

COMMENTARY

Kenya's 2013 Elections

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Kenya managed to conduct passable and relatively peaceful national and local elections in March 2013, the first such elections since the passage of its comprehensively democratic Constitution in August 2010. The relatively smooth transition from the departing Mwai Kibaki administration to the new Uhuru Kenyatta regime has marked a critical step forward from the debacle of state-threatening violence of the 2007 elections, in which more than a thousand people died and an estimated six hundred thousand persons were internally displaced. At the same time the elections, in and of themselves, represented an important step toward implementation of the new Constitution, approved in a special referendum, after voters rejected a draft five years earlier.

The relatively violence-free outcome of the 2013 elections, on its face, seemed to offer at least a partial refutation of two literatures critical of conducting competitive, multiparty elections in weak states, as Kenya continues to be regarded.¹ One influential literature contends that these elections, absent also adequate levels of economic development, risk promoting state-weakening domestic violence and even international conflict (see Snyder 2000; Mansfield & Snyder 2005). The passage of the 2010 Constitution offered an affirmation that state strengthening democratization is possible after severe electoral violence, albeit, in this case, with the aid of international mediation

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in the form of the Kenya National Development and Reconciliation (KNDR) program. The 2008 KNDR agenda had succeeded in joining the election opponents from the 2007 election in a power sharing agreement fashioned by former U.N. Secretary-General Kofi Annan and his team of Eminent African Personalities. For the new government of Uhuru Kenyatta and William Ruto, however, the complex task of furthering progress on the KNDR agenda is now only one of the objectives. The government must also find a way forward in terms of Kenya's goals and the roles it wishes to play in furthering peace and stability in the Horn of Africa, especially in the wake of the terrorist attack in Nairobi in September 2013.

The other literature also insists that democracy must follow sequentially after the creation of a strong state and certain levels of economic development (see Lipset 1981; Huntington 1991; Linz & Stepan 1996). As a practical matter, however, with the end of the Cold War, sub-Saharan African countries found themselves confronting a number of challenges simultaneously, including the challenges of Third Wave democratization, the requirements of economic development, and the need for state strengthening after decades of authoritarian rule. Thus, following competitive elections, nascent democracies in Kenya and elsewhere in the region have needed to initiate and reinforce the socioeconomic development and state strengthening that may not have been accomplished beforehand. To what extent did the relatively violence-free 2013 elections indicate that enough of the KNDR agenda had been accomplished, or will the jury still be out on this question until perhaps the next general elections in 2018? Time alone will tell.

This commentary will summarize the outcomes of the election and its major accomplishments, and then consider the extent to which Kenya may or may not have managed to create the foundations for the future free, fair, and peaceful elections that are needed to achieve a sustainable democratic state.

Election Outcomes

In a crowded field of eight candidates in the presidential election, Uhuru Kenyatta's Jubilee alliance prevailed, receiving 50.51 percent of the valid votes cast among the 85 percent of the country's 14,352,533 registered voters who turned out. This result barely enabled Kenyatta to escape an obligatory second-round runoff contest with the opposition candidate from the Congress for Reform and Democracy (CORD), Raila Odinga. To win in the first round Kenyatta needed not only more than 50 percent of the popular vote, but also at least 25 percent of the vote in over half of the country's newly established forty-seven counties, a hurdle he surmounted in thirty-three counties. Odinga received 43.7 percent of the popular vote, surpassing the 25 percent threshold in thirty counties.

The newly reconstituted Kenya Supreme Court, headed by the renowned lawyer Willy Mutunga, heard Odinga's appeal that the election was fatally

flawed not only by possible corruption, but also by malfunctioning of the state-of-the-art election technology that Kenya had adopted. To the dismay of many professional observers, given the closeness of the first-round results, the court concluded, after examining a sampling of the results, that acknowledged flaws were not sufficient either to invalidate the outcome, or even to force a second-round runoff between Kenyatta and Odinga.

In the 290-seat National Assembly, Kenyatta's Jubilee alliance garnered 137 seats compared to the 115 seats won by CORD, with the remaining thirty-eight seats divided among two smaller coalitions and independent candidates. In addition, the forty-seven women elected in the special seats reserved for them produced twenty-four Jubilee and twenty-one CORD representatives. The twelve nominated members brought the total membership to 349. In the Senate elections, in which each county will have one representative, twenty-one Jubilee and twenty CORD candidates were elected, to be joined by twenty nominated members (16 women, 2 youth, and 2 persons with disabilities). At the county level, CORD candidates captured eighteen governor's chairs to Jubilee's fifteen, with fourteen going to parties not formally affiliated with either national-level election coalition.

The Way Forward

For at least three important reasons, the elections represented a significant achievement. First, they were conducted more peaceably than any of the country's first five multiparty elections in the democratic era, with the exception of the 2002 election which brought the opposition candidate Mwai Kibaki to the presidency after Daniel arap Moi opted not to seek a third term. Specifically, Kenya escaped the major violence many observers feared when they recalled the state-threatening violence attending the aftermath of the 2007 elections. The 2013 elections were relatively violence free, notwithstanding significant flaws in their conduct and the controversy regarding the outcome that followed. Thus, the 2013 elections set a precedent for relatively peaceable, even if imperfectly conducted, elections. If that precedent indeed is followed, it will have been strengthened significantly by Raila Odinga's decision to appeal the outcome to the Supreme Court rather than to his supporters in the street. His decision also powerfully asserted that elections in Kenya must ultimately be accountable under the rule of law.

Second, the elections implemented what is arguably the core and perhaps single most important objective of Kenya's first constitution since it achieved independence fifty years ago in 1963: limiting executive power, most notably by devolving some executive and legislative power to forty-seven county governments. At least formally, devolution supplants a system of provincial and district administration carried over from the colonial era that projected to the grassroots largely unimpeded executive power of colonial governors and that of the independent country's first three presidents. Full devolution will remain a work in progress for some time, given its complexity

and innovativeness in the Kenyan context. But critical initial steps have been taken with the election of new governors and regional legislatures. A major purpose of restoring a second parliamentary chamber in the new Constitution was also to insure that the interests and prerogatives of the new county governments are safeguarded in the work of the national government in general, and the executive branch specifically.

Critically important to the success of devolution in diffusing executive and legislative power and effectively bringing government closer to the lives and circumstances of ordinary citizens will be what kind of political culture develops around these new county governments. To what extent will they exemplify the democratic vision written into the new Constitution and turn away from simply replicating corrupt, overbearing executive behavior and legislative ineffectiveness which has been so pervasive at the national level throughout the country's history since independence?

Third, the elections implemented an important constitutional commitment to empower women, and to some degree, youth and individuals with disabilities. Roughly 20 percent of the members of the bicameral national legislature are now women, including one woman elected to represent each of the forty-seven counties. Their election is a critically necessary step in empowering women throughout Kenyan society and in the economy, though it is not sufficient in and of itself. One of the most important steps in this regard will be implementing improved land holding and inheritance rights for women as mandated by the Constitution and as provided by the 2009 land reform law.

The election of county governors and legislatures to implement devolution, and that of more than four hundred members of the newly bicameral national legislature, has brought about both constitutional innovation and a reinstating of provisions that were included in Kenya's final colonial era constitution. Parenthetically, both constitutions also included independent national land commissions, whose intent has been to remove land policies from partisan and ethnic politics. The 2013 elections began to implement a constitutional structure comparable to the colonial era one, albeit for subtly but significantly different purposes. Bicameralism and devolution in the form of *majimbo* (regionalism) were both intended to check postindependence majority rule by an expected Jomo Kenyatta government, which was greatly feared by smaller ethnic communities and remaining European farmers. Devolution and bicameralism in the new Constitution have also been intended not only to check executive power, but less so in the negative sense of blocking national government initiatives than, arguably, in the positive sense of initiating broadened political participation through subnational governments working in partnership with the national government.

Toward Sustainable Democracy

These important achievements have taken place despite significant questions about the extent to which the objectives of peaceful, free, and fair

elections, and, more generally, a sustainable democratic state, have been advanced. Alternatively, has it perhaps been the case that these goals have not been furthered—that Kenya basically dodged a bullet and was lucky in 2013 elections? On the one hand, many of these objectives were included in the Kenya National Development and Reconciliation (KNDR) program. This agreement, concluded early in 2008 between Kibaki's ruling Party of National Unity (PNU) and Raila Odinga's Orange Democratic Movement (ODM), established programmatic bases for the power-sharing agreement they had reached and which lasted until the 2013 elections. On the other hand, some essential objectives may not have been advanced, specifically development of the technology for effective election management and stability in Kenya's relationship with its neighbors in East Africa and the Horn.

In any democratic election, key questions are always whether the incumbent administration has accomplished enough to merit being returned to office and, once the election results are known, how to define the electoral mandate that should guide the new government. In the Kenya 2013 elections, however, the questions were more fundamental, and potentially more consequential, by several orders of magnitude. They were: (1) had the power-sharing coalition government done enough to forestall an electoral meltdown similar to that of 2007; and (2) would the new administration, whichever it might be, have the capacity to address fundamental problems potentially threatening the long-term viability of democracy in Kenya, and even of the state itself. The terrorist assault in Nairobi's Westgate Mall in September 2013 has enlarged the scope of these fundamental issues to include the status and objectives of Kenya's relations with its neighbors in the Horn of Africa

Both questions imply a deeper one concerning the roles and capacity of democracy in twenty-first century sub-Saharan Africa. On the one hand, the influential *Afrobarometer* surveys of public opinion reaffirmed, as late as 2008, that substantial majorities of citizens in twenty African countries, including Kenya, believe democracy to be preferable to all alternatives. On the other hand, at least in Kenya, in the wake of the 2007 electoral meltdown, ultimately the question has arisen as to what extent, in fact and in popular perceptions, democratic processes must result in socioeconomic progress and interethnic accommodation in order to sustain the belief that maintaining democracy is essential.

Given qualified progress in implementing the KNDR agenda, to what extent might voters in this election have said, in effect, that peace was preferable to risking violence over a flawed democratic election simply because of doubts they may have acquired about what democratic progress could actually do to improve the conditions under which they live? Freedom House and other democracy-monitoring groups have recorded what has appeared to be a still largely unexplained plateau in sub-Saharan African democratization since about 2005. To what extent might part of the underlying explanation of this plateau, to the extent it continues, reflect waning citizen belief, not in principle about the benefits of democracy as opposed

to the alternatives, but in their assessments of what democratic processes can actually do to improve the quality of their lives? Over the next few years, Kenya will be an especially interesting country to watch as a test case.

Requisite foundations upon which an ultimately sustainable democracy in Kenya may depend may include, *inter alia*: (1) technologically competent election management; (2) the KNDR stipulation that national healing must be promoted through humanitarian assistance and the bringing to justice of major violators of human rights; (3) land reform; (4) an end to impunity; and now (5) regional peace and security in the Horn of Africa.

Election Technology

One of the first and most important tasks in implementing the new Constitution was the prolonged effort to establish and appoint the members of what became the Independent Election and Boundaries Commission (IEBC). A lengthy vetting process was undertaken to insure that the IEBC would be competent and incorruptible, the failings of its predecessor having been a significant factor prompting the violence of the 2007 election. Buoyed by polls indicating high levels of public confidence, the IEBC opted to utilize state-of-the-art election technology to effect a flawless as well as free and fair 2013 election process.

To this end, the IEBC attempted a wholly computerized voter registration process that would include biometric data (BVR) on each individual, his/her fingerprint and scanned photo, as well as other standard identifiers. The process would maximize transparency, allowing the public to trace registration and turnout patterns across the country as they evolved. In addition, a special secure mobile phone apparatus was to be set up to allow each polling station presider to communicate precinct results directly to the IEBC, in turn permitting transparent tracking of the returns as they emerged, a process fully consistent with Kenya's high level of Internet penetration.

The IEBC's reach exceeded its grasp, however, with pervasive shortcomings inevitably fueling not only concerns, but also the real possibility, that corruption had occurred along with technology-caused administrative shortcomings. Only in an estimated thirteen out of 290 constituencies were 80 percent or more of polling stations able to report the presidential vote electronically, and only eight constituencies reached that percentage for the parliamentary elections (see Barkan 2013). Organizational failings included incomplete cost estimates, a failed bid process, an already flawed tendering process, and shortages of critical supplies, notably batteries for the mobile phones. One upshot was registration of only about 67 percent of eligible voters (the IEBC claimed 80%), which, combined with an 85 percent election turnout, meant that only about 59 percent of likely eligible voters decided the election. Mature democracies like the U.S. seem to be able to survive turnouts at this level, but they do not do much to deepen nascent democracies like Kenya's.

Justice for Violations of Human Rights

The KNDR agreement stipulated that the power-sharing government would insure the impartial, effective, and expeditious investigation of gross and systematic violations of human rights and that those found guilty would be brought to justice. Progress in meeting this requirement has been minimal, and it is not clear even to what extent a commitment existed, or continues to exist, to discharge this obligation effectively. In a few instances violators have been brought to justice, but these were not even the most egregious cases. And while polling for the KNDR program indicated strong popular support for ICC trials to proceed against those alleged to be the most egregious violators, Parliament has again signaled a willingness to withdraw from the Rome statute creating the International Criminal Court.

Kenyatta and Ruto's Jubilee alliance effectively made the ICC the enemy in the election, implying that these leaders' indictments were unjust indictments of their constituent communities as a whole. An emerging position appears to be that the President and Vice President, though on opposite sides in 2007, have superseded as well as mooted the charges they both face before the ICC because they combined forces to win the election in 2013. Domestically, in effect, the outcome of the elections has posed the question to what extent the mandate of the KNDR has been electorally reinterpreted to imply that elections in sovereign democracies, at least in certain circumstances, may be understood to supersede preexisting constitutional commitments to the rule of law.

Land Reform

The KNDR included in its Agenda 4 a set of long-term commitments to constitutional reform, combating poverty, inequality, and development imbalances among regions of the country, ameliorating unemployment among the youth, promoting "national cohesion and unity," "addressing transparency, accountability and impunity," and undertaking land reform.

With surprising ease Parliament passed a comprehensive land reform program in 2009, including the establishment of the National Land Commission to oversee its implementation. Importantly, the principles established by this new policy were, for the first time, given constitutional status in the 2010 Constitution. However, the fact that the carefully vetted members of the National Land Commission have only just been appointed—four years after passage of the reform legislation and three years after passage of the new constitution incorporating its key provisions—and then only at the insistence of the Supreme Court, does not augur well. In no single area have the depredations of overbearing executive power been more manifest, nor its ill effects on ordinary citizens more pronounced since independence, than in land governance. Moreover, the findings of the Waki Commission on the causes of 2007 election violence made clear that controversies over long-established land policies, suppressed by half a century of authoritarian

rule, were one of its major causes. Thus, whether the newly elected government possesses the commitment to implement admirable principles of justice and efficiency in land reform remains in question.

Ending Impunity

Kenya's level of corruption has been a matter of record in all major surveys of the status of Kenyan democracy. Election of the first new government under the 2010 Constitution, which commits the country to transparency and accountability, raises hopes that the will to end impunity has been established, building on some notable efforts during the power-sharing government. Careful and relatively transparent vetting of candidates for the judiciary and for the IEBC have been important down payments on a much larger public sector-wide commitment. But it is not clear to what extent, if any, the new government will interpret its electoral mandate to include systematic honoring of this commitment.

Promoting Regional Peace and Stability

The attack on the Westgate Mall in Nairobi in late September 2013 has raised the question of what may be obligatory international as well as domestic requisites for Kenya's continued domestic progress toward a sustainable democratic state. On the one hand, the attack connected the goal of establishing terms for a sustainable reconstructed Somali state with that of Kenya's sustainable democratic state. On the other hand, for Kenya, as the only democratic state in the Horn of Africa, the question arises as to what roles domestic democratic political processes can, may, and/or must play in shaping the country's objectives and roles regarding Somalia's future. The question of how foreign policy can be conducted in a democratic state, which is difficult in any democracy, whether it is nascent or mature, has been raised tragically and inescapably for one of the first times in sub-Saharan Africa's post-Cold War democratic era.

Conclusion

This commentary has suggested that while Kenya's 2013 election represented an important achievement, an appraisal of Kenya's progress toward long-term sustainable democracy yields an uncertain picture. On the one hand, the election has signaled important progress in preserving the peace, despite important electoral management flaws. It has activated devolution to diffuse formerly highly concentrated national executive authority, and to begin empowering women and heretofore marginalized communities. On the other hand, the country's progress in fulfilling the commitments of the Kenya National Dialogue and Reconciliation program, which the leaders of the ruling party and the major opposition party agreed in 2008 were critical to the country's future, has been very mixed at best. Kenya's military

participation in Somalia with a view to creating peace and stability in the Horn of Africa has added new and worrisome dimensions that were unforeseen in 2007.

Some Kenyan observers have wondered, at least privately, to what extent any of the five likely requisites of a long-term sustainable democratic state, outlined in this commentary, even lie within the capabilities of any democratic government. Thus the relatively violence-free 2013 elections, juxtaposed with limited progress in establishing requirements for a prosperous and stable Kenya as envisaged in the KNDR, raises deeper questions about Kenyan citizens' long-term confidence in the capacity and effectiveness of democracy in addressing the fundamental interests and needs of the nation.

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Note

1. The 177-country Fund for Peace survey of fragile states (<http://library.fundforpeace.org>) finds Kenya to be the eleventh weakest state in sub-Saharan Africa and the sixteenth worldwide.