

The 2010 Constitution and Electoral Governance in Kenya: Prospects for the Prevention of Electoral Violence

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Abstract

Since the advent of multi-party politics in the early 1990s, Kenya has experienced a series of violent episodes characterized by loss of lives, destruction of property and internal displacement. Interestingly, these spates of violence seemed to be associated with electoral politics, particularly before or immediately after General Elections. The worst of these cycles was that witnessed in late 2007 and early 2008 in which nationwide violence led to 1,300 deaths and the internal displacement of at least 630,000 people. In February 2008, the two main contending sides- Orange Democratic Movement (ODM) and Party of National Unity (PNU) - agreed to the enactment of the National Accord and Reconciliation Act; a move that brought an end to violent hostilities among their supporters, thereby averting full-scale civil war in the country. The Accord underscored among other issues, addressing fundamental and long-term causes behind the violence, including legal and constitutional reforms. It was against this background that the country promulgated a new Constitution in August 2010. In this paper, we interrogate pertinent issues surrounding electoral governance in Kenya with specific reference to the ability of the 2010 Constitution of Kenya to secure a favourable, sustainable and institutionalized electoral governance environment in the country. At the core of the discussion is the question of whether or not electoral violence can be mitigated, prevented and effectively handled under the new constitutional dispensation.

Introduction

Kenya is a relatively mature state by chronological standards having attained independence nearly five decades ago, in 1963 from Great Britain. It generally followed the western system of managing state affairs; a republic of the commonwealth tradition and of the liberal representative democratic kind. At independence, its Constitution (the *Majimbo* Constitution) had a regional orientation but it was almost immediately amended to acquire a unitary character following Constitutional of Kenya (Amendment) Act No. 28 of 1964. These developments were mainly driven by the challenges of state formation that faced the immediate post-independence regime and its continued survival (Munene et al., 2006). Major parties were merged and the Kenyatta regime maintained a *de facto* single-party system while the Moi regime maintained a *de jure* one-party system thereafter. This trend was continued, institutionalized and sustained for 3 decades (1960s to 1980s), thereby engendering much disagreement and discontentment as far as political inclusion and exclusion as well as overall the management of public affairs was concerned. The advent of multiparty politics in 1992 broadened the political space and popular participation, but it failed to institutionalize crucial political processes and/or structures necessary for the full attainment of liberal democracy (Chege, 2007; Nzau, 2011).

Such failure is that associated with the process of selecting public office holders in elections. More often than not, the electoral process in Kenya has been largely informed by the elite and ethnically driven patronage machinations, force, blackmail and blatant crime (Okondo, 1995; Waruhiu, 1994). Unfortunately, the manifestation of this style of handling national affairs landed

the nation in a series of misfortunes that include ethnic violence, human rights abuse, mass destruction of personal and state property, mass internal displacement of populations, gross economic decline and a negative regional and international image mainly between 1992 and 2007 (Republic of Kenya, 1992; Republic of Kenya, 1999). These regrettable episodes of widespread violence seemed to take a cyclic and repetitive pattern every election year (five years apart) since 1992 but with the exception of the 2002 General Elections. It is noteworthy that although 2002 is regarded a peaceful election year, there were tensions and eviction threats in a number of instances in parts of the Rift Valley Province. Nonetheless, the 2002 General Elections marked a new beginning for the country and its relations with key allies both regionally and internationally. The popularly elected National Alliance Rainbow Coalition (NARC) government rose to power through a platform of change, transparency, accountability and rule of law. It appeared as though the country was now in the hands of an inspired and genuine political leadership (Nzau, 2011).

Under the NARC dispensation, Kenya seemed to have got back on the democratic course; her economic growth rate per annum was headed for 6 percent and domestic revenue collection seemed sufficient to cover the fiscal budget (Central Bank of Kenya, 2008: 114-117). However, barely a year or two later, dangerous cracks began to appear on the Kenyan governance landscape. A Constitutional Referendum later in the year 2005 fuelled by elitist trajectories for power, amid serious accusations of grand corruption on the part of top leaders in government appeared to kill the spirit of the 2002 ‘moment of change’ (Murunga & Nasong’o, 2007: 9-11; See also Nzau, 2011). This culminated in the December 2007 post-election violence over the disputed elections results, which opened the country’s ‘horrific closet’ elite engineered ethnic violence that led to mass deaths, rape, hatred and destruction among rural and urban impoverished populations (Republic of Kenya, 2008).

Following these events that brought the country to the brink of total civil war, a national reconciliation process was engendered under the Kenya National Dialogue and Reconciliation (KNDR) process. In this direction, the country conducted a National Referendum that ushered in a new constitutional dispensation and its subsequent promulgation in August 2010 (South Consulting, 2012). This paper critically interrogates pertinent issues surrounding electoral governance in Kenya, with specific reference to the ability of the newly promulgated Kenya (2010) Constitution to secure a favourable, sustainable and institutionalized electoral governance environment in the country. At the core of it is the question of whether or not electoral violence can be mitigated, prevented and effectively addressed under the new Kenya Constitution.

A Conceptual Framework

The Westminster model of democracy that Kenya was bequeathed by Great Britain at independence has a fairly old tradition in political philosophy. Throughout the nineteenth century, Western Europe, which is representative democracy, and is a brand of politics that operationalizes the theory of political pluralism, was seen as a mechanism through which citizens would protect themselves from the encroachments and excesses of government. This view appealed to the early liberal/pluralist thinkers whose overriding concern was to create and promote the idea of individual liberty. Political philosophers of this thought like Locke, Rousseau, Hobbes and Montesquieu were popularly known as the Social Contract Theorists (Lawson, 2006; Heywood 2002: 79). Locke particularly held that the right to representation was based on the existence of natural rights; particularly the right to life, liberty and property. To

him, there ought to be an extent to which the state can interfere with these fundamental freedoms of the individual. Protective democracy thus pointed to the centrality of the consent of the people through representation, which in modern times is operationalized through regular, open and free voting in competitive elections. In other words, it is but a limited and indirect form of democracy (Sabine, 1961).

Another strand of representative democracy is ‘developmental democracy’. It is closely related to protective democracy in the sense that it is also a form of rule that points to limited and indirect rule. The difference between representative democracy and developmental democracy is the fact that developmental democracy is more specific to questions of equality and economic well-being. In other words, its focus is beyond the individual to a concern with broader socio-economic development. On this, Rousseau contended that citizens were ‘free’ only when they participated directly and continuously in shaping the life of their community. He further pointed out in one of his writings that developmental democracy did not merely point to political equality (in the protective democracy sense), but a relatively high level of economic equality. In this direction, he posited thus ‘No citizen shall be rich enough to buy another and none so poor as to be forced to sell himself’ (See Rousseau [1762] 1913: 96; in Heywood 2002: 79). In other words, it may be argued that developmental democracy is a model of democracy that goes beyond democracy in the political sense, but rather points to social equity and general economic well-being of the governed. In this sense, elections should translate to governments that uplift the living standards of the people and their general socio-economic welfare. This tenet of democracy is almost entirely lacking in Kenya’s political cosmology. The argument here is that elections are not an end in themselves.

There seems to be a sense of insecurity associated with losing elections in Kenya (Centre for Governance and Democracy, 2004). Subsequently, the political and economic elite seem to have engrained on the people’s mind the blind belief that it is either ‘we win’ or ‘our’ [ethnic] group will be ‘out in the cold’; hence winning the election is a matter of ‘life and death’. Thus, the noble idea(s) for electing public officials is lost in a language of ‘we win by all means possible and we can’t lose’ and nothing beyond that. In fact, one may rightly observe that the rationale for elections, campaigns and voting is differently understood cross the Kenyan electorate (Republic of Kenya, 2008a). Elections and their utility in the political process actually have different meanings to Kenyans. In this context, we argue that Kenya has strived to meet the tenets of representative democracy albeit with limited success.

In any effort to construct a conceptual outlook in a discussion on ‘the constitution and prevention of electoral violence’, we are faced with a tricky and challenging question; ‘Is electoral violence not simply political violence?’ Perhaps it is least challenging to make a rational explanation for some form of political violence, as opposed to the more specific discourse on electoral violence. Hansen (2009) maintains that identifying the causes of political violence is a problematic task. To him, any attempt to ‘explain’ a phenomenon such as political violence can be subjected to the objection that attempting to establish causal connections to certain economic, social, or political realities is simply the wrong way of approaching political violence. Viewing political violence as an outcome of particular societal features easily gives way to the perception that the emergence of political violence is unavoidable. Nonetheless, the reverse position is also problematic. Mass violence is not simply irrational and unexplainable and it remains a fact that political violence

seems to occur persistently in some countries and not, or to a much smaller extent, in others. In any case, some scepticism is justified whenever studies pursue the 'explanation' or 'identification of causes' of such a phenomenon.

Hansen (2009) further contends that more often than not (and especially in developing political systems) support and resistance to political leaders is conditioned by several factors; the most outstanding being ethnic orientation. Subsequently when forming governments, power holders reward certain individuals whom they consider to be the 'authentic' representatives of supportive ethnic groups with power, money, jobs and all the niceties of being regime insiders, while marginalising or excluding individuals belonging to ethnic groups associated with political opponents. This way, gaining political office is seen as 'a struggle for survival'; if power is obtained, the perception is that access to scarce resources is ensured and if not, marginalisation and exclusion is reckoned to follow. Hence, when 'your person' takes over power, this translates to power, jobs, land and entitlements.

The African post-independence experience has demonstrated that this state of affairs has led to a situation in which the acquisition of presidential power is perceived both by politicians and the publics they represent, as a zero sum game in which losing is seen as hugely costly and is not accepted. Yet, this perception either by the many who regard themselves as insiders or the few who feel excluded and/or vice versa is a gross miscalculation of political gain and a miscarriage of the ethos of modern statehood. In the real sense in fact, only a handful of regime elite who in many cases do not really care about the masses the purport to represent in grand ethnic, religious or region patronage schemes are the ultimate beneficiaries (discussed variously by Chazan, 1999; Shraeder, 2004; Ndulo, 2006). In this way, electoral violence (which is a form of political violence) in Kenya may pass to be a manifestation of (fundamental) root-causes that are deeply embedded in Kenyan society. Nyawalo et al. (2011) for instance hold that the causes of conflicts during elections revolve around poor governance, unemployment and poverty. Weak governance and leadership is evident in the centralization of power and control of public resources and decision making in the public institution of the presidency across all the political regimes. More proximate factors also account for electoral violence. UNDP (2009) for example, argues that party politics driven by tribe, personalities, male domination and money increases propensity for the triggering of violence during election times.

However, some studies reveal that in cases where dictatorships have used elections as mere rubber-stamps for cling-on to power, a reaction to such elections may precipitate the [incumbent] regime breakdown and enhance the possibility of democratic transformation. This may be achieved through actions outside of the electoral arena, if opposition parties successfully mobilize voters to protest stolen elections (Bunce & Wolchik, 2006; Beissinger, 2007). To these scholars, an informed reaction to stolen elections can lead to revolutionary outcomes (Thompson & Kuntz 2004: 162; Gandhi & Lust-Okar 2009: 415). This explains what ODM termed 'mass action' in reaction to the declaration of PNU's Mwai Kibaki as the winner in the presidential race on December 30th 2007 and consequently sworn-in at dusk the same day. Yet the aftermath of it all brought to the fore, the stark realities of the thin line separating genuinely informed protest on one hand; and destructive and criminal acts ranging from looting, arson, and rape to crimes against humanity on the other.

Subsequently, we argue that the 2007 General Elections in Kenya demonstrated that immediate causes of the violence that followed could strongly be associated with what over the years appeared to be seemingly simple. In reality however, these were extremely important procedural and circumstantial issues that are perhaps quite remotely related to the so called ‘deep-seated historical issues and/or injustices’. This points to the lack of consciousness and a calculated unwillingness to have in place a well institutionalized and constitutionally anchored process of counting and tallying of votes and reporting of electoral outcomes. True enough, the actual voting exercise on December 27th 2007 was largely peaceful throughout the country. As such, the violence that ensued following the announcement of the presidential results was indeed to a large extent the product of the lack of the conscious and calculated unwillingness on the part of a section of Kenya’s ruling elite to have in place a well institutionalized and constitutionally anchored process of counting and tallying of votes and reporting outcomes. This state of affairs hence became manifest in the confusion associated with the real or imagined perception among Kenyans that the electoral outcome was not a true representation of the popular will. Pursuant to this line of thought, it is well possible to interrogate the nature and dynamics of the electoral governance *problematique* in Kenya with specific reference to the 2010 Constitution. Nonetheless, the next grand question would be; to what extent can a constitution mitigate and prevent electoral violence? If it can, why did 2007 post-election violence occur? Subsequently, how can the post-2010 constitutional dispensation in Kenya prevent a recurrence of the 2007 scenario?

At this level, it appears quite problematic to reach a consensus as far as an express theoretical standpoint that would account for a clear causal and/or relational mechanism between constitutions and electoral governance is concerned. A strong line of argument that would solve such a puzzle lay in the answer to the question: Have ‘questionable’ or mishandled elections been conducted and the outcome announced without recourse to violence among aggrieved parties? The answer would be ‘yes’ but exceptionally and rarely so. The obvious ‘no’ part of this answer is most easily supported by the ‘rich’ theatre of post-election violence in Africa; for instance in Ghana, Cote d’Ivoire, Nigeria, Kenya, Uganda, Democratic Republic of Congo and Zimbabwe just to mention a few (Bekoe, 2010).

For starters, where has the ‘Yes’ occurred and how can it be explained? The 2000 Presidential Election in the United States comes to mind. And although in the strict sense espoused by seminal works on democratization and political development (Duverger, 1954; Huntington, 1968; Almond & Verba, 1963), it is discouraged to compare a mature democracy such as the US and ‘[African] non-democracies’. In a nutshell, the two contestants; Democratic Party’s Al Gore and Republican Party’s George W. Bush were involved in a very tight race to the point that one vote (that of Florida State) at the Electoral College level was supposed to make the difference between Bush’s 271 and Al Gore’s 266 in meeting the minimum 270 Electoral College Votes required to win the Presidential Race. According to Al Gore, the Florida electoral vote, which was not well handled, had given Bush the undue advantage. It is noteworthy that these events were taking place at the very final and extremely critical moments of the election. The ultimate decision was made by the United States Supreme Court, which overruled the decision of a subordinate/state court (the Florida Supreme Court) and while acknowledging that based on different interpretations of how the votes were counted and reported in Florida, any of the two presidential candidates would have won. It ruled in favour of George W. Bush, making him the

43rd President of the United States. There was no post-election violence in the US despite deep-seated grievances that surrounded that election and the court decision that ultimately put the matter to rest. 309 million Americans were bound by this decision, and in principal had accepted this verdict (Abramson et al., 2002).

In accounting for these ‘No’ and ‘Yes’ parts of the answer, we propose the theoretical argument enshrined in the concept of [national] sovereignty. Though ‘sovereignty’ is a contested concept in political philosophy (while some scholars regard it to be a purely legal concept, others think it is a purely political concept), the practice of modern representative democracy has shown that the nationwide acceptance of a decision such as that of the Supreme Court in the 2000 Presidential Elections in the United States lay in ‘what most the people regard to be the ultimate sovereign’ (Sabine, 1961; Lipset, 2001; Cohen, 2001). The ultimate sovereign in the United States for instance, is the Constitution, which lays out the best possible channels of its own interpretation; the sole and most highly regarded, revered and respected institution on the land being the United States Supreme Court that is the highest and ultimate interpreter of the US Constitution.

We strongly contend (for purposes of this discussion) that the key to this puzzle lay in what most of the people within a political system regard to be the ‘highest sovereign’ in the state and the degree of support they accord such a sovereign as part of their national political culture. If the words of the ODM at the height of the post-election violence are anything to go by; that ‘we cannot take this case to court because we have no confidence in the local justice system’, then it is well possible that overhauling the constitution, legitimizing it through a nationwide and transparent referendum process and upholding its letter and spirit by should provide the most favourable environment better electoral governance. This can be done by first enacting laws as laid down by it (as Kenya did with the 2010 Constitution), and secondly, by establishing institutions as stipulated therein (such as the establishment of a new governing environment of the judicial system). In this way, in the event that ‘electoral controversies emerge, though in exceptionally rare circumstances since credible electoral laws and institutions are already in place, then post-election violence need not occur (Powel, 2000). The last ingredient to this recipe than could be: where is the mature and favourable environment that should make these institutions work? Where is the ‘supporting’ national political/electoral culture to mid-wife proper electoral governance under a widely accepted constitution? Before examining the Constitution itself, this part of the question needs to be analyzed at length.

A Background of Kenya’s Electoral Environment

Kenya’s post-independence experience reveals that more often than not, electoral processes have been riddled with tensions, conflicts and acts of violence (Ogot & Ochieng, 1995; Ochieng, 1998). It must not be forgotten that this trend has increasingly grown manifest itself in other forms of electoral processes such as those conducted locally for varying purposes by Farmers’ Cooperatives such as *Mboi-Kamiti* in Kiambu, or local football clubs and sports associations such as Kenya Football Federation (KFF) among others. These have from time to time been marred by violence, bribery and blackmail; a phenomenon that sadly mirrors the national electoral scene. We argue that the problem of violence during national general elections in Kenya is a culmination and incremental manifestation of decades of aberrations on the part of the political, legal and administrative actors that are charged with the responsibility of overseeing

democratic representation and electoral processes. Over time and more so in the past two decades, the integrity of the electoral system and the general conduct of actual elections (including party elections and pre-polls preliminaries and nominations) seem to lack a concrete set of institutionalizing principles.

Over the years, the Constitution was watered down with amendments that only spelt doom on electoral governance in Kenya (Constitution of Kenya [Amendment] Act No. 5 1969; Constitution of Kenya [Amendment] Act No. 1 1975; 1982 Constitution of Kenya [Amendment] Act No. 7 1982; Constitution of Kenya [Amendment] Act No. 6 1986; and, Constitution Amendment No. 14 1986). Between 1963 and 1991, the Constitution of Kenya was amended 24 times mainly to ensure regime sustenance and survival. The Constitution of Kenya (Amendment) Act of 1969 vested the duty of appointing members of the Electoral Commission of Kenya on the President; while the Constitution of Kenya (Amendment) Act No. 1 1975 allowed the president to overturn decisions of an Elections Court (See also Munene et al., 2006).

Starting 1992, the electoral environment was increasingly punctuated by threats, harassments and violent clashes that led to the loss of lives and internal displacement. The 1997 General Elections were preceded by the ‘infamous’ tribal clashes. Six months prior to the General Elections, KANU party activists allegedly organized armed gangs who attacked ‘non-native ethnic groups’ at the Coast Province, causing the deaths of more than 100 people and leading to the displacement of more than 100,000 people (KHRC, 2010). From time to time, between 1992 and 2002 in the Rift Valley Province, acts of politically instigated violence occurred particularly in areas where parliamentary contestants from those communities who purportedly supported the opposition had won over those from communities that supported the then ruling party; Kenya African National Union (KANU). Reports from human rights organisations indicated that this violence was endorsed and supported by political leaders while no meaningful action on the part of law enforcement establishments such as the Kenya Police was taken to halt the violence (Kenya Thabiti Taskforce, 2009).

Despite a history of electoral violence, the post-election violence of late 2007 and early 2008, (because of its relationship to the contested election results and its speed and scale) seemingly came as a surprise and shock for many Kenyans and the outside world. The violence erupted even before President Kibaki was declared winner (this could have been triggered by the delayed counting, tallying and reporting of cast votes) and increased in scale following the announcement. It was in the Rift Valley, in particular around Eldoret, Wareng District that violence first erupted. This violence took strong ethnic dimensions between Raila Odinga’s supporters from the Kalenjin ethnic group and supporters of Kibaki, who were mostly from the Kikuyu ethnic group among others (Klopp et al., 2010).

It is noteworthy that the 1992 and 1997 violence took place within the election years but mostly before the actual time of the General Elections. In fact, the 1992 violence was not a reaction to any election results. It was mainly a move to forestall the possibility of the opposition winning in the December Polls. To such an extent therefore, the 1992 violence revolved around electoral issues but at a different chronological setting. The same applied to the 1997 violence that took place in parts of the Rift Valley and the Coast Province. The outstanding character of these election-related spates of violence was that they broke out just a few months before the actual General Elections. Perhaps the election results did not necessitate or provide ripe moments for

further violence. After all, the incumbent KANU regime easily defeated a largely divided opposition thereby maintaining the status quo and securing its grip on power (Wanyande et al., 2007).

These earlier waves of electoral violence were different (though not radically so) from the 2007 scenario in the sense that the latter was a typical post-election violence scenario. In fact, this violence did not in any way have to do with the actual casting of votes as already discussed. However, in the 2007 general elections, there seemed to be a regrettably serious disconnect between the casting of votes, the tallying of votes at the constituency level and the final counting and/or tallying of votes at the national level. Subsequently, these elections represented one of the most seriously flawed systems in the management of electoral information (and public information for that matter) in post-independence Africa (South Consulting, 2009). Generally, Kenya failed the test of a favourable electoral governance environment. But how did this poor electoral governance national culture emerge despite there being a constitution and laws anyway?

While such an explanation may be dismissed as trivial and simplistic; it is imperative to re-visit how this violence actually occurred. For violence to take the nature and magnitude that the 2007 post-election violence did, there ought to be some fundamental/requisite prevailing conditions necessitating such an event. Some pertinent questions come to mind. First, has such violence taken place before? The answer is yes. It follows therefore that the many actors involved in electoral violence in Kenya have learnt and perfected such violent tendencies and tactics through repeated and familiar experiences. It is possible to argue that in a remote sense, the events of 1992 and 1997 did inform the 2007 post-election violence. Second, who plans such violence? Who executes it and why? In answering these questions, one ought to be prudent that it is not always the case that violence occurs because it is planned. In fact, many such violent events happen spontaneously. Nonetheless, such violence can begin in a spontaneous fashion but soon acquire an organized and well orchestrated character as it gains momentum.

It follows therefore that electoral violence in many cases is a well orchestrated and organized process that calls for human and material resources in terms of planning and/or coordinating. Such processes mostly involve public office contenders and groups they represent getting into violent confrontations aimed at influencing election outcomes or reacting to the outcome of such elections. The foot soldiers in such violence are mostly able-bodied persons (mostly young adults) who invariably unleash terror on their adversaries. Why then all this violence? It is assumed that such violence is the best medium in taking revenge on political adversaries and to send a deterrent message that a certain person (or group of persons) is aggrieved or agitated by the elections outcome or wishes to influence such an outcome in his/her favour. One underlying character of the youths who are lured into carrying out such violent activities is that they are mostly poverty-stricken and gullible individuals who by virtue of their low socio-economic status and narrow worldview can do anything for money or misdirected incitement. Thus, structural factors such as poverty, destitution, illiteracy and general social vulnerability are real among the majority of Kenyans. They are more often than not moribund until such contentious situations and/or events as disputed election results ignite their more overt manifestation; violence.

In this way, unemployment, ignorance and general socio-economic vulnerability makes the youth easy prey to gangs, vigilante groups and organized criminal syndicates which easily acquire a manifest character during election campaigns and the entire electioneering period. In this direction, the 2007 general election outcome was a more of a manifestation of a moribund conflict situation that was only lying in wait for the ripe moment to trigger its more manifest setting, which is widespread violence. According to the UNDP (2009), many structural problems and challenges persisted since colonial times to the present. The following have singularly or collectively inhibited past elections in Kenya: Land ownership; scarcity of water and pastures for pastoral communities; corruption; economic marginalization of certain minority groups; socio-economic deprivation and inequalities; the formation of political parties along ethnic lines and subsequent zoning of populations in this light; lack of institutional capacity to manage political and social conflicts effectively; and general impunity among the political class.

The next question would then be to interrogate why the violence of such magnitudes, and yet there was the Constitution and the laws that give it operational character? Were such laws well enforced? Generally, the high incidence of violence in elections has been blamed on lack of strong mechanisms to mitigate election-related conflicts. Previously, the now disbanded Electoral Commission of Kenya (ECK) formed constituency-based Peace Committees to help engender transparent, free and fair elections. However, the role of these committees lacked focus on preventing conflicts. Apparently, the ECK did not provide proper guidelines on how the Peace Committees were expected to deal with conflicts and how best to identify early warnings on impending election-related conflicts. The lack of effective, proactive and coherent violence prevention policies and programmes led by the state at national and local levels effectively contributed to the recurrent cycles of election-related violence (Owiti, 2008: 40-55).

Further, the Electoral Code of Conduct Enforcement Committee and the Mediation and Liaison consultative meetings that the ECK relied on to manage election related conflicts were ineffective, especially when dealing with violations of the electoral code of conduct. Subsequently, only a meagre monetary fine was meted out to offenders in the campaign period. However, many blatant violations of the electoral code of conduct went unpunished, thereby reinforcing a culture of impunity. A weak electoral system and poor management of the electoral process has therefore been blamed for paving the way for the establishment of corrupt legislatures. Corruption in elections is manifest through denial of national identity cards to some communities, vote buying through handouts and money, vote rigging, manipulation of voters' registers, harassment of voters and blackmail in vote counting (see also Republic of Kenya, 2008; Owiti, 2008).

In many ways therefore, the pre-2010 constitutional dispensation had several weaknesses in the sense that it created a weak institutional framework for the management of elections and the vindication of electoral grievances. Most outstandingly, the Chief Executive (the President, be it Kenyatta, Moi or Kibaki) seemed to enjoy a lot of latitude in the appointment of Commissioners to the defunct Electoral Commission of Kenya (ECK), top judicial officials, as well as other Constitutional Office holders. In fact between 1997 and 2002, despite the reforms made under the Inter-Party Parliamentary Group (IPPG) talks, the composition and appointment of the commissioners in the ECK was largely the product of political bargaining and/or machinations; one in which the overarching powers of the Chief Executive over the composition of the ECK

remained largely intact. This state of things, which remained uncorrected, strongly undermined the performance of the Commission in the 2007 national polls. Given this state of affairs, it appears that the constitutional provisions and legislative mechanisms that oversaw the management of Elections in Kenya could not guarantee impartiality and professionalism in the handling of electoral affairs in the country (See also Owiti, 2008: 40-55). As such, the pre-2010 constitutional dispensation in Kenya appears to have had serious loopholes that engendered electoral impunity, hence the post-election violence of late 2007 and early 2008. But before passing a blanket judgment on the constitutional and legal environment before 2010, it is crucial at this juncture to examine exactly what the new dispensation has to offer (see also South Consulting, 2009).

The Constitution of Kenya, 2010

Section 86 of the 2010 Constitution of Kenya (Republic of Kenya, 2010a) declares that: At every election, the Independent Electoral and Boundaries Commission shall ensure that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent. It also declares that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials. Further, section 87 prescribes that Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes. The Constitution therefore lays down the foundation for the conduct of credible elections right from the voting exercise, counting, and tallying, right up to the reporting of election outcomes. However, the Constitution lays down the parameters and Parliament legislates. In this light, Parliament legislated ‘The Elections Act of 2011’ (Republic of Kenya, 2010b). The 2010 Constitution also established the Independent Electoral and Boundaries Commission (IEBC), whose members were publicly and openly interviewed and finally vetted by Parliament before taking up the public office (South Consulting, 2012).

Most important in a discussion of ‘Implications for the Prevention of Electoral Violence’ is sections 56 to 68 of the Elections Act of 2011, which are dedicated to the mitigation of electoral violence among other election related actions, inactions or omissions. By all standards, the Act is very elaborate and firm on these issues (South Consulting, 2012). Section 56 particularly protects the sanctity of election materials. It declares thus that:

A person who without authority makes, prepares, prints or is in possession of a document or paper purporting to be a register of voters; without authority makes, prepares or prints a document or paper purporting to be a voter’s card; not being a person authorised to be in possession of a voter’s card bearing the name of another person or which has not been written in the name of any person, has such voter’s card in his possession; without authority supplies a voter’s card to any person; without authority destroys, damages, defaces or makes any alteration on a voter’s card; sells or offers for sale a voter’s card to any person or purchases or offers to purchase a voter’s card from any person; knowingly makes any false statement on, or in connection with any application to be registered in any register of voters; or aids, abets, counsels or procures the commission of or attempts to commit any of the offences referred to in paragraphs to, commits an offence and is liable on conviction, to a fine not exceeding one million shillings and to imprisonment for a term not exceeding six years or to both.

Further, Section 57 declares a penalty of not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year or to both for double registration as a voter. Similarly, Section 58 guards against forgery, counterfeit, defacing or destroying ballot papers as well as the official perforation, stamp or mark on any ballot paper. Also, any unauthorized handling, opening possession, printing, manufacture, supply, sale, purchase of ballot papers and ballot boxes, official stamps and marks attracts a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or both. Section 59 is equally dedicated to one of the greatest immediate trigger of the 2007 post-election violence. It talks about electoral officials involved in blackmail and falsification of electoral information. It expressly prohibits IEBC officials from adversely abrogating the formal declaration of election results (see also Ongoya & Otieno 2012: 42-67). It declares thus that:

[Any official of the Commission] who without reasonable cause does or omits to do anything in breach of his official duty; colludes with any political party or candidate for purposes of giving an undue advantage to the political party or candidate; wilfully contravenes the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful considerations; or fails to prevent or report to the Commission and any other relevant authority, the commission of an electoral malpractice or offence committed under this Act, commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

Additionally, Section 60 further lays out the rules governing the conduct of IEBC officials. It posits thus that:

Every elections officer, candidate or agent authorised to take part in any proceedings relating to the issue or receipt of ballot papers or to attend at a polling station or at the counting of the votes shall, before so attending, make an oath of secrecy prescribed in the Third Schedule. Every officer, candidate or agent in attendance at a polling station shall: maintain and aid in maintaining the secrecy of the ballot; and not communicate, except for a purpose authorised by law before the poll is closed, any information as to the name or number on the register of voters, of any voter who has or has not applied for a ballot paper or voted at that station or as to the official mark.

Sections 62, 63, 64, 65 through to 68 of the Act point to issues of voter bribery, intimidation of voters and other forms of electoral corruption especially on the part of candidates and party agents (see also Ongoya and Otieno 2012, 42-67). Section 62 thus declares that:

A candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting undertakes or promises to reward a voter.....pays, undertakes or promises to pay.....any voter, giving or providing any food, drinks refreshment or provision of any money, commits the offence of treating.”

It further declares that:

A voter who accepts or takes any food, drink, refreshment, provision, any money or ticket, or adopts other means or devices to enable the procuring of food, drink, refreshment or provision knowing that it is intended to influence them commits the offence of treating.

Even more importantly, section 63 provides that:

A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, intimidation, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of, or on account of: inducing or compelling a person to vote or not to vote for a particular candidate or political party [etc] at an election commits the offence of undue influence.

It also states that:

A person who directly or indirectly by duress or intimidation: impedes, prevents or threatens to impede or prevent a voter from voting; or in any manner influences the result of an election, commits an offence; and, a person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election: to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or to display the ballot paper on which the voter has marked his vote, commits an offence.

From the foregoing, the Election Act of 2011 represents a firm, decisive and well informed piece of legislation as far as preventing and punishing electoral violence is concerned. Sections 64 through to 68 actually prescribe high fines and jail terms ranging from at least 100,000 KES to higher fines of 500,000 KES and 1 Million KES. Though the fines look seemingly high, this may not be enough. True enough, the 2010 Constitution and its attendant legislation; the Elections Act, 2011, have laid down truly firm and highly punitive measures towards preventing and punishing electoral violence among other offences. But it is also true that documents in themselves neither act nor talk. They can only be implemented and turned into living documents by the people whom they serve. Subsequently, a peaceful election in March 2013 is no option for Kenya. Kenya promulgated a new Constitution, and so they can only affirm, protect and obey laws and institutions emanating from it (Kennedy & Bieniek, 2010; Oloo, 2012).

We therefore hold that at the end of the day, these are ‘only laws’ and the most a good constitution can do is to lay out a foolproof environment that would guarantee a well governed electoral environment. Armed with this setting, it is the duty of all Kenyans to be conscious of these realities. The assumption made is that by promulgating a new constitution, the Kenyan people are conscious of these facts. It follows therefore, that the institutional environment that oversees the conduct of national elections [by virtue of having been established under the confines of the same constitution] should be able to impartially conduct, oversee and deliver the vote without consciously doing anything that would abrogate the people’s mandate under the laws governing them as well as the letter and spirit of the Constitution. In this way, any aggrieved party (or parties) at any level of the electoral process will seek recourse in the judicial institutions, which have been established and/or reconstituted under the same 2010 Constitution (Kennedy & Bieniek, 2010; Bekoe, 2010).

With such machinery in place, electoral violence of the scale of the 1992-2007/08 periods would be prevented. While the potential to actualize such a goal is imminent in the post-2010 constitutional dispensation, we acknowledge that building a strong and mature political culture that may actualize these ideals in a society exhibiting strong signs of ungovernability, seems an uphill task. Mass poverty, unemployment and gross inequality, poorly funded public institutions

and irresponsible leadership do not make help to make it easy either. The latter half of 2012 witnessed the killings of 47 Police Officers by armed bandits in Baragoi, Samburu District; communal violence in Tana River District which claimed over 100 lives; a heightened state of insecurity in the face of organized criminal gangs and vigilantes such as the *Mungiki* in parts of Central Province; and the unresolved plight of hundreds of Internally Displaced Persons (IDPs) in transit camps, all seemed to paint a grim picture for the concluded 2013 General Elections.

Conclusion

While the pre-2010 constitutional dispensation exhibited many fundamental flaws especially the inability to secure impartiality, transparency and accountability in electoral governance, it is also true that constitutions do not operate in a vacuum. True enough, we conclude that the political culture of a state is crucial to the success of such a dispensation. Important triggers of electoral violence such as electoral misconduct and crime by election officials, general intolerance by the Kenyan electorate, political posturing by candidates, incitement, intimidation and manipulation, disenfranchisement, undue use of state resources by incumbent public office holders can and must all be avoided as part of national culture. This would uphold the spirit of the Constitution and the laws and institutions that emanate from it which would include the new Judiciary and the Independent Electoral and Boundaries Commission (IEBC). Engendering such a culture cannot be left to the Kenya Police Service. Of course, the IEBC and all other political and civic actors in the country must actively conduct civic education aimed at enhancing the state of electoral governance. In this direction, the participation and will of public actors and/or institutions including political parties, civil society agencies; the academia and key government ministries in this discourse is most imperative. The post-2010 Constitutional dispensation in Kenya provides the best environment for mitigating and preventing post-election violence. However, the Constitution cannot ‘implement itself’ in the literal sense. This is the core argument of this paper.

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