Beyond The Rhetoric: The Uncomfortable Truth About Why Political Parties Are Losing Election Petitions.



Why Throwing Fits Won't Win Election Petitions (But Evidence Might)

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Taona E MWANYISA

The Elephant in the Room: Why Political Parties are Part of the Problem (and the Solution)

Africa faces a surge in disputed elections, with allegations of electoral fraud tainting democratic processes. Unconstitutional power grabs and attempts at term elongation, like the recent case in Senegal, further undermine the democratic progress made over the past decade. Despite existing electoral dispute resolution mechanisms, the integrity of elections on the continent is often compromised, fuelling dissatisfaction and instability. This is a worrying trend and if it remains untamed, Africa will see the acceleration of the backsliding of the electoral democratic gains. While electoral processes and constitutions provide for mechanisms and institutions for electoral dispute resolutions at both formal and informal levels these have failed to tame the increased levels of electoral disputes. Some electoral commentators have attributed this to the captured nature of these processes and institutions and the inability of political parties to effectively utilise them. While acknowledging the captured nature of election dispute resolution mechanisms and institutions at formal and informal levels, this paper controversially focuses on the latter.

In some African countries, political parties demonstrate a clear failure to effectively utilize election dispute resolution mechanisms and institutions. This stems from either a lack of understanding of how they function or a lack of interest in employing them. This is understandable, especially in regimes where these are compromised or alleged to be compromised. Even when parties choose to engage with these mechanisms and institutions, they cannot often present compelling evidence-based petitions to challenge electoral outcomes. These petitions frequently suffer from insufficient evidence of malfeasance, improper legal filing, and structures that hinder the ability to prove electoral misconduct.

Additionally, some petitions are so poorly filed that courts struggle even to identify the grounds for the requested relief. In Botswana, for instance, Judge Mercy Garekwe dismissed electoral petitions filed by the opposition party, concluding that: "The petitions fail to show that the alleged perpetrators of corrupt and illegal practices were election or polling agents. Therefore, the petitions are invalid." This raises questions on the capacity of political parties to establish and manage the operational structures required to allow for the timely codification, transmission, treatment, and analysis of all information collected by their agents in the field during elections to support petitions when they arise.

In some cases, political parties often shift the blame from themselves for failure to prove election malfeasance and often direct their anger on third parties other than themselves. It's time they take responsibility for this failure as well. It is the sickening belief and appalling fickleness of losing political parties that are endlessly furious about losing an election to assume someone other than themselves should prove an election was stolen from them. They often transfer responsibility to either domestic or international election observers to prove election malfeasance on their behalf. This is a discussion you hear every election. It’s errant nonsense, the buck starts and stops with the political parties. Recent events in Africa offer undeniable proof of this trend. Elections across the region have provided incontrovertible evidence. Political parties tend to react to election losses with intuitive and emotional responses, lacking the evidence to support their claims. They cling to weak narratives for their defeats, shying away from the "heavy lifting" required to build strong cases of electoral manipulation.

It's however important to emphasize the foregoing does not disregard the challenges faced by political parties in some countries as the playing field is often uneven. Ruling parties often hold the advantage, wielding significant resources and state machinery during campaigns.

Additionally, some Electoral Commissions have further undermined trust in the process through their failures to conduct credible elections or deliver accurate results. The 2018 Zimbabwean presidential election, with its three sets of announced results, and the 2020 Malawian presidential election petition, which exposed issues in tabulation and results certification, serve as stark examples of these challenges. Furthermore, in some countries, legal frameworks are not favourable and do not provide for a level playing field negatively affecting the ability of parties to file petitions. They are structured, in some cases, in ways that make it difficult to prove election malfeasance. For example, in deciding electoral petitions, courts now require a higher standard of evidence. The petitioner must prove beyond a reasonable doubt that the outcome of the election was affected by the irregularity. This makes it difficult for political parties as some irregularities are difficult to qualify.

Furthermore, the timeframes for filing election petitions can be very restrictive, often preventing petitioners from gathering sufficient evidence to support their claims. In Zambia, for example, a presidential election petition must be filed within a mere seven days of the results being announced. Additionally, the costs associated with launching election appeals can be prohibitive. In Zimbabwe, petitioners are required to provide security for the respondent's costs within seven days of lodging an election petition. Courts may then apply higher-than-normal tariffs, further increasing the financial burden on petitioners.

In some countries, resolving election disputes can face deliberate excessive delays, obstructing the fairness and effectiveness of the electoral process. This hinders the prompt and just resolution of electoral challenges. For example, Zimbabwean courts have still not resolved a dispute from the 2002 presidential election. Additionally, cases may be dismissed on technicalities, ignoring the merits of the challenge, as seen in Zambia after the 2016 election. Worse still, some countries' laws completely prevent electoral appeals. Tanzania's constitution bars the judiciary from hearing challenges to presidential elections.

Breaking the Cycle: Strengthening Elections Petitions

Opposition parties should not simply accept this “status quo”. They must actively counterbalance the ruling parties’ advantage by establishing strong and robust oversight mechanisms for the electoral process. These mechanisms should focus on collecting evidence of potential electoral fraud. The success of Malawian opposition parties in the 2019 tripartite elections demonstrates this approach's effectiveness. They presented irrefutable qualitative evidence of electoral irregularities to the courts. This highlights the importance of focusing not just on the quantitative aspects of elections (e.g., vote count), but also on the qualitative aspects (e.g., campaign practices, polling station procedures). By neglecting the qualitative aspects, parties limit the strength and quality of their election petitions.

The focus should extend beyond election day processes to encompass all preceding stages that may influence the outcome of an election. This comprehensive approach empowers political parties to gather evidence of potentially unfair practices that could affect the final results. Armed with both qualitative and quantitative data, political parties can make informed decisions. These include whether to participate in an election or not, whether to challenge the election outcome, if warranted or deciding whether to forgo a challenge. Additionally, information gathered by long-term party agents serves as valuable data. This facilitates targeted interventions and advocacy for electoral reforms, particularly concerning legal frameworks.

Election petitions, while intended to overturn disputed results, also serve a critical function of highlighting flaws within the electoral process. One noteworthy example is Namibia's 2019 presidential election petition. While Chief Justice Peter Shivute upheld the results, he

acknowledged the unconstitutional use of Electronic Voting Machines (EVMs) without corresponding paper ballots. This ruling illuminated systemic shortcomings and created an opportunity to advocate for crucial reforms, safeguarding the integrity of future elections.

Properly filed petitions backed by credible and irrefutable evidence stand a chance of not only winning an election petition but gaining public sympathy for the political party in addition to showing how compromised the election dispute resolution mechanisms and institutions may be. Outcomes of petitions can confer legitimacy on those who emerge as winners in an election or call their legitimacy into question and this can be aided by evidence-backed claims of electoral malfeasance.