence to gain and retain political power from Moi's time onward, Kenyatta and Ruto's recent strategy of running for president and deputy president before the ICC trials, their associated tactics to undermine the ICC and the rule of law, and the cementing of negative ethnicity. Even though Kenya is far less statist than in the past, the carrot and the stick still hold sway and holding state power is the best

⁸² Macharia Gaiitho, "Behind the Young, Fresh Cabinet are Stern Old Faces of Central Government," *Daily Nation*, August 5, 2013.

⁸³ Ngugi wa Thiongo, "A Dictator's Last Laugh," *New York Times*, March 14, 2013, <http://www.nytimes.com/2013/03/15/opinion/a-dictators-last-laugh.html> (last accessed August 4, 2013).

⁸⁴ Lynch, *I Say to You*, 10; and Lynch, "The 'Ethnic Clashes.'"

⁸⁵ North, "Economic Performance Through Time, 364.

means of using them. Right now opposing government still is costly and so is losing. It is impossible to say for how long this will persist.

Unfortunately, we understand stasis better than change, including the seemingly rare factors that give rise to the latter. Acemoglu and Robinson note that major institutional and economic changes over millennia in the West often hark back to large historical disruptions including invasions, revolutions, depressions, and other seminal junctures.⁸⁶ In the past, they upset the status quo of societies and their elites creating political and economic divergences that often have persisted over time. Also, initial endowments or the ability of an emerging commercial class to take advantage of trade or to favor industrialization put some societies on a path of democracy and development. This contrasts with others that either did not have the same opportunities or were still controlled by elites who resisted change fearing it would bring a loss of power and rents.⁸⁷

In contrast to these large-scale changes over time, we do not have a systemic understanding of what Capoccia and Ziblatt call the historical “microfoundations of democracy.”⁸⁸ Earlier theories about the importance of sequencing and the interrelationship among economic modernization, the rise of a middle class, and democratic institutions are now hotly contested⁸⁹. Hence, explaining which of Kenya’s democratic openings noted above will endure or why and which instead will succumb to the resilience of the past is increasingly difficult. Equally intractable is

⁸⁶ Daron Acemoglu, James A. Robinson, and Rafael J. Santos, “The Consequence of Radical Reform: The French Revolution,” *American Economic Review* 100, 7 (2011), 3287–317; and James A. Robinson, Daron Acemoglu, and Simon Johnson, “Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution,” *Quarterly Journal of Economics* 118 (2002), 1231–394.

⁸⁷ For instance see James A. Robinson and Daron Acemoglu, “The Rise of Europe: Atlantic Trade, Institutional Change and Economic Growth,” *American Economic Review* 95, 3 (2005), 546–79; James A. Robinson and Daron Acemoglu, “Political Losers as Barriers to Economic Development,” *American Economic Review* 108, 4 (2000), 663–79; and James A. Robinson and Daron Acemoglu, “De Facto Political Power and Institutional Persistence,” *American Economic Review* 96, 2 (2006), 326–30.

⁸⁸ Giovanni Capoccia and Daniel Ziblatt, “Democratization Studies: A New Research Agenda for Europe and Beyond,” *Comparative Political Studies* 43, 8/9 (2010), 937–38.

⁸⁹ For instance see Carles Boix, “Democracy, Development, and the International System,” *American Political Science Review*, 105, 4 (2011), 809-28. For a general discussion of the contending theories see, Julian Wucherpfennig and Franziska Deutsch, “Modernization and Democracy: Theories and Evidence Revisited,” *Living Reviews in Democracy*, 1 (2009), 3-9. For the role of the middle class see, Nic Cheeseman, “Does the African Middle Class Defend Democracy?” *WIDER Working Paper*, 2014/096, United Nations University (UNU-WIDER), July 2014, 1-16 (http://www.wider.unu.edu/publications/working-papers/2014/en_GB/wp2014-096/ last accessed September 15, 2014)

the question of why African and other states with relatively similar histories have responded differently to attempts at democratization, if these differences that we now observe and the resilience of the past will persist over time, or if not, when not, why not, and due to what factors.