

## **Fait accompli: legitimizing the illegitimate in elections outcomes** *Does the legality of the electoral process matter in Kenya?*

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### **Abstract**

Credibility of the electoral process across the world is both a means and a necessity to peaceful and stable democracy as credible elections serve to anchor functional legitimate democracy. It also serves as a vehicle that affords citizens an opportunity put in place a people-responsive government that mirrors the people's will. Elections in most African states, however, have over time tended to validate evidently glaring constitutionally flawed outcomes. This trend is further aggravated by seemingly complicit and dysfunctional constitutional and electoral bodies and institutions. With a focus on the 2013 general elections in Kenya, this paper raises the question of the role of these bodies and institutions tasked with overseeing and ensuring credible electoral outcomes and their ability to live up to their expectations.

**Key words:** Constitutionalism; Elections; Legality of electoral process

### **Introduction**

Transparent, fair and credible elections serve to anchor functional legitimate democracy, hence, election ideally remains a vehicle that affords citizens an opportunity to gauge their leadership and put in place a people-responsive government through a process deprived of choice manipulation, but rather conforms to the popular will of the electorates. The credibility of the electoral process is therefore both a means and a necessity to peaceful and stable democracy; essentially, fair competitive elections remain a fodder crop to maturing democracy. The fact that credible elections lend legitimacy, citizen affection and by extension popular acceptability of the winners cannot be contested given its innate reality. However, a cursory examination of periodic and regular elections in some African countries have without guilt perpetuated the anti-thesis that elections outcomes can still be valid even if the process is largely unconstitutional. That winners can hand losers defeat through 'justified' impunity perpetuated by electoral bodies who are mandated to conduct credible elections in liaison with the institutions of redress such as the judiciary whose billing more often change to massage the needs of the 'winners' of fraudulent elections. Thus, key questions arise: Does legality of the electoral process matter in Kenya? How can 'illegitimate winners' observe constitutionalism? Are the electoral bodies and the judiciary retarding the institutionalisation of democracy in Kenya? What's the role of state and non-state actors in remedying this cropping culture of 'chosen-election winners'? in the paper, we have re-examined the political parties primaries exercises and their (il)legitimacy; and, the misgivings of Independent Electoral and Boundaries Commission aided by judiciary 'sanitising' winners. The thesis being that practices and conduct of electoral processes across these institutions were both in form and intention illegal but the resultant effects were billed as democratically sane.

### **Conceptualising significance of elections in a democracy**

The essence of elections in a democracy cannot be contested neither trivialised. The electoral process and its outcome play such significant role in supplying legitimacy<sup>1</sup> to a democracy, solving principal-agent<sup>2</sup> problems while also ensuring that the government is responsive. Symbolic legitimacy is rendered by elections when citizens are afforded a platform to choose their representatives, choose the party which they want to see at the

<sup>1</sup> Legitimacy as used in the paper extends beyond legal prudence to acceptance of the right of public officials (representatives) to hold office and promulgate policies because of the means by which they were elected.

<sup>2</sup> The electorates are deemed as principal in this write up, thus, elections are seen as mechanisms by which the electorates can hold their representatives accountable and/or keep the representatives in check.

position of power, ideally based on the policies which they want the state to adapt and follow in governance. On the hand, instrumental legitimacy is reached when elections provide pathway to punish the government or ruling party, thus, if the people are not satisfied with the performance of the government, then they can easily show them the way out in the next election. All these are ideal and real practices in functional democracy.

While the elections have been billed as significant to democracy, its frequency and regularity cannot be a measure of democracy. Indeed, UNDP (2002) contends that true democratization means more than elections; it requires the consolidation of democratic institutions and the strengthening of democratic practices, with democratic values and norms embedded in all parts of society. Put in context, the living to the ideals and demands of democratic values and principles are necessary for electoral legitimacy both in its process and outcomes. Thus, there is need for: acceptance and exercise of the laid down rules including enforceable elections laws, public faith in the electoral system, equal access to voting, accuracy in vote counting, and subsequent government being effective. As a consequence, elections should cause any democratic government to translate citizen preferences into policy.

The evolution of functional democracy largely depends on the electoral culture in which regular, credible and transparent multiparty elections are institutionalised and carried out (AGF, 2012). This would translate into elections that are not only respectful of national demand for constitutionalism but also meets the international threshold of transformative democratic practices. Koffi Annan(2013)<sup>1</sup> while examining the process of deepening democracy through elections, observes that elections without integrity are characterised by uncontrolled, unregulated and opaque political finance which compromise the equal opportunities of citizens to influence political outcomes, leading to voter apathy and distrust. This, he posits, makes elections continue to be associated with a 'winner-takes-all' approach, fuelling the potential for conflict and violence. The resultant effects of such exercises is the entrenchment of veneer of democratic legitimacy to autocratic regimes.

From the foregoing, elections define a space in a democracy when citizens are expected to evaluate regimes, sanction or reward leadership based on performance and policy. Elections not only foster leadership transformation but also provide a bridge between citizens and the state, and a mechanism for them to dialogue. Accordingly, the manner in which elections are conducted, and the integrity associated with both its process and outcomes has a direct bearing on state legitimacy.

### **The context of Kenya 2013 General elections**

On March 4, 2013, Kenyans participated in a complex election that included voting for the president and deputy president, county governors, senators, members of parliament and women representatives, Members of County Assemblies. Kenyans turned out in large numbers with over 80 percent of registered voters coming out to vote. This was the first election after the chaotic 2007 exercise. Some of the key outstanding facts and firsts in the 2013 elections include:

- First general Election under the new constitutional order and new election laws.
- First general Election covering a total of six elective positions.
- First general Election to incorporate elective affirmative action seats.
- First general Election to incorporate the use of biometric technology in registration and identification of voters.
- First general Election to be conducted beyond borders, enfranchising Kenyan Diaspora voters (though only with EAC).
- A general Election that saw the launch of devolution in Kenya.

There was a significant guarantee for women's political representation entrenched by the 2010 constitution where one-third of the seats in each County Assembly and in both Houses of Parliament taken together must be filled by women (Article 81(b)) which directly benefits article 27(8)<sup>2</sup>. The 2013 electoral environment was

<sup>1</sup> Koffi Annan, March 2013, Deepening Democracy: why elections with integrity matter.

<sup>2</sup> Article 27(8): In addition to the measures contemplated in clause (6), the State shall take legislative and other

defined by progressive (2010) constitution which not only creates lower level county governments but also reduces the powers of the presidency and establishes many independent institutions that are 'not subject to manipulation' by the executive. The most important of these in the electoral process include a reformed judiciary and the Independent Election and Boundaries Commission (IEBC).

The constitutional and institutional context presented an ideal environment for a free, fair and credible election and so were the citizens' expectations, however, as to whether this theory matched the practice remains the thesis of this paper.

### **The political parties nomination and the (il) legitimacy**

The constitution<sup>1</sup> demands that political parties nominate candidates in a free and fair elections guided by the party's nomination and elections rules. In their nomination process, political parties are required to abide by the democratic principles of good governance and promote and practice democracy through regular, fair and free elections within the party.<sup>2</sup> Section 13 of the Elections Act (2011) requires that nomination by political parties be undertaken at least 45 days before a general election and in accordance with the party's constitution and nomination rules.

In the political primaries of 2013, most of the political parties conducted nominations that were undemocratic, chaotic and literally delayed up the deadlines for nominations to manipulatively curtail party hopping (PAD, 2013)<sup>3</sup>. The exercise presented scenarios of party dictatorial tendencies through candidate preferences, non-compliance with the Elections Act (2011) and due disregard for internal party democracy in the perceived party strongholds. This party dictatorial was particularly witnessed in the nominations of the leading political parties such as Orange Democratic Movement (ODM), The National Alliance (TNA), Wiper and United Republican Party (URP). Critical to underline from the party primaries was the outright reversal of democracy in the political parties supposedly endorsed by the party leadership under the watch of IEBC. The fact that parties never had any internal impartial and/or functional dispute resolution mechanisms saw a number of disaffectionate aspirants seek redress in the courts of law, which at the time were pressured by the deadlines of elections calendar and the numerous litigants.

The major political parties opted to have their nominations as close to the deadline as possible in order to limit last-minute party-hopping. The decision to hold party nominations so close to the deadline resulted in the inability to conduct an all-inclusive nomination process that allowed for timely dispute resolution. Consequently, primary voting did not take place in a number of constituencies, and in those constituencies where voting did take place, vote counting was not completed on time. The end result saw 206 cases filed with IEBC dispute resolution committee and 47 cases in high court. The IEBC pressed for time could not handle all the disputes and the lengthy judicial processes also meant that complainants were likely to miss on the ballots. After the conclusion of the primaries, occurrences of party-hopping were still witnessed in contravention of the Elections Act and the Political Parties Act. In the same cue, Carter centre (2013) indicates that nomination processes for most parties were considered deceptive, with many cases of fraud, rigging, and outright bias being reported. Similarly, party officials were poorly trained, some of them exhibiting incompetence and tallying malpractices. Parties were also not clear on what rules to use regarding those eligible to cast a vote in the nominations, resulting in non-members voting in parties with which they had no affiliation and, in some cases, voting in multiple party nominations.

The IEBC as an oversight body displayed its less than optimal state of electoral preparedness at the party primaries. In pure breach of the law, the IEBC changed the deadlines for party nominations from January 18, 2013 to January 21<sup>st</sup>. The shift contravened the electoral law requiring all political parties to present the list of nominated candidates 45 days prior to the elections, that is, on Jan. 18 given that the elections were slated for March, 4<sup>th</sup>, 2013. As late as Feb. 8, returning officers in some constituencies were still receiving nomination papers for candidates in spite of the Jan. 18 deadline set by the IEBC operational calendar.

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measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

<sup>1</sup> CoK (2010), Art. 91 and Political Parties Act(2011), Sections 6(2)(e) and 21(1)(b)

<sup>2</sup> Art. 91(d) of the constitution and Sections 6.2.9(e) and 21.1(b) of the Political Parties Act

<sup>3</sup> PAD: Reflections on Kenya 2013 General Elections at <http://www.africanleadershipacademy.org>

It is quite clear from the foregoing that intra-party democracy, adherence to the constitutional demands including the provisions of the Elections and Political parties Acts of 2011 were never complied with at the party primaries. Even more disturbing is the fact that IEBC that was held in ‘sanctity’ as being independent exercised and exerted traits of unconstitutionality by extending deadlines in pure disregard for the provisions of the law. In essence, the political parties’ primary nomination exercises in the run up to 2013 General elections lacked legal sanity and the requisite democratic ideals adept for transformative democracy, however, for some strange culture, more specifically adoring illegalities as part of maturing democracy, the exercises were validated as effective and transparent. The very ‘death’ of democracy at inter-party levels and the violent environment in which the exercise was conducted created spheres of exclusionary politics and by extension eroded the very legitimacy of leaders arising from such exercises.

The occurrences therefore raise a number of questions:

- *Did the political parties become foci for unconstitutionality? Were political party primaries the nerve centres of ‘electoral choiceness’?*
- *Why was it easy for big parties to breach electoral laws with such impunity?*
- *How could IEBC as an oversight body abet and accept fraudulent party primaries’ nomination results and still expect citizenry trust? Was IEBC equally fraudulent?*
- *Can the opaque and non-inclusive party primaries of 2013 be deemed democratic?*
- *Did the misgivings of political parties and acts of IEBC adulterate symbolic legitimacy of the electoral process?*

### **The IEBC and its misgivings in 2013 elections**

The creation of IEBC was a welcome reprieve for Kenyans in light of the electoral mismanagement that resulted in the turbulence witnessed during the 2007 general Elections. As a constitutional commission, the exercise of its mandate and public expectation is anchored in the constitution<sup>1</sup> demanding that IEBC lives to the billing of the law of the land. While IEBC has a number of its functions spelt out clearly in the constitution, of interest to this paper is its conduct around the voter register publication, the handling of party nomination lists, and the absolute failure of BVR kit at the tallying after a massive investment in the technology.

The Elections Act (2011) requires the IEBC to compile and maintain a register of voters. The Act also requires that not later than two months before holding of general elections, the registration of voters shall cease. In preparation for 2013 elections, voter registration ended in December, 2012 and a provisional register of voters was published on December 18, 2012. Subsequently, IEBC issued a soft copy of the compiled voter register to political parties on the 18<sup>th</sup> of January 2013 largely deemed as ‘provisional register to allow the conduct of party primaries. It was not until a week to elections that the IEBC circulated advertisement in the dailies about the availability of the final register on its site, which in reality was never uploaded. In the end, the elections were conducted without an official register of voters that would be the basis of determining the eligible number of voters. This was part of the contentious issues raised by Africog in challenge the presidential outcome in 2013 at the Supreme Court. *In both lay and legal understanding, what was supposed to be ceiling in terms of number voters if the body in charge of elections (IEBC) had not published the register as required by law? Was the missing upload a technical failure or a ‘learned mischief’? What legitimacy would a provisional version of voters’ register lend to the 2013 elections? Why would a constitutional body perpetuate illegalities at such crucial election? Why this culpability circumvented by Supreme Court and referred to lower courts as if it meant little an offence?*

The provisions in the Elections Act 2012 derived from the clauses on Representation in the Constitution provide that in order to ensure disadvantaged groups do not miss out in democratic governance; political parties would present the IEBC with representative special interests lists before elections for possible proportional nominations after elections. Elections for the nominated seats in the National Assembly, Senate, and County Assembly are allocated on the

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<sup>1</sup> Article 88(5): The Commission shall exercise its powers and perform its functions in accordance with this Constitution and national legislation.

basis of proportional representation through the use of party lists. The IEBC is mandated by the Constitution to supervise the process by which party lists are formulated and ensure compliance with the law in terms of form and timelines. As a result of failure to publicise the party lists, the public was effectively denied the opportunity to demand accountability on the part of the IEBC. This resulted in over 500 cases being filed against the IEBC with the composition of party lists being disputed, a situation which laws had attempted to remedy by providing for closed lists that must be published before elections as a measure of transparency and accountability. Key issues then arise: *Why did IEBC ignore its constitutional mandate to publish the list in at least two national dailies? Why did IEBC certify the contentious lists from the parties? Was IEBC within its architecture serving the interest of parties at the expense of constitutionalism? How can a constitutional commission blatantly lead an offence against the same constitution?*

The aftermath of the elections of 2007/2008 led to a creation of several commissions. Two of these commissions included the Independent –Review commission (IREC) and the Commission of Inquiry on Post-Election Violence (CIPEV), the former which recommended the use of ICT in the management of electoral process. It was felt at the time that the electoral process was flawed and open to abuse. This was because the previous votes in Kenya have had been dogged by “ghost” voters, stuffed ballot boxes and rigging at the final tally. In the circumstances, the government spent Kshs.6,480,000,000 to procure 15,000 BVR kits. The BVR kits besides helping in voter registration, was meant to transmit the number of votes cast to a central tallying centre unlike in the past when votes were ferried manually from polling stations, increasing the chances of tampering. The use of BVR kits would ensure transparency in the tallying process.

In spite of the massive investment in the BVR kits, the system was a massive failure in its application during the election. Many polling stations reported the failure of the system to identify voters and running out of power in the early hours, thus, instrumentally, the whole issue of ghost voters was not cured by the system. Even more interesting was the failure of the system to transmit electronic tallies to Nairobi prompting a return to manual tallying which was a recipe for ‘elections rigging suspicions’ by the public. While the supreme court ruling established no breach of electoral laws in resorting to manual tallying upon failure of the BVR, some logical questions abound: *Why would a government massively invest in ineffective system? Why would IEBC term the use of BVR as complimentary rather necessary yet there were sound reasons for resorting to electronic management? Was the failure after a smooth start-up a default or design? Could the technical failure have been avoided? How do we convince the voter that resorting manual process never rekindled to very ills of 2007 elections in terms ghost voting?*

In the two institutions, political parties and the IEBC, there was outright assassination of democratic ideals, even more disturbing, a deep disaffection and distrust from the general public and/or electorates were fermented by the illegalities. While parties form the primary foci for consolidating citizenry opinions and preferences around governance, lack of integrity witnessed in the party primaries during the 2013 elections can only amount to electoral choiceness and route-causes to exclusionary political practices. The very fact that parties perpetuated unconstitutionality in disguise for their own elections rules and regulations is itself telling of democratic barrenness of Kenya political party systems. Thus, constitutionally and ideally, the party primaries were a facade marked with violence which by their own outcome do not live to the billing of legitimate elections.

Similarly, while not exhaustive, the IEBC originally trusted by Kenyans after successful 2010 constitutional referendum and subsequent by elections which were carried with precision and accuracy, became the vessel upon which electoral democracy would be sacrificed. The vigour with which it displayed its optimal state of electoral unpreparedness, the violations of its mandate and non-adherence to the rule of law constituted a democratically fluid electoral environment. It was therefore a case of a constitutional commission leading an onslaught on the very law that established architecture and mandate while pulling a surprise backing from the judiciary on technicalities rather than the substance of its faults. As to whether the partnership was a mere move to salvage or redeem the little of IEBC dignity can only be decided by the public opinion-court. It is therefore our proposition that the elections of 2013 through historic were defined by illegitimate processes, this, has in turn manifested itself in the inability of the elected leadership to live to billing of constitutionalism.

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