

## Peace at the Expense of Justice is Always Fragile

In the aftermath of election violence, there are always difficult choices. Restoring peace is the first priority and an important short-term goal. But when the underlying reasons for the violence are not addressed and justice is repeatedly sacrificed in the name of keeping quiet, the prospects for long-term stability and successful reconciliation are bleak. The longer this goes on, the harder it is to restore trust in a country's institutions and perceptions that the election process is fair. Trust in institutions and faith in the electoral process are entirely based on perception, but are key to democratic legitimacy. Without them, we have impunity by governing regimes, creeping authoritarianism, festering tensions, and increasing support for non-democratic means for effecting change. This scenario has resulted in authoritarian retrenchment and protracted crises in a number of countries in Africa and is at the heart of Kenya's current election impasse.

In 2007, when the current opposition leader Raila Odinga faced Mwai Kibaki, the election was marred with extensive and blatant vote rigging. Most observers agree that Raila won, yet Kibaki was sworn in, sparking widespread protests and violence leaving over 1000 dead and more than 600 000 displaced. An international mediation effort resulted in a broad coalition government and a new devolved constitution intended to relieve the 'winner takes all' pressure from the presidential race. But Kibaki was allowed to serve his full term as president and no one was prosecuted or sentenced for the massive election irregularities that took place. Raila's supporters were told to settle and keep quiet in the name of peace and unity.

In 2013, when Raila faced Uhuru Kenyatta - an ethnic Kikuyu like Kibaki - there were serious problems with the new electronic system put in place to protect the vote. This, together with inflated vote totals in Kikuyu majority areas led observers to again seriously question Uhuru's narrow victory. Raila contested the result in the Supreme Court, but the Court upheld Uhuru's victory. For fear of repeating the 2007 post-election violence, no serious investigation of vote rigging took place in 2013 and justice was not served then either. Anyone questioning the country's institutions or the electoral process was portrayed as a threat to peace, an opportunist, or a tribalist. This fed perceptions among Raila's Luo community that the system is rigged against them, that the election process can never be free and fair, and that no change can be made through the ballot box.

Fast-forward to this month's hotly contested election. Since the incumbent Uhuru Kenyatta was declared winner two weeks ago, security forces have shot and killed protesters in opposition strongholds and assaulted people in their homes. The regime attempted to shut down the Kenya Human Rights Commission and the African Center for Open Governance (AFRICOG) – the two leading human rights watchdogs in the country, which have been very critical of the government and the electoral process. For a government supposedly re-elected with a comfortable margin of 54%, they have certainly not acted like it. This has only fueled suspicion of yet another flawed election.

Some blame lies with the international community as well: when foreign observers prematurely pronounced the election "free and fair" and urged Raila to concede, this further emboldened the government to move to silence dissenting voices. Viewing Kenya as always teetering on the brink of tribal clashes has not helped matters either: it has fed the narrative that the country is in a permanent state of crisis and all is justified in the name of peace and stability. This also applies to Africa more

generally: news only focusing on violence and instability give authoritarian rulers an excuse to crack down on critics and often creates a self-fulfilling prophecy ultimately undermining democracy.

Raila's opposition coalition disputes the election results and wants them nullified. In a 25 000 page petition filed with the country's Supreme Court on August 18, they allege the country's electoral commission selectively manipulated, engineered and distorted votes cast and counted in ways that favored Kenyatta. Members of the opposition's legal team have had to seek refuge and work from Raila's residence last week to escape harassment and intimidation.

And so Kenya's newly constituted Supreme Court has no good options in what will be its biggest test. Nullifying the election results would mean the government and the electoral commission pulled off an electoral heist of massive and unprecedented proportions. Upholding the results would cement long held views that the system is rigged in a way that permanently excludes a large portion of the population. Such perceptions have been at the root of violent crises elsewhere in Africa, such as in Uganda, Mali, Ivory Coast since the 80s and South Sudan more recently.

Ordering a recount may be the least bad of all options, but given the extent of the alleged irregularities, it is not even clear this would be possible at all. Moreover, the opposition is unlikely to accept anything short of a repeated election because for them, this is bigger than 2017: it is about 2007 and 2013 as well. They have already vowed to supporters to "not let this one go".

This attitude distinguishes Kenya's current crisis from Ghana's in 2012: the loser in the presidential race in Ghana also petitioned the Supreme Court, but accepted the verdict largely because Ghana's Electoral Commission was widely seen as independent and effective in managing the electoral process. The incumbent stepping down in Ghana in 2008 after a razor-thin margin was widely celebrated in the country and praised outside, and set in motion a virtuous cycle of trust in the system. In general, incumbents stepping down after being defeated at the ballot box is the one key difference between Africa's democratic success stories and its failures. It builds confidence in the election process and institutions, diffuses social tensions, and encourages all sides to invest in connecting to voters within existing democratic structures, not outside of them. Today's election losers believe they can be tomorrow's winners so they have an incentive to continue playing the game.

But this hasn't been the case in Kenya where the opposition appears to have lost all faith and patience. So whichever way the country's Supreme Court rules in two weeks, there will likely be instability in the months to come. Kenya today is paying the price for repeatedly making justice secondary to peace and stability in the past.

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\* Note: Since the time of writing, Kenya's Supreme Court has begun deliberations on the alleged election irregularities and the opposition have circulated a petition for the secession of some parts of Kenya.