INSTITUTIONAL FAILURE IN KENYA AND A WAY FORWARD

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I. Introduction

On December 27, 2007, Kenyans cast their ballots for the fourth time since multiparty elections were introduced in 1991. Although the country had become notorious for its election violence during the 1990s, the relatively smooth transition of power from Daniel arap Moi to Mwai Kibaki in 2002, and the tangible progress that had been made between 2002 and 2007—including real average GDP growth of 5.4 percent (Norad 2009)—led to a general consensus that the 2007 elections, while susceptible to some degree of conflict, would be relatively peaceful. However, when Kibaki's highly contested victory resulted in mass protests, state-led violence, and coordinated displacement, many observers struggled to understand what had gone awry.

The reasons for the outbreak of the 2007–2008 post-election violence are numerous, but many of them have a strong correlation with one of the most fundamental impediments to development in Kenya since the introduction of multiparty politics: institutional failure. This paper explores how weak institutions have obstructed Kenya's path to sustainable development, focusing primarily on institutional failure since 1991, with a particular focus on the election cycles in 1992, 1997, and 2007. We define institutional failure in the Kenyan context as the lack of credible restraints on state actors, particularly the executive, allowing for excessive discretion in the absence of effective accountability mechanisms. Five factors are identified as central in keeping Kenyan institutions weak: a powerful executive, corruption, ethnic polarization, poorly enforced property rights, and violence.

After examining these five factors and their impact on development, we turn to the sweeping devolution reforms in the 2010 Kenyan constitution and offer a brief analysis of how these reforms address each of these components that contribute to institutional failure. Finally, we make recommendations on how to capitalize on devolution efforts given the identified patterns of institutional failure.

II. Executive Power

A central feature of all four post-independence political transitions has been the survival of a political structure in which a powerful executive rules through a highly centralized system of administration (Cheeseman 2006, 4). Beginning with Kenyatta in 1963 and lasting until the constitutional reforms in 2010, the president of Kenya has enjoyed almost absolute power, with only nominal checks and balances. Even the transition to multiparty politics in 1992 under the longest-standing president, Daniel Moi, did not bring about effective decentralization of power (ibid.). Because the president had complete control over the federal budget due to the winner-take-all characteristics of Kenya's political system, he was able to commandeer state resources and keep power within his ethnic group (Shikwati 2012). This, in turn, has exacerbated economic inequalities along ethnic and regional lines.

Until the promulgation of the new constitution in August 2010, the law did not restrict the president's ability to make decisions without consulting the cabinet or undermining the independence of the judiciary, nor did it restrict the chief justice's ability to compromise the decisional independence of judges, nor legislators' ability to become hired mercenaries for the highest bidder (Akech 2011, 344). Due to the disorganization and fragmentation of the opposition parties at the time, they were unable to deliver meaningful oversight of the government. Ultimately, the absolute power bestowed upon the president through the previous constitution resulted in weak political and economic institutions that hindered economic development, particularly economic equality.

Under the 1963 Independence Constitution, the president was given the ultimate authority to appoint the judiciary, dissolve parliament, and control the federal budget. It was not until the early 1990s, under pressure from the International Financial Institutions (IFIs) that President Moi tacitly agreed to make constitutional reforms, including the establishment of multiparty elections. While the constitutional reforms prior to the 1992 multiparty elections established an independent election commission, it left the appointment of the commission members and the chair wholly to the discretion of the president (Ndegwa 1998, 10). After 1992, the government neither initiated nor permitted any steps to consolidate democracy or improve institutions beyond the mere holding of legally required elections, despite the fact that Moi's Kenya African National Union (KANU) regime was a minority government (Harbeson 1998). At best, by holding elections, the Moi government paid lip service to the international donor demands to reduce high-level corruption. The troubling aspect of the donor demands, however, is that while they may have been uncomfortable with the idea of the excessive executive power held by the Kenyan president, their focus was mainly on the reduction of corruption, ostensibly to improve the economic environment for foreign direct investment. The lack of comprehensive, institutional restructuring after this transitional election undermined further development of democratic governance in Kenya and led to the even more problematic elections of 1997 (Ndegwa 1998).

The IFIs continued to be troubled by the Moi government's inability to curb high-level corruption in the lead-up to the 1997 election, culminating in the decision by the International Monetary Fund (IMF) to halt an Enhanced Structural Adjustment Facility (ESAF) loan of two hundred fifteen million dollars in late July. Two months later the European Union opted to withhold an aid package, which immediately deepened the country's economic problems (Southall 1999). Both decisions were, in part, intended to prompt Moi to make political concessions to the opposition (then riding on the back of popularly based demands for constitutional reform), but more particularly, these actions registered impatience at Moi's failure to confront graft (ibid.).

It was in response to the IFI pressure that Moi ultimately agreed to constitutional reforms that would require him to vacate office before the 2002 elections, although he had a successor—former President Kenyatta's son—in mind. In December 2002, the National Rainbow Coalition (NARC) and its candidate Mwai Kibaki defeated the incumbent KANU candidate, Kenyatta, and promising comprehensive political and economic reforms, including the completion of the constitutional review process. Despite NARC's election promise, the draft constitution that was finally approved by parliament failed to reduce the powers of the president, reflecting President Kibaki's desire to maintain Kenya's "top-heavy" structure of government ahead of the general elections scheduled for December 2007 (Cheeseman 2006, 4). The new draft constitution was submitted to Kenya's voters for ratification in a national referendum held during November 2005 and was overwhelmingly rejected. The principal reason for defeat, in the eyes of its opponents, was that the proposed constitution, much like the one it was meant to replace, ensured the survival of a powerful executive branch (Mwangi 2008, 2).

The excessive executive authority has had detrimental economic results, particularly in the area of economic equality. Recent studies by Acemoglu and Robinson suggest that sustainable economic progress requires institutional constraints on the authority of the chief executive (2000a) and have also provided evidence showing that concentrating power in a monarchy or a ruling coalition blocks the path to prosperity (2000b). Assuming these authors are correct, leveraging power-sharing reforms is therefore crucial to economic development (Mwangi 2008, 2). The Kenyan example adds additional evidence that concentrated executive power impedes economic progress and that it can lead to systematic corruption.

III. Corruption and Institutional Failure

Kenyan political elites have resorted to corrupt methods to exploit their influence over public resources for self-interested purposes. The effects of this widespread corruption have been detrimental to Kenya's development, as anti-corruption efforts have been ineffective and even prolonged by the same individuals who hold the responsibilities of combatting it (Lawson 2009).

Corruption in the form of petty bribes has penetrated the daily lives of the Kenyan population (Hope 2012). According to the Kenyan Permanent Secretary of the Ministry of Finance, more than three billion dollars of public funds were lost to corruption and mismanagement, a sum equal to 25 to 30 percent of the government's budget for 2010/2011 (ibid.). The high rates of corruption increase transaction costs and reduce the interest of would-be foreign investors to enter Kenyan markets. As such, corruption remains the largest obstacle to doing business in Kenya and is likely to persist in the presence of weak institutions that lack genuine adherence to democratic governance and the rule of law (Mwangi 2008). Consequently, the majority of Kenyans' livelihoods and overall national development have been continuously exposed to the negative impacts of systematic corruption.

In a historical context, it is evident that the rampant corruption did not receive adequate attention during Moi's administration, and while there were some improvements at the beginning of Kibaki's presidency, the Goldenberg and the Anglo-Leasing scandals under both leaders revealed that corruption continued to remain widespread. In the Goldenberg Affair, the Kenyan government received fifty million dollars annually "in exchange for a monopoly on gold and diamond exports from Kenya" (Lawson 2009, 80). In the Anglo-Leasing case, the government was paying a nonexistent company for public goods and services that were never completed for the purposes of party and electoral financing (ibid.). Both of these instances involved state leaders engaging in fraudulent activities that only benefited a few elite individuals. While the corruption under Moi's rule may be explained by the authoritarian domination of the single-party state, Kibaki's presidential victory was won through a campaign that promised responsible and accountable governance. Following his win, Kibaki appointed John Githongo as Permanent Secretary of Governance and Ethics and head adviser of Kenya's anti-corruption efforts (ibid.). Kibaki also instituted multiple institutional reforms, including the establishment of the Kenya Anti-Corruption Commission (KACC), and through the Anti-Corruption and Economic Crimes Act of 2003 (Hope 2012, 132). These changes were designed to diminish the incidence of corruption but proved to be relatively ineffective in the absence of institution capacity and government support (Lawson 2009). Many of Kibaki's early progressive stances on corruption weakened substantially over time not only because those in power continued to benefit from the status quo, but also because the competition amongst the political elites further influenced officials to constrain their anti-corruption efforts (ibid., 74). In withdrawing his initial support of the anti-corruption movement by removing Githongo, Kibaki immediately diminished the influence of the KACC, as it lacked the leadership, legitimacy, capacity, and the autonomy to carry on the fight against corruption.

Another key obstacle to the progress of the anti-corruption initiatives was Kenya's recent transition to democratic governance and the adoption of the multiparty elections. Competing parties vied for and exploited public resources to finance their political campaigns (Mwangi 2008). As such, the dawn of electoral competition saw the investment of the major political parties, the presidential candidates, and their inner circles in restricting the anti-corruption movement. Because the transition from authoritarianism to democracy took a long time, this allowed new institutions meant to guarantee democratic checks and balances (including the KACC) to become exposed to harmful political interests (ibid., 272).

IV. Ethnicity and Institutional Failure

Since the end of British colonial rule in 1963, Kenya has been dominated by political systems that are maintained by ethnically centered patronage systems. These systems are incredibly damaging to the maintenance of effective institutions and economic development. A patronage network is one that Cherotich defines as "an unequal relationship of mutual dependence and reciprocity." (2010, Slide 2) As was common in post-colonial states, the Kenyan government groomed a ruling class dominated by the Kikuyu ethnic group that continued to be sympathetic to the British and their economic interests. This patronage system ensured that members of this group ruled unopposed and maintained a monopoly on resources such as land and political appointments until the introduction of multiparty elections in 1991 (Branch & Cheeseman 2009).

An essential feature of autocratic or near-autocratic rule is the establishment of loyal coalitions that enhance stability within the government (Kimenyi and Shughart 1989) and come at the exclusion of large sections of the population. Ethnicity enables the creation of easily maintained coalitions that have high barriers to entry and low costs to maintain loyalty. Because of the winner-take-all nature of Kenya's political system, there is a strong incentive for members of ruling ethnicities to rally behind their candidate because of the benefits the winner can confer, such as land and lucrative contracts. After a ruler exits office under this arrangement, there is typically evidence of government growth and the culling of previous political appointments (ibid.). One such instance came after the inauguration of President Moi in 1978 when Moi sacked civil service employees from his predecessor's government and stacked his new government with people from his own tribe. Also, he dramatically increased the size of the government to create new positions for additional supporters and by the end of Moi's first term in 1997, only 3 percent of Kenyatta's ethnic group remained in the cabinet (ibid., 3).

Even after the 2005 constitutional referendum, ethnicity proved to be the deciding variable in the vote (Kimenyi and Shughart 2008) with the majority of "yes" votes coming from the ruling ethnic groups in the form of the Gikuyu, Embu, and Meru Assocation and the majority of "no" votes coming from the other ethnic groups that have not benefited from government largesse. The constitutional referendum was defeated by a large margin (62 percent) and with a strong nationwide turnout (60 percent)—because of its preservation of gross executive power (ibid.). Those benefiting from the largesse of the government desire to maintain the status quo, while those that are not benefitting prefer to see change, namely in the form of a devolved federal government.

The effects of this patronage system on the population are evidenced in economic data. While 47 percent of Kenyans live above the poverty level, this rate varies by ethnicity: 65 percent of Kenyans in the Central Province, the home of the Kikuyu tribe, live above the poverty level while 56 percent of those in the Rift Valley live below the poverty line (ibid.). It is no surprise that the regions with the most wealth have also been home to past and current presidents. It is also no surprise that the majority of violence and displacement in Kenya has happened to those groups that live in the poverty-stricken Rift Valley.

The forty years of high levels of patronage has created a great institutional deficit that continues to affect ordinary citizens. As decisions were made by elites and for elites, the systems of governance needed by the rest of the population were left to languish and atrophy. By not allowing a great number of people to access services – essentially locking them out of the process of governance simply because of their ethnic affiliation – they are deprived of the basic right to governance and economic self-determination. The unfair distribution of resources, poor infrastructure, and inadequate government services are the more benign manifestations that common people experience with patronage systems: such arrangements can also lead to physical violence as seen in Kenya in 2007.

V. The Failure of Property Rights Institutions

Weak property rights institutions were a central component in the displacement and violence of 1992, 1997, 2002, and 2007, and have significantly obstructed Kenya's chances for sustainable development. Prior to the 1992 multiparty elections, property rights institutions in Kenya were thought to be relatively strong (Onoma 2010). Land was not allocated equitably under Kenyatta or Moi, but formal understandings of property rights and ownership were fairly clear. These administrations made significant investments in the Ministry of Land's Department of Land Adjudication and Settlement (DLAS), which worked to establish and enforce rules regarding property acquisition and disposal (ibid.). When land disputes arose, the DLAS used its division leaders to resolve them, relying on a regulatory framework that was enforced by local police (ibid.).

All attempts to strengthen property rights institutions –most notably those dealing with land management – came to a screeching halt when Moi and his KANU allies faced multiparty elections in 1992. For the first time in several decades, KANU politicians were exposed to the possibility of electoral defeat and, in response, devised new strategies to maintain their grip on power. The reallocation and sale of land, particularly in the Rift Valley, became a central strategy to ensure political survival. Boone argues, "Land rights were used as an incentive and a reward for grassroots actors who mobilized and acted on the exhortations of ruling politicians" (2012, 86). Although patronage networks played an important role in Kenyan society well before the 1992 elections, the return to a multiparty system unquestionably intensified their importance and a scheme in which land was exchanged for votes necessitated the weakening of the same property rights institutions that KANU had worked to strengthen over the previous three decades. The central government stopped providing the DLAS with basic resources needed to carry out its work, even withholding paper to register titles (Southhall 2005). District and divisional officers with close ties to KANU politicians ensured that property transfers were not recorded and changes in registers were removed (ibid.). Through this process, the ruling elite caused the confusion necessary to advance their political aims – they were able to issue multiple titles to different people in exchange for political support or cash payments to fund their campaigns (Kamungi 2009). When it became apparent to potential land purchasers that titles might not be recognized legally, the Ministry of Land created Land Disputes Tribunals to settle conflicts of land adjudication. However, the state neither paid tribunal members' salaries nor provided them with the logistical support required to carry out their functions properly. As a result, formal or customary claims to property were subject to political interests, absent institutional constraints.

There was some expectation that the 2002 triumph of Kibaki would lead to the institutional reforms necessary to allow property rights regimes in Kenya to operate effectively. Kibaki promised to do away with the violent land grabbing that had defined his predecessors' rule and to establish the legal framework to restrain the power of the presidency by means of a new constitution (Gibson & Long 2007). After Kibaki's election, however, land continued to play its historical role as political capital, as well-functioning property rights institutions posed the same threat to Kibaki's political livelihood as they did to Moi's. Kibaki, in a manner similar to that of his predecessor, continued to undermine property rights institutions and use his power to arbitrarily distribute and repossess land. For example, in 2005, Kibaki attempted to regain the votes of the Ogieks – a community that state agents had recently removed from their land under presidential orders – in order to push through a new constitutional referendum by issuing twelve thousand land deeds to the group in spite of a high court ruling that had placed an injunction on the arbitrary distribution of the land (Onoma 2010). This strategy was effective, as the Ogiek community voted overwhelmingly in favor of the referendum. At the same time, senior public servants, local land boards, and provincial administrators colluded to stifle the capacity of land management institutions (Kamungi 2009). Rather than strengthening property rights institutions, Kibaki's moves kept them weak and open to political manipulation.

Thus the violence surrounding the 2007–2008 election should have come as no surprise, given that weak property rights institutions increased the level of uncertainty in society. Control of the central state was inextricably linked with the allocation of access to much of the land in the country, particularly the farmland in the Rift Valley (Boone 2009). By recognizing the fact that the triumph of an opposition party has the potential to result in the displacement of the electoral losers, it becomes easier to understand the violence that has plagued the country for decades and continues to incite fear in the minds of Kenyans.

VI. Violence and Weak Institutions

Since the restoration of multiparty politics in 1991, Kenya has become prone to economically damaging conflicts caused by acts of institutionalized violence (Waki Report 2008, viii) that weaken the power of state institutions and defeat their purpose of promoting development and social protection. There is a strong correlation between higher levels of intra-national conflicts and weak institutions (Besley and Reynal-Querol 2012) and in Kenya, already weak institutions have been destabilized even further by the use of institutionalized violence that forces the country endure a cycle of fear, lack of integrity, and impunity. Violence has become widespread and part of everyday life, and is not limited to election time (Waki Report 2008). Four key factors contribute to this cycle of institutionalized violence, fear, lack of integrity and impunity: 1) the lack of coordination between security mechanisms; 2) the lack of accountability; 3) the use of organized ethnic gangs as a way to assert political power and provide public services; and 4) the personalization of presidential power to deliberately weaken public institutions (Waki Report 2008). The following discussion will focus on the evolution of these four factors from a historic perspective, while illustrating examples of the violence in Kenya post-1991.

The first form of institutionalized violence occurred shortly after independence as Kenyatta concentrated means of violence in the hands of the state to bully and harass opposition parties. As an alternative to violence, the opposition parties were lured back to Kenyatta's ideas through the use of a patronage system that allocated government positions and land to those that were willing to support the president (ibid.). Even though most patronage networks in Kenya work on the basis of ethnicity, Kenyatta made an exception to this practice to maintain power and appease the opposition. Moi not only followed his predecessor's tactics, he instituted even stronger forms of state violence, including detentions without trial and routine torture of perceived and real dissenters (ibid., 24). His ability to remain in power until 2002 was a direct result of his use of violence as a means of securing political power and winning elections, both presidential and parliamentary (ibid., 26). Moi hired gangs in the Rift Valley and elsewhere to kill or displace people to prevent them from voting. Because these tactics were used in both the 1992 and 1997 elections, it attracted the attention of many NGOs such as the Kenya Human Rights Commission and Human Rights Watch.

In addition, two Kenyan government inquiries looked more in depth into the causes of the violence. The Kiliku Report in 1992, and the Akiwumi Report in 1999 documented the perpetrators' names, and "implicated politicians as the organizers of violence and killing for political ends, and noted that warriors and gangs of youth who took action were both paid and pressed into service" (ibid.). Neither of these reports resulted in any action against those perpetrators – instead, they set a precedent for a culture of impunity for those who maimed and killed for political ends (ibid.). Even though these inquiries marked the beginning of the dismantlement of the systematic form of violence in Kenya, they fell short of bringing the perpetrators to justice, as those in charge of enforcing it were part of the systemic violence as well. As a result, the marginalized ethnic groups and displaced populations continued to form groups, such as the Mungiki, that use extra-state violence to obtain political power, knowing they would not be punished due to lack of enforcement (ibid., 27) and at times supported by high levels officials.

Because a good deal of government revenue since the 1990s was used to mobilize political support for the ruling party (ibid., 34), infrastructure and the provision of social services were under-funded. This situation has given an opening to violent gangs to provide social services and security, in addition to extra-state protection and enforcement services for those willing to pay, including members of the opposition or within the government itself (ibid.). These gangs became "shadow governments" that exercised control as a "state within a state" in various parts of Kenya and used violence to maintain such control (Hansen 2009, 4).

These gangs bullied individuals and businesses using Mafia-like methods such as threats and extortion to control the Kenyan public transport sector (ibid.). They bullied business owners into making payments for services, including connecting electricity, providing pit latrines in the slums, and meting out justice (Waki Report 2008, 27). As such, the state no longer commanded a monopoly over the use of force or governance. Extra-state gangs continued to proliferate and diffuse into the rest of Kenyan society.

Centralized power in the executive arm of the government destabilized institutions further. Regardless of the laws established in other parts of the government such as the civil service, judiciary, and even parliament, the executive has the last word (ibid.), which resulted in the personalization of presidential power. The Waki Report notes that checks and balances normally associated with democracies are very weak in Kenya, and deliberately so (Hansen 2009, 5).

This lack of accountability and trust in the government to regulate election fraud became a major factor in the violence during the elections of 2007. Although President Kibaki had made only minimal efforts to let the prime minister regulate power in the executive branch, there had been an informal Memorandum of Understanding (MoU) before his election. Yet his watered-down alternative to the MoU, and the changes in the 2005 constitution, minimized many of the provisions agreed upon prior to his election and increased political polarization along ethnic lines (Waki Report, 2008). Effectively, this drew the lines for the 2007 election in which the presidency was seen as all-important, which led people to believe that if a person was picked from their own tribe, it would secure benefits and protection against the opposing ethnic groups (ibid.). The Waki Report concludes that Kibaki's regime failed to unite the country and it allowed feelings of marginalization to fester into what became the most violent post-electoral period Kenya has ever seen.

Violence has become a way of life in Kenya as more individuals report having experienced violence, even after the 2007 election (Kenya National Dialogue and Reconciliation Monitoring Project 2009, 3). This diffusion of violence has had repercussions in Kenya's political and economic spheres, which will likely continue to have an impact (Mueller 2011). According to Ksoll, Macchiavello and Morjaria, Kenya's key sources of revenue, which are tourism and horticulture exports, declined after the 2007 elections by approximately 35 percent and 40 percent respectively (2009) and in a recent survey by Synovate, it was revealed that a large number of those in areas affected by the 2007 election violence predict more violence in the future (Mathenge 2010; Mueller 2011), all of which further impacts Kenya's subsequent development.

All of these factors have converged to make violence the method of choice to resolve differences and obtain power in Kenya, thereby rendering its devolution plan – the road to strengthen development and the fate of the nation – vulnerable. Additionally, because the violence surrounding elections has been ethnically directed, it has increased distrust among groups and damaged any sense of national identity. Along these lines, Besley and Reynal-Querol have concluded that historical conflicts are negatively correlated with trust and a sense of national identity, and are positively correlated with strong ethnic identity (2012). Hence, ethnicity has taken on a perilous connotation because it can rapidly propagate violence in the country.

A fundamental problem facing the nation is how to break this cycle of violence. Kenya must decide if it will let violence, corruption, and weak institutions prevail, or will introduce fundamental changes to the 2010 Constitution and government to deal with perpetrators of violence, like the Special Tribunal institution recommended in the Waki Report.

VII. Constitution and the Devolution Plan

The devolution plan – an integral component of the 2010 Constitution – provides a framework to strengthen Kenya's institutions and promote sustainable and equitable economic development. The plan includes the establishment of forty-seven new counties and the diffusion of power from the national to local governments. Although it attempts to address as the catalysts of institutional failure, considerable uncertainty and skepticism regarding the implementation of the devolution reforms remain. The following discussion will outline how the 2010 Constitution addresses the problems of a powerful executive, corruption, ethnic polarization, poorly enforced property rights, and violence.

We agree with Akech's doubts as to whether the 2010 Constitution establishes principles and mechanisms that will circumscribe the exercise of power in all three branches of government (2011, 383). Furthermore, it remains to be seen whether the president will continue to have unfettered authority that undermines the judiciary's role, but it is clear that the arrangement fails to regulate the president's powers to appoint and dismiss (ibid., 389). Thus, if the perceived inability of the constitution to curb the centralized powers of the political elites is borne out, this will impede the potential successes of the proposed reforms in addressing the main sources of institutional weakness and the lack of Kenya's long-term development. Although it is too soon to tell whether there are enough measures in the constitution to effectively constrain executive power, optimally, the devolution plan could reduce the excessive executive authority wielded by the Kenyan presidents and, if successfully implemented, could be the mechanism that will address the functional decentralization of the executive power.

The 2010 Constitution and the inscribed devolution plan provide the legal framework and courses of action to confront the challenges of corruption, ethnic divisions, and ill-defined property rights. The document specifically prohibits "political parties [from] engag[ing] in bribery and other forms of corruption […] to promote its interests or its candidates in elections" (Constitution of Kenya 2010, 58). Government attention given to the institutions implementing the anti-corruption programs has resulted in positive changes, such as a 62.5 percent increase in corruption reports by the Ethics and Anti-Corruption Commission (EACC) in 2009. The longevity of these outcomes is dependent on the devolution plan's ability – along with local governments – to limit the influence of Kenya's elite circles in the government.

Furthermore, in an attempt to address the stark ethnic divisions that facilitated inequality and violence, the devolution plan seeks to diminish the power of ethnicity in politics. Prior to the institution of the new countries, the previous regions of Kenya were divided the according to ethnic group and were maintained by the ruling group as a convenient way to allocate resources according to the ruling group's own preferences. The reorganization is structured to prevent such unequal distribution of resources by reducing strong concentrations of ethnic groups. Moreover, the constitution prohibits discrimination and creates affirmative action plans (Akech 2010, 20). It further disallows any political party that "is founded on an ethnic, age, tribal, [...] basis" (Constitution of Kenya 2010, 58), which is meant to force politicians to reach across ethnic lines to represent all their constituents as well as decrease the amount of tension created along ethnic lines, all of which should benefit minority populations.

With respect to property rights, the 2010 Constitution takes away considerable power from both the executive and the Ministry of Lands, and redistributes it to other bodies such as the National Land Commission (NLC), an independent government group charged with managing public land on behalf of national and county governments (The Land Development and Governance Institute, 2012), and implementing sweeping land rights reforms, including the devolution of lands grabbed illegally by the state. Along with NLC management of these lands, constitutionally mandated land allocation powers are given to the new forty-seven semi-autonomous local governments (Boone 2012). The NLC's chairman, Ibrahim Mwathane, has recognized that considerable resources will be needed in order for institutional capacity building to take place and for property rights institutions to become more salient (Ndonga 2012). Thus, even with effective implementation of the devolution reforms, property rights institutions will be susceptible to political influences.

Considering the persistent doubt over the ability of the new reforms to ease the problems of property rights and the tensions caused by systematic corruption and ethnic divisions, it is unlikely that the 2010 Constitution and devolution plan alone will effectively deal with violence, especially if the catalyst to violence is another factor altogether unrelated to elections (Mueller 2011) such as the ethnic conflict. Additionally, the propensity for violence may be reinforced by the failure of the current government to deal with impunity and to establish the Special Tribunal recommended by the Waki Commission of Inquiry to Investigate the Post Election Violence (CIPEV). Mueller states, "there has been no political leadership on how to address this proliferating violence whether from the political elite or ordinary politicians […] (ibid., 106). Currently, the message being sent to the victims, witnesses, and human rights defenders in the wake of the post-election violence is "keep quiet or watch out and suffer" (ibid., 110).

Violence in Kenya is no longer an issue under Kenyan jurisdiction: after Kofi Annan became tired of waiting for the Kenyan government to provide the institutions and mechanisms to address the cycle of impunity, the International Criminal Court (ICC) took up the case in 2010. Annan gave Luis Moreno Ocampo, first prosecutor of the ICC, an envelope with all the perpetrators names investigated by the CIPEV (ibid.). Although the trial was scheduled to start in January 2013, it has been postponed due to weather related issues and the March 2013 election, which has one presidential candidate, Uhuru Kenyatta, who has been indicted by the ICC for crimes against humanity in the 2007 post election violence.

VII. Recommendations and Conclusions

While recognizing its limitations, we believe that if successfully funded and implemented, the devolution plan presented in the 2010 Constitution offers the most comprehensive opportunity to address the current levels of executive power, corruption, ethnic division, property rights, and violence. The eventual ICC ruling, moreover, could further contribute to reducing violence. The devolution process, however, presents a number of implementation challenges and as such, we provide the following recommendations.

- The inclusion of the devolution plan in the 2010 Constitution by the Committee of Experts and Parliamentary Special Committee (PSC) points to a concerted effort to reduce the power of the executive branch in Kenya. However, a successful devolution plan requires sustained central coordination (Fengler 2011), and overcoming this challenge will depend upon efficacious intergovernmental communication and coordination between the central government and the new county authorities.

- In order to address challenges associated with corruption, in accordance with The Ethics and Anti-Corruption Commission (EACC), we recommend increasing the reach of the of the Public Service Integrity Programme (Integrity Assurance Officers trainings or IAOs) so that it "focuses on developing a pool of skilled officers in the public sector to support management of corruption risk mapping and management" (2011, 54). Additionally, we recommend increasing the number of local government leaders and staff to be trained on corruption risk assessment and the development of the Corruption Prevention Plan, the Corruption Committees-Corruption Prevention/Integrity Committee Capacity Programme (ibid., 55). Both of these actions will help to improve institutional capacity to combat corruption and may help to curb decentralized corruption as well.
- The devolution process can help to weaken the ethnically centered patronage systems that have been increasingly entrenched by Kenyan presidents. By giving county governments the responsibility to provide services to citizens (Constitution of Kenya 2010, 108), a more equitable provision of services can be realized for ethnically marginalized groups as authorities would now be charged with ensuring the provision of such services (World Bank 2012, 1). Additionally, a clause requiring seats for marginalized groups on the county assemblies can ensure a more equitable distribution of services (Constitution of Kenya 2010, 109).

- The devolution process affords an opportunity to promote more equitable access to land than ever before; however, adequate funding and planning will be required to make this a reality. In order to address these challenges, we recommend providing substantial funding for the National Land Commission. A significant part of this funding should come from a reallocation of monies from the Ministry of Land's budget. Establishing publically accessible NLC division offices in each of the counties would enable citizens to obtain information on titling and registration procedures as well as a forum in which to lodge grievances against violators at the county level. Giving NLC division offices the power to impose severe penalties on county officials who do not comply with the constitutional framework on land management and administration will ensure greater accountability of the county officials also (Syagga, 2008).

As this paper has demonstrated, multiparty elections have exposed the weaknesses of Kenyan institutions over the past two decades. While deeply entrenched in the Kenyan institutional framework, the lack of restraint on state actors and the absence of accountability mechanisms, became highly visible during the 1992, 1997, and 2007 election cycles. Therefore, the success or failure of the devolution process hinges upon the outcome of the election in March 2013. If the elections are conducted freely and fairly, the results legitimized by the Kenyan population, and the leadership transition smooth, devolution, while not the panacea for development, can provide the opportunity to release the Kenyan population from the historic experience of excessive executive authority and strengthen the institutions needed to sustain economic development.

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