

Kenya Decides: The Electoral Commission and Stability in the 2017 Presidential Election

Interference by political interests in the affairs of Kenya's electoral management system poses the greatest threat to the August 8, 2017 election. The government is said to use subtle ways rather than overt direct measures to gain influence in the Independent Electoral and Boundaries Commission. On its part, Kenya's opposition has seemingly reverted to the strategy of discrediting the electoral body as corrupt, dysfunctional and incapable of running credible election in 2017, widely seen as aimed at creating grounds to reject results and force power-sharing deal with the winner. It has proposed that Commissioners of the electoral body be chosen by the political parties contrary to the constitution which prevents them from being members or appointees of a political party. Kenya should continue to anchor its nascent democratic institutions like IEBC in law. The country should also consider staggering the appointment of Commissioners to ensure that the entire body can never expire. The political class should cease to meddle in the processes of the electoral management body.

Indisputably, the independence of Election Management Bodies (EMB) from interference by competing political interests is the hallmark of a true democratic order and the best guarantee for post-election stability. Meddling in the affairs of electoral bodies can spell doom to a democracy, and remains the surest way to plunge a country into anarchy and chaos. Indeed, history has shown that anchoring these institutions in law rather than in short-lived political deals is the safest path to democratic consolidation and post-election stability.

Yet, the desire by governments and oppositions to influence the running of election bodies is commonplace, even in advanced democracies. Sitting governments have used subtle means rather than overt direct action to wield influence in election management bodies.

Inversely, the strategy of choice by opposition parties in Africa's emerging democracies is to discredit electoral bodies as corrupt, dysfunctional and compromised brokers unable to run a credible presidential election. The ensuring mistrust of these pivotal institutions has created fertile grounds for election losers to reject results and force power-sharing models of government as a solution to otherwise mundane post-election disputes.

In the light of this, Kenya's post-election violence in 2007/08 is often cited as a smoking gun proof of how political interference in an election management system can plunge a country into mayhem. Therefore, a recent sharp spotlight on the Independent Election and Boundaries Commission (IEBC) is rekindling the fears of the 2008 mayhem and demanding rational

solutions.

The renewed spotlight on IEBC has focused on three areas. First is the funding status of the body to be able to conduct credible elections. On February 10, 2016, during a meeting with the European Union's pre-election mission yesterday, opposition leaders claimed that financial constraints facing IEBC could undermine the credibility of next year's polls. However, the commission has reported that it is in talks with Parliament and the National Treasury to secure timely funding to prepare well for the 2017 General Elections. Recently, the European Union has provided Sh560 million expected to boost voter registration.

Second, CORD has renewed its corruption allegations against the IEBC, calling for bold steps to be taken “to restore the electoral body's credibility” and warning of “an unpredictable 2017 process” if action is not taken.

Third, and the newest, on February 11, 2016, Cord sensationally claimed that Jubilee was planning to break IEBC. This followed a rather intriguing advice last month by the Chairman of the Office of the Judiciary Ombudsperson (OJO), Otiende Amollo, to the IEBC commissioners to allow a new team to conduct the 2017 elections. Mr. Amollo argued that the expiry of the IEBC's term conflicts with the election cycle and this may plunge the country into a constitutional crisis.

With the election scheduled for August 8, 2017, exactly three months before the expiry of the six-year tenure of the IEBC commissioners on November 9 next year, there is more than enough time for the Commission to complete the election cycle—including a petition and a run-off, if that became necessary.

It may never become clear why the Ombudsman decided to issue the manifestly alarmist warning of a looming constitutional crisis. But perhaps a positive lesson from this is that in future we need to ensure that the Commissioners are staggered to avoid the uncertainty of expiry of the whole body.

For example, although each of the Commissioners in America's Federal Election Commission (FEC) serves for a six-year term, two seats are subject to appointment every year, ensuring that the entire body can never expire.

But Mr. Amollo's advice has put the country on a frenzied debate on how to reconstitute the “new commission” and “make it credible”.

In the ensuing soliloquy involving Cord and allied civil society stalwarts, the opposition has proposed that Commissioners of the IEBC should be chosen by the political parties in order of their numerical strength in Parliament. This would allow all the parties to nominate a person to serve on the commission.

Cord's proposal carries the eerie echoes from the 1997 election's Inter-Party Parliamentary Group (IPPG) political deal on "Minimum Reforms" where KANU and opposition parties agreed that parties in parliament would each nominate a person to serve on the now-defunct Electoral Commission of Kenya (ECK).

This was a political strategy to whittle down President Daniel Arap Moi's influence in the appointment of ECK commissioners with no legal safeguards to ensure that ECK was not exposed to future accusations of political meddling.

The IPPG deal on ECK expired before the 2007 General Election, but its legacy lived on to haunt our nation's stability and survival.

As the adage goes, old habits die hard. Ahead of the 2007 election, ODM pushed for the IPPG-style political deal enabling it to appoint some of the Commissioners to the ECK. In line with the law, Kibaki appointed ECK Commissioners. And the country went to the election in an atmosphere heavily poisoned by mistrust of institutions.

In rejecting the 2007 presidential vote, ODM made two inter-related arguments. One, the ECK "stole the election for Kibaki" because he "single-handedly picked" its commissioners. Two, the courts were not suitable to arbitrate the dispute over the presidential vote because, like the ECK, Kibaki has handpicked the Court judges.

In crafting the 2010 constitution, we took to heart the hard lesson of Kenya's failure in the past to entrench democratic institutions in law. We entrenched the IEBC in our constitution and laws. By law, Commissioners cannot be members or appointees of a political party!

While Kenya's democracy, as elsewhere, is imperfect, and is, indeed, still work in progress, its future lies in continued anchoring of our democratic institutions like IEBC in law and not in wheeler-dealer solutions by elements of our political class.

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