



Kenya's elections: the peace lobotomy?

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This Africa Policy Brief will look at the Kenyan elections of March 4th 2013 and examine what lessons can be learned from them. The argument that will be developed throughout this paper is that, although the violence was contained, the elections were not a success, because the drivers of conflict in Kenya remain untouched. The underlying reason being that the informal power of the political class still outweighs all the formal institutions and plans put in place. The ruling elite has acknowledged the drivers of conflict in Kenya for years but has shown very little interest in resolving them, because that could influence the drivers of their power.

Why was the violence contained?

The violence during the latest election campaign was limited due to a number of reasons. First, there was a general call for peace by Presidential candidates and civil society in the run up to the elections, because nobody wanted to repeat what had happened in the aftermath of the elections in 2007. The media knew they contributed to the hostile climate in 2007.¹ This time the media monitored hate speech and emphasised that voters had to be positive, celebrate their national pride and refrain from tribalism. As a consequence, the media became a toothless watchdog in the process. They were so afraid of stirring up violence that they forgot to play their role as an independent force questioning the flaws in the election

¹ On 8 March 2011 Joshua Sang was indicted by the ICC for his role in planning attacks, along with Kosgey and Ruto, as well as whipping up ethnic hatred on the airwaves via the Kalenjin language radio station KASS FM.

<http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>

process and informing the Kenyans of what was happening. In practice, this meant that the media went with whoever had an early lead - in this case Uhuru Kenyatta - and did not even give due attention to the demand of Raila Odinga to stop tallying ballots and conduct an audit. They did not even report on the violence that broke out in the coastal region because of the effects it might have had on the unfolding and the aftermath of the elections.² Even at the end of May, the election results for the constituencies were still not released. The Independent Electoral and Boundaries Commission (IEBC) had to reconcile the presidential results and those of other positions at the level of the constituencies and the numbers didn't match. Over a million votes had to be reconciled with others and they didn't know how to do that.³ The media has rarely reported on these issues, because nobody wanted to hear that these elections were not the success they need to be.

Second, the presence of the International Criminal Court (ICC) in the political debate, was used and abused as a political weapon, but it prevented an outbreak of violence, because everybody within the political elite was aware of the possible consequences. The Jubilee coalition used the ICC to drum up nationalist and anti-colonial discourses against the West to help them win their ticket, but they did that first and foremost to obtain immunity and keep the ICC at bay. Indeed, both candidates are indicted and awaiting trial before the ICC, so if they joined forces,

² Michela Wrong To be prudent is to be partial 14 March 2013

<http://latitude.blogs.nytimes.com/2013/03/14/erring-on-the-side-of-caution-kenyas-media-undercoverd-the-election/>

Kenya After the Elections Crisis Group Africa Briefing 94, 15 May 2013 p. 3

³ IEBC wants Political Parties Act amended The Star 23 May 2013

<http://the-star.co.ke/news/article-121442/iebc-wants-political-parties-act-amended>

they could create an opportunity for themselves to get out of their precarious situation. But Kenyatta and Ruto also knew very well that Kenyan Realpolitik dictates that you have to add up the potential ethnic support of a candidate; if Kenyatta and Ruto would combine their respective ethnic constituencies, the coalition of Kikuyu (17%) and Kalenjin (13%) would be hard to beat.⁴

In short, violence during and after the Kenyan elections was contained, because nobody wanted to be blamed for the consequences if violence was to break out, even if that meant that essential questions on the elections couldn't be asked.

Why were the Kenyan elections not successful?

First, the year of reference for these elections should not be 2007 but 2002, when the first Kibaki government came to power with an ambitious agenda of reforms most of which are still on the political agenda today: reform of the civil service (including the security services), tackling corruption, constitutional reform including devolution and the creation of the post of Prime Minister.

The way Kibaki's National Rainbow Coalition (NARC) came into existence and ruled is not only an illustration of how Kenyan politics function up until today but it also indicates why the reforms were never executed. In 2002, ten weeks before the elections, the opposition finally agreed to gather behind a single list of candidates spearheaded by Mwai Kibaki. NARC was a merging of two coalitions: the National Alliance Kenya (NAK) consisting of Kikuyu people and a dozen other ethno-regional parties; and the Liberal Democratic Party (LDP) which was a coalition of defectors from Kenya African National Union (KANU). The most prominent member of the LDP coalition was Raila Odinga, recognised leader of the Luo. Once again, the numbers game of estimating the potential ethnic votes of each coalition was crucial in forging the political cooperation between NAK and LDP. On 22 October 2002, NAK and LDP signed a memorandum of understanding in which Odinga was promised the post of Prime Minister that would be created as a part of the constitutional reforms. The other major promise was that the cabinet positions would be equally divided between both coalitions.⁵

As soon as the new government was installed, President Kibaki backtracked on the promises made to

his coalition partners and surrounded himself with advisors of his ethnic constituency. This was the beginning of the end for the execution of the reform agenda. On top of that, 18 months after coming to office, the new government was already involved in the corruption scandal, "Anglo Leasing", concerning the purchase of an expensive passport equipment system from France.⁶ At his inaugural speech, President Kibaki stated: "Corruption will now cease to be a way of living in Kenya."⁷ The fight against corruption was at the center of his political message during the election campaign, and a year and a half later, he rendered his own message of renewal unreliable, obsolete and even redundant. This government was now perceived as being worse than Moi's, because they were as corrupt as his administration but did not have Moi's robust patronage system that was crudely inclusive. The perception was that this patronage system was now used to benefit Kibaki's people only. These events reinforced the already existing ethnic fragmentation and mutual stereotyping. In 2005, Kibaki faced a constitutional referendum that developed into a vote against the government in the ethnically fragmented context he created. Kibaki lost the referendum and reacted by dismissing his entire cabinet, including Raila Odinga, who was never reinstated, and thereby reinforced the existing clichés about Kikuyu power. In that sense, the 2005 referendum became a dress rehearsal for the 2007 elections.⁸ All of these broken promises resulted in a fundamental breakdown of the social contract in Kenya with which it still struggles today.

Second, the elections of 4 March 2013 were not freer or fairer than previous elections in Kenya. The Supreme Court was very careful in its judgment on the Presidential election petition of 2013, because it was aware of the fact that its ruling was as important as a political statement as it was in terms of jurisprudence.⁹ The Supreme Court wanted to steer away from political controversy in its first ruling of this magnitude, but also clearly stated that the problems with the electronic voting system should be investigated:

"(...) It is, indeed, likely that the acquisition process was marked by competing interests involving impropriety, or even criminality: **and we recommend that this matter be entrusted to the relevant State**

⁶ Pallister, D. Scandals cast shadow over Kenya's government, 6 July 2004 The Guardian <http://www.guardian.co.uk/world/2004/jul/06/kenya.davidpallister>

⁷ Wrong, M. 2010 It's Our Turn to Eat Harper Collins p. 5

⁸ Githongo, J. 2010 Fear and Loathing in Nairobi Foreign Affairs 4 p. 4-5

⁹ Art 177 section VI Supreme Court of Kenya Petition N°5 of 2013

agency, for further investigation and possible prosecution of suspects.”¹⁰

Because this recommendation might directly or indirectly involve the government and members of the Independent Electoral and Boundaries Commission (IEBC), it remains to be seen whether this will be followed through. Despite all the preparations, the IEBC was not equipped to bring these elections to a good end, and they knew it in advance. On 27 February, few days before the elections took place, the entire electronic voting system crashed during a test.¹¹ Because delaying the elections and getting new material was not an option, the elections were held as planned and the system went down as had happened before. This meant that the Commission was forced to go back to the manual tallying system that had failed in 2007.

The reports of bribery, flawed voter registration¹² and intimidation passed the test of the international observers, but they noted two important issues: first, this election had a very high ratio of spoiled ballots because of its complexity. The official number of rejected votes after manual tallying was 108,975.¹³ According to the Judgment of the Supreme Court of Kenya, one of the petitioners brought to light that the rejected votes were as high as 300,000 at a certain point during the elections, which made the rejected votes the 3rd virtual candidate in the race. That issue started the discussion about if and how these votes should have been factored in, which was one of the questions that had to be resolved in court.¹⁴

The second issue the international observers brought forward was the lack of voter education. Voter education was not taken seriously enough despite the efforts of the consortium of donors including The Nation Media Group, USAID and DFID, amongst others which launched a voter education campaign in September 2012.¹⁵ The IEBC, in partnership with Kenyan media, stepped up their voter education efforts only two weeks before this very complex election.¹⁶ The joint team of the Common Market for

Eastern and Southern Africa (Comesa), East African Community (EAC) and the Intergovernmental Authority for Development (IGAD) linked the two issues and stated that the confusion created at voting centers spoils the votes of many and was due to a lack of voter education.¹⁷ One of the reasons for the reluctance to spend sufficient time on voter education lies in the fact that it became a very sensitive political subject in the run up to the elections of 2002, when the voter education campaign financed by DFID was abused by politicians to bash the Moi government at the time.¹⁸

The third reason why these elections are problematic has to do with the way Kenyatta and Ruto translate their first round victory in the elections into power. The first example is the way Uhuru Kenyatta has used his Presidential power of assent in the budget discussions with regard to the financing of the counties. He pushed through the original proposal whilst ignoring the recommendations of the Senate. In reaction to the President's decision the Senate asked the advice of the Supreme Court.¹⁹ This act by the President raises questions precisely on the power and influence of his office over what is meant to be a democratically elected devolved system. The assumption being that the President and the national assembly should not exercise such control over the counties, because that goes against the spirit of the new constitution that was promulgated on the 27th of August 2010.

The goal of a democratically organised devolved system as foreseen in the Kenyan Constitution is to reinforce democratic control not reinforce the (informal) power of the President. An inherent conflict has been created between the devolution that is anchored into the new Constitution, and the preservation of the provincial administration appointed and controlled by the President. The abolishment of the provincial administration was originally foreseen in the Constitution but has been changed by law.²⁰ This structure, which was the cornerstone of colonial rule, has not been revoked in the end. As a consequence, the concentration of power remains with the President of the Republic,

¹⁰ Art 234 Supreme Court of Kenya Petition N°5 of 2013

¹¹ Egmont Institute interview with a Kenya experts in Brussels on 18 April, 30 April and 25 May 2013

¹² The voter registration and the different documents used as the register of voters had serious incongruencies as can be deduced from the cases brought before the Supreme Court. Details under section E of the judgment from p. 14 onwards.

¹³ Kenya After the Elections Crisis Group Africa Briefing 94, 15 May 2013 p. 5

¹⁴ Supreme Court of Kenya Petition N°5 of 2013 p. 10

¹⁵ Kenya's 2013 Elections Crisis Group Africa report N°197, 17 January 2013 p. 28

¹⁶ Kenya: The Process of March 4 voting explained 15 February 2013 <http://allafrica.com/stories/201302151497.html>

¹⁷ Observers cite poor voters education 6 March 2013 http://www.standardmedia.co.ke/?articleID=2000078766&story_title=Observers-cite-poor-voter-education

¹⁸ Turning the page? Kenya's post-election dynamics Africa Briefing 18 April 2013

¹⁹ Senate petitions Kenyatta's assent to Revenue Allocation Bill 13 June 2013 <http://www.nation.co.ke/News/-/1056/1881530/-/w3g6uxz/-/index.html>

President Kenyatta assents to Revenue Bill 11 June 2013 <http://www.nation.co.ke/News/politics/-/1064/1879146/-/bmbxeul/-/index.html>

²⁰ Kenya's 2013 Elections Crisis Group Africa Report N° 197, 17 January 2012 p. 5

who has a network of county commissioners at his disposal who answer only to him and are not subject to democratic control. Retaining this structure is diametrically opposed to the devolution that has been anchored into the new Constitution and confirms that the political elite is not prepared to let its grip on power slip away.

The second example of this use of power by Kenyatta and Ruto is illustrated by their double approach towards their ICC indictment. Despite the fact that they both pledged their full cooperation with the ICC, the Kenyan Ambassador to the United Nations, Macharia Kamau, submitted a petition to the UN Security Council to terminate the charges of crimes against humanity in all three cases (Kenyatta, Ruto and Sang) on 2 May 2013. On 9 May 2013, Deputy President William Ruto distanced himself from that petition, stating it was not government policy.²¹ And on Monday 13 May 2013, he flew to The Hague to ask whether his case could be postponed. As a result his case will come before the Court at the beginning of September. On 17 May President Kenyatta asked for a deferral of his case until January 2014 but that request was not granted. His case will be postponed until 12 November.²² The ICC Chief Prosecutor, Fatou Bensouda, stated that, although the Kenyan Government had complied with a number of their requests, crucial documents were still lacking, and the cumulative actions of the Kenyan government were undermining the investigation.²³ She even threatened to bring Kenya before the Security Council if the government doesn't cooperate with her office.²⁴ This example not only questions the commitment of the Kenyan government towards the ICC; more importantly it illustrates the nature of the relationship between Uhuru Kenyatta and William Ruto. Although Kenyatta is President of Kenya, Ruto is the political mastermind of the duo. Even if the evidence in the ICC case against Ruto is stronger than that against

Kenyatta, the latter will stand by Ruto, because they need one another to govern the country.²⁵

These examples illustrate that the balance of power between the office of the President, Parliament and the Senate is not (yet) a reality. The concentration of power remains with the President even within the new devolved system. The relationship between the President and Vice-President is one of mutual necessity for now but harbors a lot of potential conflict.

Formal and informal power

The discrepancy between formal and informal power in Kenya is considerable. If the continental and international community want to understand the dynamics inside and outside the election process, the drivers of informal power need to be addressed. The following enumeration of drivers of informal power, are by no means intended as an all inclusive list but as an illustration of the scope and impact.

The first driver of informal power in Kenya is a high tolerance for violence within and outside of the state. Because the government does not hold the monopoly on violence anymore, it has been diffused into a commodity. The private security armies that politicians used for their own protection and political agendas turned into gangs that are no longer controlled by those politicians. This diffusion of violence that can easily be ignited was the basis of the clashes in 2007 and 2008. The fact that the elections of 2013 were less violent does not mean that the tolerance for violence has diminished or that the gangs are gone, because no systemic attempt has been made to disband these groups. There is a fundamental lack of political leadership on how to address this proliferating violence, because politicians are either afraid of these gangs, or they have supported them in the past.²⁶

The second driver of informal power is the deliberate continuation and exploitation of weak institutions and the zero sum game politics by the political elite. Behind the new legal changes like the constitution and the creation of new formal entities like the IEBC, politicians are still mostly concerned with their own position and that of their ethnic constituency as these elections have illustrated. There is no interest in

²¹ Ruto denies bid to halt ICC trials 9 May 2013 The Daily Nation

<http://www.nation.co.ke/News/politics/Ruto-disowns-bid-to-stop-ICC-cases-/1064/1847692/-/us85v0z/-/index.html>

²² Bensouda reveals five witnesses in Uhuru case 14 June 2013 The Daily Nation <http://www.nation.co.ke/News/Bensouda-reveals-five-witnesses-in-Uhuru-case-/1056/1883326/-/rp0ldt/-/index.html>

President Kenyatta ICC trial open November 12 <http://www.nation.co.ke/News/politics/Uhuru-ICC-trial-to-open-November-12-/1064/1889158/-/12ngqoyl/-/index.html>

²³ Judges to rule on Ruto trial date 13 May 2013 The Daily Nation <http://www.nation.co.ke/News/politics/Judges-to-rule-on-Ruto-trial-date-/1064/1851724/-/116qiapz/-/index.html>

²⁴ Bensouda threatens UN action 11 June 2013

<http://www.nation.co.ke/News/Bensouda-threatens-UN-action-/1056/1879884/-/sjdkc4/-/index.html>

²⁵ Egmont Institute interview with a Kenya expert in Brussels, 25 May 2013

²⁶ Mueller, S.D. 2011 Dying to win: Elections, political violence and institutional decay *Journal of Contemporary African Studies*, 29:1 p. 106

Mueller, S.D. 2008 The Political Economy of Kenya's Crisis, *Journal of Eastern African Studies*, 2:2, 185-210

establishing viable independent institutions. The fact that the provincial administration has been remodeled over time to suit new provisions but was essentially kept in place to retain power and influence is a case in point. Ethnic clientelism remains the basis of political parties in Kenya, their programmes are only of secondary importance. The political parties are interested in access to the resources of the state in a winner-takes-all, zero sum game. The changing political alliances over the past decade are proof of that, as illustrated above with the alliance under NARC and the Jubilee Coalition.

A third driver of informal power is the use and abuse of land access as a patronage resource. Land access has been used as a political tool.²⁷ The Truth, Justice and Reconciliation (TJRC) Commission considers it as one of the most important sources for ethnic conflict in Kenya. The abuse started in colonial times, but all of the post-independence governments have not done enough to stop it. In article N° 253 of the TJRC-report's findings, the Commission even states "that the Provincial administration has pervasively and significantly perpetrated land-related injustices including forceful evictions of individuals and communities and land grabbing for personal gain, and should not at all participate in any efforts to redress land related problems in the new constitutional dispensation because of their lack of moral authority and support."²⁸

Perhaps the most important factor that drives informal power in Kenya is the (growing) inequality amongst Kenyans. The post-independence governments up until now created economic welfare for the top 25% of the country and they have done very little to compensate the growing cost of living for the rest of the population. Nonetheless the idea that if one's ethnic community is in power, there might be a chance to share in their wealth remains a very strong incentive.²⁹

Conclusion

Nobody wanted these elections to fail, but that does not mean they were a success. The year of reference to measure the progress of politics in Kenya should not be 2007 but 2002, and that result is mixed at best:

welfare for the top 25% of the country, the rest of the people didn't fare so well.

The violence during and after the Kenyan elections was contained because nobody wanted to be blamed for the consequences if violence were to break out, even if that meant that essential questions on the elections couldn't be asked. These elections were not freer or fairer than previous elections in Kenya. People just wanted peace and quiet and were willing to pay a price for that. The ICC's presence in the political debate contributed to a relatively peaceful election, but it has also been abused to steer up anti-western feelings in favour of the Jubilee Coalition. Although the national pride of the Kenyans was called upon, the ethnic politics were present as ever.

As long as the underlying drivers of conflict in the Kenyan society - high tolerance for violence; deliberate continuation and exploitation of weak institutions and the zero sum game politics by the political elite; land access as a patronage resource; and inequality - are not addressed in a long-term political process, elections will not be free let alone fair and the potential for conflict will not diminish. Patrick Gathara put it this way on his blog on 25 May 2013 in a reaction to the TJRC-report: "The colonial state was never dismantled. We simply exchanged one bunch of oppressors for another. The relationship between the powerful and the people remains one based on exploitation, not the platitudes of service we are treated to every day."

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²⁷ Boone, C. 2011 Politically Allocated Land Rights and the Geography of Electoral Violence : The Case of Kenya in the 1990s Comparative Political Studies 44: 1311

²⁸ The report of the Truth, Justice and Reconciliation Commission Volume IV p. 54 http://www.kenya-today.com/wp-content/uploads/2013/05/TJRC_report_Volume_4.pdf

²⁹ Githongo, J. 2010 Fear and Loathing in Nairobi Foreign Affairs