



By Patrick Gathara



In [his op-ed for the Washington Post](#), Kenya's President Uhuru Kenyatta expressed "every confidence that the impasse in Kenya would be resolved by the new vote." Which is strange given that the current impasse is precisely about the new vote, the fresh election ordered by the Supreme Court after it annulled the August presidential election in which Kenyatta had been declared the winner.

As Kenyatta stated, that historic decision by the Supreme Court came as a shock to everyone - just not for the reasons he espouses. It wasn't because international observers had hastily declared the polls free and fair (and equally hastily [tried to walk that back](#) following the nullification). Anyone who followed the publicly televised proceedings would have been treated to the spectacle of the country's electoral body, the Independent Electoral and Boundaries Commission, disowning the results it had streamed on TV screens during the tallying of the votes. If the president had read [the full Supreme Court majority judgment](#), he would have heard tales of differing forms used to declare the outcome ("If they were forgeries, who introduced them into the system? If they were genuine, why were they different from the others?" asked the judges) and of the IEBC defying the court's order to have its servers audited and acting as though the constitution and election law didn't exist.

That sufficient grounds existed to question the veracity of the results announced by the IEBC is not seriously contested. The real reason for the surprise at the reversal was that no one expected that the power of Kenya's "owners" would be seriously questioned.

Kenya ina wenyewe or Kenya has its owners - the *wenyenchi* - is a common refrain throughout the

country. What it refers to is the fact that the country is set up to work for very few individuals at the very top. This is a legacy of the country's colonial past, and the fact that President Kenyatta's predecessors, including his father, Kenya's first president, Jomo Kenyatta, failed to reform the colonial state they inherited from the British.

That sufficient grounds existed to question the veracity of the results announced by the IEBC is not seriously contested. The real reason for the surprise at the reversal was that no one expected that the power of Kenya's "owners" would be seriously questioned.

Yet the struggles to change that state were at the core of the independence struggle, and those debates were not just carried out in London, where Kenya's independence constitution was negotiated; even the Mau Mau [created a Parliament in the bush and debated the shape a free country should take](#). It is not, as President Kenyatta [asserted on the eve of the new vote](#) on 26 October, that "our forefathers fought and died for the right of the African to vote" in a political and economic system defined by the colonialists.

Sadly, these efforts were all betrayed. In 1992, the current Attorney-General, Githu Muigai, [described](#) how this betrayal came about:

"The colonial order had been one monolithic edifice of power that did not rely on any set of rules for legitimisation. When the independence constitution was put into place it was completely at variance with the authoritarian administrative structures that were still kept in place by the entire corpus of public law. Part of the initial amendments therefore involved an attempt - albeit misguided - to harmonise the operations of a democratic constitution with an undemocratic and authoritarian administrative structure. Unhappily instead of the latter being amended to fit the former, the former was altered to fit the latter with the result that the constitution was effectively downgraded."

In effect, the colonial state, and its logic of extracting resources from the many to enrich a few *wenyenchi* - the political elite that replaced the British colonials at the apex of Kenya's political arrangement - prevailed. The renewed push for a new constitution in the 1990s, which culminated in the promulgation of the 2010 document, was another attempt to reconfigure the state. However, like its independence counterpart, the current constitution continues to face opposition from Kenya's "owners" who were content to allow a semblance of democracy as long as it did not fundamentally challenge their place at the top. Democracy was never meant to be real, but the September 1 annulment of the presidential election changed all that.

"I did not agree with that decision. But I accepted it," wrote Kenyatta. He was being disingenuous. The decision shook him - and his fellow "owners" - to the core. What followed was an emotional and frenzied attack on the courts led by the president himself. He branded the judges "*wakora*" or bandits and said that the judgment was a "judicial coup" that he promised to "revisit". Soon his supporters, led by David Murathe, the Vice-Chairperson of his Jubilee Party, were [openly extolling the virtues of dictatorship](#).

In the meantime, the president did not just "immediately return to campaigning, taking the case for a renewal of my mandate to the people of Kenya once again", as he claimed. In Parliament, his allies were busy changing electoral laws to essentially make it impossible for another presidential election to ever be annulled and to regularise the illegal acts of the IEBC. Even more worrying, this fit into a wider trend where democratic rights and freedoms were being progressively curtailed.

A [report by Amnesty International and Human Rights Watch](#) claims that up to 67 people in opposition strongholds may have been killed by the police in the period following the August 8

election. Avenues for popular political participation - from the media to civil society to street protests - are being closed. As Kavuwa Musyoka describes this state of affairs in [Julia Steers' article](#) on police killings in Nairobi's informal settlements, "It is democracy for the have-its. The have-nots do not have democracy. In the slums, democracy is not ours."

The insistence on holding this election thus had little to do with, as Kenyatta suggested, resolving the political impasse. Neither was the election about Kenyatta's main rival, Raila Odinga, whose "devotion to ... democracy" can be questioned given his past willingness to [align with despots](#) and [defend kleptocrats](#) when it suited him. It was rather about putting down the democratic revolt that the Supreme Court threatened in September and ensuring that the owners stay in charge.

Even judges may not feel safe. Following [an attack on her bodyguard](#), the Deputy Chief Justice Philomena Mwilu was unable to attend the scheduled hearing on the eve of the election of an urgent case at the Supreme Court seeking to have the 26 October election postponed, a possibility that Kenyatta had flatly rejected. Her absence, along with that of four other judges (two so far without explanation and another claiming she couldn't get a flight to Nairobi), meant the case could not be heard as the two available justices [could not constitute a quorum](#).

It was in this context that the fresh election was being held. It was not entirely true, as the president asserted, that the international community had "declared support for the upcoming election". Prior to the election, Western diplomats [warned](#) that "inflammatory rhetoric and attacks on the election commission made it more difficult to hold a legitimate poll". Before that, the IEBC Chairman Wafula Chebukati had declared that all his efforts to reform the commission had been frustrated and that he could not guarantee a free fair and credible poll. However, by the time he was announcing the election results on Monday this week, his tone had changed considerably. He declared that having received assurances of security and restraint from the police and the president, he had changed his mind about the IEBC's ability to carry out a free and fair election.

Around the world, elections do little to resolve political problems. From Afghanistan to Egypt and even in established democracies like the US and the UK, they tend to polarise public opinion rather than bring people together. The insistence on holding this election thus had little to do with, as Kenyatta suggested, resolving the political impasse. Neither was the election about Kenyatta's main rival, Raila Odinga, whose "devotion to ... democracy" can be questioned given his past willingness to [align with despots](#) and [defend kleptocrats](#) when it suited him. It was rather about putting down the democratic revolt that the Supreme Court threatened in September and ensuring that the owners stay in charge.

The gambit [appears to have backfired](#). With Odinga refusing to participate in the election and calling for a boycott, Kenyatta's win was a foregone conclusion. However, the legitimacy of his victory was pegged on the voter turnout, which explains the shenanigans the IEBC has gone to seemingly massage the figures. Once again, as happened in August, the IEBC is running away from the data generated by its own voter identification and results transmission kits - known as KIEMS (Kenya Integrated Election Management System) kits - which were meant to periodically give turnout figures throughout the day as voting happened. Aside from [convoluted explanations](#) for why it wouldn't be releasing the data from KIEMS, the elections body has also offered differing numbers, with Chebukati at one point offering what he would later call a "best estimate" of 48 per cent voter turnout, before paring that back to just over 6.5 million voters, or 33% with 91% of constituencies reporting. The lower figure tallies with media reports of depressed turnout throughout voting day, including in Kenyatta's strongholds.

A high turnout would have seen Kenyatta claim some measure of popular endorsement for his efforts to roll back the constitutional order. The opposite indicates serious misgivings about how the election was conducted even in his electoral backyard. Along with [a poll](#) showing most Kenyans, including half of those in Kenyatta's strongholds, approved of the decision to annul the August election, this suggests that across the political divide, Kenyans prefer credible processes to fixed outcomes. And even though he claims vindication, the low turnout was not so much an endorsement of Odinga but rather a repudiation of the *wenyenchi's* schemes to frustrate the constitution.

A high turnout would have seen Kenyatta claim some measure of popular endorsement for his efforts to roll back the constitutional order. The opposite indicates serious misgivings about how the election was conducted even in his electoral backyard. Along with a poll showing most Kenyans, including half of those in Kenyatta's strongholds, approved of the decision to annul the August election, this suggests that across the political divide, Kenyans prefer credible processes to fixed outcomes. And even though he claims vindication, the low turnout was not so much an endorsement of Odinga but rather a repudiation of the *wenyenchi's* schemes to frustrate the constitution.

So where does Kenya go from here? Kenyatta has said he is now [willing to talk to Raila Odinga](#), though no one is sure what about. However, Kenyans should be wary of leaving the country's future to the two leaders. Kenya's political factions have historically not been interested in free and fair polls, but rather in retaining their ability to manipulate results while denying the same to their opponents.

Similarly, the issues that need to be addressed must go beyond the narrow political interests in carrying out a more legitimate election. Kenya's historical experience with politicians negotiating electoral reform teaches that politicians are not fundamentally interested in the people's right to choose their leaders, but in the politicians' ability to hold onto power. The inevitable horse-trading leads to minimal reforms and shortchanging of the electorate.

A good example of this was the effort to reform the IEBC last year where, off the bat, the politicians agreed they would [not change the constitution](#) to give the Supreme Court more time to comprehensively deal with legal challenges to the outcome of the presidential election, currently limited to 14 days. This despite the fact that following the 2013 challenge to Kenyatta's election, the then Chief Justice, Willy Mutunga, had said that the court needed more time. The court ended up throwing the meat out of Odinga's case citing limited time, and declared the 2013 election free and fair. More worryingly, another Supreme Court judge would later admit that the court might have come to a different conclusion if it had been given more time.

Similarly, in the run-up to the 1997 polls, and following huge pressure for reform driven by civil society, parliamentary politicians ganged up to steal activists' thunder by agreeing to a set of minimum reforms that not only did away with many of the critical demands but which were also never entrenched in law. A decade later, President Mwai Kibaki's [repudiation](#) of the "gentleman's agreement" that had allowed opposition politicians a say in the appointment of electoral commissioners fatally undermined the credibility of the 2007 elections and set the stage for the violence that followed, which killed over 1,300 people and displaced hundreds of thousands more.

Kenya cannot afford to leave its politics to the whims of its politicians. Any talks should be conducted within the context of a wider national dialogue that involves a wider cross-section of society, including representatives of civil society, workers as well as religious and business leaders. Similarly, the issues to be addressed must go beyond the narrow interests of political parties. The

agenda must include the people's "irreducible minimums": comprehensive audit and reform of the electoral system; constitutional changes to shore up the independence of the judiciary and other constitutional bodies; reform of the police; compliance with all the provisions of the constitution, including the requirement that no gender should have more than two-thirds representation in any appointive or electoral bodies; and implementation of [the report of the Truth, Justice and Reconciliation Commission](#), which has been gathering dust in Parliament for the last three years, so that Kenya can finally begin the hard work of righting the wrongs of the past.

Kenya cannot afford to leave its politics to the whims of its politicians. Any talks should be conducted within the context of a wider national dialogue that involves a wider cross-section of society, including representatives of civil society, workers as well as religious and business leaders.

Inadvertently, President Kenyatta has provided Kenyans an opportunity to consolidate their nation's future and begin to develop a genuine democracy - one that works for all its people and not just a few. It is an opportunity that must not be wasted.

However, dangers remain. The ruling elite will not easily give up its privileged position, which is undergirded by the state. The colonial regime was not legitimised by popular will but by a combination of brute force, co-option of ethnic elites and dividing the people along ethnic lines. The continuing brutal crackdown on protests and the [use of tribal militia in tit-for-tat attacks](#) shows that the country's owners' appetite for both state-sponsored and privately contracted violence is undimmed. Further, the many defections of opposition politicians, as well as the fanning of ethnic animosity, show that these owners have not lost their capacity to co-opt and to practise the politics of divide and rule.

The reform of the state is by no means inevitable; it will be forcefully resisted. "Kenya's internal conflict is instead between its better self, the liberal, open, law-abiding country so often apparent, and a more retrograde, corrupted version" [writes Andreas Katsouris](#), a Canadian political consultant who was working on Odinga's August campaign before he was [abducted and deported by Kenyan authorities](#). It is now a struggle in which the Kenyan people have clearly shown which side they are on.

By Patrick Gathara

Mr Gathara is a social and political commentator and cartoonist based in Nairobi

Published by the good folks at [The Elephant](#).

The Elephant is a platform for engaging citizens to reflect, re-member and re-envision their society by interrogating the past, the present, to fashion a future.

Follow us on [Twitter](#).