

**"IMPORTATION" OF VOTERS IN KENYA'S ELECTORAL PROCESS: A CASE OF LAWS THAT CAN DEFY AN ANGEL'S ATTEMPT TO ENFORCE IN THE ABSENCE OF A VIGILANT ELECTORATE.**

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**Background**

The recently concluded voter registration exercise in Kenya, in tandem with what has become the norm in every electoral process in the country, was not without complaint. Complaints ranged from delay in issuance of identification documents leading to disenfranchisement of certain, mostly youthful, citizens, through the short period set aside for the voter registration process, to "importation" of "outsiders" to register as voters into other constituencies. These allegations bring to the fore a question of the capacity of the forthcoming elections to be free and fair. It is now a truism that the "freeness" and fairness of an election calls for a consideration of factors prior to, and beyond, the ballot box ritual. This paper seeks to interrogate the commonly used criteria to ascertain whether a particular election has been free and fair; the law regarding the eligibility of a person to register as a voter in any constituency in Kenya, the prescribed mechanisms of detecting "imported" voters in Kenya, practical challenges to detecting "imported" voters and finally, whether, in light of the allegations of voter "importation" the forthcoming General Elections stand a chance of passing the free and fair test.

**The Criteria for Free and Fair Elections**

A number of commentators are on record as contributing to the discourse on the factors that must be borne in mind in ascertaining how free and fair an election has been.

The International Institute for Democracy and Electoral Assistance (International IDEA) sets out the following standards that ought to guide an election<sup>1</sup>:

Elections are a means to translate the general will of the electorate into representative government. To achieve this objective, it is necessary that all parties and candidates be able to put out their manifestos – the political issues and their proposed solutions – freely to the electorate during the

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<sup>1</sup> International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections, 2002. the publication can also be found at [www.idea.int/publications/pub\\_electoral\\_main.html](http://www.idea.int/publications/pub_electoral_main.html) last accessed on August 13, 2006.

electoral campaign. The electoral campaign period should normally be well defined and should commence after the valid nomination of parties and candidates, ending one or two days polling. ... All contesting parties and candidates should be afforded an opportunity to reach out to the electorate at large and to put forth their views, policies and programmes. The legal framework should ensure that:

- There are no unreasonable restrictions on the right to freedom of expression and whatever restrictions there are be set out in the law.
- Every party and candidate has equitable access to the media, especially the electronic media, to undertake their campaign.
- Where state or private funding is permissible, every party and candidate has equitable access to resources to undertake a credible election campaign.
- No party or candidate (especially the ruling party) is favoured, financially or otherwise through the availability or use of state resources, over the other parties and all stakeholders in the election process have an equal chance of success.
- No party or candidate threatens or does violence or otherwise impedes the freedom to campaign.
- All parties and candidates should normally cease active campaigning one or two days prior to polling day, allowing the electorate to weigh the options and to exercise their franchise freely and without undue pressure.

In its contribution to the concept of free and fair elections, the Zanzibar Elections Monitor and Observer Group (ZEMOG)<sup>2</sup> set out the following elements as a criteria assessing whether elections were free and fair<sup>3</sup>:

- a) Were the voters, during the entire election process, free to make their decisions without fear, harassment and other coercive and intimidating acts?
- b) Have there been any deliberate efforts by the government of the former single ruling party to drop the practice of many years of using its state organs to influence the conduct of elections? [this criterion includes the manipulation of constituency boundaries, the use of provincial administration and security apparatuses and the utilizing of government resources by the ruling party for electoral purposes].
- c) Has the ruling party sufficiently separated itself from the state to ensure that it does not have an advantage over other parties?
- d) Does the government provide subsidies and other assistance to all parties equally?
- e) Was there any discrimination in the registration of political parties which would have hindered new parties from competing fairly with other parties in disseminating their policies? [this criterion can include the hindrance of political parties, by the ruling party, from presenting their candidates for nominations to the elections]
- f) Has there been a solid constitutional and legal basis which enhances democracy and reinforces the concept of free and fair elections? [this criterion also addresses a free and independent judiciary which can be relied upon to ensure that the process, including the hearing of election petitions, is free, fair and impartial]
- g) Are the people generally, and the parties satisfied with the Electoral Commission and other officials appointed by the government to oversee the electoral process, considering especially the

<sup>2</sup> A group constituting thirty election observers who included scholars from Tanzania, South Africa, Lesotho, Malawi, Jamaica, Great Britain and Kenya. The observers from Kenya were Grace Githu who was the Executive Director of Institute of Education in Democracy (IED), Ahmed Muhidin the renowned professor of political science who has taught at Makerere, Nairobi and Carleton Universities, Professor Kivutha Kibwana and Dr Willy Mutunga.

<sup>3</sup> Uchaguzi wa Zanzibar 1995 Ripoti ya Zanzibar Elections Monitor and Observer Group (ZEMOG) Zanzibar, October 1995.

composition of the Commission and the ability of its officers to make free, fair and impartial decisions?

- h) Have all eligible voters been given the opportunity to register for elections?
- i) Has the procedure within the parties for choosing their candidates been fair, transparent, democratic and impartial?
- j) Has there been appropriate gender balance and sensitivity reflected in the registration of voters, voting, electoral candidacy and administration of voters?
- k) Have there been equal opportunities for political parties, candidates and NGOs dealing with civic education to have access to the people countrywide without any hindrance?
- l) Have all political parties and their candidates had equal access to the media?
- m) Has there been sufficient education on the elections for the voters, election officials and the candidates?
- n) Have all the political parties openly declared their sources of funding for party and election campaign activities?
- o) To what extent has the secrecy of the ballot been sustained?
- p) Have the voters been allowed to participate freely in the elections?
- q) Has there been a reliable procedure in the entire vote counting and the announcement of results process?
- r) Has there been a reliable procedure for getting solutions to any problems that may have arisen during the entire voting process?
- s) Was there any violence during any part of the election process? Was the whole election conducted in a peaceful and calm manner?
- t) Were there any problems in the entire electoral process, caused by the non-observance of any of these criteria, which seriously affected the election results?
- u) Have the election results been accepted by the people generally, the candidates, the contesting parties and the international community?

I hold the view that the above listed questions are fairly comprehensive and should form a significant aspiration of any democratic state that employs electoral processes as a measure of its democracy. Indeed, to the extent that exercise of the above elements results in free and fair elections, failure to exercise the same elements would, inevitably, lead to a failure of the free and fair test of an election.

Contributing to the discourse on the constitutive elements of free and fair elections, Kibara G has noted thus<sup>4</sup>:

There seems to be a general consensus that for an election to be certified as democratic, it should be free and fair. Some attempts have been made to define what constitutes free and fair elections. Some of the conditions that must be met for an election to be certified as free and fair are:

- o The entire electorate should have the right to vote for candidates for office.
- o Elections should take place regularly at prescribed periods.
- o No substantial group should be denied the right to form a political party and field candidates.
- o Campaigns must be conducted with reasonable fairness in that neither law nor violence nor intimidation bars candidates from presenting their views and qualifications or prevents voters from learning about the candidates and discussing them.
- o Votes should be cast freely and secretly, counted and reported honestly and the candidates who receive the proportions required by law must be duly installed in office.

<sup>4</sup> Kibara G., *The Challenges to and Efficacy of Election Monitoring*, in, Walter O.Oyugi *et al* *The Politics of Transition in Kenya: From KANU to NARC*, Heinrich Boll Foundation, Nairobi, 2003, P.283 *et seq.*

The fairness of the election depends on several factors including: (a) the proper application of criteria for qualification and disqualification of voters; (b) the fair delimitation of constituencies; (c) prevention of corruption and intimidation of voters; (d) the equitable use public media; (e) respect for freedoms of assembly, association and speech; (f) refraining from the use of public resources by the party in power; and (g) independence of the public service. All these determinants are crucial in assessing whether a free and fair election is possible in a given context. They are interrelated and mutually reinforcing or undermining as the case may be.

The Electoral Commission of Kenya, the body charged with the task of superintending over presidential, parliamentary and civic elections in Kenya has remained part of this norm-setting function. In one of its guidelines, it has noted that:

A very wide and equal suffrage loses its value if political bosses are able to gerrymander constituencies so as to suit their own interests; there is no point in having an elaborate system of proportional representation if the electors are all driven in one direction by a preponderance of bribes or threats; legal provisions mean nothing if enforcement of the law is left wholly in the hands of those who profit by breaking it<sup>5</sup>.

One thing is clear from all these criteria, namely; for elections to be free and fair, they must be conducted in accordance with the law. A question then arises, what is the law intended to reign over the mal-practice of voter "importation"?

#### **Law Governing Eligibility of Voters in Kenya**

The criteria for determining the eligibility of a person to be registered as a voter in a particular constituency in Kenya is a constitutional criteria.

Section 43 of the Constitution of the Republic of Kenya sets out the criteria of eligibility by providing at subsection 1 that:

Subject to subsection (2), a person shall be qualified to be registered as a voter in elections to the National Assembly and in elections of a president if, and shall not be qualified unless, at the date of his application, to be registered:

- (a) is a citizen of Kenya who has attained the age of eighteen years; and
- (b) has been ordinarily resident in Kenya either
  - (i) for a period of not less than one year immediately preceding that date; or
  - (ii) for a period of, or periods amounting in the aggregate to, not less than four years in the eight immediately preceding that date; and
- (c) has for a period of, or for periods amounting in the aggregate to, not less than five months in the twelve months immediately preceding that date, been ordinarily resident in the constituency in which he applies to be registered, or has for such a period or periods carried on business there, or has for such a period or periods been employed there or has for such a period or periods lawfully possessed land or residential buildings there.

Subsection 2 of section 43 of the constitution provides for disqualifications from registration as a voter which are:

<sup>5</sup> Electoral Commission of Kenya, Official Opening Statement at the Seminar on Free and Fair Elections Through Wider Electoral Democracy, 14<sup>th</sup> – 16<sup>th</sup> June 2000 at Mombasa, Kenya.

- (a) if, under any law in force in Kenya, he is adjudged or otherwise declared to be of unsound mind; or;
- (b) if he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under a law in force in Kenya; or
- (c) if he is detained in lawful custody; or
- (d) if he is disqualified therefrom by Act of Parliament on the grounds of his having been convicted of an offence connected with elections or on the grounds of his having been reported guilty of the offence by the court trying an election petition.

A question whether a person is qualified to be registered as a voter in elections to which Section 43 of the Constitution applies is to be determined in such a manner as may be prescribed by Parliament<sup>6</sup>.

Where a person is qualified to be registered in more than one place as a voter in elections to which section 43 of the Constitution applies, he shall be so registered only in the first of those places in which he applies to be so registered, and Parliament may provide for the punishment of a person who, being already registered in one place as a voter in the elections or having applied to be so registered there and not having had that application finally rejected applies to be registered in another place as a voter<sup>7</sup>.

**How exactly is the Electoral Commission of Kenya expected to detect “imported” voters?**

The National Assembly and Presidential Elections Act<sup>8</sup> (hereinafter “the Act”) obliges the Electoral Commission of Kenya to prepare or cause to be prepared in such manner and at such times as may be prescribed:

- (a) Constituency registers in respect of all constituencies; and
- (b) The principal register, being a combination of the constituency register, and such other registers, for the time being in existence, as the Commission may direct<sup>9</sup>.

The Commission is further obliged to cause all constituency registers to be opened for inspection by members of the public, for such period of time as it may deem appropriate for the purposes of rectification of particulars thereon<sup>10</sup>. Upon expiry of the period of time for inspection and rectification of particulars aforesaid, the Commission is obliged to compile the principal register and:

- (i) Publish a notice in the gazette to the effect that such compilation has been completed; and
- (ii) Cause to be transmitted to every registration officer, a copy of the part of that register relating to the constituency for which he is reliable to be kept in safe custody<sup>11</sup>.

The law thereafter prescribes the manner of determination of questions concerning registration under Part III of the Act.

<sup>6</sup> Section 43(3) of the Constitution of Kenya. This method is set out under Part III of the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya.

<sup>7</sup> Section 43(4) of the Constitution of Kenya.

<sup>8</sup> Chapter 7 of the Laws of Kenya.

<sup>9</sup> Section 4(1) of the Act

<sup>10</sup> Section 4(2) of the Act

<sup>11</sup> Section 4(3) of the Act

Under the said part, a person who is registered in a register of electors may, in a prescribed manner, among other things, object to the registration in that register of electors of any other person; or the registration in that register of electors of a person who has made a claim to the registration officer to the effect that he/she has duly applied to be registered and that his/her name is not included in the appropriate register of electors<sup>12</sup>. Such objection is to be determined by a subordinate court of the first class having jurisdiction in the constituency concerned and the decision of such court is not subject to appeal<sup>13</sup>.

Although the Act does not specify on what grounds such objection is to be based, it should follow that such objection can only be based on the criteria whether the elector whose registration is challenged meets the conditions set out in Section 43 of the Constitution of Kenya.

### **Challenges to Detection of "Imported" Voters**

The following challenges face the Electoral Commission of Kenya in the delivery of its mandate to detect and deal with cases of "imported" voters.

First, the conundrum remains what the practical criteria is their for ascertaining that someone

"has for a period of, or for periods amounting in the aggregate to, not less than five months in the twelve months immediately preceding that date, been ordinarily resident in the constituency in which he applies to be registered, or has for such a period or periods carried on business there, or has for such a period or periods been employed there or has for such a period or periods lawfully possessed land or residential buildings there"

It would follow that persons who are ordinarily residents in rural Kenya, say, a village in Emuhaya constituency who carries out business ordinarily as an informal trader in Busia town on the market day there, and, in Kakamega town during the market day, and, in Kisumu city during the market day and who has bought a parcel of land and or plots in Nakuru town and Nairobi city has a number of options as to where to register as a voter. After all, who keeps the track record on the time duration that such an itinerant businessman/ woman stays in each of these constituencies to ascertain that he/she meets or fails the constitutional criteria of eligibility to register as a voter? The answer is, no one. What, therefore, would be the basis of the Electoral Commission of Kenya to declare that such a businessman is (in)eligible to register as a voter in one constituency and not the other?

In the country, Kenya, there is no mechanism of regulating movement of people from one constituency to another; it follows that a domestic servant who works in Westlands, Nairobi but ordinarily resides in Kawangware area of Nairobi will lawfully register as a voter either in Westlands constituency or Dagoreti constituency. Assuming that such a citizen has a rural home in Esirabe village where (s)he was born and bred and where he/she possesses a grass thatched house to which (s)he resorts for the Christmas festivities every year, how does the Commission deal with such a voter when (s)he is making the option on where to register as a voter?

<sup>12</sup> Section 10 of the Act

<sup>13</sup> Section 10(2) as read with Section 11 of the Act.

How many Kenyans can afford the "luxury" of critically checking out on the voters' register with a view to ascertaining who is an "imported" voter in a specific constituency? The criteria of eligibility for registration as a voter in a particular constituency in Kenya is such that literally anyone can register as a voter anywhere.

**Is the Chase for Free and Fair Elections, therefore, futile?**

In the absence of a proper and practical criteria of ascertaining the eligibility of electors to register as voters in given constituencies to deal with the ever green challenge of "imported" voters, it follows that eligible voters may have their rights to representation by leaders of their choice compromised by "outsiders" unfairly tilting the balance.

Happily, the voters' register, as is required by law, shall be opened for public scrutiny. It is hoped that, as far as possible, constituents will take it as their civic duty to interrogate the lists and "smoke" out those who are not eligible to vote in their respective constituencies as per the law established. The desire for free and fair elections, so far as it relates to ensuring that only eligible voters in specified constituencies participate in elections, can only be achieved by optimal co-operation of the electorate. The Electoral Commission of Kenya has no other talisman, however much the citizens may wish to blame it.