

**The advent of unholy alliances? Coalition governments in the aftermath of
disputed elections and electoral violence in Africa; a case study of Kenya**

Dissertation submitted in partial fulfilment of the requirements for the degree
LLM (Human Rights and Democratisation in Africa) Faculty of Law, University of Pretoria

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3 November 2008

DECLARATION

I, JAPHETH Biegon, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's works have been used, they have been duly acknowledged.

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ACKNOWLEDGMENTS

I am grateful to my supervisor, Professor Nico Steytler, under whose counsel and direction I wrote this dissertation. For the invaluable comments and critique of the draft chapters of this work, I say *dankie*. I am equally grateful to Professor Israel Leeman whose command of the Queen's language (English) is unmatched. The precision and accuracy with which you edited every line of this dissertation is a rare gem. My heartfelt thanks are also due to Jill Claassen, who taught me that 'you can't google an LLM dissertation', and to Trudi Fortuin, whose motherly touch seasoned the journey to 'November third' with lively moments. I am also profoundly indebted to the Centre for Human Rights, Pretoria University, for giving me the chance to be part of this challenging and exciting programme.

To the Capetonians- Remember, Rhoda, Messi, Hillary and Peace- I say *merci beaucoup mes amis*. Our weekly 'Friday dissertation exercise' was invaluable. In tracking each other's dissertation progress, we exuded an exceptional spirit of teamwork. Our 'cooking union' was yet another proof that, with sheer commitment, coalitions can work. My sincere gratitude also goes to the 1230 Back Flat Boys- Azu, Charles, Victor and Samuel- with whom I share fond memories from our first semester in Pretoria. Serving as your rapporteur was a worthwhile experience. My appreciation also extends to LLM Class 2008. As a whole, we lived to the spirit of *ubuntu*. I salute you all.

There are those outside there who have stood with me prior to and in the course of my study: my parents, for their love, sacrifice and prayers over the years; my two brothers, Steve and Sammy, for hanging in there with me; Andrew Tanyasis, for taking me in as a brother; and Ted Moya for the encouragements that keeps me going. I am equally grateful to those who have touched my heart with their kindness and generosity: Tom Ojienda, Richard Saningo, Eric Kithome, Elizabeth Muli, and many others who, for lack of space, I am constrained not to mention them by name. Finally, and most significantly, I am grateful to God. His love, mercies, favour, and grace have brought me this far. He is my Ebenezer.

DEDICATION

In loving memory of my late sister
Grace Chelangat Kilel (1976-2000)

As with flowers, so with men
They blossom, bloom and wither away
But there are some who always
Leave a fragrance behind
In them you belong.

LIST OF ABBREVIATIONS

AFORD	Alliance for Democracy
ANC	African National Congress
AU	African Union
CAP	Comprehensive Peace Agreement
CIPEV	Commission of Inquiry into the Post-Election Violence
DRC	Democratic Republic of Congo
ECK	Electoral Commission of Kenya
GEMA	Gikuyu, Embu, Meru Association
IFP	Inkatha Freedom Party
IREC	Independent Review Commission
KAMATUSA	Kalenjin, Maasai, Turkana, and Samburu
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KPU	Kenya People's Union
Legco	Legislative Council
LNC	Local Native Councils
LSK	Law Society of Kenya
MDC	Movement for Democratic Change
MFP	Minority Front Party
MoU	Memorandum of Understanding
NAK	National Alliance Party of Kenya
NARA	National Accord and Reconciliation Act
NARC	National Rainbow Coalition
NCNC	National Council of Nigerian Citizens
NPC	Northern People's Congress
NP	National Party
ODM	Orange Democratic Movement
PMSD	Parti Mauricien Social Democrite
PNU	Party of National Unity
RUF	Revolutionary United Front
SADC	Southern Africa Development Community
SPLA	Sudanese People's Liberation Army
UDF	United Democratic Front
UNITA	National Union for the Total Liberation of Angola
UN	United Nations
US	United States

TABLE OF CONTENTS

DECLARATION	ii
ACKNOWLEDGMENTS	iii
DEDICATION	iv
LIST OF ABBREVIATIONS.....	v
TABLE OF CONTENTS.....	vi
ABSTRACT	viii

Chapter one: Introduction

1.1 Background to the study	1
1.2 Statement of the research problem	3
1.3 Hypothesis	5
1.4 Focus and objectives of the study	5
1.5 Significance of the study	5
1.6 Research methodology and limitations	5
1.7 Literature review	6
1.8 Overview of chapters	6

Chapter two: The spectre of disputed elections and electoral violence in Africa

2.1 Introduction.....	7
2.2 Conceptual framework.....	7
2.2.1 Elections.....	7
2.2.2 Electoral violence.....	9
2.2.2.1 Pre-election violence.....	10
2.2.2.2 Post-election violence.....	10
2.3 The history of elections in Africa	11
2.3.1 Pre-colonial era	11
2.3.2 Colonial era.....	11
2.3.3 Independence era (1960s-1989).....	13
2.3.4 Post-Cold War era (1989-present)	13
2.4 Electoral violence: theoretical explanations	15
2.4.1 Institutional-functionalism.....	15
2.4.2 Structuralism.....	16
2.5 Conclusion.....	17

Chapter three: The resort to coalition government: a critical analysis

3.1 Introduction.....	18
3.2 The theory of coalition formation.....	18
3.3 Models of coalition government	19
3.3.1 Classical coalition governments	19
3.3.1.1 Pre-electoral coalitions.....	20
3.3.1.2 Post-electoral coalitions	20
3.3.2 Consociational coalition governments	21
3.3.2.1 Transition from repressive to democratic regime	22
3.3.2.2 Transition from civil war to peace	22

3.4	Coalition governments in the aftermath of disputed elections	23
3.4.1.	Labelling the model	23
3.4.2	Justifications of the resort to coalition governments	25
3.4.2.1.	Restoring political stability	25
3.4.2.1	Reclaiming political legitimacy	26
3.4.3	Criticism of the resort to coalition governments	28
3.4.3.1	A dangerous precedent	28
3.4.3.2	A failure of democracy	29
3.5	Mandatory coalition governments for Africa.....	29
3.6	Conclusion.....	32

Chapter four: The 2007 Kenya presidential election and its aftermath: a case study

4.1	Introduction.....	34
4.2	A history of exclusion	34
4.2.1	The Kenyatta regime	35
4.2.2	The Moi regime	37
4.2.3	The Kibaki regime.....	38
4.3	The 2007 presidential election and its aftermath	40
4.3.1	The disputed results	40
4.3.2	The electoral violence.....	43
4.3.3	The coalition government.....	45
4.4	A future of inclusion	47
4.5	Conclusion.....	49

Chapter five: Conclusions and recommendations

5.1	Introduction.....	50
5.2	Conclusions.....	50
5.3	Recommendations	51

BIBLIOGRAPHY	54
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ABSTRACT

The resort to coalition governments following the disputed presidential elections in Kenya and Zimbabwe pioneers a new trend in unlocking political gridlock in Africa. This dissertation analyses this trend with a view to establishing its viability in guaranteeing sustainable peace and democracy. It is argued that the resort establishes a precedent in which incumbent presidents, upon losing elections, may refuse to vacate office in the hope that a power sharing agreement will be negotiated with opposition leaders. Moreover, the resort only takes the heat off the moment and as such, the peace it offers is temporary and the political legitimacy it reclaims is little. Therefore, it is concluded that while the resort to coalition government in the aftermath of a disputed election and electoral violence may rescue a country from disintegration, it is not a guarantee to sustainable peace and democracy. This argument proceeds from the understanding that disputed elections and electoral violence in Africa are rooted in historical economic and political exclusion. Therefore, sustainable peace and democracy will require not only free and fair elections, but also strategies aimed at fostering inter-ethnic cohesion and a culture of economic and political inclusion. In this regard, mandatory coalition governments, embedded in consociational democracy, are presented as one of the institutions of inclusion that may be adopted in Africa. Ultimately, however, the cry for Africa is one for genuine political leadership and a citizenry committed to democratic practices.

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

Africa is a continent of vast geographical, ethnic and political diversity that continues to evoke the images of Chinua Achebe's *Things Fall Apart*, Joseph Conrad's *Heart of Darkness* and Antjie Krog's *Country of My Skull*.¹ More than 40 years after a majority of African states attained independence, democracy is yet to be consolidated on the continent. Even the third wave of democratisation,² has failed to bring the much anticipated democracy. Multi-party elections have instead been riddled with deadlocks, reverses, failures and mounting complexities.³ Indeed, a snapshot across the length and breadth of Africa testifies that, at the very least, elections have been manipulated to favour incumbent governments and, at worst, have resulted in political violence and civil war.

In Nigeria, for instance, electoral violence left 100 people killed and many injured in the 2003 elections.⁴ A similar pattern of electoral violence was replicated in the 2007 elections.⁵ In Sierra Leone, the ballot box will remain a grave reminder of the 10 years of civil war. In what was dubbed 'Operation Stop Elections', the Revolutionary United Front (RUF) rebel forces chopped off the hands of hundreds of Sierra Leoneans as a way of preventing them from voting.⁶ In Rwanda, Burundi, and Cote d'Ivoire, widespread conflicts were preceded by disputes over the electoral process and results thereof.⁷ In Angola, the National Union for the Total Liberation of Angola (UNITA) returned to war, which lasted almost a decade, after disputing the 1992 election results.⁸ Elections in Uganda, Ethiopia, Chad, Zambia, Zimbabwe and Kenya have also been disputed and marred by violence.

The picture that emerges out of Africa shows that the incidence of election related violence is so high that even an election considered free and fair in its outcome may not have been free of violence before, during or after the election. Africa seems to be under a constant curse of election disputes and electoral violence that hangs precariously over the continent

¹ J van Wyk *Promoting human security: ethical, normative and educational frameworks in Africa* (2007) 35.

² See S Huntington 'Democracy's third wave' in L Diamond & M Plattner *The Global resurgence of democracy* (1993) 3.

³ E Conteh-Morgan *Democratisation in Africa- the theory and dynamics of political transitions* (1997) 1.

⁴ Human Rights Watch *Nigeria's 2003 elections: the unacknowledged violence* (2004) 1.

⁵ O Nwolise 'Electoral violence and Nigeria's 2007 elections' (2007) 6 *Journal of African Elections* 155.

⁶ *Witness to truth: Report of the Sierra Leone Truth and Reconciliation Commission, volume 3A* (2004) 473.

⁷ S Atuobi 'Election-related violence in Africa' (2008) *Conflict Trends* 10, 14.

⁸ As above.

ready to strike at the slightest provocation. As such, elections in Africa are periods during which the stability and security of African states hang in the balance. The resolution and management of election disputes accordingly acquires a significant place in Africa's political life. For this reason, politicians, political scientists, and academics have long grappled questions related to the resolution of election disputes in particular, and civil wars in general.

In this regard, Kenya and Zimbabwe present the most recent scenarios of efforts to resolve political stalemates resulting from flawed and disputed elections. Kenya, which had long enjoyed relative peace, was thrown into political violence following the declaration of the incumbent president, Mwai Kibaki, as the winner of the hotly contested December 2007 presidential elections. Almost immediately after this declaration, which was quickly followed by the swearing in of Kibaki for a second term of office, virulent riots erupted across the country. Fuelled by deep ethnic divisions, the violence pitted, against each other, supporters of the two main contending political parties: the Orange Democratic Movement (ODM) led by Raila Odinga and the Party of National Unity (PNU) led by Kibaki.

The post-election violence not only drew the world's attention to Kenya but also ignited a global call for peace and restraint.⁹ The focus was on the leaders of PNU and ODM who were at the core of the disputed presidential election. While PNU asserted that 'we won it fair and square', ODM countered, 'you stole it fair and square.'¹⁰ To resolve this political stalemate and pull Kenya from the brink of collapse, the African Union (AU) initiated negotiations between the leaders of these two political parties. After weeks of intense negotiations mediated by former United Nations (UN) Secretary-General, Kofi Annan, a pact for the creation of a coalition government was signed between Kibaki and Odinga on 28 February 2008.¹¹ This agreement brought to an end the post-election violence which, in only two months, had claimed more than 1200 lives and displaced an estimated 350,000 Kenyans.¹²

Shortly after Kenya was rescued from the precipice of disintegration, Zimbabwe found itself in almost a similar situation. The country was plunged into a political impasse after the opposition leader, Morgan Tsvangirai, emerged as the winner of the presidential elections of March 29 2008 but failed to secure the requisite majority. He subsequently withdrew from the run-off election citing widespread violence and intimidation by the incumbent

⁹ 'World watches Kenya' *The Sunday Standard* 13 January 2008 1.

¹⁰ 'Kibaki won fair and square' *The Sunday Standard* 13 January 2008 34.

¹¹ *Acting together for Kenya: Agreement on the Principles of Partnership of the Coalition Government*, 28 February 2008, (hereinafter Kenyan Agreement), available at www.mfa.go.ke (accessed on 12 March 2008).

¹² *Report from OHCHR Fact Finding Mission to Kenya*, 6-28 Feb 2008, available at www.ohchr.org/Downloads/Press/OHCHRkenyareport.pdf (accessed on 12 March 2008).

government and forces loyal to it. As a result, the incumbent, Robert Mugabe, solely contested the run-off election and was sworn in as president on 29 June 2008. Several African countries including Liberia, Uganda, Kenya, Nigeria, Sierra Leone, Senegal and Tanzania refused to recognise Mugabe as the legitimate president of Zimbabwe. Similarly, the international community refused to recognise Mugabe's government.

The route taken by Kenya was thus floated as a way out of Zimbabwe's political crisis. Thus, former South African President, Thabo Mbeki, acting under the auspices of Southern Africa Development Community (SADC) and African Union (AU), mediated negotiations between Mugabe and Tsvangirai aimed at striking a pact for power sharing. The negotiations triumphed on 15 September 2008 when Mugabe and Tsvangirai signed a power sharing agreement.¹³ Hopefully, the Agreement will see the formation of a coalition government in Zimbabwe.

It seems, therefore, there is a growing trend in Africa towards the resort to coalition governments as a way out of political stalemates in the aftermath of disputed elections.¹⁴ Yet, while negotiations that unchained Kenya and Zimbabwe from political gridlock represent triumph for diplomacy, it remains debatable whether the coalition governments crafted thereunder will deliver lasting peace and sustainable democracy in these countries. As such, it is important that the trend towards the resort to coalition governments in the aftermath of disputed elections is examined with a view of exploring its viability in Africa. It is against this backdrop that this dissertation is written.

1.2 Statement of the research problem

The formation of coalition governments before or after elections is traditionally a manifestation of the absence of a dominant party capable of controlling the majority in a legislative assembly.¹⁵ It is usually the ruling political party, with a minority of seats in parliament that finds it compelling to invite opposition parties in the formation of the government. In Western democracies, for instance, coalition governments formed since the end of World War II have resulted from the failure of elections to return a majority political party to office.¹⁶

¹³ Agreement between the Zimbabwe African National Union Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) Formations on Resolving the Challenges Facing Zimbabwe, 15 September 2008 (hereinafter the Zimbabwean Agreement).

¹⁴ See J Murimi 'Zimbabwe goes Kenya's way to the end' available at www.eastandard.net/insidePage.php?id=1143994789&cid=4& (accessed on 13 September 2008).

¹⁵ WO Oyugi 'Coalition politics and coalition governments in Africa' (2006) 24 *Journal of Contemporary African Studies* 53.

¹⁶ See E Browne & J Dreijmanis (eds) *Government coalitions in western democracies* (1982).

Coalition formation, therefore, is a process which normally occurs only because none of the co-operating parties can manage to win an election and govern on its own.¹⁷ Accordingly, coalescing parties are compelled to enter into what is otherwise an ‘unholy alliance’. In the words of Oyugi, coalitions are a ‘necessary evil- an evil in the sense that normally no party ever coalesces except in circumstances in which not to do so would deprive it of the chance to exercise power’.¹⁸ This ‘unholiness’ particularly rings true of coalitions fashioned in the aftermath of disputed elections or civil wars in Africa. In these circumstances, coalition governments seek to bring together rival parties who have long been divided by, *inter alia*, ethnic, cultural, religious, racial or battle lines.

Accordingly, coalition governments born of disputed elections or civil wars are in principle based on the consociational model of democracy, as articulated by the Dutch political scientist Arend Lijphart. Consociational democracy is anchored on the idea that political institutions can be designed to help facilitate conflict management in divided societies.¹⁹ This idea in turn flows from the realization that, unlike in homogenous societies, institutional arrangements are vital for democratic stability in divided societies because they have the potential to skew the political system to favour or adversely affect different groups.²⁰ Thus, Lijphart’s consociational model presupposes that ‘the formation of a grand coalition cabinet or an alternative form of elite cartel is the appropriate response to the internal crisis of fragmentation into hostile subcultures’.²¹ Lemarchand aptly summarises the rationale behind the consociational model:

Rather than contemplate secession or partition, neither of which are without major drawbacks, or let conflicts burn themselves out, at great cost in human life, the aim is to bring about a major restructuring of power relations through a more inclusive participation in policy making accompanied by corresponding spheres of autonomy for the groups concerned.²²

In essence, consociational democracy means government by an elite cartel designed to turn a democracy with a fragmented political culture into a stable democracy.²³ Therefore, when viewed through the lens of consociational theory, the formation of coalition governments in the aftermath of disputed elections and electoral violence in Africa invokes four relevant

¹⁷ Oyugi (n 15 above) 53.

¹⁸ As above.

¹⁹ K Belmont et al ‘Institutional design, conflict management and democracy’ in A Reynolds (ed) *The architecture of democracy- constitutional design, conflict management, and democracy* (2002) 1.

²⁰ As above.

²¹ A Lijphart ‘Consociational and consensus democracy’ in A Lijphart *Thinking about democracy: power sharing and majority rule in theory and practice* (2008) 31.

²² R Lemarchand ‘Consociationalism and power sharing in Africa: Rwanda, Burundi, and the Democratic Republic of Congo’ (2006) 106 *African Affairs* 1.

²³ Lijphart (n 21 above) 31.

questions pertinent to this study. First, what is the viability of such coalition governments in securing sustainable peace and democracy in Africa? Secondly, what do the Kenyan and Zimbabwean experiences portend for Africa? Thirdly, what are the justifications and criticisms of coalition governments in the aftermath of disputed elections in Africa? Finally, what are the possible solutions to the problem of electoral violence in Africa? This dissertation addresses these questions.

1.3 Hypothesis

The dissertation proceeds from the notion that coalition governments formed in the aftermath of disputed elections and electoral violence are consociational in nature. It takes the preliminary position that their resort in Kenya and Zimbabwe do not guarantee sustainable peace and democracy in these countries.

1.4 Focus and objectives of the study

The dissertation seeks to examine the viability of coalition governments in securing sustainable peace and democracy in the aftermath of disputed elections and electoral violence in Africa. It focuses on the trend established by Kenya and Zimbabwe, that is, the resort to coalition government to break political gridlock.

1.5 Significance of the study

This study intends to contribute to the understanding of the resort to coalition governments in the wake of disputed elections and electoral violence. It provides suggestions that may be adopted by African countries in preventing electoral violence. In specific reference to Kenya, the work is expected to contribute to the constitutional review debate as the country charts its path towards a new constitution.

1.6 Research methodology and limitations

This work adopts a library-based research methodology. In this respect, it will mainly involve the analytical study of documented works on the subject matter. Kenya forms the case study of the work not least because it provides the most recent experience relevant to the study.

1.7 Literature review

The theory and practice of consociational democracy has evoked much scholarly work since its formulation by Lijphart in the late 1960s. The books by Lijphart²⁴ and Reynolds²⁵ present recent updates in this field. Lijphart provides an emphasis on the intellectual development of power sharing theory and on the cohesion among its components. The volume edited by Reynolds lays emphasis on how political institutions can be designed to help facilitate conflict management in divided societies. These books, however, mainly draw their case studies from western democracies.

Studies on consociational models in Africa are not entirely lacking. The articles by Oyugi,²⁶ Sullivan²⁷ and Lemarchand²⁸ provide scholarly work on consociational frameworks in Africa. Sullivan looks at the failure of power sharing attempt in Burundi in 1993 through the lens of Lijphart's theory of consociational democracy. Lemarchand offers a comparative assessment of the radically different trajectories followed by Rwanda, Burundi and the Democratic Republic of Congo in their efforts to regulate conflict through consociational formulas. Studies on the recent experience in Kenya, and the trend towards the resort to coalition governments in the aftermath of disputed elections and electoral violence are, however, still lacking.

1.8 Overview of chapters

This work is divided into five chapters. Chapter one presents the background to the study and its justification. Chapter two explores the spectre of disputed elections and electoral violence in Africa. Chapter three analyses the resort to coalition governments for purposes of unchaining political gridlocks in the aftermath of disputed elections and electoral violence in Africa. Chapter four undertakes a case study of the Kenya 2007 presidential elections and its aftermath. Chapter five brings the work to a conclusion and provides a catalogue of recommendations flowing from the study.

²⁴ A Lijphart *Thinking about democracy: power sharing and majority rule in theory and practice* (2008).

²⁵ A Reynolds (ed) *The architecture of democracy-constitutional design, conflict management, and democracy* (2002).

²⁶ Oyugi (n 15 above).

²⁷ DP Sullivan 'The missing pillars: a look at the failure of peace in Burundi through the lens of Arend Lijphart's theory of consociational democracy' (2005) 43 *Journal of Modern African Studies* 75.

²⁸ Lemarchand (n 22 above).

CHAPTER TWO

THE SPECTRE OF DISPUTED ELECTIONS AND ELECTORAL VIOLENCE IN AFRICA

The violent struggle for power, even in states which do not descend into armed conflict, still remains an important component of political life in Africa, in spite of moves towards democratization in many countries'.²⁹

2.1 Introduction

The political path in Africa is littered with disputed elections and electoral violence. Indeed, violence has become an integral part of the political struggle on the continent.³⁰ In recent times, as witnessed in Kenya and Zimbabwe, only by sharing power amongst main political opponents have electoral disputes been resolved and electoral violence abated. Appreciating this trend demands a historical and conceptual understanding of elections and electoral violence. This chapter defines these concepts. It then traces the historical development of elections in Africa. Most importantly, it seeks to explain the prevalence of disputed elections and electoral violence in Africa.

2.2 Conceptual framework

2.2.1 Elections

Elections are generally understood to refer to the process of choosing people for particular jobs by voting.³¹ In the political realm, elections are conceived as a formal expression of preferences by the governed, which are then aggregated and transformed into a collective decision about who will govern, who should stay in office, who should be thrown out, and who should replace those who have been thrown out.³² It is simply the process of elite selection by the mass of the population in any given political system.³³ In other words:

²⁹ Amnesty International Report 2008- the state of the world's human rights (2008)3.

³⁰ B Fortman 'Elections and civil strife: some implications for international election observation' in J Abbink & G Hesselning (eds) *Election observation and democratisation in Africa* (2000) 76.

³¹ E Ojo 'Elections: an exploration of theoretical postulations' (2008) 6 *Journal of African Elections* 5. See also D Nohlen *Elections and electoral systems* (1996) 1.

³² M Harrop & W Miller *Elections and votes- a comparative introduction* (1987) 2.

³³ Ojo (n 31 above) 6.

Elections encapsulate the mediating institutional and psychological processes and anchors for citizens, as adults, in an organized and routinized manner, to express their choice among those who seek public political office.³⁴

The conceptualisation of elections in the political field rests squarely on the concept of liberal democracy.³⁵ Today, it is almost impossible to comprehend the theory and practice of democracy without linking it to the process of elections. According to Lindberg, every modern vision of representative democracy entails the notion of elections as the primary means of selection of political decision makers.³⁶ As a matter of fact, earlier attempts at conceptualising liberal democracy equated it with the phenomenon of elections. Democracy, however, should not be reduced to the process of elections only. It is a mixed bag of elements that transcend the mere holding of elections. They are nevertheless hailed as ‘the heart of the democratic order’,³⁷ and ‘a hallmark of democracy’.³⁸

Elections, therefore, play an important role in the larger project of democracy. According to Akzin, elections have technical and social significance.³⁹ In the technical sense, they are the process through which an office is assigned to a person by an act of volition that requires the simultaneous expression of many people’s opinions. In the social sense, an election is the process by which a person is linked to an office through the due participation of the people who will bear the weight of his or her authority. He notes that it is this social aspect of elections that generates the idea of governing a society with the consent of the governed, and that this boils down to democracy and distinguishes election from appointment.⁴⁰ In a nutshell, elections, as a symbol of popular sovereignty, serve the purpose of investing governments with political authority and legitimacy.⁴¹ It ensures that the citizen retains the power to ‘hire and fire’ political leaders’.⁴²

³⁴ A Jinadu ‘Political science, elections and democratic transitions: fragments of an autobiography and some conjectures’ in G Onu & A Momoh (eds) *Elections and democratic consolidation in Nigeria* (2005) 3.

³⁵ Nohlen (n 31 above) 2.

³⁶ S Lindberg ‘The democratic qualities of competitive elections: participation, competition and legitimacy in Africa’ (2003) 41 *Commonwealth & Comparative Politics* 61, 62.

³⁷ B Chiroro ‘Apathy, fatigue, or boycott? an analysis of the 2005 Zimbabwe senate elections’ (2005) 38 *EISA Occasional Paper* 1.

³⁸ Ojo (n 31 above) 4.

³⁹ B Akzin ‘Election and appointment’ (1960) LIV *American Political Review* 3 cited in Nwolise (n 5 above) 157.

⁴⁰ As above.

⁴¹ The concept of popular sovereignty has three elements: the power to constitute a frame of government, the power to choose those to run the government, and the power to define the powers involved in governing. See B Nwabuezi *Presidentialism in commonwealth Africa* (1974) 292.

⁴² S Adejumobi ‘Elections in Africa: a fading shadow of democracy?’ (2000) 21 *International Political Science Review* 59, 61.

To achieve the above goals, an election must be free and fair, or at least perceived to be so.⁴³ The structures and processes of elections must be guarded by democratic ideals and practices. At the structural level, there must be, as minimum prerequisites: a competent, relatively autonomous and non-partisan electoral body to administer the conduct of elections; an impartial judiciary to interpret electoral laws and adjudicate on electoral matters; a viable press; and a non-partisan police force. At the procedural level, there must be a body of electoral laws and an electoral system acceptable to all the parties to an election.⁴⁴

An election, therefore, is not simply the casting of a vote during the polling day but a sum-total of processes that come before and after that. For this reason, it is submitted, elections should not be viewed as periodic one-time events but as a 'set of events and decisions leading up to elections that have long lasting consequences once the proverbial dust has settled'.⁴⁵ In voting, one essentially selects a set of policies that will define his/her life for the next four or five years. It is on this account that elections are always emotive and susceptible to violence, either to influence or challenge its outcome, and to which we now turn.

2.2.2 Electoral violence

The study of electoral violence is one that digs into a paradox. Implicit in the above definition of elections, is the notion that elections entail the art of resolving political differences through non-violent means. If this is so, it makes little sense to study electoral violence, since elections in essence should be part of the democratic rules to solve political conflicts without force and violence.⁴⁶ This paradox notwithstanding, until the spectre of electoral violence is exorcised, its study will remain relevant in Africa. Granted, the conceptual understanding of electoral violence must be preceded by a clear definition of violence.

According to Nwolise, 'violence is any form of organised or spontaneous action or threat effected by the people or by government or its agents to occasion harm, undue advantage, injury or destruction, with the aim of influencing or achieving a desired objective'.⁴⁷ Electoral violence may thus be viewed as violence targeted towards the electoral process. It may take place before, during and after elections. It has to be seen as an activity, observes Laakso, motivated by an attempt to affect the results of the elections- either by manipulating

⁴³ See J Elklit & P Svensson 'What makes elections free and fair' (1997) 8 *Journal of Democracy* 32.

⁴⁴ See A Reynolds & B Reilly (eds) *The international IDEA handbook of electoral system design* (1997).

⁴⁵ A Reynolds & T Sisk 'Elections and electoral systems-implications for conflict management' in T Sisk & A Reynolds (n 84 below) 11, 13.

⁴⁶ L Laakso 'Insights into electoral violence in Africa' in M Basedau et al *Votes, money and violence-political parties and elections in sub-Saharan Africa* (2007) 224, 225.

⁴⁷ Nwolise (n 5 above) 160.

the electoral procedures and participation or contesting the legitimacy of the results.⁴⁸ In other words, it is the use of physical force, psychic terror tactics, or official bureaucratic machinery to pursue improper electoral ends.⁴⁹ In this regard, electoral violence assumes physical, psychological and structural dimensions.⁵⁰ Implicit in Laakso's definition above, is the fact that electoral violence may occur at the two ends of an election: before and after.

2.2.2.1 Pre-election violence

Pre-election violence is often targeted towards influencing the results of an election. It is always accompanied by election rigging and fraud, usually at the instance of the incumbent government for the reason that it wields state power. Voters, in this case, are often intimidated in order to affect their choices.⁵¹ The violence against opposition supporters in Zimbabwe towards the June 2008 presidential run-off election is a case in point in this regard.⁵² Voters may also be violently displaced to prevent them from voting.⁵³ The ethnic clashes witnessed in the 1992 and 1997 Kenya general elections are evidence of such pre-electoral violence.⁵⁴

2.2.2.2 Post-election violence

Post-election violence is usually a reaction to what is perceived as a 'stolen' election. It is a violent means of contesting the legitimacy of an election results.⁵⁵ As such, post-election violence is a product of a disputed election. It may take the form of street riots or attacks against those who are perceived to have voted for the 'wrong' candidate.⁵⁶ The violence following the 2007 Kenya presidential election is instructive in this regard.⁵⁷ It must be noted here that the fact of disputing an election is not in itself evil, rather it is the violent means employed to express it that is evil. Indeed, election disputes are not limited to Africa.

⁴⁸ Laakso (n 46 above) 228.

⁴⁹ Nwolise (n 5 above) 160.

⁵⁰ Physical violence involves physical assault such as attacks against persons and properties. Psychological violence involves generating and living in fear, terrorising people, or publishing abusive material directed against people. Structural violence is usually indirect. It involves, among other factors, political repression, economic exploitation, and deprivation of rights such as freedom of choice. See J Galtung 'violence and peace' in P Smoker et al (eds) *A reader in peace studies* (1991) 11-12 cited in Nwolise (n 5 above) 158.

⁵¹ Laakso (n 46 above) 228.

⁵² See Human Rights Watch *Bullets for each of you: state sponsored violence since Zimbabwe's March 29 elections* (2008); Human Rights Watch *They beat me like a dog: political persecution of opposition activists and supporters in Zimbabwe* (2008).

⁵³ Laakso (n 46 above) 228.

⁵⁴ See *Report of the Parliamentary Select Committee to investigate ethnic clashes in Western and other parts of Kenya* (1992); Human Rights Watch *Divide and rule- state-sponsored ethnic violence in Kenya* (1993); *The report of the judicial commission of inquiry into tribal clashes in Kenya (The Akiwumi Report)* (1999); KHRC *Killing the vote: state-sponsored violence and flawed elections in Kenya* (1998).

⁵⁵ Laakso (n 46 above) 228.

⁵⁶ As above.

⁵⁷ See Chapter Four below.

For instance, elections have been disputed in the United States (US) since 1800,⁵⁸ with the recent case been the dispute over the 2000 presidential election between George Bush and Al Gore.⁵⁹ Perhaps, if anything is unique to Africa, then it is the violence associated with disputed elections.

2.3 The history of elections in Africa

The history of elections in Africa is intricately tied with the evolution of democratisation on the continent.⁶⁰ This evolution has undergone three major phases. The first wave of democratisation came in the 1950s in the wake of decolonisation which ushered African states into political independence.⁶¹ This was followed by the second wave which spans from the 1960s to the late 1980s. During this period, democratisation was stifled as the first generation of African leaders became autocratic and established one-party states. With the end of the Cold War, the third wave of democratisation broke on the shores of Africa, bringing with it multi-party elections. The history and pattern of elections in Africa has been defined by these three phases of democratisation.

2.3.1 Pre-colonial era

Access to power in pre-colonial Africa was based on arrangements that communities made in a bid to identify and influence forces of the invisible world.⁶² The notion that prevailed was that all power had its ultimate origin in the supernatural or invisible world, and that humans could acquire or lose power only with the acquiescence of the denizens of this invisible world. Accordingly, secret societies, priests, clerics, and diviners, rather than the ordinary people, played a role in king-making. Where a semblance of election occurred, a choice was made between several individuals through a process of consultation.⁶³ Accordingly, there is little evidence to suggest that elections, in their contemporary sense, had any place in pre-colonial African societies.⁶⁴

2.3.2 Colonial era

The modern practice of elections in Africa is linked to the advent of colonialism. As observed by Adejumbi, 'elections, in terms of their origin in Africa, were a colonial

⁵⁸ The first election to be disputed in America's history was the fourth election in 1800 between John Adams and Thomas Jefferson. See M Schulman 'Close and disputed elections' available at www.multied.com/elections/Disputedelections.html (accessed on 10 August 2008).

⁵⁹ See A Greene *Understanding the 2000 election-a guide to the legal battles that decided the presidency* (2001).

⁶⁰ See L Rudebeck 'Popular sovereignty and constitutionalism: a historical and comparative perspective' in L Rudebeck et al (eds) *Democratisation in the Third World- concrete cases in comparative and theoretical perspective* (1998) 209, 211.

⁶¹ See R Southall, *Democracy in Africa: moving beyond a difficult legacy* (2003) 1.

⁶² S Ellis 'Election in Africa in historical context' in Abbink & Hesselting (n 30 above) 39.

⁶³ D Nohlen et al *Elections in Africa- a data handbook* (1999) 1.

⁶⁴ Adejumbi (n 42 above) 62.

contrivance that evolved as part of the institutional transfer of the superstructure of liberal democracy'.⁶⁵ For the larger part of the colonial period, however, elections were the sole preserve of the white settlers. Africans were not permitted to participate in these elections. However, in French speaking colonies, particularly Senegal, a few 'assimilated' Africans were able to vote, from the mid 19th century, for a depute, a parliamentary representative to the French National Assembly. Similarly, in the early 20th century, Africans in the Cape Colony were given the right to vote based on property qualification.⁶⁶

In the majority of English speaking colonies, elections began to take root only in the 1920s. Natives became members of a Legislative Council (Legco) which was bounded by race and other forms of exclusion.⁶⁷ Legco, nevertheless, became a forum for arguments with colonial administration over policy. Elections were also held for Local Native Councils (LNCs).⁶⁸ Those elected were trusted with decisions over local resources, especially education. The LNCs, therefore, became sites of keenly fought political contests. In Kenya, for instance, the first elections for representatives to the Legco took place in 1920 followed by LNCs elections in 1923.⁶⁹ Elections to the Legco were also introduced in Ghana, Nigeria, Sierra Leone and Zambia in the 1920s.⁷⁰

It was, however, after the Second World War that elections in which the mass of the African adult population could participate were held. Precipitated by participatory demands of the African elites,⁷¹ these elections were the forerunners of the independence of African states. For instance, ordinances issued in August and September 1945 opened the door for multiparty political activity throughout French speaking Africa.⁷² The elections became a constitutional tool used to lead colonies into independence and/or to pre-structure the post-colonial development of the new African states in the interest of the old colonial powers.⁷³

An important feature of these elections is that they were carried out in a peaceful manner; they were fairly free and fair; and the outcomes were never generally disputed.⁷⁴ As such, the first generation of African nationalists could claim the legitimacy of having been duly

⁶⁵ As above.

⁶⁶ Ellis (n 62 above) 40.

⁶⁷ M Cowen & L Laakso 'An overview of election studies in Africa' (1997) 35 *The Journal of Modern African Studies* 717, 718.

⁶⁸ As above.

⁶⁹ Cowen & Laakso (n 67 above) 718.

⁷⁰ As above.

⁷¹ The demand for elections, and an extension of the right to vote, were closely tied to demands for participation, self-determination, and the independence of the African states, and proved to be one of the most effective weapons available to anti-colonial movements in and outside Africa. It was only in the context of growing opposition to colonial rule at home and abroad that the French and British governments introduced the general right to vote in the 1950s and 1960s. See Nohlen (n 52 above) 2.

⁷² Ellis (n 62 above) 41

⁷³ Nohlen et al (n 63 above) 2.

⁷⁴ As above.

elected in competitive elections. It is, however, important to note that these initial elections were simply held to legitimise the outcome of the struggle for independence; otherwise the new power relations had already been determined.⁷⁵

2.3.3 Independence era (1960s-1989)

The years following the end of colonialism in Africa witnessed the reversal of the political freedom earned at independence. The popular belief that independence would usher in democratic practices was frustrated by the founding leaders, who utilised the systems left behind by the departing colonial rulers to establish authoritarian regimes. They withdrew the independent constitutions, fundamentally modified them or simply ignored them.⁷⁶ They argued that the more urgent tasks of the new states were state building and economic development.⁷⁷ As such, the emphasis was not only for national unity, but also for national uniformity.⁷⁸ In the euphoria that prevailed after independence, the public gullibly accepted these ideas. As a consequence, one-party states were established across Africa fundamentally altering the pattern of elections.

In 1965, Tanzania pioneered an experiment of how electoral competition could be combined with the need for national unity under a single party system.⁷⁹ Variations of this semi-competitive approach to legislative elections, in which the voter could choose among several candidates approved by the ruling party, were later introduced in several other African countries.⁸⁰ These states also held direct presidential elections under the one party system, but they were without exception non-competitive. In the main, 'the one-party system gave the voter no say in the question of the national leadership or overall policy directions'.⁸¹ All it served was to secure the power of the ruling elite.⁸²

2.3.4 Post-Cold War era (1989-present)

The end of the Cold War and the collapse of bipolar global relations in 1989 mid-wifed the rebirth of multi-party elections in Africa. The one-party systems and autocratic regimes collapsed under internal and external pressures, opening up the way for a spate of multi-party elections throughout the continent. Between 1992 and 1994, there were more than 20

⁷⁵ Fortman (n 30 above) 81.

⁷⁶ Nohlen et al (n 63 above) 3.

⁷⁷ See e.g. B Chourou 'The challenge of democracy in North Africa' (2002) 9 *Democratisation* 17.

⁷⁸ Lindberg (n 37 above) 64.

⁷⁹ Nohlen (n 63 above) 10.

⁸⁰ Such elections were introduced in Kenya (1969), Zambia (1973), Sudan (1974), Zaire (1977 & again in 1987), Malawi (1978), Mali (1979), Ivory Coast (1980), Sierra Leone (1982), Togo (1985), Ethiopia (1987), Central African Republic (1987), Comoros (1987) and Cameroon (1987). See Nohlen (n 63 above) 10.

⁸¹ Nohlen et al (n 53 above) 6.

⁸² Ellis (n 62 above) 38.

'founding' multi-party elections, including in South Africa where the end of apartheid was marked by the first multi-racial elections in 1994.⁸³ Since then, multi-party elections have been held periodically in Africa. In countries previously rocked by armed conflicts, elections have been conducted as the capstone of war termination efforts.⁸⁴

However, the elation of the 1990s has since ebbed away. Elections have failed to bring about the much anticipated change, as political leaders have manipulated the electoral system in order to cling to power.⁸⁵ The incumbents have only brought opposition parties into the game so long as they can keep them under control.⁸⁶ After all, they have not been interested in institutionalizing democracy but in legitimising their continuity in power. As such, in addition to tremendous technical and logistical problems,⁸⁷ multi-party elections have been characterised by reckless manipulations and rigging.⁸⁸ In addition, multi-party elections have exacerbated tensions in Africa's invariably multi-ethnic societies.⁸⁹

At the very least, opposition parties have frequently refused to participate in elections perceived as not free and fair from the onset.⁹⁰ The most recent example in this regard is the decline by Zimbabwe's Tsvangirai to participate in the June 2008 run-off election against Mugabe. In some instances, electoral violence has been used to prevent the elections from being held under the existing rules.⁹¹ Violence was used in this manner, for example, in Cote d'Ivoire in 1995 as a consequence of the 'boy-cott actif' before the presidential elections in that year.

At acute levels, disputed elections have been greeted with violence, which in some situations have disintegrated into civil war. In Nigeria, the 2007 elections were declared by President Obasanjo as a 'do-or-die' affair.⁹² This statement did set the stage for the violence that rocked the ensuing elections. Indeed, the historical trajectories of electoral politics in Nigeria show the pervasive struggle to control electoral machinery for individual votes.⁹³ As

⁸³ See generally S Lindberg *Democracy and elections in Africa* (2006).

⁸⁴ T Sisk & A Reynolds (eds) *Elections and conflict management in Africa* (1998) 1.

⁸⁵ See e.g. R Sandbrook 'Transitions without consolidation: democratisation in six African cases' (1996) 17 *Third World Quarterly* 69.

⁸⁶ See e.g. S Brown 'Authoritarian leaders and multi-party elections in Africa: how foreign donors help to keep Kenya's Daniel arap Moi in power' (2001) 22 *Third World Quarterly* 725.

⁸⁷ Nohlen et al (n 52 above) 9.

⁸⁸ Adejumobi (n 42 above) 60.

⁸⁹ Sisk & Reynolds (n 84 above) 2.

⁹⁰ The following presidential elections were fully or partly boycotted by the opposition in the 1990s: Burkina Faso (1991, 1998); Djibouti (1993), Togo (1993); Cote d'Ivoire (1995); Equatorial Guinea (1996), Zimbabwe (1996); Zambia (1996); Mauritania (1997); Mali (1997); & Cameroon (1997). See Nohlen (n 52 above) 14.

⁹¹ A Mehler 'Political parties and violence in Africa- systematic reflections against empirical background' in Basedau (n 44 above) 194, 204.

⁹² Nwolise (n 5 above) 165.

⁹³ D Seteolu 'Historical trajectories of elections in Nigeria: the state, political elite and electoral politics' in Onu et al (n 34 above) 34, 36.

such, rather than being a political asset and legitimising force, elections in Nigeria, have become a political liability, a source of instability and decay.⁹⁴

In Lesotho, the 1998 and 2007 elections led to post-election conflicts which were only contained after a combination of internal and external diplomatic and military interventions.⁹⁵ In Zanzibar, violence in the 2001 elections brought into sharp focus the increasingly fragile union between Zanzibar and mainland Tanzania.⁹⁶ Elections in Angola, Uganda, Ethiopia, Chad, Zambia, Rwanda, Burundi, Sierra Leone, Cote d'Ivoire, Zimbabwe and Kenya have witnessed violence of varying scales at one point or another. Thus, the spectre of disputed elections and electoral violence haunts the continent with no promise of receding. In sum, it is often the case that Africans look at elections with much trepidation. As ironically put, 'the fear of elections is the beginning of political wisdom'.⁹⁷

2.4 Electoral violence: theoretical explanations

Electoral violence does not easily lend itself to general explanations due to its contextual nature. However, two broad theoretical explanations may be distilled: institutional-functionalism and structuralism. The former explains instability by focusing on the interface between institutionalisation and political participation, while the latter gives pride of place to social stratification and the configuration of power relations among social forces within and without the ambit of the state.⁹⁸ A discussion on these theories ensues below.

2.4.1 Institutional-functionalism

According to Huntington, political disorder is more likely to occur in societies marked by high levels of political participation but with slow or weak processes of political institutionalisation.⁹⁹ This is particularly true of Africa where the development of political institutions lags behind social and economic change. As such, African states have often failed to respond to popular demands or, worse still, have rode roughshod over them.¹⁰⁰ The upshot has been detraction from state legitimacy and the moral claim to rule. As such, where elections have offered a genuine possibility of changing existing power relations,¹⁰¹

⁹⁴ I Ogundiya & T Baba 'Electoral violence and the prospects of democratic consolidation in Nigeria' in Onu *et al* (n 34 above) 369.

⁹⁵ K Matlosa 'Political instability and elections: a case study of Lesotho' (1997) 3 *Lesotho Science Review* 2.

⁹⁶ See S Karume 'Towards an understanding of contemporary conflict in Zanzibar' (2004) 27 *EISA Occasional Paper* 1.

⁹⁷ Ogundiya & Baba (n 83 above) 369.

⁹⁸ K Matlosa 'Managing post-election conflict in Lesotho' (2007) 70 *Global Insight* 2.

⁹⁹ S Huntington *Political order in changing societies* (1968) cited in Matlosa (n 98 above) 2.

¹⁰⁰ Matlosa (n 98 above) 3.

¹⁰¹ Violence correlates with the meaningfulness of the elections, which, is very high during periods of transition. See P Quantin 'Pour une analyse comparative des élections africaines' (1998) 69 *Politique Africaine* 13 cited in Laakso (n 46 above) 227.

electoral violence has occurred in the event of the manipulation, whether real or perceived, of the electoral process.¹⁰²

The inability of African states to meet popular demands co-relates with their weak status.¹⁰³ This has two implications. First, it means that in the absence of empirical attributes of statehood, most African states exist as juridical entities only.¹⁰⁴ Consequently, a larger percentage of the African populace is trapped in grinding poverty. Poverty is a potential recipe for igniting electoral violence. According to Nathan where underdevelopment is coupled with inequality, violence may occur as expression of anger, frustration and fear.¹⁰⁵ As such, electoral violence may only be the spark that ignites years of unsettled grievances. Secondly, as weak states, political power is personalised rather than embedded in political institutions.¹⁰⁶ As a result, the political playing field is skewed in favour of those in power and who, in their resolve to cling to power, use this opportunity to manipulate elections and win them at all cost. Election manipulation, coupled with the lack of independent electoral bodies, impartial judiciary, viable press and non-partisan police force, ultimately renders the resort to violence, as a means of expressing political grievances, almost inevitable.

2.4.2 Structuralism

The structural explanation of electoral violence suggests that society and politics are organised in a manner that generates conflict.¹⁰⁷ Here, the causal factor of electoral violence is the political economy of the state. In this regard, it must be recalled that the capture of state power, upon independence, immediately assured the new African ruling elite enormous political power.¹⁰⁸ This power was translated into economic power through accumulation and, in most instances, malfeasance by the ruling classes. Thus access to state power, in the African context, is equivalent to a political licence to rapid accumulation by fair and foul means.¹⁰⁹ This phenomenon has bred 'clientelism' in most African states.¹¹⁰ Accordingly, capital accumulation outside the ambit of the state is bleak and as such, contestation for the capture of the state is fierce, often sliding into violence.

¹⁰² Fortman (n 30 above) 76.

¹⁰³ See L Diamond et al (eds) *Democracy in developing countries: volume two* (1988)21.

¹⁰⁴ See C Cone & H Solomon 'The state and conflict in the Democratic Republic of Congo' (2004) 32 *South African Journal of Military Studies* 51.

¹⁰⁵ L Nathan 'The four horsemen of the apocalypse: the structural causes of crisis and violence in Africa' (2000) 25 *Peace and Change* 188, 191.

¹⁰⁶ See J van Wyk 'Political leaders in Africa: presidents, patrons or profiteers?' (2007) 2 *ACCORD 1 Occasional Paper Series* 1. See also N van de Walle 'Presidentialism and clientelism in Africa's emerging party systems' (2003) 41 *Journal of Modern African Studies* 297.

¹⁰⁷ Friedrich Ebert Stiftung & Centre for Conflict Management 'Political and electoral violence in East Africa' (2001) 2 *Working Papers on Conflict Management* 2.

¹⁰⁸ Matlosa (n 98 above) 101.

¹⁰⁹ As above.

¹¹⁰ Clientelism refers to a state in which the political leader has the state as his client. In essence, the leader 'owns' or personalises the state. Clientism breeds political corruption and the state only exists for purposes of extraction. See van Wyk (n 106 above); van de Walle (n 106 above).

The political economy of the state in Africa is inextricably tied to the political manipulation of ethnicity.¹¹¹ The game of politics in Africa is understood to revolve around the transfer of state resources by politicians in return for voters' political support.¹¹² Voters, therefore, assume that the likelihood that resources will be channelled to them is directly related to whether the politician who controls those resources is from their ethnic group.¹¹³ On their part, politicians use ethnic ideology to consolidate a substantial political base. As such, there are to be found innumerable overtly and covertly ethnic political parties in African states.¹¹⁴

Therefore, for those in power, it means that the power must be retained at all cost, not only for their own benefit but also for the sake of their ethnic groups. For those in opposition, losing an election, especially the presidential election, is a consignment to continued political and economic marginalisation of the ethnic groups whom they represent. In essence, all parties to an African election approach it with only a single option: to win. Thus when this goal is not achieved, coupled with the perception that the election has been 'stolen', violence inescapably follows.¹¹⁵ In this regard, electoral violence may be ignited by a flawed election but its root causes may lie in historical marginalisation and exclusion.

2.5 Conclusion

With the spectre of disputed elections and electoral violence so embedded in Africa, it is easy to cast doubt on the utility of elections as an instrument of political change on the continent.¹¹⁶ But at closer scrutiny, one would appreciate that electoral violence in Africa is not simply a function of flawed elections but, most significantly, a reaction to historical political and economic discontent that explodes into violence during election periods. Elections must, therefore, be viewed as a process that links a society's past with its future. Thus, exorcising the spectre of electoral violence in the continent will require strategies that seek to address past injustices and prevent similar occurrences in the future.

¹¹¹ See C Ake 'What is the problem of ethnicity in Africa' (1993) 22 *Transformation* 1.

¹¹² D Posner 'Regime change and ethnic cleavages in Africa' (2007) 40 *Comparative Political Studies* 1302.

¹¹³ As above.

¹¹⁴ M Ottaway 'Ethnic politics in Africa: changes and continuity' in R Joseph (ed) *State, conflict and democracy in Africa* (1999) 299, 300.

¹¹⁵ Laakso (n 46 above) 226.

¹¹⁶ Adejumobi (n 42 above) 60.

CHAPTER THREE

THE RESORT TO COALITION GOVERNMENT: A CRITICAL ANALYSIS

It is an accepted practice in times of emergency for opposition parties to sink their differences and join together in forming a national government.¹¹⁷

3.1 Introduction

The phenomenon of coalition governments has long provided the fodder for discourse in political corridors. The present Chapter plugs into this discourse by examining the resort to coalition government in the aftermath of disputed elections and electoral violence. First, it delves into the theory of coalition formation and seeks to distinguish between classical and consociational coalition governments. Then, it proceeds to analyse the phenomenon of coalition governments formed in the aftermath of disputed elections. Finally, the case for the adoption of mandatory coalition governments in Africa is presented.

3.2 The theory of coalition formation

Coalition formation or building is a process of organising parties collectively in pursuit of a common goal.¹¹⁸ The elements or actions that entail this process include, among others, the pooling of resources in pursuit of this goal, communication about the goal, forming binding commitments concerning this goal, and an agreement of the product that may result from achieving this goal.¹¹⁹ The organisation of the parties may take place either at the executive or legislative level of the government, giving rise to two kinds of coalition: government (cabinet) coalition, and legislative coalition. Cheibub *et al* define a government coalition as a set of legislators belonging to different parties that hold cabinet posts.¹²⁰ On the other hand, they conceive a legislative coalition as a set of legislators from different parties who vote together. This dissertation focuses on the latter, although ordinarily, 'if parties are disciplined then every government coalition is a legislative coalition'.¹²¹

¹¹⁷ J Nyerere 'One party rule' in P Sigmund Jr. (ed) *The ideologies of the developing nations* (1963) 199 cited in Lijphart (n 21 above) 30.

¹¹⁸ S Karume 'Conceptual understanding of political coalitions in South Africa: an integration of concepts and practices', paper presented at the Electoral Institute of Southern Africa (EISA) Roundtable on Political Party Coalitions, Cape Town, 19 June 2003.

¹¹⁹ As above.

¹²⁰ J Cheibub *et al* 'Government coalitions and legislative success under presidentialism and parliamentarism' (2004) 34 *British Journal of Political Science* 565, 569.

¹²¹ As above.

A distinction must be drawn between coalition formation in presidential and parliamentary systems. In presidential systems, the popularly elected presidential candidate forms the government with the membership of the cabinet mainly drawn from her political party. Such a candidate forms the government even when her party does not have a majority of seats in the legislature. Therefore, the formation of a coalition government in a presidential system is a unilateral act, in that the president may invite members of parties other than her own to the cabinet.¹²² In parliamentary systems, however, the party with the most number of seats in parliament forms the government and the party leader becomes the prime minister or head of government. In such a system a coalition government results from formal negotiations among parties.¹²³

3.3 Models of coalition government

Coalition formation is informed by a delicate interplay of many factors which has a lot to do with the socio-political situation in a given society.¹²⁴ As such, no two coalition governments are exactly similar in the rationale behind their formation, and in their structure.¹²⁵ However, for purposes of this work, two broad categories of coalition government have been extracted from existing practices: classical coalition governments formed to attain parliamentary majority, and consociational coalition governments resorted to in divided societies. An exposition of these models ensues below.

3.3.1 Classical coalition governments

Traditionally, the resort to coalition government by political parties and elite leaders has been a function of political expediency. This means that the primary motive for resorting to coalition governments is the attaining of majority in parliament. Hence Oyugi's contention that the formation of coalitions is usually a manifestation of the absence of a dominant party capable of controlling the majority in a legislative assembly.¹²⁶ Elections, therefore, play a pivotal role in the formation of classical coalition governments. In this regard, coalitions leading up to the formation of coalition governments may be formed either before or after the elections. This gives rise to two types of classical coalition government: pre-electoral and post-electoral.

¹²² Cheibub (n 120 above) 571.

¹²³ As above. See also K Strom & W Muller 'Coalition governance institutions in parliamentary democracies', paper presented at the joint sessions of the workshops of the European Consortium for Political Research, Mannheim, 26-31 March 1999.

¹²⁴ Oyugi (n 15 above) 54.

¹²⁵ A Majeed *Coalition politics and power sharing* (2000) 3.

¹²⁶ Oyugi (n 15 above) 53.

3.3.1.1. Pre-electoral coalitions

Pre-electoral coalitions exist when multiple parties choose to co-ordinate their electoral strategies rather than run for office alone.¹²⁷ They are resorted to by political parties in the hope that in so doing they will stand a better chance of winning an election and subsequently constituting a working majority in parliament.¹²⁸ According to Golder, two distinct features run through pre-election coalitions. First, the coalition parties never compete in an election as truly independent entities. Secondly, the fact of coalescing is usually made known to the electorate.¹²⁹ Allern and Aylott sharpen Golder's definition, which they argue is a little imprecise, by adding a third feature, that is, the coordination of party strategies must have the explicit aim of forming a post-election executive coalition.¹³⁰ Pre-electoral coalitions leading to the formation of coalition governments have been witnessed in Mauritius¹³¹ and Kenya.¹³²

3.3.1.2 Post-electoral coalitions

In a majority of cases, classical coalition governments have resulted from the failure of elections to return a ruling party with a majority of seats in parliament. It is often the ruling party that finds it compelling to invite an opposing party in forming the government. In other words, if it were not for the lack of sufficient numbers in parliament, the ruling party would not resort to a coalition government. Thus, in many states where the norm is coalition governments, political actors usually discuss the formation of such coalitions after the election.¹³³ Consequently, post-electoral coalitions, as opposed to pre-electoral ones, do not generally reflect voter preferences.¹³⁴ African countries that have resorted to post-electoral coalitions include Malawi after the 1994 elections and South Africa after the 1999 elections.¹³⁵

¹²⁷ S Golder 'Pre-electoral coalition formation in parliamentary democracies' (2006) 36 *British Journal of Political Science* 195.

¹²⁸ Oyugi (n 15 above) 53.

¹²⁹ Golder (n 127 above)

¹³⁰ E Allern & N Aylott 'Overcoming the fear of commitment: pre-electoral coalitions in Norway and Sweden', paper presented at the annual Political Studies Association conference, Bath, 11-13 April 2007.

¹³¹ See R Sithanen 'Coalition politics under the tropics: office seekers, power makers, nation building- a case study of Mauritius', paper presented at EISA roundtable on political party coalitions, Cape Town, 19 June 2003.

¹³² See J Mutakha 'Coalition governments and governments of national unity' (2007) 1 *Moi University Law Journal* 1.

¹³³ Sithanen (n 131 above) 2.

¹³⁴ See M Laver & I Budge (eds) *Party policy and government coalitions* (1992) xx. See also H Norpoth 'The German Federal Republic: coalition government at the brink of majority rule?' in E Browne & J Dreijmas (eds) *Government coalitions in western democracies* (1982) 7.

¹³⁵ In the 1994 Malawian elections, the United Democratic Front (UDF) won the elections but failed to secure a majority of seats in parliament. It was forced to co-opt the Alliance for Democracy (AFORD) into the government with its leader as the country's vice-president. In South Africa, the ANC won the 1999 elections but co-opted the Minority Front Party (MFP) so as to secure a two-thirds majority in the National Assembly. Oyugi (n 15 above) 66. See also D Kadima 'Political party coalition building and splitting in post-apartheid South Africa: effects on representatives democracy and party system', paper presented at the EISA Roundtable on Political Party Coalitions, Cape Town, 19 June 2003.

3.3.2 Consociational coalition governments

Consociational coalition governments are designed to guarantee stability through the accommodation of the disparate segments of a deeply divided society.¹³⁶ In these societies, institutional design can systematically favour or disadvantage different groups.¹³⁷ As such, there is always a need to design a system of governance in which the interests and demands of these diverse groups are accommodated. According to Lijphart, these interests and demands can only be accommodated by the establishment of power sharing under the consociational model of democracy.¹³⁸ As a concept, consociationalism is composed of four elements: grand coalition, group autonomy, proportional representation, and minority veto.¹³⁹

A pure form of consociational democracy would entail the above four elements. With these elements as the basis of analysis, it is easy to conclude that ‘nowhere in the continent [Africa] has consociationalism been fully operationalized’.¹⁴⁰ But as Lijphart concedes, ‘the essential characteristic of consociational democracy is not so much any particular institutional arrangement as the deliberate joint effort by the elites to stabilize the system’.¹⁴¹ This means that it is the purpose behind the resort to a consociational coalition government that defines it as such, rather than its constitutive elements. For this reason, it is submitted that, to the extent that a coalition government is resorted to for the sole purpose of stabilizing a political system, then it is consociational.

In this light, consociational coalition governments can be found in Africa especially in countries that have undergone or are undergoing transition, either from repressive to democratic regimes or from civil war to peace. During such transitions, the prevailing balance of power largely determines whether the society in question will stand on its feet or will slide back into anarchy.¹⁴² As such, coalition governments have been peddled as the appropriate model of governance during the transition period. The exposition below demonstrates this practice in Africa.

¹³⁶ Lijphart (n 21 above) 31.

¹³⁷ See Belmont (n 17 above) 1.

¹³⁸ A Lijphart ‘Constitutional design for divided societies’ (2004) 15 *Journal of Democracy* 96. See also A Lijphart ‘The wave of power-sharing democracy’ in A Reynolds (ed) *The architecture of democracy-constitutional design, conflict management, and democracy* (2002) 37.

¹³⁹ Lijphart (n 138 above) 97.

¹⁴⁰ Lemarchand (n 22 above) 3.

¹⁴¹ Lijphart (n 138 above) 29.

¹⁴² See J Sanguinetti ‘Present at the transition’ in L Diamond & M Plattner (eds) *The global resurgence of democracy* (1993) 53.

3.3.2.1 Transition from repressive to democratic regime

Consociational coalition governments first emerged in Africa in the 1960s in the transition from colonisation to independence. These coalitions, which Oyugi describes as ‘first generation coalitions’, came into being either on the eve of independence or immediately after independence.¹⁴³ They were primarily configured to create a stable political climate, particularly in the former British colonies, including Nigeria,¹⁴⁴ Mauritius,¹⁴⁵ and Uganda.¹⁴⁶ Zimbabwe and South Africa similarly adopted consociational coalition governments in 1980 and 1994 respectively. The coalition governments in these two countries, discussed in detail later, were meant to foster inter-racial accommodation and create an environment for reconciliation following decades of white oppression against blacks.¹⁴⁷ These coalition practices, however, have since been abandoned.

3.3.2.2 Transition from civil war to peace

A second set of consociational coalition governments in Africa has been resorted to in times of transition from civil war to peace. Where an end to war is negotiated, the adversaries would always want an assurance that state power will not be exclusively dominated by any one group.¹⁴⁸ Power-sharing provides this assurance by guaranteeing every group a slice of state power.¹⁴⁹ It is ‘a promising solution to groups who can neither envision secession nor tolerate the status quo’.¹⁵⁰ As such, peace agreements in Africa have often included power sharing pacts as a strategy for terminating civil war and maintaining political stability.¹⁵¹ For

¹⁴³ Oyugi (n 15 above)

¹⁴⁴ The Nigerian coalition government was formed between the Northern People’s Congress (NPC) and the National Council of Nigerian Citizens (NCNC) following the 1959 elections leading to independence. The coalition was designed to maintain the territorial integrity of Nigeria as a united country after independence.

¹⁴⁵ The 1967 general election leading to Mauritius’ independence in 1968 was bitterly fought along ethnic considerations. While the Hindu majority massively supported political independence, the minorities, for fear of political domination by the Hindus, overwhelmingly opposed it. The election left the country deeply polarised and in need of healing. As such, a coalition government was crafted between the main party that fought for independence (Labour Party) and the one that opposed it, *Parti Mauricien Social Democrate* (PMSD), as a strategy for nation building and economic development.

¹⁴⁶ The first independent government of Uganda from 1962-1966 was a coalition between the Uganda’s Peoples’ Congress led by Milton Obote and the Buganda Kingdom under Kabaka Yekha. While Obote became the executive prime minister, Kabaka Yekha occupied the position of president and head of state. Cabinet positions were also allocated in proportion to the representation of the two parties in parliament. See Oyugi (n 15 above) 59.

¹⁴⁷ See generally D Tutu *No future without forgiveness* (1999); B Raftopoulos & T Savage *Zimbabwe-injustice and political reconciliation* (2004).

¹⁴⁸ C Hartzell & M Hoddie ‘Institutionalizing peace: power sharing and post-civil war management’ (2003) 47 *American Journal of Political Science* 318, 319.

¹⁴⁹ As above.

¹⁵⁰ I Spears ‘Understanding inclusive peace agreements in Africa: the problems of sharing power’ (2000) 21 *Third World Quarterly* 105. See I Lustick *et al* also ‘Secessionism in multicultural states: does sharing power prevent or encourage it?’ (2004) 98 *American Political Science Review* 209.

¹⁵¹ For analysis of peace agreements and power sharing in Africa see I Spears ‘Africa: the limits of power sharing’ (2002) 13 *Journal of Democracy* 123; A Mehler ‘Not always in the people’s interest: power-sharing arrangements in African peace agreements’ *BWPI Working Paper 40* (2008).

instance, peace agreements in Rwanda and Burundi,¹⁵² the Sudan,¹⁵³ and the Democratic Republic of Congo (DRC),¹⁵⁴ have included power-sharing pacts resulting in the formation of consociational coalition governments.

3.4 Coalition governments in the aftermath of disputed elections

Having laid the foundation of this Chapter by discussing the theory of coalition formation and the models of coalition governments to be found in Africa, it now falls to analyse coalition governments adopted in the aftermath of disputed elections and electoral violence. As was highlighted earlier, the resort to coalition governments to unchain political gridlock in the aftermath of disputed elections in Africa is a new phenomenon that was first pioneered in Kenya and later replicated in Zimbabwe. Debates surrounding the propriety or otherwise of this phenomenon dominated Africa's political discourse immediately following Kenya's experience. This debate fell into a lull for a few months and then resurrected after Zimbabwe's experience. The next pages of this Chapter are dedicated to a discussion of this trend.

3.4.1. Labelling the model

The discussion above on coalition governments has distilled two broad models: classical coalition and consociational. The question then is whether a coalition government resorted to after a disputed election is classical or consociational in nature. To begin with, since such coalitions are adopted after elections, can they be labelled as post-electoral classical coalitions? It is submitted that such a labelling would be erroneous for two reasons.

First, classical post-electoral coalitions are, as a general rule, formed by parties that have more or less accepted the outcome of an election. This is not the case in a coalition government formed by parties in the aftermath of a disputed election. In this case, it is ironically the parties at the core of the disputed election that coalesce. In Kenya, the ODM,

¹⁵² See Sullivan (n 27 above); Lemarchand (n 22 above).

¹⁵³ The Comprehensive Peace Agreement (CPA) of January 2005 in Sudan brought an end to the protracted civil war that had for decades pitted the government of Sudan against the Sudanese People's Liberation Army (SPLA). Based on the CPA, the Interim National Constitution of Republic of the Sudan creates a framework for power-sharing and a coalition government for a transitional period of six years which will terminate in 2011. The coalition government is intended to reflect the need for inclusiveness, the promotion of national unity, and the protection of national sovereignty.

¹⁵⁴ The December 2002 Global and All-Inclusive Agreement on the Transition in the DRC paved the way for transition from years of civil war to peace. The Agreement led to the adoption of a transitional Constitution in April 2003 which established the framework for power sharing for the transition period. The result was a transitional coalition government headed by President Joseph Kabila and consisting of four vice-presidents drawn from three armed groups and one unarmed opposition party. The transition period ended in October 2006 with the holding of elections under a new Constitution adopted in May 2005. See J Haskin *The tragic state of the Congo- from decolonization to dictatorship* (2005); S Koko 'The one-plus four formula and transition in the Democratic Republic of Congo' (2007) 16 *Africa Security Review* 33.

which still maintains its presidential candidate won the 2007 presidential election, formed a coalition with PNU, that equally still claims victory. The same scenario holds in Zimbabwe with MDC coalescing with ZANU-PF notwithstanding that MDC boycotted the run-off election of 29 June 2008.

Secondly, as earlier noted, classical coalition governments are formed with the primary purpose of attaining a majority in parliament. This purpose does not feature as a primary factor in the resort to a coalition government in the aftermath of a disputed violent election. Instead, it is the need to stabilise the country and break the political gridlock that drives the resort to coalition government in such scenarios. This does not, however, preclude the fact that attaining a parliamentary majority may be a factor, although secondary, in the formation of such a coalition. Here it is noteworthy that, in both Kenya and Zimbabwe, the ruling parties, PNU and ZANU-PF respectively, did not attain a parliamentary majority in the disputed elections. As such, even in the absence of a dispute over the elections, they would still be compelled to resort to a classical post-electoral coalition. Accordingly, it cannot be far-fetched to argue that in accepting to allow opposition parties into the government, PNU and ZANU-PF were partly alive to the fact that it was politically expedient to do so.

If the above discussion has eliminated the labelling of coalition governments in the aftermath of disputed elections as classical, then it has tacitly labelled them as consociational. Here it is the purpose of forming such a coalition that defines the labelling as consociational rather than the elements that would be expected of Lijphart's consociational democracy. In this regard, coalition governments in the aftermath of Kenya and Zimbabwe disputed elections are consociational as they entailed consensus by political elites to restore stability in their respective countries by way of a coalition government. The power-sharing agreements by these political elites testify as much. In Kenya, Kibaki and Odinga noted that, 'we are stepping forward together, as political, leaders to overcome the current crisis and to set the country on a new path'.¹⁵⁵ Similarly, the Zimbabwean Agreement aims at 'resolving once and for all the current political and economic situations and charting a new political direction for the country'.¹⁵⁶ The conclusion that the coalition governments in these countries are consociational in nature is, therefore, inescapable.

¹⁵⁵ The Kenyan Agreement (n 11 above) preamble, para 3.

¹⁵⁶ The Zimbabwean Agreement (n 13 above) art II.

3.4.2 Justifications of the resort to coalition governments

3.4.2.1. Restoring political stability

Having concluded that coalition governments in the aftermath of disputed elections take the form of consociational coalitions, it follows that the resort thereto finds its justifications in consociational theory. This means that the need to stabilise the system is the primary justification for the resort to coalition governments. Put differently, it is the imperative to avert falling into ‘hostile subcultures’ that has informed the resort to coalition governments in Kenya and Zimbabwe following electoral dispute and violence. Two features of the instability in these two countries must be highlighted at this point.

First, the electoral violence justifying the resort to coalition government, particularly in Kenya, threatened the stability of the nation as a whole. It tended to, or arguably degenerated into, a civil war. By the time the power-sharing agreement was signed, approximately 1200 people had been killed and 350,000 others internally displaced.¹⁵⁷ As such, to prevent further deterioration of the situation, the political elites agreed to form a coalition government. The violence in Zimbabwe fell short of the threshold witnessed in Kenya but the deeply entrenched culture of state sponsored violence against opposition supporters equally justified the resort to coalition government.¹⁵⁸ In addition, the power sharing in Zimbabwe is justifiable on account of lifting the country from the economic crisis that has for years now crippled it.¹⁵⁹

Secondly, the disputed elections led to a political gridlock that brought the functioning of the governments almost to a halt. This meant that only by the sharing of power amongst political elites would the proper functioning of the governments resume. In Kenya, the violence across the country and the calls for demonstrations by opposition leaders grounded normal government operations. The political elites recognised this fact and noted that, given the situation then, neither side could realistically govern the country without the other.¹⁶⁰ In Zimbabwe, the collapse of the economy coupled with the wanting legitimacy of Mugabe’s government, locked the country in isolation. As such, only by the unity of political elites would the gridlock begin unlocking. Tsvangirai captured this notion when he noted that ‘party divisions and party brands no longer matter to the people of Zimbabwe. We must all unite to solve to (sic) the problems facing the nation’.¹⁶¹

¹⁵⁷ OHCHR Report (n 12 above) 1.

¹⁵⁸ L Ohijiofor ‘Power-sharing deal: more power to despots’ available at www.guardiannewsngr.com/africa/article01/indexn2.html?pdate=19090&ptitle=mugabe (accessed on 22 Sept 2008).

¹⁵⁹ As above.

¹⁶⁰ The Kenyan Agreement (n 11 above), para 2.

¹⁶¹ Speech by Morgan Tsvangirai during the signing of the power sharing ceremony, Harare, 15 September 2008.

It is, however, important to note that coalition governments in the aftermath of disputed elections are not in themselves sufficient to guarantee sustainable peace in the long term. They only act as a ‘stop-gap measure’ that ensures that a society does not entirely disintegrate.¹⁶² As such, while calm has since been restored in Kenya and Zimbabwe, this does not necessarily translate into sustainable stability. The promise of sustainable peace in these countries would require a matrix of strategies that seek to address the root causes of violence. At one level, this would mean fixing the electoral system and the institutions of the rule of law, and, at another level, it would mean reversing the history of exclusion. It is this latter strategy- reversing the history of exclusion- that embodies the emphasis of this study and to which, we shall return later.

3.4.2.1 Reclaiming political legitimacy

It was highlighted in the previous Chapter that elections serve the purpose of investing governments with political authority and legitimacy. The corollary to this fact is that where elections have been disputed and marred with violence, the resulting government is lacking in political authority and legitimacy. The resort to a coalition government following such an election may, therefore, serve as an institution for reclaiming legitimacy both at domestic and international level. Hence Mesfin’s observation that, ‘the creation of a power-sharing arrangement has the advantage of conferring some sort of legitimacy to the ruling party without discrediting the opposition’.¹⁶³

At the domestic level, legitimacy entails citizens’ attitudes toward the functioning of government.¹⁶⁴ In the case of a disputed election, the attitude that really matters is that of the citizens who feel that their vote has been violated. This is because winners are prone to support the government they put in place even if fraudulent means were employed in doing so.¹⁶⁵ As such, it is the loser’s support of such a government that would ultimately accord it genuine legitimacy.¹⁶⁶ And how else can this be achieved but by incorporating representatives of the losers of the blotted election into the government? Essentially, therefore, a coalition government in the aftermath of a disputed election restores, to some extent, losers’ faith in the functioning of the government.

¹⁶² B Reilly & A Reynolds *Electoral systems and conflict management in divided societies* (1999) 31.

¹⁶³ B Mesfin ‘Democracy, elections and political parties- a conceptual overview with special emphasis on Africa’ *ISS Paper* 166 (2008) 2.

¹⁶⁴ A Christopher et al *Losers’ consent- elections and democratic legitimacy* (2005) 2.

¹⁶⁵ See D Moehler ‘Free and fair or fraudulent and forged: elections and legitimacy in Africa’, *Afrobarometer Working Papers* 25 (2005).

¹⁶⁶ Christopher et al (n 164 above) 9.

At the international level, political legitimacy is tied to the recognition of the government in place by other governments.¹⁶⁷ While this recognition is guided by political considerations,¹⁶⁸ states are increasingly reluctant to publicly recognise a government that has come to power through a highly flawed election. In the case of Kenya, save for Uganda and the US, no government congratulated Kibaki on his re-election as would be traditionally expected.¹⁶⁹ Indeed, the US changed its position after it became clear that it was in the minority.¹⁷⁰ Accordingly, the formation of a coalition government helped restore some legitimacy to the Kibaki government.

The case of Zimbabwe is even more telling. Prior to the elections, Mugabe's government was facing legitimacy issues on account of human rights abuses. This problem was compounded after the elections when the international community, including several African countries publicly declared they would not recognise Mugabe's government. Thus the power sharing agreement paved the way for the recognition of Mugabe as the president of the country and the legitimacy of his government. This was confirmed by the approval of the power-sharing agreement by the AU,¹⁷¹ and the presence of the AU chairman and leaders from SADC countries during the signing of the power-sharing agreement.

It must be underscored that coalition governments in the aftermath of disputed elections only reclaim some modicum of legitimacy. The mere fact that they are based on disputed elections means that their legitimacy remains dented. Here, one should not confuse legitimacy with legality. While they are closely related- in the sense that a legally constituted government is likely to be legitimate- the two concepts are quite different. Legality entails the force of law in that something is legal because it is backed by law.¹⁷² Legitimacy, on the contrary, is an issue of perception and attitude defined by, amongst others, morality.¹⁷³ In this light, a fully legitimate government is one in which legality and legitimacy converge. Such a convergence cannot be found in the instance of a coalition government founded on a disputed election outcome that remains unresolved. Reclaiming true legitimacy in such a situation can only be achieved through a fresh, free and fair election held in accordance with the law.

¹⁶⁷ J Dugard *International law-a South African perspective* (2005) 111.

¹⁶⁸ As above.

¹⁶⁹ G Gikonyo 'Kenya: why recognition concept is important' available at <http://allafrica.com/stories/200801250896.html> (accessed on 03 October 2008).

¹⁷⁰ N Cheeseman 'The Kenyan elections of 2007: an introduction' (2008) 2 *Journal of Eastern African Studies* 166, 171.

¹⁷¹ 'AU welcomes Zimbabwe's power-sharing agreement' available at www.nation.co.ke/news/africa/-/1066/470172/-/148xbsyz/-/index.html (accessed on 13 September 2008).

¹⁷² See J Fraser 'Validating a measure of national political legitimacy' (1974) 18 *American Journal of Political Science* 117, 118.

¹⁷³ As above. See also A Buchanan 'Political legitimacy and democracy' (2002) 112 *Ethics* 689; T Nagel 'Moral conflict and political legitimacy' (1987) 16 *Philosophy and Public Affairs* 215.

3.4.3 Criticism of the resort to coalition governments

3.4.3.1 A dangerous precedent

Critics of the resort to coalition government in Kenya and Zimbabwe following the disputed elections in these countries have argued that the trend establishes a dangerous precedent that should not be replicated elsewhere. In this regard, it is feared that these experiences create a trend in which incumbent African presidents will refuse to vacate office, even after losing elections, in the hope that a power-sharing agreement will be negotiated with opposition leaders.¹⁷⁴ As such, coalition governments will become the tool for incumbent presidents to retain power albeit through the 'back door'.¹⁷⁵ There is also a possibility that a trend in which opposition parties simply dispute elections and invoke violence so as to be incorporated in the government may emerge. Consequently, the trend established by Kenya and Zimbabwe may well end up being the new form of acquiring and/or retaining political power in Africa, replacing coups which are apparently on the decline.¹⁷⁶

If Africa's political history is anything to go by, then these fears hold some water. Experience has demonstrated that political practices in Africa have a tendency to replicate themselves across the continent. Consider, for example, the phenomenon of one-party states which, as earlier noted, was pioneered in 1965 by Tanzania. This phenomenon was 'photocopied' across the continent, such that, by 1989, there was a uniform pattern of one-party states (or some semblance thereof) in Africa. A similar practice with a 'replicating effect' is what came to be called the 'third term phenomenon', by which, in their ambition to remain in power, incumbent presidents changed the constitutions of their countries to allow them to run for a third term of office.¹⁷⁷ Starting with Gabon in 2003,¹⁷⁸ this trend was replicated in Uganda,¹⁷⁹ Chad,¹⁸⁰ and Cameroon. However, similar attempts in Malawi and Nigeria failed.¹⁸¹ In this light, the possibility of the Kenyan and Zimbabwean experiences having a 'replicating effect' cannot be ruled out.

¹⁷⁴ Ohijiofor (n 158 above). See also 'Pact must benefit Zimbabweans' available at www.nationmedia.com/dailynation/nmgcontententry.asp?category_id=24&newsid=1278621 (accessed on 23 July 2008).

¹⁷⁵ 'Kenya and now Zimbabwe- is power sharing the panacea?' available at www.nation.co.ke/oped/Opinion/-/440808/471990/-/item/1/-/30002x/-/index.html (accessed on 24 September 2008).

¹⁷⁶ See J Clark 'The decline of the African military coup' (2007) 18 *Journal of Democracy* 141.

¹⁷⁷ Van Wyk (n 106 above) 13.

¹⁷⁸ The constitutional restriction on how many terms a president may serve was abolished in Gabon in 2003.

¹⁷⁹ In 2006, Uganda's president, Yoweri Museveni, successfully changed the Constitution to enable him to run for a third term. See 'Museveni's third term ambition' available at www.afrika.no/detailed/11327.html (accessed on 03 October 2008).

¹⁸⁰ In August 2006, Chadian President Idriss Deby won a third term presidential term after pushing through a referendum to lift the constitutional two-term limit.

¹⁸¹ Van Wyk (n 106 above) 13.

3.4.3.2 A failure of democracy

The second criticism levelled against coalition governments in the aftermath of disputed elections is that they signify a failure of democracy. As initially noted, elections ensure that citizens retain the power to determine the composition of government. In this context, it is argued, rightly so, that the Kenyan and Zimbabwean trend turns the notion of liberal democracy on its head.¹⁸² In both cases, the will of the people was fundamentally altered, first, by a flawed electoral process, and, second, by the resort to coalition governments. In other words, the resort to coalition governments in these countries served the purpose of approving the outcome of flawed electoral processes. According to a commentator, the trend mocks the idea that power should change through the ballot box, and entrenches the view, held by so many, that Africa is not ready for democracy.¹⁸³

Ideally, therefore, it would have been expected that, while the imperatives of the moment would demand the resort to coalition government, such a resort would only be for a temporary period. This would then create the opportunity for fresh elections to be held in which the will of the people would be captured. But this has not been the case in Kenya and Zimbabwe. In both scenarios, the coalition governments have been designed to last until the end of the constitutionally mandated five years term or until a coalescing party pulls out. What this design, therefore, does is to re-define democracy to mean the consensus of the political elites. Yet democracy, as we know it, 'is not simply a choice made by elites but is contingent on mass preferences and values'.¹⁸⁴ It may, thus, be effectively argued that the Kenyan and Zimbabwean experiences are simply but reflections of the failure of democracy.

3.5 Mandatory coalition governments for Africa

The cumulative upshot of the above discussion is that, despite their justifications, the resort to coalition governments in the aftermath of disputed elections is not a sufficient strategy in promoting sustainable peace and consolidated democracy. This presents a good cause to argue that strategies should be put in place to avert similar resorts in the future. At one level, the strategies should entail institutional reforms. In this regard, there must be consensus over the rules of the game, independent electoral bodies, independent judiciaries, and a range of other structures aimed at entrenching democratic ethos. If translated into practice, such reforms would guarantee free and fair elections.

¹⁸² (n 175 above).

¹⁸³ D Mogeni 'New trend of power-sharing a threat to democracy' available at www.nation.co.ke/oped/opinion/-/440808/472328/-/31sw28/-/index.html (accessed on 26 September 2008).

¹⁸⁴ N Malhotra & M Carnes 'Political stability under uncertainty: applying bounded rationality to the study of governance and civil conflict' (2007) 38 *British Journal of Political Science* 45, 49.

But as was shown in the previous Chapter, the spectre of electoral violence largely reflects historical problems, at the core of which is exclusion. As such, institutional reforms leading to free and fair elections would still not solve the problem if some groups, ethnic or otherwise, remain excluded from a nation's mainstream economic and political life. At another level, therefore, exorcising the spectre of electoral violence in Africa would entail reversing the history of exclusion. This essentially calls for developing a culture of inclusion.¹⁸⁵ Accordingly, it is submitted that what Africa requires is a system of governance, based on consociational theory, which allows room for mandatory coalition governments. It must be mentioned from the outset that mandatory coalition government as suggested here should only be part of a larger project to ensure inclusion. In this regard, an all-inclusive system would include, *inter alia*, federalism and rotation in office distribution.

Mandatory coalition government in this context means that the coalition is in response to a legal requirement. In effect, the law ensures the inclusion of members of particular political parties or social groups in government. While this inclusion may be obtained informally without the compulsion of law, such informal practices may be easily overthrown.¹⁸⁶ Therefore, in addition to being guaranteed inclusion in government, parties in a mandatory coalition government have a judicial remedy in the event of a dispute. Suffice it to note that the law spoken of here is one entrenched in the relevant constitution. The same may be embodied in legislation, but by its very nature, legislation can be easily repealed. For this reason, it is submitted that, if African countries are to adopt mandatory coalition governments, then the legal requirement should be entrenched in national constitutions.

For sure, African countries have sought to accommodate ethnic diversity through a number of ways, including federalism and proportional representation.¹⁸⁷ Some, including South Africa and Zimbabwe, have had coalition governments mandated by law, although only for a transitional period. Mandatory coalition governments, therefore, are yet to be adopted on the continent as a permanent feature. How then can this be done? Two principal methods

¹⁸⁵ Writing in 1961, Frantz Fanon advised that, to prevent the politics of exclusion, post-colonial African governments should as a matter of principle only operate on the basis of governments of national unity. See F Fanon *Wretched of the earth* (1961) 41 cited in T Murithi 'Kenya in transition: mediation, power sharing and constitutional reform' (2008) *Conflict Trends* 16, 18. Nobel Laureate, Sir Arthur Lewis, tendered similar advice in 1965 in respect to West Africa. See A Lewis *Politics in West Africa* (1965) 65 cited in A Lijphart *Patterns of democracy- government forms and performance in thirty-six countries* (1999) 31.

¹⁸⁶ K Novakova 'New wine in old bottles consociational democracy: comparative analysis of Bosnia and Herzegovina, Kosovo and Macedonia' in Centre for Human Rights (2008) *International Yearbook of Regional Human Rights* 351, 364.

¹⁸⁷ In Mauritius there is an unwritten rule that political and key government offices should be distributed so as to reflect the different ethnic groups of the country. See Sithanen (n 131 above) 9. In Nigeria, there are formal and informal principles and practices established to create equitable state power and encourage the recognition and respect for ethnic differences in the political process. These principles and practices include federalism, zoning, rotation, and federal character principles in office distribution. See O Nkwachuku 'Explaining the institutionalisation of power-sharing in Nigeria: a hypothesis' available at http://web.ceu.hu/polsci/brownbag_papers/0607/orji.pdf (accessed on 4 September 2008).

are available. First, the constitution may stipulate that the cabinet shall be composed of equal or proportional numbers of each group, be they ethnic, religious or linguistic. In Belgium, for instance, the Constitution requires the cabinet to be composed of equal numbers of Dutch-speakers and French-speakers.¹⁸⁸

This method may work where the nation is divided in two or three large segments. In Burundi, for instance, the Constitution provides an elaborate framework for the sharing of power between the Hutus and Tutsis.¹⁸⁹ Where the number of groups runs into tens or hundreds, as is the case in many African countries, the method is not tenable. Requiring the representation of each group in such a country would lead to an 'over-size' cabinet. In addition, the method may, by specifying the groups entitled to share in power, entrench discriminatory choices inherent in electoral systems.¹⁹⁰ In Burundi, for instance, there is no express provision guaranteeing the inclusion of the Twas in government even though they are entitled to three seats in parliament.¹⁹¹

A second method, which is proffered for African countries, is where the constitution requires executive power-sharing on the basis of political parties. In this regard, the constitution may stipulate that political parties with a certain number or percentage of seats in parliament shall be entitled to join the government. The South African 1993 interim Constitution¹⁹² presents such a model. Under this Constitution, parties winning over 20 seats in parliament were entitled to a post, in a proportional manner, in the 27 member cabinet.¹⁹³ In addition, parties holding at least 80 seats in parliament were entitled to designate an executive deputy president.¹⁹⁴ For inclusion of its members in the cabinet the party must have first 'decided to participate in the government of national unity'.¹⁹⁵ This means that the ultimate choice to join the government rested with the political parties. As

¹⁸⁸ Lijphart (n 138 above) 103.

¹⁸⁹ The Constitution of Burundi requires the president to be assisted by two vice-presidents, a Hutu and a Tutsi. It stipulates that the government must comprise of 60% Hutu and 40% Tutsi. The same proportion is required in the National Assembly, whereas the Senate should have an equal number of Hutu and Tutsi. The security forces, likewise, have to include as many Hutu as Tutsi. At the communal level, no more than 67% of the mayors are to belong to either group. See Lemarchand (n 22 above) 8.

¹⁹⁰ Lijphart (n 138 above) 103.

¹⁹¹ C Nsabimana 'The concept of power-sharing in the constitutions of Burundi and Rwanda' unpublished LLM dissertation, University of Pretoria, 2005, 13.

¹⁹² The Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁹³ Section 88(2) of the 1993 interim Constitution stated that 'A party holding at least 20 seats in the National Assembly and which has decided to participate in the government of national unity, shall be entitled to be allocated one or more of the Cabinet portfolios in respect of which Ministers referred to in subsection (1) are to be appointed to in proportion to the number of seats held by it in the National Assembly relative to the number of seats held by the other participating parties.'

¹⁹⁴ The Constitution of the Republic of South Africa, 1993, section 84.

¹⁹⁵ Following the 1994 multi-racial elections in which the ANC emerged the winner, the National Party (NP) and the Inkatha Freedom Party (IFP) decided to join the government of national unity. The cabinet had 18 ANC members, six from the NP and three from the IFP. In addition, the ANC retained the presidency and the first vice-presidency, the NP obtained the second vice-presidency, while the IFP secured the ministry of home affairs.

such, the parties were not entirely compelled into a 'forced marriage'. The 1997 Fijian Constitution presents almost a similar model. The relevant section reads as follows:

In establishing the Cabinet, the Prime Minister must invite all parties whose membership in the House of Representatives comprise at least 10% of the total membership of the House to be represented in proportion to their numbers in the House.¹⁹⁶

The key words here are 'must invite'. This bears the meaning that whereas the prime minister is obligated to invite the relevant parties to join the government, the parties are not obligated to accept the invitation. The South African and Fijian models may be an attractive way of reducing the high stakes in Africa's politics. At the very least, such models would ensure that parties with a requisite number or percentage of parliamentary seats are guaranteed a place in the government. This may be a strong incentive for forming pre-electoral coalitions so as to obtain the requisite number or percentage of parliamentary seats. As such, parties with relatively national outlooks will emerge, replacing purely ethnic parties. Such models may also serve to shift the perception of government as a prize to be won by all means, since parties would in any event stand the chance to be incorporated in government. Two points must, however, be emphasised. First, the adoption of mandatory coalition governments in any country must be contextual to its economic and socio-political needs and features. Secondly, the success of any coalition government is almost entirely dependent on the commitment of the political elites.

3.6 Conclusion

It follows that a number of points are in order. First, while the resort to coalition governments in the aftermath of disputed elections are justified on account of restoring political stability and legitimacy, these justifications have inherent limitations. The coalition governments are incapable of guaranteeing sustainable stability and they only reclaim some little legitimacy. Secondly, in addition to pointing to a failure of democracy in Africa, the trend established by Kenya and Zimbabwe may create a dangerous precedence in the continent. What this trend portends for Africa is that there is a need to avert similar crises in future.

Accordingly, as a third point, it has been suggested that, if the spectre of disputed elections and electoral violence is largely a function of exclusion, then mandatory coalition governments may infuse a culture of inclusion. As a departure point, the 1993 South African interim Constitution and the 1997 Fijian Constitution have been used to demonstrate how

¹⁹⁶ Constitution of the Republic of the Fiji Islands, 1997, section 99(5).

mandatory coalition governments may be structured. In sum, it is worth emphasising that reversing the history of exclusion in Africa requires concerted strategies contextual to every country. A mandatory coalition government is only one such strategy.

CHAPTER FOUR

THE 2007 KENYA PRESIDENTIAL ELECTION AND ITS AFTERMATH: A CASE STUDY

The importance of the Kenya crisis for the African continent is not that Kenya may become ‘another Rwanda’, but that it reveals how fragile Africa’s new multi-party systems may be when weak institutions, historical grievances, the normalization of violence, and a lack of elite consensus on the ‘rules of the game’, come together to form...a ‘perfect storm’.¹⁹⁷

4.1 Introduction

The foregoing two Chapters have respectively analysed the spectre of electoral violence and the resort to coalition governments from general stand points. This Chapter narrows the analysis to the Kenyan experience, not least because it presents the first case in Africa of unlocking political gridlock through a coalition government. To begin with, the history of Kenya is briefly tracked; for it is only by placing the 2007 presidential election in the historical context that one can aptly understand its aftermath. The Chapter then proceeds to scrutinise three main issues related to the 2007 presidential election: the disputed results, the electoral violence, and the coalition government. Finally, the case for a mandatory coalition government for Kenya is presented.

4.2 A history of exclusion

The violence that engulfed Kenya following the 2007 general election came as a surprise to many. Kenya had long been considered as the hub of peace in eastern Africa. It had escaped military coups and civil strife. Regular elections had been held since independence.¹⁹⁸ Contrary to expectations, power was peacefully transferred from Daniel arap Moi to Mwai Kibaki in 2002,¹⁹⁹ augmenting the belief that Kenya had attained democratic maturity.²⁰⁰ But for keen observers of Kenya’s political history the country was a volcano that had long been waiting to erupt. The disputed 2007 presidential election was simply the spark that

¹⁹⁷ N Cheeseman (n 170 above) 167.

¹⁹⁸ D Throup ‘Elections and political legitimacy in Kenya’ (1993) 63 *Journal of the International African Institute* 371.

¹⁹⁹ R Ajulu ‘Kenya: one step forward, three steps back: the succession dilemma’ (2001) 88 *Review of African Political Economy* 197.

²⁰⁰ M Munene ‘Kibaki’s moment in history: the election of 2002 and its aftermath’ (2003) 1 *East African Journal of Human Rights and Development* 71, 72.

triggered off the volcano. But what is it in Kenya's history that accounts for the unprecedented post-electoral violence?

For sure, Kenya has had its share of the trappings of a 'typical African state'.²⁰¹ Within one year of independence, the country had transformed from a multi-party to a one-party system, from a Westminster parliamentary model to a presidential one. In the years that followed, like in many African countries, power was gradually concentrated in the presidency, ultimately creating an 'imperial presidency'.²⁰² No doubt, this presidential system has over the years influenced the perceptions of state power in the country.²⁰³ However, it is the political ethnicity and exclusion accompanying this system that has endured as the sole defining element in Kenyan politics.

Since independence, economic resources have been channelled to the sitting president's ethnic group to the exclusion of other groups.²⁰⁴ Land has been the primary resource peddled in this endeavour.²⁰⁵ As such, Kenya's history is one of 'divisive politics that revolves primarily around ethnic allegiances'.²⁰⁶ It is thus submitted that the violence that rocked Kenya should be seen, perhaps more than anything else, as a reaction to a history of exclusion and an earnest desire for a future of inclusion. At this point, light should be shed on the country's three post-independence regimes with a view to demonstrating how these regimes developed a history of exclusion.²⁰⁷

4.2.1 The Kenyatta regime

In the race towards independence in Kenya, two political parties emerged: Kenya African National Union (KANU) and Kenya African Democratic Union (KADU). These two parties represented ethnic affiliations and divisions that were already taking shape as independence drew closer.²⁰⁸ While KANU represented the two large tribes of Kikuyu and Luo, KADU represented the smaller tribes of Kalenjin, Luhya and Giriama who feared domination by the larger tribes.²⁰⁹ In the May 1963 pre-independence elections, KANU emerged the victor.

²⁰¹ See generally P Ghai & J McAuslan *Public law and political change in Kenya* (1970).

²⁰² H Okoth-Ogendo 'Constitutions without constitutionalism: reflections on an African political paradox' in IG Shivji (ed) *State and constitutionalism: an African debate on democracy* (1991) 3.

²⁰³ See S Wanjala 'Presidentialism, ethnicity, militarism and democracy in Africa: the Kenyan example' in J Oloka-Onyango *et al* (eds) *Law and the struggle for democracy in East Africa* (1996) 86.

²⁰⁴ K Musambayi 'After the floods- the rainbow: contextualising NARC's election victory- lessons learnt and the challenges ahead' in C Maina & F Kopsieker (eds) *Political succession in East Africa: in search for a limited leadership* (2006) 13, 46.

²⁰⁵ See *Report of the Commission of Inquiry into the illegal/irregular allocation of public land* (2004); S Coldham 'The settlement of land disputes in Kenya- an historical perspective (1984) 22 *The Journal of Modern African Studies* 59.

²⁰⁶ Kenya National Commission for Human Rights *Referendum report* (2006) 25 (Hereinafter Referendum report).

²⁰⁷ See K Masime & G Kibara 'Regime transitions and the institutionalisation of democracy in Kenya: the December 2002 elections and beyond' (2003) *East African Journal of Human and Development* 197.

²⁰⁸ Throup (n 198 above) 372.

²⁰⁹ As above.

At independence, therefore, KANU's Jomo Kenyatta became the prime minister with the English Queen as the head of state. A year later, KADU dissolved itself and joined the government making Kenya a *de facto* one party state. At the same time, the parliamentary system was abandoned as Kenyatta and Jaramogi Oginga became president and vice president respectively. The two represented the two dominant tribes; while Kenyatta was a Kikuyu, Oginga was a Luo.

The first few years of Kenyatta's reign witnessed some form of democratic practice.²¹⁰ The picture, however, began to change in 1966. Not only did Kenyatta begin to be uneasy with divergent opinions but, most significantly, he also began to surround himself with members of his Kikuyu tribe to the exclusion of others. This led to the resignation of Oginga as the vice-president in 1966. Upon his resignation, Oginga established the Kenya Peoples Union (KPU), returning the country to a multi-party system.²¹¹ By 1969, with the assassination of Tom Mboya, the Luos had been successfully edged out of the government.²¹² In the same year KPU was banned and, thus, the country reverted to a one party state.²¹³ Consequently, the path for the consolidation of kikuyu power in the economic and political spheres had been paved.

Among the peasantry the government orchestrated an oathing campaign designed to unite the kikuyu ethnic group in a determination to keep the 'flag in the house of mumbi', that is, the government was to remain under Kikuyu leadership.²¹⁴ Among the political elites, the Gikuyu Embu Meru Association (GEMA) was formed.²¹⁵ It symbolised the power of the Gikuyu bourgeoisie and became the pipeline through which resources were exclusively channelled to the community.²¹⁶ The upshot was that other ethnic groups were excluded both from state power and resources. Accordingly, by the time of his death in 1978 Kenyatta had presided over a highly ethnicised regime. He had set the tone for exclusionary politics and his successor, Daniel arap Moi, would proceed to perfect it.

²¹⁰ Wanjala (n 203 above) 86.

²¹¹ In reaction to the formation of KPU, the Government enacted new legislation, Amendment No. 2 of Act No. 17 of 1966, requiring that all members of the Assembly who changed parties had to seek a new mandate from their constituencies.

²¹² At the time of his death, Tom Mboya was the Minister of Economic Planning, the Secretary-General of KANU and, more significantly, the only Luo of considerable political influence to have remained in government following the resignation of Oginga as the vice-president in 1966.

²¹³ See H Okoth-Ogendo 'The politics of constitutional change in Kenya since independence, 1963-69' (1972) 71 *African Affairs* 9.

²¹⁴ R Ajulu 'Thinking through the crisis of democratisation in Kenya: a response to Adar and Murunga' (2000) 4 *Sociological Review* 133, 140.

²¹⁵ The Kikuyu, Embu and Meru occupy the Central Province of Kenya. While the association was banned in 1970 alongside other tribal unions (Luo Union, Abaluhya Union and Akamba Union) the acronym is today used to refer to these three tribes.

²¹⁶ F Matanga 'Kenya: a chequered path to democracy' (2003) 1 *East African Journal of Human Rights and Development* 31, 37.

4.2.2 The Moi regime

Moi's ascension to power was unexpected, especially among the Kikuyu. Although he was a Kalenjin, Kenyatta had granted him the vice-presidency primarily because he was seen as a conformist who would never challenge the president.²¹⁷ It was thus never intended that he would succeed Kenyatta. But as fate would have it, the sudden death of Kenyatta meant that Moi, then the vice-president, constitutionally rose to power despite GEMA's effort to bar him.²¹⁸ On his inauguration as president, Moi vowed to follow the *nyayo* (footsteps) of Kenyatta.²¹⁹ He coined the *nyayo* philosophy of peace, love and unity purportedly to unite the country. The philosophy, however, was meant to 'camouflage the qualitative shifts in power and class forces that were taking place at the level of economic and political control'.²²⁰

In particular, Moi's men from the KAMATUSA²²¹ community in general, and Kalenjin in particular, began taking over levers of state power and resources.²²² In addition, Moi sought to downsize the GEMA capital by crippling Kikuyu banking institutions.²²³ Thus, according to Mueller, 'unlike Kenyatta, who could give without taking away, Moi had to take away before he could give'.²²⁴ This process entailed creating state parastatals which became sources for amassing wealth among the Kalenjin elite. Accompanying this 'economic re-engineering' was the muzzling of political dissent. In June 1982, section 2A was inserted into the Constitution of Kenya making it a *de jure* one party state.²²⁵ An attempted coup two months later only served to justify Moi's subsequent actions. He dismantled the Kenyatta security apparatus, and replaced it with his own. Further, constitutional amendments were effected to consolidate power in the presidency.²²⁶ Thus by 1991, when multi-partyism was re-introduced,²²⁷ Moi had created a strong presidential system which thrived on exclusionary politics.

²¹⁷ Ajulu (n 214 above) 142.

²¹⁸ Matanga (n 216 above) 37.

²¹⁹ To gain the confidence of the Kikuyu, Moi appointed Mwai Kibaki as his vice-president. He also retained all the Kenyatta ministers who made it back to parliament following the 1979 elections.

²²⁰ Ajulu (n 214 above) 145.

²²¹ KAMATUSA is an acronym for Kalenjin, Maasai, Turkana and Samburu, which are tribes that occupy the Rift Valley province of Kenya.

²²² Musambayi (n 204 above) 28.

²²³ As above.

²²⁴ S Mueller 'The political economy of Kenya's crisis' (2008) 2 *Journal of Eastern African Studies* 185, 188.

²²⁵ Constitution of Kenya (Amendment Act) 1982, Act 7 of 1982.

²²⁶ In 1986, the Constitution was amended to remove the security of tenure of constitutional office holders including the Attorney-General, the Controller and Auditor General, and judges of the High Court. In 1987, treason was made punishable by death. From 1988, the police could henceforth hold suspects for 14 days before producing them in courts of law. While the security of tenure of constitutional office holders has since been restored and the police custody period reduced to 24 hours, treason remains punishable by death.

Multi-partyism did not, however, assuage Moi's stronghold on power and resources as was expected. The political parties that emerged were so fragmented on ethnic lines that they could not pose meaningful challenge to his rule.²²⁸ Moreover, the 'rules of the game' were skewed in favour of the incumbent.²²⁹ Accordingly, Moi easily triumphed in the 1992 and 1998 multi-party elections.²³⁰ Most important though was the electoral violence that coincided with these elections. In Rift valley, Western, and Coast provinces the elections were marred with violence at the instance of the state through organised militias.²³¹ The strategy was to alter the political demography by ensuring potential opposition voters were prevented from voting. Therefore, in addition to perfecting presidentialism and exclusionary politics, the Moi regime added a third dimension into Kenyan politics: the institutionalisation of ethnic violence during elections. It is this third feature that would eventually explode at the end of Kibaki's first term in office.

4.2.3 The Kibaki regime

The victory of Kibaki in the 2002 presidential election was greeted with much euphoria.²³² It brought an end to KANU's uninterrupted rule in Kenya since independence. According to Mutua, it marked 'the first genuine opportunity in 40 years for Kenyans to create a democratic state'.²³³ The victory was as a result of the fact that, for the first time since the advent of multi-partyism, the opposition parties agreed to join forces with the sole aim of trouncing KANU out of power.²³⁴ As such, a pre-electoral coalition was formed between National Alliance Party of Kenya (NAK) under Kibaki and the Rainbow Alliance under Odinga.²³⁵ This coalition gave birth to National Rainbow Coalition (NARC) which fielded Kibaki as its single presidential candidate to run against KANU's Uhuru Kenyatta. The coalition yielded the desired results as Kibaki routed Uhuru with a landslide.

The NARC government brought with it a spate of changes that expanded the democratic space. However, it was not long before tensions started to grow between the initial coalescing parties: NAK and Rainbow Alliance. During the negotiations that led to the formation of NARC, a secret Memorandum of Understanding (MoU) had been signed between the parties. Central to this MoU was the agreement that upon assuming power, a

²²⁸ A Hammestad, *African commitments to democracy in theory and practice: a review of eight NEPAD countries* (2004) 15.

²²⁹ Matanga (n 216 above) 36.

²³⁰ See D Throup & C Hornsby *Multi-party politics in Kenya: the Kenyatta and Moi states and the triumph of the system in the 1992 election* (1999); B Joel 'Kenya: lessons from a flawed election' (1993) 4 *Journal of Democracy* 85; N Njuguna 'Kenya tries again' (1998) 9 *Journal of Democracy* 32.

²³¹ (n 54 above).

²³² M Munene (n 200 above) 71.

²³³ M Mutua, 'Political parties in transitions: the Kenyan experience' in C Peter & F Kopsieker (n 183 above) 109, 116.

²³⁴ Oyugi (n 15 above) 67.

²³⁵ NAK in itself was a coalition of 14 small parties that had earlier decided to field Kibaki as its single presidential candidate. The Rainbow Alliance was a team of politicians who broke away from KANU after President Moi unilaterally declared Uhuru the party's presidential candidate.

new constitution would be adopted within 100 days which constitution would establish the office of the premier to be occupied by Odinga.²³⁶ This was never to be. Like his predecessors, Kibaki, himself a Kikuyu, was quickly surrounded by his tribesmen from the GEMA community. For this group, Kibaki's presidency signified a restoration of the political and economic power they had lost in 1978. They would thus begin the process of channelling resources to the GEMA community so as to 'regain the ground lost during the years of being outsiders'.²³⁷

In addition, Kibaki and his allies made it apparent that the president's powers would not be diluted. This position became clear when the government amended the draft that came out of the Constitutional Review Conference, with the effect that the provisions for the office of the premier were purged from the document.²³⁸ Consequently, the draft presented for the 2005 Referendum retained a strong presidential system and, as such, it was overwhelmingly rejected.²³⁹ Noteworthy, in the campaigns that preceded the referendum, the coalescing parties had taken diametrically opposing sides with NAK supporting the draft and Rainbow Alliance opposing it. The campaigns became highly ethnicised dividing the nation into two. On one side of the divide, those campaigning against the draft were seen as scheming to take the presidency out of the GEMA community.²⁴⁰ On the other side of the divide, the draft was viewed as an attempt by GEMA to cling to power.²⁴¹ The referendum was thus reduced to an 'ethnic census' in which the opposing sides weighed their strength in preparation for the 2007 elections. Ultimately, this division would play itself out in the 2007 elections with catastrophic consequences.

In summary, Kenya's political history is one of exclusion and the 2007 presidential elections and its aftermath should be seen in this light. The election was a process that was defined by history even as it was one that sought to define the future. Cheeseman lends credence to this assertion when he notes that the post-election violence in Kenya needs to be placed in the context of local understanding of, *inter alia*, belonging and exclusion.²⁴² It is against this background that we now proceed to analyse the election and its aftermath.

²³⁶ Musambayi (n 204 above) 47.

²³⁷ Oyugi (n 15 above) 71.

²³⁸ Referendum report (n 206 above) 21.

²³⁹ As above.

²⁴⁰ Musambayi (n 204 above) 50

²⁴¹ As above.

²⁴² Cheeseman (n 170 above) 170.

4.3 The 2007 presidential election and its aftermath

The 2007 presidential election in Kenya was the fourth since the advent of a multi-party system in the country. Over the years, from 1991, the country had experienced ‘a forward democratic trajectory’²⁴³ which saw the 2002 election and the 2005 referendum described as free and fair. In view of this linear progression in the conduct of elections in Kenya, it was least expected that the 2007 elections would end up in violence and the ultimate resort to coalition government. In retrospect it has come to be accepted that the violence in particular could have been foreseen and prevented.²⁴⁴ But setting a precedent as it did, three issues emanating from the election must be analysed in this work: the disputed results, the electoral violence, and the coalition government.

4.3.1 The disputed results

There is a consensus that the voting process on 27 December 2007 was to a large extent transparent.²⁴⁵ Trouble, however, brewed during the tallying process by the Electoral Commission of Kenya (ECK) at its headquarters in Nairobi. While Odinga took an early lead, Kibaki gradually narrowed the gap. The rising count of votes for Kibaki coincided with ODM concerns that some results announced at the headquarters were different from those announced at the constituency levels.²⁴⁶ These fears mounted as results were purportedly withheld by Kibaki’s stronghold constituencies. Statements made by the ECK chairman, Samuel Kivuitu, confirmed ODM’s fears. Before the full glare of the media he confessed that he feared some of the ECK officers were ‘cooking’ the results.²⁴⁷

It is no wonder, therefore, that when Kivuitu finally declared Kibaki the winner, ODM immediately rejected the results. Kivuitu would later confess that he was actually not sure who won the presidential contest.²⁴⁸ The Independent Review Commission (IREC),²⁴⁹ which

²⁴³ M Kiai ‘The crisis in Kenya’ (2008) 19 *Journal of Democracy* 162, 166.

²⁴⁴ See D Anderson & E Lochery ‘Violence and exodus in Kenya’s Rift Valley, 2008: predictable and preventable?’ (2008) 2 *Journal of Eastern African Studies* 328.

²⁴⁵ See *European Union Election Observation Mission, Kenya, 27 December 2007: final report on the general elections* (2008); *The report of the Commonwealth Observer Group on Kenya general elections: 27 December 2007* (2008); *The East Africa Community Observer Mission report: Kenya general elections, December 2007* (2008).

²⁴⁶ See ‘Kenyan elections observers’ log: Dec 29-30 2007’ available at www.khrc.or.ke/documents/KPTJCountdown2deception.pdf (accessed on 4 September 2008).

²⁴⁷ As above.

²⁴⁸ Murithi (n 185 above) 17.

²⁴⁹ IREC was formed as part of the settlement signed between Kibaki and Odinga. It was established under the Commission of Inquiry Act, Cap 102, Laws of Kenya. Its terms of reference, as set out in the Kenya Gazette Notice 1983 of 14 March 2008, covered a wide range of aspects relating to the Kenyan electoral process in general and specifically as regards the 2007 general elections. IREC presented its findings and recommendations on 17 September 2008. See *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (2008) (Hereinafter IREC Report). The IREC Report is popularly known as the Krieger Report after the South African judge, Johann Krieger, who headed IREC.

was subsequently formed to examine the elections, also failed to ascertain the winner. It noted that ‘the conduct of the 2007 elections in Kenya was so materially defective that it has been, and will remain, impossible for IREC to establish true and reliable results for the presidential and parliamentary elections’.²⁵⁰ In these circumstances IREC concluded that it was irrelevant to declare who won the election. Put differently, a ‘no winner’ verdict was issued.

It would seem that IREC’s verdict largely rests on pragmatism. The existence of the coalition government born of the disputed election renders undesirable any effort to ascertain the winner. In other words, since the foundation of the coalition is the disputed election (and the electoral violence), clearing up the dispute is tantamount to dissolving the coalition. If IREC would have declared one of the parties a winner, then it would mean that the other party has no basis in the coalition. As such, it is in the interest of the coalition that the disputed election remains unresolved. But two pertinent issues consequently emerge.

The first issue relates to the legitimacy of the coalition government. It was earlier argued that coalition governments in the aftermath of disputed elections only reclaim some modicum of legitimacy. This assertion is particularly true of Kenya’s coalition government in the light of IREC’s verdict. If neither Kibaki nor Odinga won the 2007 presidential elections, then none of the two can confidently assert that he is in office legitimately. Here, it must be noted that both of them have accepted IREC’s Report. Thus, according to a commentator, ‘what they are accepting is not the issue whether there was rigging or not, but neither of them can claim legitimacy’.²⁵¹ Accordingly, it could only be fair if the coalition had been designed to last for an interim period, at the end of which fresh elections would be held. But as matters stand today, it is as if Kenyans never went to the poll in the first instance.

The second issue relates to the refusal of ODM to seek a judicial remedy over the disputed results, thus necessitating the formation of the coalition government. In an ideal setting ODM would have simply challenged Kibaki’s disputed re-election in court. This was the case in 1992 and 1997 when Matiba and Kibaki, respectively, challenged Moi’s election. But, Odinga categorically stated that he would not petition ‘Kibaki’s courts’.²⁵² This statement, although political, carries with it some legal reasoning. The practice of election petitions in Kenya shows that it is almost impossible to win one against an incumbent president for the following two prime reasons.

²⁵⁰ IREC Report (n 249 above) 126.

²⁵¹ M Gaitho ‘Kriegler report: politicians must see the bigger picture’ available at www.nation.co.ke/oped/Opinion/-/440808/473646/-/item/1/-/trOcgaz/-index.html (accessed on 23 September 2008)

²⁵² C Ouko ‘Kenya: why the violence was so virulent’ (2008) 470 *NewAfrican* 23.

First, the independence and impartiality of the election courts in particular, and the judiciary in general, have always been suspect.²⁵³ In the absence of a permanent election court, the Chief Justice must always designate a bench to adjudicate presidential election petitions.²⁵⁴ This raises perceptions of partiality because the Chief Justice is appointed solely by the president.²⁵⁵ As a result, a petitioner will always have the apprehension that the bench has been purposely selected to rule in favour of the incumbent. In the present case, the Chief Justice's impartiality was already dented by his mere presence at the ceremony where Kibaki was sworn in the re-elected president. The ceremony hurriedly took place shortly after Kibaki was declared the winner, creating the impression that it was meant to legitimise what was otherwise illegitimate.²⁵⁶ Therefore, the contention that the courts were Kibaki's would arguably pass the test of a reasonable apprehension of partiality.

Secondly, the law in Kenya requires that an election petition must be served personally on the respondent.²⁵⁷ In the case of a dispute over a presidential election, the respondent would have assumed the office of the presidency by the time the petitioner wishes to effect service. As a result, the protocol and security that surround the president would make it difficult, almost impossible, to effect service. While appreciating this difficulty, the Court of Appeal of Kenya in *Kibaki v Moi* has stated:

Parliament...has decreed in section 20(1)(a) [of the National Assembly and Presidential Elections Act] that service of election petitions must be personal and whatever problems may arise from that, the courts must enforce that law until Parliament should itself be minded to change it.²⁵⁸

In light of the above, one would understand why ODM insisted on resolving the disputed election through negotiations rather than by judicial means. Yet the resolution of election disputes by negotiations is a reflection of the failure of the institutions of democracy, in this

²⁵³ See ICJ *Kenya: Judicial independence, corruption and reform* (2005); *Report of the Advisory Panel of Eminent Commonwealth Judicial Experts: the Kenya judiciary in the new constitution* (2002); *Report of the Commission on the Administration of Justice in Kenya* (1998).

²⁵⁴ National Assembly and Presidential Elections Act, Cap 7, section 19.

²⁵⁵ Section 61(1) of the Constitution of Kenya states that '[the] chief justice shall be appointed by the President'. As such, the president is not required to consult anyone in appointing the Chief Justice, neither is the appointed person vetted by parliament.

²⁵⁶ The Law Society of Kenya (LSK) has since petitioned the president for appointment of a tribunal to investigate the Chief Justice. The petition cites several reasons, including, that the Chief Justice presided over an 'illegal' swearing in ceremony of the president. See 'LSK to petition for tribunal on CJ' available at www.nation.co.ke/News/-/1056/463522/-/tk8vg/-/index.html (accessed on 23 September 2008).

²⁵⁷ National Assembly and Presidential Elections Act, Cap 7, section 20(1)(a).

²⁵⁸ *Kibaki v Moi* (No 3) (2008) 2 KLR (EP) 351, 378. For analysis of this case see O Elisha & W Masitsa 'The law of politics or the politics of the law? an evaluation of the "Mwai vs Moi" rule as to personal service of election petitions in Kenya' available at www.kenyalaw.org/Articles/show_latest.php?=8 (accessed on 14 October 2008).

case, the judiciary and the electoral body. Averting similar scenarios in future would require the reform of these institutions. In this regard, IREC rightly recommended that the ECK should be overhauled.²⁵⁹ Yet again, implementing such a decision in the currency of the coalition government is not easy, because the verdict of the ECK favoured one of the parties of the coalition.²⁶⁰ In the long run, however, such a reform is inevitable, lest future political contestants are tempted to resolve election disputes through negotiations.

4.3.2 The electoral violence

Electoral violence in Kenya is not a new phenomenon, having been witnessed in the 1992 and 1997 elections. The 2007-2008 electoral violence was, however, unique in a number of ways. Unlike previous electoral violence, this one came after, rather than before, the election. Its magnitude was unprecedented, killing approximately 1200 and displacing 350,000. It covered five of the eight Kenyan provinces, grinding the nation to a halt. Only by the formation of a coalition government did the violence abate. The question then that requires an answer is: what accounted for the unprecedented violence?

It is submitted that, in the light of the history elaborated above, the 2007 presidential election turned out to be a contest between the 'included' and the 'excluded'. These social classes were represented by the two main contending presidential candidates and their parties: Kibaki on a Party of National Unity (PNU) ticket represented the included while Odinga on an Orange Democratic Movement (ODM) ticket represented the excluded. For this reason, the contest was not only stiff but it also raised high hopes and fears.²⁶¹ Considering that the opinion polls had predicted a win for Odinga,²⁶² the excluded saw the potential for inclusion. On their part, the included feared that they would slide into exclusion if Kibaki failed to recapture the seat. So high were the stakes that the included were not ready to let go of the presidency, and when finally the hopes of the excluded were dashed, violence erupted.²⁶³

²⁵⁹ IREC recommended that the Government of Kenya should radically reform the ECK, or create a new electoral body. See IREC Report (n 249 above) x.

²⁶⁰ The coalescing parties have since reacted differently to the IREC Report. While ODM has called for its implementation, PNU has called for caution, particularly in overhauling the ECK. See 'Coalition's disharmony on ECK fate ludicrous' available at www.nation.co.ke/oped/Opinion/-/440808/476796/-/index.html (accessed on 3 October 2008).

²⁶¹ See M Githinji & F Holmquist 'Kenya's hopes and impediments: the anatomy of a crisis of exclusion' (2008) 2 *Journal of Eastern African Studies* 344.

²⁶² Cheeseman (n 170 above) 168.

²⁶³ For detailed accounts of the violence see Kenya National Commission for Human Rights *On the brink of the precipice-a human rights account of Kenya's post 2007 election violence: final report* (2008); Kenya Human Rights Commission *Violating the vote: a report on the 2007 general elections* (2008); Human Rights Watch *Ballots to bullets: organised political violence and Kenya's crisis of governance* (2008); *Report of the Commission of Inquiry into Post-Election Violence* (2008) (hereinafter CIPEV Report).

As such, the violence was a reaction to historical grievances that had remained unresolved for years. This is particularly true of the violence in Rift Valley province where PNU supporters were attacked.²⁶⁴ However, it is important to note that there were other patterns of the violence that were unrelated to this history. Killings in Nyanza and Western provinces, for instance, were largely occasioned by police officers who were quelling the post-election riots.²⁶⁵ In Nakuru and Naivasha in Rift Valley province, the killings were reprisals against ODM supporters by the Mungiki militia group.²⁶⁶ Accordingly, the violence was ‘an extremely heterogeneous process’.²⁶⁷ It is thus important to appreciate factors other than historical exclusion that contributed to the violence. These factors, as rightly identified by the Commission of Inquiry into the Post-Election Violence (CIPEV)²⁶⁸ include: politicisation of violence interlocked with impunity, personalisation of power around the presidency, increasing levels of poverty, and the emergence of militia groups.²⁶⁹ Thus, addressing the spectre of electoral violence in Kenya will require reversing the history of exclusion, curbing impunity, delimiting presidential powers, eradicating poverty, and eliminating militias. This task lies squarely on the shoulders of the current government.

The question that emerges is whether the government, being a coalition born of the violence, has the will to undertake the task. It is important to particularly note that CIPEV in its Report has recommended the prosecution of the alleged perpetrators and planners of the violence, who include cabinet ministers from both sides of the coalition government.²⁷⁰ Indeed, the CIPEV Report boldly indicates that a meeting was held in president Kibaki’s official residence to plan the reprisal attacks by Mungiki militia.²⁷¹ In these circumstances, the implementation of the CIPEV Report might well shake the very foundation of the coalition government hence the likelihood that the coalition may not be minded to pursue prosecutions.²⁷² It is, therefore, not a surprise that in the wake of the CIPEV Report,

²⁶⁴ See generally Anderson & Lochery (n 244 above) 328.

²⁶⁵ See *Forensic investigations into post-election violence related deaths: an investigative report of the Independent Medico-legal Unit (IMLU)* (2008).

²⁶⁶ CIPEV Report (n 263 above) 97-128.

²⁶⁷ Cheeseman (n 170 above) 170.

²⁶⁸ CIPEV, like IREC, was created as part of the settlement between Kibaki and Odinga. It is anchored on the Commission of Inquiry Act, Cap 102, Laws of Kenya. Its mandate as set out in the Kenya Gazette Notice No. 4473 of 2008 is to ‘investigate the facts and circumstances surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters’. CIPEV presented its report on 15 October 2008. The report is popularly known as Waki Report after the name of CIPEV’s chairman.

²⁶⁹ CIPEV Report (n 263 above) 21-35.

²⁷⁰ CIPEV compiled a list of the alleged perpetrators and presented it to Kofi Anan in a sealed envelope pending the establishment of a special tribunal by the Government of Kenya for the prosecution of these alleged perpetrators. In default of setting up the tribunal, the names of the alleged perpetrators will be forwarded to the prosecutor of the International Criminal Court (ICC) for investigations. See CIPEV Report (n 263 above) 18.

²⁷¹ CIPEV Report (n 263 above) 121.

²⁷² See ‘Waki report breaks new ground, but will it be implemented’ available at www.nation.co.ke/oped/Opinion/-/440808/48126/-/3mepxg/-/index.html (accessed on 18 October 2008).

president Kibaki has hinted about the grant of amnesty to the perpetrators.²⁷³ Yet the promise of sustainable peace would demand curbing the culture of impunity. We, therefore, return to our earlier conclusion that a coalition government in the aftermath of electoral violence is not a guarantee of sustainable peace.

4.3.3 The coalition government

Kenya's coalition government, designed to break the political stalemate following the 2007 disputed presidential election, is the first of its kind on the continent. It was formed after intense negotiations between PNU and ODM through the mediation of Kofi Anan. The product of the negotiations was a power sharing pact based on consociational theory. Its main thrusts were the creation of the office of the premier and the sharing of cabinet positions. The Agreement was subsequently transformed into the National Accord and Reconciliation Act 2008 (NARA),²⁷⁴ provisions of which were entrenched in the Constitution of Kenya (the Constitution).²⁷⁵ A 'content analysis' of the provisions sanctioning the coalition reveals critical issues pertinent to its survival and capacity to guarantee sustainable peace and democracy.

Reading through the Agreement, one will most definitely be struck by its insufficiencies. While it has been signed by Kibaki and Odinga on behalf of PNU and ODM respectively, the Agreement itself does not make express reference to these parties.²⁷⁶ Similarly, NARA refers to 'the parties' without indicating who these parties are.²⁷⁷ But more striking is the provision establishing the office of the prime minister. It is indicated that '[the] prime minister will be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly'.²⁷⁸ No doubt this provision was couched in the knowledge that Odinga would satisfy its qualifications. But assuming for a moment that ODM lost its parliamentary majority today, would Odinga still be entitled to be the prime minister? If the coalition was meant to resolve the disputed presidential election between Kibaki and Odinga, then a situation where the latter is displaced may return the country to chaos.

Another issue relates to the sharing of cabinet positions. It is stated that 'the composition of the coalition government will at all times take into account the principle of portfolio balance

²⁷³ See 'Poll violence: Kibaki hints at amnesty' available at www.nation.co.ke/News/-/1056/482520/-/tlgcxo/-/index.html (accessed on 21 October 2008).

²⁷⁴ National Accord and Reconciliation Act 2008, Act 4 of 2008.

²⁷⁵ Constitution of Kenya, section 15A.

²⁷⁶ The Zimbabwean Agreement, on the contrary, makes specific reference to the relevant political parties.

²⁷⁷ NARA, preamble, para 1.

²⁷⁸ NARA, section 3(2).

and will reflect their relative parliamentary strength'.²⁷⁹ As such, ODM would have been expected to have more cabinet positions than PNU. In practice, however, the reverse is not only true but PNU holds 'key ministries' too.²⁸⁰ Moreover, the coalition was created without paying much attention as to how it would operate under existing laws and structures. It has never been clear, for instance, as to whom in practice commands higher authority as between the prime minister and the vice-president.²⁸¹ It would seem that the prime minister with the powers to 'coordinate and supervise the execution of the functions and affairs of the Government of Kenya',²⁸² wields more powers than the vice-president who is the principal assistant of the president.²⁸³ The prime minister's powers also collide with those of the head of civil service who has traditionally supervised government functions.²⁸⁴

Most disturbing, however, is section 6(a) of NARA which states that the coalition shall be dissolved if, *inter alia*, the current parliament is dissolved. Under section 59(2) of the Constitution, the power to dissolve parliament solely lies with the president. As such, section 6(a) of NARA, read with section 59(2) of the Constitution, essentially accords the president the power to dissolve the coalition on his own. This provision not only puts one coalescing partner at the mercy of the other, but also reflects the fact that the coalition is superimposed against a strong presidential system. Indeed, save for the consultation the president has to engage in appointing and dismissing cabinet ministers,²⁸⁵ his powers remain intact. Therefore, the 'real power sharing' envisaged in the Agreement and NARA is in practice defeated.

Accordingly, it may well be argued that the Agreement largely creates offices for individuals rather than room for power sharing. This is clearly reflected than in the size of the cabinet. In the wake of the coalition, a cabinet of 42 ministers was created, the biggest ever in Kenya's history. The cabinet, described as 'bloated', 'over-sized' and 'inflated', was meant to accommodate key individuals of the coalition parties.²⁸⁶ While the large cabinet was necessary to break the political impasse, it nevertheless has serious implications for the tax payers, especially in the wake of the electoral violence which devastated the economy. Suffice it to note that Kenyan legislators are among the most highly paid in the world, with a minister's salary almost double that of an ordinary legislator.²⁸⁷ As such, the common

²⁷⁹ NARA, section 4(3).

²⁸⁰ See 'Key ministries: why PNU, ODM won't let go' available at www.eastandard.net/news/?id=1143983908&cid=4 (accessed on 10 August 2008).

²⁸¹ See 'Raila and Kalonzo row resurfaces' available at www.nation.co.ke/News/-/1056/480828/-/tiffin91/-/index.html (accessed on 17 October 2008).

²⁸² NARA, section 4(1)(a).

²⁸³ Constitution of Kenya, section 15(3).

²⁸⁴ See 'Orengo: Let PM oversee Government' available at www.eastandard.net/InsidePage.php?id=1143996875&cid=4& (accessed on 23 October 2008).

²⁸⁵ NARA, section 4(2) & (5).

²⁸⁶ See J Nyamori 'Kenya: power sharing cabinet' (2008) 45 *Africa Research Bulletin* 17491c.

²⁸⁷ Kiai (n 243 above) 164.

citizen has had to pay twice for the disputed election: first, by bearing the brunt of the electoral violence, and secondly, by footing the cost of the coalition government.

Ultimately, the challenge for the coalition remains charting the path forward for sustainable peace and democracy in Kenya. Yet, as discussed above, the first few steps towards this direction in the form of implementing the IREC and CIPEV Reports are fraught with difficulties. These difficulties primarily emanate from the fragile nature of the coalition under which the implementation ought to be undertaken. Inevitably, however, the promise of a new Kenya can only be a function of a coherent and far-reaching reform agenda purposed to address the root causes of recurrent conflicts. In this regard, it must be noted that IREC and CIPEV have made a wide spectrum of recommendations which, if implemented, will mark the beginning of a new Kenya.²⁸⁸ The picture, however, will not be complete without placing these reforms within a new constitutional dispensation. At the core of the new constitutional dispensation, it is suggested, must be laws and institutions designed to guarantee a future of inclusion. Mandatory coalition government is hereunder suggested as one such institution of inclusion.

4.4 A future of inclusion

Thus far it has been demonstrated that at the heart of Kenya's problems is a history of exclusion, which must be reversed to guarantee a peaceful future. Thus, according to Githinji and Holmquist, for Kenya to be democratic it must ameliorate multiple historical exclusions.²⁸⁹ While the current coalition has cultivated a sense of inclusion amongst those who previously felt excluded, it can only survive, at the very best, until the next presidential election. As such, there is a need to have in place a permanent structure that will guarantee the option for inclusion. The provision for a mandatory coalition government in the constitution is suggested for this purpose.

As earlier discussed, a mandatory coalition government may guarantee inclusion by incorporating either social groups (e.g. ethnic groups) or different political parties in the government. In the context of Kenya, the first option will entail the constitution stipulating that every ethnic group is entitled to a position(s) in the cabinet. With 42 officially recognised ethnic groups in Kenya, this will translate to a cabinet of 42 ministers at the minimum. The result will be an oversized cabinet that will, at the very least, strain the economy. But the problem with such a cabinet runs deep when it is considered that there are several minority ethnic groups that are not counted amongst the 42 officially recognised

²⁸⁸ IREC Report (n 249 above) 153-163; CIPEV Report (n 263 above) 470-481.

²⁸⁹ Githinji & Holmquist (n 261 above) 356.

groups.²⁹⁰ As such, having a cabinet of 42 will exclude these groups; incorporating them will lead to a much more bloated cabinet. In essence, a mandatory coalition government fashioned along ethnic lines may not be a viable option for Kenya.

The second option, therefore, falls for consideration. Drawing lessons from South Africa's 1993 interim Constitution and the Fijian 1997 Constitution, this option will entail the constitution stipulating that the ruling party shall invite political parties with a requisite number, or percentage, of seats in parliament to be part of the government. Such a provision must be accompanied with a ceiling on the number of cabinet ministers. The recent trend in terms of which political parties have entered into an umbrella party while maintaining their original identity, favours the creation of a mandatory coalition government in Kenya. NARC, as already mentioned, was a coalition of NAK and Rainbow Alliance which were originally coalitions of smaller parties. Similarly, PNU- and to some extent ODM- draw their membership from affiliate parties which are considered corporate members of these umbrella parties.²⁹¹ This practice has since been sanctioned by law.²⁹²

If this practice is to grow into a political culture, as it is likely to do, then there are bound to be two or three umbrella parties in Kenya with national outlooks. As such, when one of these parties wins an election and invites the others into the government, there is always likely to be an all inclusive government. The upshot will be that government policies, more often than not, will be a product of the consensus of political parties. The current coalition government is a case in point in case. PNU and ODM represent the diverse interests of the nation and, as such, no policy is likely to be adopted that prejudice these interests. Of course, with a ceiling on the number of cabinet ministers, it will not always be the case that all representatives of the smaller parties will get a position in the cabinet. Their interests, however, can always be secured through the umbrella parties. In the long run, there is bound to be a culture of political accommodation, where politics is not a zero-sum game and the presidency is not an ultimate prize to be won by all means.

In closing, it must be emphasised that a future of inclusion in Kenya demands a matrix of strategies of which this work suggests only one: mandatory coalition government. Indeed, the success of such a government can only be realised within the framework of laws and institutions that have been designed to infuse a culture of inclusion. It must be remembered, however, that even the best of laws and institutions fall prey to human folly. Accordingly,

²⁹⁰ See generally Minority Rights Group International *Kenya: minorities, indigenous peoples and ethnic diversity* (2005)

²⁹¹ PNU has a corporate membership of 11 political parties. Although ODM has no corporate members *per se*, it has two parties which are affiliated to it.

²⁹² Political Parties Act 2007, section 2.

Kenya's cry- and indeed Africa's- is one for genuine political leadership and a citizenry committed to a democratic ethos.

4.5 Conclusion

This case study has revealed a number of points. First, it has demonstrated that at stake in Kenya is the problem of historical exclusion which with the spark of the 2007 disputed election, exploded into violence. Note has been taken, however, of the fact that a number of other factors contributed to the violence. Therefore, a new Kenya will require a broad spectrum of reforms in the political, economic and social spheres. Secondly, it has been revealed that, by its very nature, the current coalition government in Kenya suffers from incapacities that render incomplete its efforts to guarantee sustainable peace and democracy. Finally, it has been suggested that if Kenya's main problem is exclusion, then a mandatory coalition government may be adopted as part of a larger project to guarantee inclusion for all. However, it should be remembered that a future of inclusion ultimately rests on the commitment by leaders and citizens to cultivate democratic practices. Therein lies the real challenge.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

Elections are Janus-faced; they are partly human and partly monster. They can drive societies to more democratic practices or plunge them into chaos. With a history of disputed elections and electoral violence, many in Africa are familiar with the monster face of elections. This familiarity, however, should not be interpreted to mean that disputes and violence is an accepted way of life in Africa or that democracy is untenable in the continent. Efforts at peaceful co-existence and democratic practices abound in the continent. Towards this end, the resort to coalition governments in Kenya and Zimbabwe are recent efforts that establish a new trend in the continent. This dissertation ventured to analyse this trend with a view to establishing their viability in guaranteeing sustainable peace and democracy. The following conclusions and recommendations flow from the study.

5.2 Conclusions

Elections may be viewed from two perspectives. They can be seen as one-time events that come and go every four or five years or as part of democratic processes that borrow from the past to define the future. The prevalence of electoral violence in Africa challenges the view that elections are simple periodical events. In most circumstances, election disputes and electoral violence reflect historical grievances tied to economic and political discontent and exclusion. As such, exorcising the spectre of electoral violence in Africa must be informed by the knowledge that elections are part of a process in which societies attempt to reverse previous marginalisation. In this regard, it was submitted that the post-election violence in Kenya was largely a reaction to a history of exclusion. Thus, it is by addressing the root causes of the violence that a future of sustainable peace and democracy will be seen.

Accordingly, the resort to coalition government in the aftermath of a disputed election and electoral violence may rescue a country from disintegration, as it did in Kenya and Zimbabwe, but it is not a guarantee to sustainable peace and democracy. While it is justified on account of restoring political stability and reclaiming legitimacy, it has been argued that such a government only takes the heat off the moment. In other words, the peace it promises is temporary and the legitimacy it reclaims is modicum. Indeed, efforts by such a coalition government to address the root causes of the disputed election and electoral violence may be fraught with difficulties. In Kenya, the coalescing parties are torn on

whether or not to overhaul the ECK which supervised the disputed elections. The coalition is equally divided on whether or not to prosecute the alleged perpetrators of the post-election violence because key members of the coalition may be implicated. Yet sustainable peace and democracy in Kenya demand that these issues be addressed sooner rather than later.

On another front, it has been argued that the trend pioneered by Kenya and followed by Zimbabwe, may establish a dangerous precedent in which incumbent presidents may cling to power in the hope of sharing that power with opposition parties. Thus, while Africa has seen the decline of military coups, a new way of acquiring and retaining power may have been designed by Kenya. This design does not augur well with democracy. It threatens to redefine democracy to mean the consensus of political elites rather than the wishes of the populace as reflected in the polls. With the potential to be replicated, the design may mark the advent of 'unholy alliances' in Africa.

Thus, if there is a lesson that Africa should learn particularly from Kenya's experience, is not that power sharing can unlock political gridlock in the aftermath of a disputed election, but that years of neglected grievances are bound to explode into violence at some point. In this regard, the challenge for African countries is to build inter-ethnic cohesion by ensuring that all ethnic groups are meaningfully included in the nation's mainstream political, economic and social life.

5.3 Recommendations

Exorcising the spectre of disputed elections and electoral violence in Africa requires strategies at two levels. At the first level, there must be in place laws and institutions designed to deliver free and fair elections. Here we are speaking of an efficient electoral system bounded by, *inter alia*, an independent electoral body, independent judiciary, vigilant election monitors, and robust civil society. But if at the root of electoral violence in Africa is economic discontent and historical exclusion, then free and fair elections are not sufficient; they must be accompanied by strategies aimed at addressing historical grievances. At the second level, therefore, there must be in place laws and institutions designed to infuse a culture of inclusion. The thesis here is that sustainable peace and democracy is likely to be experienced where free and fair elections converge with a culture of inclusion.

Consociational democracy provides a number of ways through which divided societies, as those found in Africa, may guarantee inclusion. These are: grand coalition, group autonomy or federalism, minority veto, and proportional representation. This work narrowed its focus on mandatory coalition government as one of the institutions of inclusion. Here it was

recommended that drawing lessons from the 1996 South African Interim Constitution and the 1997 Fijian Constitution, African countries may adopt mandatory coalition governments fashioned along political parties. The idea is to reduce high stakes in politics by encouraging political accommodation and the making of national policies through ‘super majority’.

In the context of Kenya, free and fair elections will require a new set of electoral rules that provide a level ground for political competition. This competition must be supervised by an electoral body, which in the words of IREC, must be ‘committed to administrative excellence in the service of electoral integrity, composed of a lean policy-making and supervisory board, selected in a transparent and inclusiveness process, interacting with a properly structured professional secretariat’.²⁹³ In addition, the institutionalisation of violence through a culture of impunity and state-sponsored militia groups must be dismantled. In this regard, the current coalition government must face the realities of the findings of IREC and CIPEV and duly implement its recommendations.

On inclusion, it has been recommended that Kenya should consider having a constitutional provision that allows the option for mandatory coalition government. Here, it was argued that the growing trend of coalition politics in Kenya already provides a fertile ground for nurturing a culture of political accommodation. But such a government can only be meaningful if it is located within a larger project of inclusion that targets inter-ethnic reconciliation and equitable sharing of the national cake. Moreover, the presidential system, against which the current coalition government is superimposed, must be replaced by a ‘pure’ parliamentary system. The prime minister, who should be the leader of the majority party in parliament, should have executive powers while the president should assume a symbolic role.²⁹⁴ This will reduce the patrimonial and ethnicised nature of the presidency which, as argued in this work, fostered a culture of exclusion in Kenya.

At the regional level, there is a need to see the AU taking a firm position against flawed elections. It is praiseworthy that several African countries publicly denounced the June 29 presidential election in Zimbabwe. It is hoped that this stance marks the collapse of ‘solidarity politics’ amongst African heads of states and governments and introduces the public rejection of undemocratic practices in the continent. The stance should be followed by the ratification of the African Charter on Democracy, Elections and Governance by all African countries.²⁹⁵ In addition, African states should ratify the Protocol on the Amendment to the Constitutive Act to allow the AU to intervene in a country where there is

²⁹³ IREC Report (n 249 above) x.

²⁹⁴ See Githinji & Holmquist (n 261 above) 349.

²⁹⁵ African Charter on Democracy, Elections and Governance, adopted on 30 January 2007, not yet in force.

a 'serious threat to legitimate order'.²⁹⁶ Ultimately, however, the salvation of Africa lies in genuine democratic leadership and a populace committed to democratic ethos. Laws and institutions are but creatures of men and they alone, can make or break them.

Word count: 17, 394 (excluding abstract, table of contents, footnotes and bibliography)

²⁹⁶ Protocol on the Amendment of the Constitutive Act, adopted on 11 July 2003, not yet in force.

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