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Another Disputed Election Batters Kenya's Institutions

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Kenya's 2017 general election exposed the fragility of many of the country's institutions and the persistent salience of ethnicity as the primary organizing principle of national politics. The Independent Electoral and Boundaries Commission (IEBC) proved inadequate to the task of conducting a credible election. The judicial system demonstrated its independence with a shocking annulment of the August 8 presidential election but eventually capitulated to pressure and direct intimidation from the executive branch.

Similarly, it became clear that despite security-sector reforms over the last decade, the Kenya Police Service is still prone to abuse by the executive branch for political ends. Throughout the election year, the police used deadly force with impunity against opposition supporters.

Once again, the election was mainly contested among Kenya's major ethnic groups. The incumbent Jubilee Party is viewed as primarily a Kikuyu-Kalenjin alliance. The National Super Alliance (NASA) is dominated by the Luhya, Luo, Kamba, and Mijikenda.

President Uhuru Kenyatta ran for a second and final term as Jubilee's candidate. In a rematch of the 2013 contest, his leading challenger was former Prime Minister Raila Odinga, NASA's standard-bearer. Kenyans also elected a new National Assembly and Senate, as well as 47 governors and county assemblies at the sub-national level (which were constituted following the 2013 election).

The campaign period saw increased polarization and ethnic balkanization, and the election was marred by widespread violence. A week before the election, the IEBC's chief information technol-

ogy officer was found tortured and murdered, and the opposition alleged that he was the victim of a scheme to rig the vote.

Odinga successfully challenged the result of the presidential election at the Supreme Court, which ordered a new election to be held within 60 days. However, Odinga boycotted the rerun and Kenyatta was reelected on October 26 with 98 percent of the vote, on a paltry turnout of only 39 percent. He was sworn in for a second term on November 28.

The period between the two elections saw widespread street protests that were met by excessive police force. According to Human Rights Watch, at least 104 people were killed during the election cycle, nearly all of them by the police. The vast majority of these victims died from wounds caused by high-caliber rifle shots at close range. Many of them were opposition supporters, concentrated in pro-NASA informal settlements in Nairobi, the capital; Kisumu, the country's third-largest city; and Kakamega, a town north of Kisumu in western Kenya.

Overall, the events of 2017 pushed Kenya in the direction of a creeping electoral authoritarianism, albeit in the face of pushback from the courts, civil society organizations, and the opposition. Normal institutional checks on executive power—principally through the legislature and the courts—appeared unable to deter or sanction executive actions that were plainly contrary to the rule of law. Dependence on the government for advertising revenue continued to hobble the media's ability to hold the executive to account.

Perhaps the silver lining from the 2017 electoral cycle was voters' willingness to ditch poorly performing governors at the county level. The general election was the second under the 2010 constitution, which created 47 county governments with elected executives and assemblies, replacing eight

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provinces. Thus it was the first test of devolution's impact on electoral accountability at the subnational level. The election revealed widespread voter dissatisfaction with incumbents: 24 of 47 governors and 167 of 290 elected members of the National Assembly lost their seats.

The results suggest the counties may be emerging as crucibles of experimentation with making government more accountable to voters. Perhaps more importantly, county administrations provide opportunities for opposition supporters and elites alike to engage in self-government. It is fair to say that the fact that opposition governors were in charge of counties like Kakamega, Kisumu, and Mombasa played a significant role in reducing tensions following the disputed presidential elections in 2017.

ETHNIC INTERESTS

The campaign increased ethnic tension in the country. Both Kenyatta's Jubilee Party and Odinga's NASA coalition were formed on the basis of ethnic and economic interests. The Jubilee Party is primarily an alliance of Kikuyu and Kalenjin elites and their allies from the pastoralist communities of northern and northeastern Kenya. The party arose from the merger of Kenyatta's National Alliance and Deputy President William Ruto's United Republican Party. The Jubilee coalition was formed in 2012, in part to fight off the International Criminal Court's indictments against Kenyatta and Ruto for allegedly organizing or financing the ethnic violence that followed the disputed 2007 presidential election, which left some 1,400 people dead.

During the 2017 campaign, NASA's alliance of Luhya, Luo, Kamba, and Mijikenda elites accused the Kenyatta administration of systematically excluding from public-sector jobs and development projects those ethnic groups that did not vote for Kenyatta in 2013. The fact that the government was dominated by Kikuyu and Kalenjin political appointees lent credence to these accusations. In rebuttal, Kenyatta and Ruto insisted that they were committed to a meritocracy that awarded public-sector jobs and opportunities to the most qualified individuals, regardless of ethnicity.

The Jubilee Party issued a pro-business campaign manifesto in June 2017, promising to continue investments in infrastructure (electricity generation, roads, railways) and to gradually introduce free secondary education. The next day, NASA responded with a manifesto that pledged to

rewrite Kenya's social contract in order to guarantee greater interethnic equality, more investments in agriculture, education, and healthcare, and an expansion of social protection for vulnerable households.

Kenyatta and Ruto crisscrossed the country commissioning projects and cutting ribbons to demonstrate their first-term achievements. The biggest and most visible project was the first phase of a new standard-gauge railway linking the port city of Mombasa to Nairobi (the second phase will connect Nairobi to western Kenya and Uganda). The \$3.8 billion project, the biggest since Kenya's independence, was commissioned by Kenyatta on May 31. Other projects included roads, bridges, and dams. Kenyatta and Ruto also touted their "last mile" rural electrification program, which subsidizes connections to poor households. According to official government statistics, the program had contributed to increasing the electricity connection rate from 27 percent in 2013 to 55 percent in 2017.

Odinga and the NASA alliance disputed the incumbents' efforts to claim credit for these projects. They charged that the new railway was a white elephant, designed primarily to siphon funds from the public purse. They questioned the logic of building a new line instead of renovating the old one at a fraction of the cost. They also pointed to the fact that Kenya's neighbors Ethiopia and Tanzania had built or planned to build longer and more advanced railway lines at much lower cost.

Charges of corruption and wasteful spending amid rising public debt were a NASA staple throughout the electioneering period. The opposition campaign focused on a \$2.8 billion Eurobond issued by the government in 2014. Leading opposition politicians repeatedly challenged the government to point to specific projects funded by the bond issue. The Office of the Auditor General said it could not ascertain what had been done with the money.

FUDGING THE NUMBERS

As Jubilee and NASA campaigned, running court battles over the mandate and activities of the IEBC played out in the background. At issue was the election commission's neutrality.

First, the opposition alliance filed a lawsuit charging that the firm hired to print ballot papers—Dubai-based Al Ghurair—had links to Kenyatta's family. The firm allegedly lobbied Kenyatta

during an October 2016 visit to Nairobi by a delegation led by the Dubai Chamber of Commerce and Industry. Musalia Mudavadi, a key NASA leader, sensationally claimed that Muhoho Kenyatta, the president's younger brother, was Al Ghurair's local agent. But the courts eventually permitted Al Ghurair to print the ballots.

Second, NASA demanded that the IEBC abide by regulations requiring that presidential election results be declared at the constituency level and not at the national tallying center in Nairobi. The opposition coalition argued that this would guarantee against any tampering. NASA eventually won the case.

In a sinister turn of events, Christopher Msando, the head of information technology at the IEBC, was tortured and murdered a week before the August 8 election. NASA politicians claimed that Msando was killed because he had tried to prevent vote rigging. Just hours before his murder, he appeared on a news show outlining the specific security measures he had put in place to ensure that the relay of results was in strict compliance with the law. Msando's murder cast a dark shadow over the election and lent credence to the opposition's claims that the Kenyatta administration was bent on unduly influencing the IEBC through intimidation, sourcing ballot papers from a favorable firm, and opening loopholes in the results transmission system to facilitate tampering.

On Election Day, the technical aspects of voter verification and the casting of ballots appeared to go smoothly. However, the IEBC blatantly neglected to follow the regulations for counting votes. Instead of announcing results at the constituency level, the commission relayed them directly from polling stations to the national tallying center. Adding to opposition supporters' suspicions, the relaying system appeared to have been programmed in such a way that the percentage vote shares of the leading two presidential candidates stayed the same throughout the first 12 hours of vote tallying. There were also discrepancies in the forms used to record results at the polling station and constituency levels before they were sent to the national tallying center.

During the vote tallying process, four foreign information-technology experts (two Ghanaians, a Canadian, and an American) who had been hired

by NASA were arrested by masked policemen and promptly deported. NASA alleged that they were expelled to prevent the coalition from monitoring the vote count. Meanwhile, it emerged that the Jubilee Party had hired Cambridge Analytica, the British political consulting firm later linked to the alleged misuse of Facebook data on behalf of Donald Trump's 2016 US presidential campaign, to direct its strategy and messaging operations.

Citing these irregularities, Odinga rejected the results and called for street demonstrations, even as the IEBC declared that Kenyatta had been reelected with 54 percent of the vote. (The publicly available polling ahead of the election had Kenyatta ahead by only about one percentage point.) NASA politicians denounced the results even before the final tallies were announced, and boycotted the ceremony where Kenyatta was declared the winner.

A SHOCKING RULING

At first Odinga was hesitant to go to court, but his lawyers worked to collect evidence in case he decided to challenge the results. He had unsuccessfully tried to overturn the results of the previous election in 2013, when the Supreme Court upheld Kenyatta's victory.

Two leading civil society organizations, the Kenya Human Rights Commission and the Africa Center for Open Governance, moved first to challenge Kenyatta's 2017 victory in court. The Kenya Nongovernmental Organizations Coordination Board immediately responded by deregistering both groups, forcing their immediate closure.

These developments spurred NASA to mount a challenge against the election's validity at the Supreme Court. According to Article 140 of the Kenyan Constitution, the Supreme Court has original jurisdiction over disputes arising from presidential elections. The law also requires the court to review the evidence and deliver a judgment within two weeks.

On September 1, a majority of four out of six justices ruled that the IEBC had failed to conduct the election as required by law, and that the "irregularities and illegalities" that occurred were enough to tarnish the integrity of the entire process. Thus, they voided Kenyatta's victory and ordered a fresh election within 60 days. This was a first in Kenya's history, and only the fourth time

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that a court in any country had annulled a presidential election.

The ruling shocked the Kenyan political class. Kenyatta said at a press briefing that he would accept it. But only hours later at a rally in Nairobi he railed against the justices of the Supreme Court, calling them “*wakora*” (“thugs”). Many in Kenya, including Chief Justice David Maraga, saw this as an attack on the independence of the judiciary.

Odinga and NASA affiliates demanded a complete overhaul of the IEBC before the second election. Jubilee opposed this demand, prompting NASA to call for mass protests. The police met the protesters with force, resulting in dozens of deaths.

In the interim the new Parliament was sworn in, formalizing Jubilee’s massive gains in the August 8 elections. The party had won 25 of 47 elected seats in the Senate, 189 of 349 seats in the National Assembly, and 25 of 27 governorships. (For the first time, female candidates were elected as governors—in Bomet, Kirinyaga, and Kitui.) NASA had made it easier for the ruling party by fielding multiple candidates affiliated with the coalition in down-ballot races.

These sweeping victories further consolidated Jubilee’s majority in the National Assembly and entrenched its reach in the counties. Jubilee was only 19 votes short of a supermajority in the legislature, which would enable it to change the constitution. Its new majority moved rapidly to amend the electoral laws in order to limit the ability of the Supreme Court to annul future presidential elections.

The organizational strength of the Jubilee Party has enabled Kenyatta to extend his influence into Parliament. Repeating the moves he made following the 2013 elections, Kenyatta intervened in the election of the new speaker and vowed to enforce party discipline in the National Assembly. This influence, combined with the overwhelming Jubilee majority, ensures that presently the assembly functions as little more than an extension of the executive branch.

AN ANTICLIMACTIC RERUN

Brazen attempts to subvert the independence of the judiciary and influence the Supreme Court went beyond Parliament. In late October, the official car of the deputy chief justice was attacked by gunmen on the eve of an important hearing on

the rerun election. The driver was injured in the attack. On the next day, the Supreme Court failed to convene for lack of a quorum. Only two of the seven justices on the bench were present for the hearing, which would have determined whether the IEBC was prepared for the election scheduled to be held just three days later.

One of the IEBC commissioners, Roselyn Akombe, resigned in mid-October to protest what she viewed as the Jubilee Party’s undue influence over the commission. She then fled to the United States. The chairman of the IEBC, Wafula Chebukati, warned that he could not guarantee a credible election due to a lack of preparedness at the commission.

Having failed to force either reforms at the IEBC or a postponement of the election, Odinga decided to boycott the October 26 rerun. Kenyatta was reelected with 98 percent of the vote. The 39-percent turnout was skewed along party lines, as the vast majority of NASA strongholds shunned the polls. In 113 constituencies (out of 290), turnout was under 20 percent; in 25 constituencies, no votes were cast at all.

A subsequent challenge to Kenyatta’s reelection was rejected by the Supreme Court. He was sworn in on November 28 at a largely empty stadium; NASA staged a parallel rally in Nairobi that was violently dispersed by the police. The NASA leadership refused to recognize Kenyatta’s victory and vowed to swear in Odinga as the legitimate president.

On January 30, Odinga held a mock swearing-in ceremony at Uhuru Park in Nairobi, declaring himself “the People’s President.” To avoid a clash with Odinga supporters, the government ordered riot police to stand back and let the ceremony proceed. However, it shut down television stations for broadcasting the ceremony and arrested senior politicians who attended. The attorney general threatened to charge them with treason, a capital offense. One Odinga supporter, Miguna Miguna, was deported to Canada. (Miguna holds Canadian citizenship. The government claimed that he is not a Kenyan national since the old constitution did not allow dual citizenship.)

Everyone was surprised when it emerged on March 9 that Odinga and Kenyatta had agreed to work together after holding secret talks. The talks excluded other NASA leaders and threatened to

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split the alliance. It is unclear what impact this rapprochement will have within Jubilee on relations between the camps allied to Kenyatta and Ruto. The vice president himself came out in support of the plan, but his allies expressed concern that Odinga may try to destroy Jubilee from within.

The wider public for the most part has expressed relief at the end of the high-stakes brinkmanship between Kenyatta and Odinga. But many have also lamented politicians' apparent insouciance over the dozens of deaths that marked the electoral cycle.

TARNISHED INSTITUTIONS

Taken together, the conflicts surrounding the 2017 elections severely eroded the integrity of democracy in Kenya. The technical and operational failures of the IEBC diminished trust in independent public institutions. The Supreme Court ruling was a much-needed show of judicial independence, but subsequent developments exposed the weakness of the judiciary in the face of pressure from the executive branch. And the boycott of the October 26 do-over vote left Kenyatta with a serious legitimacy gap in the eyes of nearly half the electorate.

The Kenyan media's conduct during the election period has also come under scrutiny. Although the constitution broadly guarantees freedom of the press, the mainstream media engaged in a fair amount of self-censorship and was complicit in abuses of power by the Jubilee Party. Kenyan electoral laws forbid the use of state resources for political advertising. Yet the leading television networks accepted and aired advertisements from state agencies touting the Kenyatta administration's achievements.

Perhaps it was no coincidence that the media seemed reluctant to run stories that were directly critical of Kenyatta. On the day of the August 8 election, media outlets made no effort to report results from the 290 constituency tallying centers. This was widely viewed as a move to avoid drawing attention to discrepancies between reported results from the constituencies and official results published in Nairobi.

The failure to hold the government and the wider political class to account has eroded the mainstream media's image among the public. One prominent example has been the Nation Media Group, which in early 2018 saw coordinated resignations by eight of its columnists and the exodus of important staff from its television division

in protest of the company's self-censorship to appease the Kenyatta administration.

The devolved functions of Kenya's 47 county governments were another casualty of the electoral process. First, the Treasury delayed the disbursement of funds to counties, in direct contravention of the constitution and the Public Finance Management Act. By law, county governments are guaranteed funding from the pool of national revenues, distributed on the basis of population share and poverty rates. Analysts suspected that the delay was intended to deny NASA-leaning governors much-needed resources for their election campaigns. If so, the withholding of funds as a means of punishing the opposition marked a significant deterioration in the central government's commitment to the principle of devolution.

It is worth noting that devolution remains widely popular across the country. County governors, in both the ruling party and the opposition, will continue to press for more resources. The national government will be loath to antagonize governors, many of whom are eager to pass blame to Nairobi for failures to implement development projects at the local level. Thus, in addition to giving voters the opportunity to exercise electoral accountability closer to home, devolution has also created important checks on presidential authority in the 47 county headquarters.

However, the importance of devolved functions was overshadowed by the ethnic politics of the presidential race. For much of the year, the health sector was wracked by strikes as doctors, nurses, and other medical practitioners demanded higher wages and better working conditions. The strikes lasted for almost five months before the government reached a resolution with the health workers' trade unions. Yet health care did not surface as an important issue in the election campaign. Neither the opposition coalition nor the ruling party made any specific promises on how to fix the sector.

Health care is the most important function that has been devolved to the counties. As such, all subnational governments, in NASA and Jubilee strongholds alike, were implicated in the poor state of the health sector. Its lack of salience in the election reflected the Kenyan political system's continued inability to focus politicians' attention on real issues affecting voters. The nation may be better served by a staggered county-level electoral cycle in which some gubernatorial elections are held in years when there is no general election.

Perhaps the biggest casualty of the turbulent 2017 electoral cycle was the economy. On top of the adverse effects of prolonged droughts on agricultural production, political uncertainty continued to discourage new investment, while security concerns related to the election caused a decline in the number of tourists visiting the country.

In late 2016, Parliament passed a populist bill with the express purpose of limiting bank lending rates to no more than 4 percentage points above the Central Bank's rate. According to the Central Bank, the law contributed to a slowdown in the growth of private credit, which inhibited investment. Overall, the economy expanded by 4.8 percent in 2017, one point slower than in the previous year. This was well below the targeted 10-percent annual growth rate announced in Vision 2030, a plan designed to catapult Kenya into middle-income status.

VIOLENCE AND EXPLOITATION

Apart from the electoral violence, insecurity continued to plague significant sections of the country. According to the *Daily Nation*, in the first ten months of 2017 the police killed more than 214 people, a 5 percent increase from the previous year. While many of these deaths were election-related, others were extrajudicial killings in low-income parts of Nairobi. These were a consequence of several failed police reform efforts since 2010, including the creation of the National Police Service Commission, which can hire and fire police officers, and the Independent Police Oversight Authority, a civilian watchdog.

The other major hotspot in the country has been in northern Kenya, where droughts have driven pastoralists to seek grazing pasture on private ranchland. This resulted in conflict between ranchers and herders. A number of encounters turned violent in 2017; one rancher was killed and another wounded in a gun attack. The Kenyan security forces responded harshly. In one operation in Laikipia county, they killed over 300 head of cattle.

The conflict has been worsened by the politicization of land ownership in northern Kenya. Some local politicians have exploited pastoralists' need for grazing lands as a pretext for invading and grabbing private ranchers' land for themselves.

The clashes highlight the obscene levels of land inequality in the region. As with health care, however, this problem did not acquire political salience at the national level during the election

cycle—in part because most national politicians own large tracts of land that were acquired in dubious circumstances. The Kenyatta family, for instance, owns pieces of land across the country whose total acreage is equivalent to what used to be Nyanza province, around 4,800 square miles. (Uhuru Kenyatta is a son of the late Jomo Kenyatta, the first prime minister and president of independent Kenya.)

THE SOMALIA QUESTION

An important foreign policy question in the 2017 election concerned Kenya's ongoing peacekeeping role in neighboring Somalia. Following a January 27 attack by the Somali militant group al-Shabaab on a Kenyan military base in Somalia, in which it claimed it had killed 57 troops, Odinga vowed to withdraw Kenyan forces from Somalia if he won the presidency. The attack was intended to mark the anniversary of a 2016 attack on another Kenyan base in Somalia that reportedly left more than 100 Kenyan soldiers dead. Despite the high casualty numbers, Kenyatta vowed to continue Kenya's participation in the African Union peacekeeping mission.

At the same time, the government remained committed to building a 700-kilometer wall on the border with Somalia to prevent militants from entering the country. Since the Kenyan military invaded Somalia in 2011, al-Shabaab has carried out multiple terrorist attacks in Kenya. The worst were the attacks on the Westgate shopping mall in Nairobi in September 2013 and on Garissa University in April 2015, which killed 67 and 148 people, respectively.

In November 2017, a United Nations report exposed the complicity of the Kenyan military in the Somalia charcoal trade, a significant source of revenue for al-Shabaab. The report charged that Kenyan forces stationed at the ports of Kismayu and Buur Gaabo had failed to enforce the ban on charcoal exports from areas controlled by al-Shabaab and were instead directly benefiting from the trade. The auditor general routinely ranks the defense ministry as the most corrupt Kenyan government agency; much of its spending is classified and beyond the reach of public scrutiny.

The government continued to insist that it would close the Dadaab refugee camp in northeastern Kenya in order to deny al-Shabaab opportunities for recruitment among its Somali inhabitants. However, in February 2017 the High Court ruled that the Interior Ministry had acted beyond

its powers by issuing an order to close the camp. The court also found that closure would amount to unwarranted group persecution.

According to the government, more than 51,000 Somali refugees had voluntarily returned to Somalia since the announcement of the camp's closure in late 2016. At the beginning of December 2017, more than 238,000 remained in the Dadaab camp. The Kenyan government's efforts to close the camp run contrary to its international obligations to host refugees fleeing Somalia. It is also an illustration of the executive's proclivity to engage in sweeping policy changes without proper consultation with the legislature or other important stakeholders.

COUNTERVAILING FORCES

The developments of the past year have serious implications for the continued institutionalization of politics in Kenya. In many ways, they reflect the mixed results from the adoption of the new constitution in 2010. On the one hand, devolution is proving to be both popular and instrumental in entrenching the idea of political accountability at the local level.

On the other hand, the Kenyan presidency still operates much like the imperial presidency of the pre-2010 era. The legislature, though endowed with significant formal powers, is still subordinate to the executive due to party discipline. Despite having controlled a number of counties, the opposition has yet to take advantage of such opportunities to showcase its competence at governing and delivering public goods and services.

The most important question is whether a weakened and divided opposition will be able to shore up Kenya's battered institutions. It is unlikely that Kenya will descend into autocracy, but it is quite possible that an unchecked executive will continue to engage in extraconstitutional actions while facing minimal consequences from the legislature. The only institutions that can forestall this are the courts and the county governments. The judiciary remains independent and will likely keep issuing rulings unfavorable to the executive, if need be. The county governments face local pressure to deliver public goods, a reality that will create conflicts over resources and policies between governors and national politicians—and within both the ruling party and the opposition. ■