

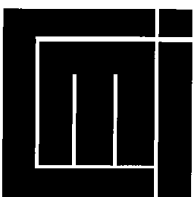
A Hobbled Democracy

The Kenya General Elections 1992

Bård-Anders Andreassen, Gisela Geisler and Arne Tostensen

This study was undertaken in collaboration with
the Norwegian Institute of Human Rights, Oslo

R 1993: 5
June 1993



Report
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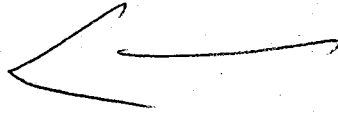
On 29 December 1992 the first multi-party elections since 1966 were held in Kenya. This report provides a critical assessment of the circumstances surrounding that event. The irregularities and problems encountered in the run-up to the elections and in the balloting and counting phases cast very serious doubts indeed on their freeness and fairness. The evidence adduced, the bulk of it credible and corroborated, even if part of it may be merely circumstantial or impressionistic, will go a long way towards supporting such a conclusion.

However, the multi-party elections, despite flaws and irregularities, no doubt signify that Kenya is moving in a democratic direction. The run-up to the election and the period of political fermentation before that time, the campaign, and the elections themselves have created a wider democratic space in Kenya. The embryo of a new democratic political culture is discernable; from it there is likely to emerge a genuinely democratic practice. Yet, there will continue to be setbacks and hurdles to be overcome.

The report concludes on a self-critical note. Whereas the institution of election observing is worth defending, a minimum of professionalism is required on the part of election observers in the discharge of their duties. Inadequate attention has thus far been devoted to specifying and operationalising a set of criteria to be satisfied in order to enhance the professionalism of election observing.

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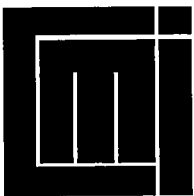
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Table of Contents

Executive Summary	v
Acknowledgements	x
1. Background	1
1.1 Fundamentals of Kenya's Political System and History 1963-91	1
1.2 Towards a Multi-Party System	4
2. Run-Up to Election Day	8
2.1 Electoral Reform and the Election Laws	8
2.2 The Electoral Commission	10
2.3 Registration of Voters	12
2.4 Nominations	14
2.5 Defections	16
2.6 Ethnic Clashes	17
2.7 Access to the Mass Media During the Election Campaign	18
2.8 The Contending Parties	19
3. Events of Election Day	23
3.1 General Atmosphere on Election Day	23
3.2 Late Opening of Polling Stations	23
3.3 Lack of Election Materials	24
3.4 Reduction of Number of Polling Streams	24
3.5 Undue Influencing of Voters	25
3.6 Extended Polling Hours	26
3.7 Location of Polling Stations and "Importation" of Voters	26
3.8 Other Irregularities	27
3.9 The Counting of Ballots	27
3.10 Delays in the Counting Process	28
4. Immediate Aftermath	31
4.1 Results of the Presidential Contest	31
4.2 The Parliamentary Constellation	32
4.3 To Acknowledge Defeat or Not?	33
5. Conclusion	34
5.1 Overall Assessment: Free and Fair?	34
5.2 A Self-Critical Note	37

Appendix A:

Interim Statement by the Scandinavian-Canadian Observer Team on the Kenyan General Elections 1992, 2 January 1993	41
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Appendix B:

Table 1 Kenya's Presidential Election 1992: Valid Votes Cast, by Province and Candidate. Absolute Figures and Percentages	44
Table 2 Distribution of Votes by Pair of Opposition Candidates Absolute Figures and Percentages	45
Table 3 Kenya's Parliamentary Election 1992: Distribution of Seats by Party and Province	46

Executive Summary

1. The irregularities and problems encountered in the run-up to the elections and in the balloting and counting phases cast very serious doubts indeed on the freeness and fairness of the general elections held in Kenya on 29 December 1992. The credible and corroborated evidence adduced, even if part of it may be merely circumstantial or impressionistic, will go a long way towards supporting such a conclusion. It is doubtful, however, whether it is sufficient for passing a definitive judgement.

2. The Electoral Commission was severely criticised for lack of consultation and transparency, which in turn led to suspicions of partiality. A particularly contentious issue was the financial bankruptcy of its chairman, which cast doubts on his fitness for service on the Electoral Commission. Criticisms were also raised with regard to inadequate preparation for the elections.

3. The registration of voters was seriously compromised. A registration period of six weeks seems far too short for any country, but particularly so for a country like Kenya, with a predominantly rural population with long distances to the registration centres, and an apparent lack of training and education in the significance and procedures of voter registration. There were convincing indications that significant numbers of potential voters were unable to register because they had not been issued national identity cards and were thus effectively disenfranchised.

4. While the presidential nomination has been described as “a study in fairness”, the nomination of civic and parliamentary candidates was marred by a number of alleged irregularities and widespread violence to which the police failed to respond appropriately. Reports of candidates who were interfered with during their attempts to present their nomination papers ranged from kidnapping, involuntary “disappearance”, theft of candidates’ nomination fees and destruction of registration papers. The way in which the nomination was conducted by the Electoral Commission was met with consternation and wrath by opposition parties. Some threatened to withdraw from the process altogether and boycott the elections.

5. Defections by prominent party members and nominees caused widespread suspicion of harassment and bribery. There were allegations of buying of prominent politicians or candidates to induce defection from one party to another, mainly from the opposition to the ruling party. Defections occurred over a long period of time, sometimes involving second-time defections (in several cases, defectors from KANU defected back to the party after a short period). Defections of this kind continued even after the civic and parliamentary nominations; in the final run-up to the elections the situation was so serious that the Attorney General had to warn candidates that “the law did not provide for defection or withdrawal of candidates who have been validly nominated by their respective parties”.

6. Since October 1991 a series of politically instigated so-called tribal clashes had occurred in parts of the country, in particular in some areas of Rift Valley and Western Provinces. Tens of thousands of innocent people had been displaced after their homes had been burnt down, and hundreds had been killed. These clashes created a volatile security situation which significantly hampered an effective democratic process in these areas. They produced a political climate of hostility, and are likely to have influenced the voting pattern in the affected areas. Mobile polling stations, promised by the Electoral Commission to be ambulating in the affected areas, never appeared.

7. Through investigative journalism the printed media offered critical in-depth articles on candidates, parties and election issues in the run-up to the election, despite an element of self-censorship. The diversity of the dailies as well as weeklies and monthlies ensured broad coverage. Access to the electronic media was perceived by observers, monitors and opposition parties alike as one of the most contentious issues of the campaign period. Not only did KANU receive disproportionately more air time than the opposition, but news items about KANU were also invariably positive and those about opposition parties always negative. There is little doubt that limited access to the electronic media greatly disadvantaged the opposition parties during the election campaign.

8. Election day proceeded with astonishing peace and quiet, thanks to what some observers termed the “dogged determination” of the Kenyan people to exercise their democratic right. However, tensions ran high and an atmosphere of extreme suspicion overshadowed the outwardly peaceful process, leading to frustration and in some cases outbreaks of violence in

and around polling stations. The frustrations of the electorate were due largely to the clearly inadequate logistics of the elections.

9. The majority of polling stations opened later than the announced time. The late opening of stations was explained by the late arrival of election materials, be they ballot boxes, registers or ballot papers, or indeed the late arrival of presiding officers or election clerks.

10. Insufficient or wrong election materials continued to cause delays during the voting. In a good number of polling stations, voting had to be temporarily halted because ballot papers ran out. Necessary implements, such as ink and stamps, were also insufficiently provided for.

11. Accusations that voters were unduly influenced were levelled against election officials and parties alike. Allegations of undue voter influencing were particularly strong with regard to the large number of illiterate voters, or those who appeared to require procedural assistance.

12. Allegations abounded about "importation" of voters across the country to particularly contested districts, implicating both KANU and opposition parties. Such malpractices were distinctly possible, as indicated by repeated comments and warnings on the matter by the Electoral Commission.

13. The organisational shortcomings and irregularities of election day carried over into the counting process. Serious delays in starting the counting were experienced due to the late arrival of ballot boxes from the polling stations to the counting centres. Although in most instances transport problems were cited as the cause of the delays, they seemed inordinately long in urban and semi-urban constituencies alike, as in Nairobi. The protracted and controversial nature of the counting process also led to deteriorating security conditions. Election results were slow in being announced, far beyond what could have been expected due to delays in the counting process.

14. The presidential elections, with a turn-out rate of 68.4 per cent, gave President Moi a fresh mandate for another five-year term, given the country's plurality system of election. With 1,962,866 votes Moi beat his closest rival, Kenneth Matiba, by a comfortable margin of 558,600 votes. The number of votes garnered by Moi accounted for 36.3 per cent of the total cast, whereas Matiba got 26 per cent. However, an alliance of any two of the other three major contenders would have out-voted Moi. Together the

three of them accounted for 63 per cent of the total vote. In other words, Moi does not enjoy the support of the majority of the Kenyan people, just over one-third of the electorate.

15. It is revealing to look at the distribution of votes for Moi. His home province, Rift Valley, repeatedly declared an exclusive "KANU zone", is clearly his Kalenjin stronghold, although in percentage terms he also carried North Eastern (inhabited predominantly by ethnic Somali) by a wide margin. By contrast Moi's support in Central Province is negligible; similarly his support is very weak in Nairobi and Nyanza provinces. Despite these disparities in support, Moi garnered at least 25 per cent of the vote in five of the eight provinces, as required by the Constitution to become elected president. With some justification Moi may thus claim broader support nationwide than any of his competitors, despite faring dismally in Central and Nyanza provinces. This geography of support testifies to the persistence of the politics of ethnicity in Kenya.

16. KANU won 36 of the 44 seats from Rift Valley, 17 of the 20 seats in Coast Province, eight of the ten seats from North Eastern and 21 of the 32 seats in Eastern. FORD-Asili, by contrast, won 14 of the 25 seats in Central Province and 6 of the 8 seats in Nairobi. With the 10 seats in Central Province won by DP, FORD-Kenya was the only other party that managed to win a seat in Central Province, but its candidate was a Kikuyu. Up to a point, the four major parties may be said to be regionally based.

17. The overall parliamentary constellation in the aftermath of the elections is such that KANU with its 100 seats has an absolute majority, whereas the opposition commands 88 seats. In addition the President may nominate 12 MPs but even with this addition the incumbent party falls short of the three-quarter majority required to amend the Constitution. Conversely, the opposition is even further away from succeeding in making amendments to the Constitution, with which they are highly dissatisfied.

18. The opposition was reluctant to acknowledge defeat. On 1 January 1993, leaders of the three opposition parties called a joint press conference to announce their rejection of the results on grounds that the election had been massively rigged. This move met with criticism from within their own ranks and among clergymen who seemed to feel that Parliament would be a better arena for continuing the struggle. Elements of the opposition also directed criticism against their leaders for not having realised the dangers of splitting the opposition vote three ways and thus serving victory on a

silver plate for Moi. Repeated calls in the run-up to the elections for unity in the opposition had fallen on deaf ears.

19. Despite countless irregularities observed, the authors of this report are not prepared to pass a judgement, *in unequivocal terms*, that the Kenyan general elections of 1992 were free and fair, or that they were *not* free and fair. The difficulty in adducing inadequate evidence is associated with the brevity of the visits by international observers and their limited number, hardly commensurate with the task. If election monitoring were to be likened to conducting a sample survey, one might say that the sample was small and biased, the response rate was low and the margin of error correspondingly wide. The political sensitivity of the situation did not make it any easier to validate responses.

20. The elections of 29 December 1992, despite flaws and irregularities, no doubt signify that Kenya is moving in a democratic direction relative to the situation prior to the repeal of section 2A of the Constitution. The run-up to the election and the period of political fermentation before that time, the campaign and the elections themselves have created a wider democratic space in Kenya. The embryo of a new democratic political culture is discernable; from it there is likely to emerge a genuinely democratic practice. True, there will continue to be setbacks and hurdles to be overcome. But the path and direction have been charted and it is now for the people of Kenya to move along, however arduously and painstakingly.

21. The problems of coverage and evidence resulting in the inability of observer team to pass definitive and unequivocal judgements as to the freeness and fairness of elections, warrant a self-critical note. Whereas the institution of election observing is worth defending, a minimum of professionalism is required on the part of election observers in the discharge of their duties. Inadequate attention has thus far been devoted to specifying a set of criteria to be satisfied in order to enhance the professionalism of election observing. There ought at least to be clear rules of thumb on several requirements. Such rules relate to the ratio of international observers and local monitors to the number of polling stations; geographical deployment; reporting and flow of information; proper liaison between international observers and local monitors; duration of stay before and after election day as well as pre-election visits; country expertise of the teams; and better coordination between observer teams and donors.

Acknowledgements

As authors of this report, our heartfelt thanks go first and foremost to those scores of Kenyans from all walks of life who generously shared information with us and aired their views. Without their kind and often enthusiastic cooperation we would have been unable to complete our task successfully. We are particularly grateful to Boro Gathuo, Rose Warmka, Benjamin Mwangi, Halvor Aschjem and Chris Cooter, all of whom in various ways assisted in facilitating our observation efforts.

We would also like to thank the Norwegian Ministry of Foreign Affairs for a generous grant which made possible our observation mission. Notwithstanding the financial sponsorship, this report should not be interpreted as reflecting the official position of Norway. Responsibility for the views expressed, conclusions drawn and any remaining errors rests solely with the authors.

Together with two Swedish colleagues, Rolf Ring and Henrik Malmquist, of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in Lund, Sweden, and a Canadian colleague, John Galaty, of the International Center for Human Rights and Democratic Development in Montreal, Canada, we made up the Scandinavian-Canadian Election Observer Team (Scan-Can). Although we formed one team while in Kenya, for practical reasons we have decided to report separately.

Bergen and Oslo, 25 May 1993

Bård-Anders Andreassen
Gisela Geisler
Arne Tostensen

1. Background

1.1 Fundamentals of Kenya's Political System and History 1963-91¹

Kenya became a republic on 12 December 1964, after only one year with a federal (so-called *Majimbo*) constitution and the Queen of England as the formal head of state. A new Constitution was adopted based on a unitary state and the *Kenya African National Union (KANU)* took office as the ruling party, which has remained in government to date. At about the same time the other major party, *Kenya African Democratic Union (KADU)* dissolved itself and joined forces with KANU.

The Constitution provides for a division of powers between the Executive, the National Assembly (Parliament) and the Judiciary. The powers of the Executive are vested in an elected President, who has normally stood unopposed for direct election by universal suffrage. The President appoints ministers from among the Members of Parliament to form his Cabinet. There is constitutional provision for Parliament to pass a vote of no confidence in the Cabinet, in which case the President and his Cabinet would have to resign. Parliament has 188 elected members and 12 additional members nominated by the President, plus the Attorney-General as an *ex officio* non-voting member. Chapter V of the Constitution contains a Bill of Rights setting out the fundamental rights and freedoms of Kenyan citizens. Thus, except for a constitutional amendment passed on 9 June 1982 by virtue of which Kenya became a *de jure* one-party state, Kenya's constitutional arrangements closely resemble those of a liberal democratic state.

However, beyond the formal institutions and procedures prescribed in the Constitution, subsidiary legislation and political practices have over the years, to some degree, modified constitutional custom. Above all, events following the aborted *coup d'etat* in 1982 served to strengthen the powers of the Executive at the expense of Parliament and the Judiciary. Although this trend was evident also under Kenyatta, it was further reinforced under

¹ This background account draws on ch. 3 in Arne Tostensen and John Scott (eds.), *Kenya Country Study and Norwegian Aid Review*, (Bergen: Chr. Michelsen Institute, 1987).

Moi in the 1980s. A political culture emerged which put the President beyond reproach. Whatever democratic political debate existed previously had gradually been replaced by a personalistic style of rule through executive directives and orders. Criticism, however constructive and well founded in facts, tended to be dismissed outright as “anti-Nyayo”.²

After the dissolution of KADU in 1964 it was not until 1966 that a new party emerged, the *Kenya People's Union (KPU)*, when some 30 KANU MPs defected to form their own party under the leadership of then Vice-President Oginga Odinga. Having to renew their mandate from the electorate in the so-called “Little General Election”, the majority of the defectors lost their seats, largely as a result of administrative harassment by the state apparatus which, in effect, intervened in favour of one of the contesting parties, viz. KANU. The failure in the 1992 general election to de-link state structures from those of the ruling party is reminiscent of what happened in 1966.³ Three years later, in 1969, the KPU was proscribed and its leadership detained without trial.

From 1969 until June 1982, Kenya remained a *de facto*, if not a *de jure* one-party state. During this period KANU virtually ceased to function as a party between elections every five years. Since Moi's take-over of the Presidency in 1978, and particularly since the formal *de jure* introduction of the one-party system in mid-1982, steps have been taken to overhaul the party machinery and to revitalise KANU, including membership drives which have at times been coercive.

Independent Kenya inherited a centralised system of government from the colonial period, based on an administration controlled by Provincial and District Commissioners, and below them cadres of District Officers, Chief and Assistant Chiefs, who together represented the extended arm of the Executive. This structure, referred to as the Provincial Administration, was geared towards maintaining law and order. Although gradually also taking on the task of development, the Provincial Administration has continued to be used as a powerful means of repression, equipped with a host of legal instruments of control.

Much security legislation was a colonial hangover, albeit with some amendments to meet new circumstances, while new laws with colonial

² The motto of *Nyayo* (meaning 'footprints' or 'footsteps') was first introduced by Moi when he in 1978 succeeded Kenyatta to denote that he would follow the path of his predecessor. The term has subsequently acquired the meaning that the citizens of Kenya should follow in the footsteps of Moi.

³ See Susanne D. Mueller, “Government and Opposition in Kenya 1966-69”, *Journal of Modern African Studies*, vol. 22, no. 3, 1984.

antecedents were passed by Parliament. One particular ordinance was retained as the Public Order Act, empowering the Executive to issue or deny licences for holding public meetings, be they political or not. The Preservation of Public Security Act predated independence; it was reenacted in 1966, and provides for preventive detention without trial. The Registration of Societies Act, requiring all societies and associations to register as such with the Registrar of Societies, has its counterpart in a colonial ordinance. Likewise, the Chief's Authority Act is a colonial creation, conferring extensive powers on the Chiefs who form part of the Provincial Administration.

The centralised state apparatus has been charged with administering these laws, and in collaboration with Special Branch, Criminal Investigation Department (CID) and para-military General Service Unit (GSU) officers, to function as a security network as well. At various levels Security Committees have been established, whose duties are to gather intelligence through police and informer networks, to defuse and control tense situations in the interest of national security. In the one-party state they were also used to prevent the emergence of new political organisations which might compete with the ruling party.

Even state institutions which were to be independent of the Executive came under pressure. In December 1986 Parliament passed a constitutional amendment with four important provisions:

- (a) the removal of security of tenure of the Office of the Attorney-General;
- (b) the removal of security of tenure of the Office of the Controller and Auditor-General;
- (c) the abolition of the Office of the Chief Secretary;
- (d) the increase of the minimum number of Parliamentary constituencies from 158 to 168, and to a maximum of 188.

In the ensuing public debate, critics noted that this amendment was tantamount to tampering with the system of checks and balances enshrined in the Constitution and jeopardising the independence of these critical institutions.

Subsequently, in August 1988, a further constitutional amendment was hastily passed which removed the security of tenure of the office of High Court and Court of Appeal judges, a move widely seen as curtailing the independence of the Judiciary. The same amendment also removed the security of tenure of office for members of the Civil Service Commission, yet another move to strengthen the powers of the Executive. Lastly, the

amendment empowered the police to detain capital offence suspects for fourteen days before taking them to court.

From time to time the simmering of opposition underneath the repressive lid has erupted in the form of riots and peaceful demonstrations, looting (e.g. after the 1982 abortive coup), political assassinations (e.g. Tom Mboya in 1969 and J.M. Kariuki in 1975) and the formation of clandestine organisations such as *Mwakenya*.

Public debates in the late 1980s centred on such issues as corruption, human rights and the queuing system of voting and the 70 per cent rule in primaries (although only one party allowed). The churches, particularly the National Council of Churches of Kenya (NCCCK) and the Law Society of Kenya (LSK) were at the forefront as critics of the government, demonstrating that opposition was widespread and growing.⁴

1.2 Towards a Multi-Party System

For a long time the government appeared able to contain the forces of change. But mounting internal discontent in the early 1990s compelled the Moi government into making concessions, however reluctantly, cautiously and erratically.

In mid-1990 a KANU review committee was set up to hear grievances and proposals for political reform. After the committee delivered its report in late 1991, KANU decided to abolish the queuing system of voting and the 70 per cent rule; to discontinue its practice of expulsion of members; to establish a corruption tribunal; but reconfirmed its faith in the superiority of the single-party system.

In November 1990 the security of tenure of the Office of the Attorney-General, the Auditor-General and the judges was restored by a constitutional amendment. In January 1991 a number of expulsions of former prominent KANU members were lifted. A new Attorney-General, Amos Wako, was appointed in May 1991 to replace Mathew Muli, who

⁴ The queue system of voting, introduced in 1986 under the pretext of being transparent, entails that party nominations are to be determined by way of queuing behind the preferred candidate or a placard with the picture of the candidate. Apart from a range of impracticalities, the system violates the secret ballot and leaves voters wide open to intimidation and victimisation. The 70 per cent rule stipulates that if a candidate manages to garner at least 70 per cent of the votes in a primary party election, he or she will be elected unopposed. In a single-party system this means, in effect, that non-party members not taking part in the primaries would be disenfranchised in their constituencies in the general election.

had come under fierce criticism. The appointment of Wako, then considered a man of integrity, was generally welcomed.

Meanwhile, opposition forces of various persuasions pushed on. Prominent lawyers associated with the LSK, such as Paul Muite, Gibson Kamau Kuria, John Khaminwa, James Orengo, G.B.M. Kariuki, Lee Muthoga, Kiraitu Murungi, Martha Njoka, Gitobu Imanyara, kept up pressure on a number of issues ranging from human rights violations and the independence of the Judiciary to broader matters of constitutional law. Likewise prominent personalities of the churches, such as Manasses Kuria, Henry Okullu, Alexander Muge, David Gitari, Timothy Nyoya and Samuel Kobia, added to the breadth of criticism within civil society. Groups of academics issued memoranda calling for an open democratic discourse. Courageous individuals like Wangari Maathai and many others of lesser prominence further contributed to the debate.

A spate of what appear to have been political assassinations contributed to the heat of the struggle. The most prominent of these was the death on 13 February 1990 of former Minister of Foreign Affairs, Robert Ouko. An official commission of inquiry was set up to investigate the case. The report, produced with the assistance of detectives from Scotland Yard, was never made public. It may be surmised, however, that names of individuals very close to the President were mentioned in the report. Other deaths under somewhat mysterious circumstances (Alexander Muge, Hezekiah Oyugi and Masinde Muliro) were widely seen to have resulted from "arranged accidents" or "induced" natural deaths. Whatever the facts, inadequate police investigation and/or post mortems not having been performed, have failed to dispel doubts and fuelled suspicions of foul play.

Knowing that the next general election had to be held by March 1993, politicians of the opposition became steadily more vocal in calling for multi-partyism and more defiant of the government's refusal to amend the Constitution to this end. Kenya's first Vice-President, Oginga Odinga, took the lead. Having made press statements already in early 1982 that he would form a new party, he reiterated his intention in October 1990. And in February 1991 he announced the formation of the *National Democratic Party (NDP)* and sought registration under the Registration of Societies Act. Registration was denied; after the matter had been taken to court, the ruling of the High Court in July 1991 reconfirmed the Registrar's refusal of registration.

Prominent politicians and businessmen Kenneth Matiba and Charles Rubia at a joint press conference in May 1990 called for multi-partyism, despite a KANU statement just one month previously to the effect that it opposed multi-partyism on grounds that it would be ethnically divisive.

About the time of the so-called *Saba Saba* riots in early July the same year, both men were detained without trial and held for nearly a year before their release.

Having failed to register his NDP, Odinga spearheaded the formation in August 1991 of a broad alliance named *Forum for the Restoration of Democracy (FORD)* comprising most of the ethnic groups of the country, with the exception of the Kalenjin. Since FORD was considered a forum of less than ten personalities rather than a party, no registration was required. However, FORD was clearly perceived as the precursor to a party — as later turned out to be the case.

In August-September 1991 a public debate on *Majimboism* flared up, spurred by Kalenjin politicians in the Rift Valley, ostensibly as a federal alternative to political pluralism. It is noteworthy that this initiative to reintroduce a federal system of government came from the same ethnic groups that before independence had advocated a *Majimbo* Constitution, i.e. constituent groups of the now defunct KADU party, whose leaders at the time included Daniel arap Moi. It came as no surprise that the debate fanned sentiments of tribalism. Poorly disguised allusions to ethnically homogeneous areas were made, with reference to the ethnic clashes observed in several parts of the country over land and residence rights. Although couched in different terms, the same sentiments reappeared later in the heated electoral campaign, when certain areas were declared exclusive zones of this or that party.

As political struggles intensified, the mass media, particularly the printed media, assumed an increasingly important role. The scope of political expression widened considerably through 1992. The three dailies were active in promoting debate on issues and the activities of personalities. The *Kenya Times*, owned by the ruling party, and the government *Kenya News Agency (KNA)*, understandably took a pro-government stand on most issues, whereas the *Daily Nation* and the *Standard* took a more critical, though not partisan, stance vis-à-vis the KANU government. A plethora of weekly publications of variable quality had emerged, performing an important democratic function in a mass-media situation which had previously been much more restrictive. Pursuing the same line of critical journalism as the previously banned *Beyond* and *Financial Review*, other weekly and monthly magazines like *Society*, *Finance*, *Nairobi Law Monthly* and *Jitegema* persisted despite harassment. The electronic media under government control, i.e. *Kenya Broadcasting Corporation (KBC)* with respect to both radio and TV, were not conducive to free debate. The exception was, perhaps, the privately-owned TV station *Kenya Television Network (KTN)*.

In the face of persistent internal opposition coupled with increasing pressures from abroad, the incumbent KANU government finally succumbed. In December 1991 section 2A of the Constitution was repealed, thus paving the way for multi-party politics.

As from early 1992 the political struggles gathered momentum and a host of new parties were formed, notably the *Democratic Party (DP)* headed by Mwai Kibaki, who on Christmas Day 1991 resigned from his government post to form his own party. Within FORD, tensions mounted over procedures and between personalities jostling for positions. These squabbles were later to result in a split leading to the formation of *FORD-Asili* under the leadership of Kenneth Matiba and *FORD-Kenya* under the leadership of Oginga Odinga. Others left to form still another grouping under the name of *Kenya National Congress (KNC)*.

2. Run-Up to Election Day

2.1 Electoral Reform and the Election Laws

The election process in Kenya is governed by a number of constitutional provisions, laws and statutory instruments. These specify in detail the conditions under which elections are to be conducted, including the right of candidates to have up to two agents at each polling station, the right to inspect ballot boxes before polling starts, and the right of candidates to have their own seals attached to ballot boxes once the presiding officer has sealed them.⁵

Despite these and related provisions for safeguarding a free and fair voting process, several issues and concerns soon became a source of contention in the run-up to the December 1992 elections. The most important among them included:

- (a) the lack of public debate and consultation about electoral reforms and a lack of involvement by the opposition parties;
- (b) introduction of electoral reforms widely seen as designed to favour the incumbent KANU Government;
- (c) a series of ill-prepared and last-minute changes (or attempted changes) of great significance in the electoral legislation.

In order to encourage a democratic culture of tolerance and trust and to facilitate a political climate conducive to free and fair elections, it would have been wise for the Government to have invited the political parties for consultation and advice. For instance, in light of the distribution and pattern of ethnic communities, arguably one of the most important bases of electoral support, it would have been appropriate to review the election system and its likely impact on the representation of various ethnic groups

⁵ These include the National Assembly and Presidential Elections Act; the Local Government Act; the Election Offences Act; the Election Laws (Amendment) Act of 1992, and subsidiary legislation issued by government departments. Cf. Report of the International Human Rights Law Group (IHRLG), *Facing the Pluralist Challenge: Human Rights and Democratization in Kenya's December 1992 Multi-Party Elections*, (Washington D.C.: IHRLG, 1992), Ch. V.

and regions, with a view to averting ethnic divisions within the electorate.⁶ As the process unfolded, no consultation of this kind took place.

Rather, electoral reforms were made through a series of hurried changes, allegedly in favour of the incumbent party, or piecemeal and last-minute measures. It is hard to see how such an approach could correspond to the requirements of a free and fair electoral process in which any contemplated procedural or other changes are to be communicated to all parties, and debated publicly long before the start of the electoral campaign. The most important of these hurriedly instituted reforms included the following:

(1) On 5 August 1992 Parliament amended to the Constitution to the effect that any presidential candidate, in addition to winning a parliamentary seat and receiving a plurality of the total votes cast nationwide, would also have to garner at least 25 per cent of the vote in at least five of the country's eight provinces. Although there may be some justification for a provision which would secure an elected President broad support regionally and ethnically, the required *level* of support was widely interpreted to disadvantage the opposition, which had only rudimentary organisational capabilities on a national basis. Conversely, it was seen to favour the incumbent party, which had a well-established machinery throughout the country.

(2) Furthermore, the constitutional amendment required that the elected President form a government from his own party only. This provision was also interpreted by the opposition as a safeguard measure on the part of the KANU Government to retain executive powers in case Moi should win the presidential election and KANU lose majority in Parliament, by blocking a coalition government by an alliance of multiple opposition parties.

A serious concern about these amendments related to the lack of prior consultation between the Government and the opposition. The amendments added to an atmosphere of confrontation which jeopardised a peaceful election campaign and orderly conduct of the elections. These amendments, and the way in which they were introduced, ran counter to the principles of multi-party democracy, by which key changes of the electoral laws would require consultation with the principal political actors.⁷

⁶ Kenya has an electoral system of plurality vote in single-member constituencies, which tends to favour the emergence of a two-party system. In view of the varied ethnic composition of Kenyan society it would be of great interest to consider the effects of proportional electoral systems on democratic representation by minor parties from comparatively smaller ethnic groups.

⁷ Cf. IHRLG report, *op.cit.*, p. 16.

(3) In November 1992, the Attorney General, apparently with the consent of the Electoral Commission, made an “interpretation” and “typographical” correction of the election law which reduced the time-period required to elapse between the date of the announcement of the election date and the date of the nomination for candidates, effectively restricting the nomination period to a mere eight days.⁸ On 12 November the opposition, represented by Jaramogi Oginga Odinga, Gitobu Imanyara and Hassan Kadir, filed a complaint to the High Court, in response to which the court dismissed the change in the electoral code, saying that it was “too legalistic a point to take in a matter of such grave importance to the country”. By that time, however, the matter had done a great deal of harm in terms of adding tension to an atmosphere already charged with mistrust and suspicion.

2.2 The Electoral Commission

According to the Constitution, the Electoral Commission is appointed by the President. This notwithstanding, it is an independent body of salaried members with constitutional security of tenure. The functions of the Electoral Commission include the preparation and supervision of elections, maintenance and revision of voters’ registers, determination of the number of constituencies and their delimitation, and promotion of voter education.

The Electoral Commission preparing for the 29 December elections was established before the repeal of section 2A of the Constitution, which paved the way for multi-partyism. Despite significant amendments to the Constitution and the political system subsequently, the government did not avail itself of the opportunity to change the composition of the Electoral Commission as well. In failing to do so, the government may have missed an opportunity of increasing confidence in the electoral process. In fact, the composition of the Commission became one among several serious complaints levelled against it and its operation. Throughout 1992, the Kenyan opposition, international organisations and diplomatic envoys

⁸ The election law enacted earlier in the year furnished parties with “not less than 21 days” after the day on which the public notice of the election day was made to file parliamentary nominations. Similarly, the general election campaign period would be “not less than 14 days” from the nomination date (Election Laws (Amendment) Act, 1992, Section 6.) When the opposition learned of this on 3 November, it was horrified. The Attorney General claimed that the change of wording had been made because it was illogical to allow a shorter period of time for the general election campaign than for the nomination process. Cf. IHRLG report, *op.cit.*, p. 16.

repeatedly requested President Moi to appoint a new commission in which the opposition parties would be represented, but in vain.⁹

Apart from lack of consultation, serious doubts were cast on the suitability, credibility and commitment of the chairman of the Electoral Commission, Justice Zachaeus Chesoni, who had made it clear earlier that he was not in favour of a multi-party form of governance.¹⁰ Two issues were particularly important:

First, according to judicial records it was publicly known that Chesoni had been removed from his office as a judge of the Court of Appeal because of financial embarrassment.¹¹ The personal credibility of the chairman of the Commission in the eyes of the public at large, and the opposition parties in particular, was considerably tarnished as a result. Complaints of a similar nature were made that Chesoni and certain members of the Commission were unfit for service because they were believed to "take orders" from the ruling party. Allegations of this kind have not been substantiated, but their persistence testifies to the lack of confidence in the impartiality of the Commission.

Second, there was serious lack of transparency in the work of the Commission. As late as November 1992 it was reported that the Chairman was "extremely secretive" not only towards opposition parties but also towards his fellow commissioners.¹² More serious, perhaps, was the slow, belated and apparently inadequate logistical preparation for the elections, the result of which became evident on election day (cf. section on Election Day). Despite ample time, more than one year, the Commission's seriousness and earnestness in preparing for the smooth administration of the elections was apparent only during a few hectic weeks before polling day.

Whatever difficulties exist in evaluating the effects of the performance of the Electoral Commission on the conduct and outcome of the elections, it is our assessment that the Commission did little to create an atmosphere of confidence and trust in the process, which was badly needed in a politically tense situation. Notwithstanding commendable efforts in the

⁹ Kennedy Memorial Centre for Human Rights, *Closing in on Elections: Accountability in the Kenyan Electoral Process*, (Washington D.C: KMCHR, August 1992), p. 9.

¹⁰ Cf. IHRLG report, *op.cit.*, p. 19.

¹¹ Cf. Commonwealth Secretariat, *The Presidential, Parliamentary and Civic Elections in Kenya, 29 December, 1992*. The Report of the Commonwealth Observer Group, (London: Commonwealth Secretariat, 1993), Annex IX detailing the circumstances of his removal.

¹² Cf. IHRLG report, *op.cit.*, p. 20.

weeks immediately prior to the elections, the preparations made by the Electoral Commission were clearly inadequate. The execution of the elections was marred by numerous irregularities and deviations from basic democratic principles of transparency and fairness, during balloting as well as during the counting phase (cf. section on Counting).

2.3 Registration of Voters

A crucial issue in a democratic system is how to decide on criteria and procedures for including, and/or justifiably and lawfully excluding, citizens from the right to vote and to stand for office. In Kenya this became a critical issue with potentially far-reaching consequences, whose precise nature still remains to be explored.

With some qualifications, Kenyan law entitles any citizen of at least 18 years of age on the date of registration to register. Any registered citizen is eligible for office and entitled to vote.¹³ The registration of voters started on 8 June 1992 and closed, after two short extensions, on 20 July. Regrettably, there is significant evidence to show that the registration process was seriously flawed.¹⁴ The most serious problems and allegations were the following:

First, a registration period of six weeks seems much too short for any country, but particularly so for a country like Kenya with a predominantly rural population with long distances to the registration centres, and an apparent lack of training and education in the significance and procedures of voter registration.

Second, there were convincing indications that significant numbers of potential voters were unable to register and were thus effectively disenfranchised. In Kenya any voter is required to have a registration card in order to be able to vote. To register as a voter, a citizen has to identify

¹³ Among the main additional conditions are the requirement that, in order to register, a citizen must have been resident in Kenya for at least one year, or must have resided in Kenya for an aggregate period of not less than four years in the past eight years. Furthermore, he or she must have been, for a period aggregating not less than five months in the preceding 12 months, ordinarily resident in the constituency, or have carried on business, or have been employed, or have possessed land or residential buildings within the constituency. Excluded from registration (and thereby lawfully disenfranchised) are persons who are of unsound mind, are undischarged bankrupts, or are detained in lawful custody or have been convicted of an election offence within the past five years.

¹⁴ Kenyan political observers and commentators referred to the conduct of the registration of voters as one element in the *structural rigging* of the elections.

himself or herself by producing a national identity card. However, the issuing of ID cards had been seriously delayed over the last years, which prevented registration by a large number of young people who had reached the age of 18 years since the previous registration exercise in 1988. The Electoral Commission claimed it was unable to remedy the problem as issuing ID cards was the responsibility of the government, not that of the Commission.

There is no reliable and authoritative source to ascertain the number of eligible voters who might have been disenfranchised. Estimates range from one to five million. One estimate, based on the Kenya population profile available in the *Encyclopedia Britannica Yearbook 1992* indicates a shortfall of some 2.5 million voters out of an estimated voting-age population of 10.4 million, which suggests that about 25 per cent of the eligible voters did not register. It is likely, of course, that a substantial share of these potential voters did not bother to register due to apathy or deliberate boycott. Still, there are abundant reasons to believe that a significant number of potential young voters were disenfranchised, either through inappropriate measures to address the problem of ID cards or through "bureaucratic inefficiencies". Both explanations cast serious doubts on the democratic nature of the elections. Such deficiencies represent in and by themselves a serious reservation about the fairness of the electoral process.

Third, it was alleged before members of the present team that registration of voters continued after the officially announced closing date of the registration period. Complaints were also heard that access to voters' registers were difficult because the registers were not open for inspection at the hours announced, or were opened at dates different from those announced.¹⁵

Lastly, voters' cards were shown to members of the present team on which the ID number of the person in question differed from that recorded on the voter's card. An ICJ/FIDA report refers to a number of cases where the electoral register lacked names, addresses, or ID card numbers of voters in the register. A more peculiar example was the use of the same P.O. Box address for 13,172 voters in Nakuru District, Reg. Unit no. 61/I, and a similar one involving 5,000 voters with the same P.O. Box address in Nakuru District, Reg. Unit no. 64/I.¹⁶ A former MP for Molo constituency raised the issue of *fake* voters who he claimed had been registered in Molo

¹⁵ Cf. IHR LG report, *op.cit.*, p. 24.

¹⁶ The P.O. Box numbers for Reg. unit no. 61/I and Reg. unit 64/I were 290 Molo and 127 Molo, respectively.

long after the closing date of registration. He asked how more than 10,000 voters could have been registered in Molo when the local primary school of that area only has about 300 registered pupils.¹⁷ This was but one of several allegations of “imported voters” in hotly contested areas.

Available information from a variety of written sources and interviews leads to the conclusion that the registration of voters was seriously compromised, the most notable result being the effective disenfranchisement of a significant number of potential voters. Moreover, the faulty registration process created public mistrust in the electoral process from its very start.

2.4 Nominations

Nomination of candidates took place on 9 December 1992 for civic and parliamentary candidates, and on 14 December for presidential candidates. The difference in the conduct of the two nomination exercises was remarkable. While the presidential nomination has been described as “a study in fairness”, the nomination of civic and parliamentary candidates was marred by various alleged irregularities and widespread violence to which the police failed to respond appropriately.

Prior to the nominations, several prospective opposition candidates expressed fears about their security, and worries that they might be harassed and attacked on the eve of nomination day.¹⁸ Despite calls on the chairman of the Electoral Commission to provide security for such candidates, it never materialised. Reports of candidates who were interfered with during their attempts to present their nomination papers ranged from kidnapping, involuntary “disappearance”, theft of candidates’ nomination fees and destruction of registration papers. A total of 43 prospective opposition candidates complained that they had been hindered in presenting their nomination papers, mainly by KANU supporters or civil servants. Samples of complaints were made available to the present team, and elaborated upon by a lawyer representing some of the plaintiffs.

The way in which the nomination was conducted by the Electoral Commission was met with consternation and wrath by opposition parties. Some threatened to pull out of the process altogether and boycott the elections. Criticism was levelled against the Electoral Commission for

¹⁷ *Society*, 28 December 1992, p. 9.

¹⁸ *Society*, 28 December 1992, p. 20.

allowing nomination papers to be submitted during five hours only (from 8:00 a.m to 1:00 p.m. on nomination day).

The chairman of the Electoral Commission, in response to these allegations and criticisms, claimed he was powerless to act, saying that there was no legal provision which would enable him to order a repeat of the nomination in affected areas.¹⁹ Nonetheless, on 11 December the Chairman met with representatives of political parties and agreed to form a committee composed of election commissioners to look into alleged administrative malpractices during the nomination process. He ruled out, however, the possibility of looking into the legal aspects of the matter, which would have to be referred to a court of law.

Despite this constructive effort, Chesoni only two days later declared that KANU had successfully nominated 16 candidates unopposed, and lamented that in none of the 43 cases of complaint examined by the commissioners could a decision be reached "because most of the complainants had not given evidence".²⁰ According to information available to the present team all of these candidates were standing for election in Rift Valley province, in so-called "KANU zones". Similar problems were reported in Wajir District of North Eastern Province.

In summary, reports presented to the present observer team by independent organisations, opposition parties, lawyers and independent observers suggest that the nominations process was seriously flawed in certain areas of the country, and that the time allocated for candidates to file their nomination papers was remarkably short and insufficient to ensure a smooth nomination exercise. The inadequate response by the Electoral Commission to most serious allegations of fraud and irregularities did not contribute to the fairness of the election process, but rather compromised severely this part of the election campaign.²¹

¹⁹ This interpretation of the law, however, stands out in contrast to the interpretation of Section 41(10) of the Constitution by Professor of Constitutional Law, Kivutha Kibwana, who claims that "the Electoral Commission could easily ensure or have ensured that(R)eturning officers who concluded civic and parliamentary elections nominations in the face of obvious electoral malpractices re-open such nomination", *Daily Nation*, 22 December 1992.

²⁰ *Society*, 28 December 1992, p. 21.

²¹ This conclusion, in addition to information collected by this team, draws upon observations made by the advance team of the Commonwealth Observer Group. Cf. Commonwealth News Release, Nairobi, 13 December 1992.

2.5 Defections

Defections by prominent party members and nominees, mostly from the opposition to KANU, attracted much public attention, and caused widespread suspicion of harassment and bribery. Although hard evidence is difficult to come by, several credible observers expressed concern about “purchasing of voters (and voters’ cards) and candidates”. Persistent circulation of such allegations for a very long period made us note with concern that the prosecuting authorities (e.g. the Attorney General) did not take appropriate action to have such rumours denied or confirmed. Additionally, it should be pointed out that responsibility for curbing such practices also rests with the political leaders of all parties.

There were mainly three types of alleged money transfers reported in the press and by individual observers:

- (a) bribing of voters, or buying of voters’ cards. Numerous complaints were lodged by opposition parties that KANU was distributing money to gain the support of voters. Testimonies were also heard that some opposition parties were guilty of such malpractices as well;
- (b) buying of prominent politicians or candidates to induce defection from one party to another, mainly from the opposition to the ruling party. Defections occurred over a long period of time, sometimes involving second-time defections (in several cases, defectors from KANU defected back to the party after a short period). Defections of this kind continued even after the civic and parliamentary nominations; in the final run-up to the elections the situation was so serious that the Attorney General had to warn candidates that “the law did not provide for defection or withdrawal of candidates who have been validly nominated by their respective parties”.²²
- (c) alleged transfers of money to opposition candidates/parties from the government.

The final upshot of these incidents or alleged incidents could not be validated for the present observer team. However, there are enough indications to conclude that bribery of voters and so-called defections of candidates, even after the closing of nominations, may have been extensive and are likely to have caused confusion on the part of voters, and may have influenced voting patterns.

²² *Daily Nation*, 25 December 1992.

2.6 Ethnic Clashes

Since October 1991 a series of politically instigated so-called tribal clashes had occurred in parts of the country, in particular in some areas of Rift Valley and Western Provinces. Tens of thousands of innocent people had been displaced after their homes had been burnt down, and hundreds had been killed.²³ The incidents were reported in the press over the past year, and reliably documented by a task force to monitor the clashes, set up by Symposium I (organised by opposition parties, NGOs, professional bodies and pressure groups under the auspices of the National Council of Churches in Kenya — NCKK), as well as a Parliamentary Select Committee (the Clashes Report). The former report was released in July 1992, while the latter, also referred to as the “Kiliku report” (after the committee chairman, Kennedy Kiliku), was tabled in Parliament in September 1992.²⁴ Excerpts from its 238 pages were widely quoted in the press.²⁵ However, the report was rejected by Parliament.²⁶

According to the above reports the ethnic clashes first occurred in late October 1991 in conjunction with the so-called *Majimbo* rallies which started in September, at which KANU politicians in Rift Valley were campaigning for regionalism (*Majimboism*), and warning the Kalenjin (a collection of ethnic groups inhabiting the Rift Valley) that they risked being “evicted” from Rift Valley Province in a multi-party democracy. The reports also stated that the ethnic clashes invariably pitted the Kalenjin and Maasai in the Rift Valley Province against “virtually all other ethnic groups residing in western Kenya”.²⁷

Irrespective of the facts and root causes of the clashes which had been unfolding since October-November 1991 and throughout 1992, there is enough evidence to conclude that they impacted adversely on election preparations in the affected areas (the hardest hit areas were located on the boundary between Western and Nyanza Provinces, and the Rift Valley).

²³ According to estimates included in the Select Parliamentary “Clashes Report” tabled in Parliament in September 1992, 54,000 people had been displaced and 779 killed by 15 July that year. Later thousands more were displaced and many killed. Cf. *Weekly Review*, 25 September 1992. The “Clashes Report” concludes that the clashes “were politically motivated and fuelled by some officers in the provincial administration” (*Ibid.*, p. 15).

²⁴ The NCKK report was basically mirrored by the Kiliku Report, including the names of MPs allegedly involved in funding the “warriors” of the clashes.

²⁵ *Weekly Review*, 25 September 1992, pp. 3-15.

²⁶ *Weekly Review*, 23 October 1992, p. 12.

²⁷ Quoted from *Weekly Review*, 25 September 1992, p. 11.

The clashes created a volatile security situation which significantly hampered an effective democratic process in these areas. They produced a political climate of hostility, and are likely to have influenced the voting pattern in the affected areas.

As pointed out by the reports referred to above, the local or central authorities were not seen to be taking appropriate measures to prevent the aggressors from continuing hostilities in order to ease tensions between communities. No one was apprehended by the police, indicted or tried in a court of law. Shortly before the elections, the chairman of the Election Commission, Justice Chesoni, assured the displaced persons that mobile polling stations would be ambulating in the affected areas, but this measure, which would have enabled the displaced peoples to exercise their democratic rights, was never implemented.

2.7 Access to the Mass Media During the Election Campaign

Through investigative journalism, the printed media offered critical in-depth articles on candidates, parties and election issues in the run-up to the election. The diversity of the dailies as well as weeklies and monthlies ensured broad coverage. However, not all international observers were altogether satisfied with the performance of the press. The Commonwealth Observer Group expressed criticism of “a certain degree of self-censorship” and criticised particularly the tendency of newspapers to emphasise sensationalism over investigative articles on serious political issues, such as the ethnic clashes.²⁸ The International Human Rights Law Group in its pre-election report also detected an element of self-censorship in the printed news media and suggested, as far as the foreign-owned press was concerned, that this might be attributable to a cautious attitude on the part of foreign business interests in Kenya.²⁹

It was access to the electronic media, however, that was perceived — by observers, monitors and opposition parties alike — to be one the most contentious issues of the campaign period, largely because radio transmissions in particular have very broad nationwide coverage. The Professional Committee for Democratic Change (PCDC), a local non-governmental organisation that was a constituent part of NEMU, monitored news coverage of selected English-medium news broadcasts of both KBC and KTN television and KBC radio before the election. It concluded that

²⁸ Commonwealth Secretariat, *op. cit.*, pp. 26 and 27.

²⁹ IHRLG report, *op.cit.*, p. 27.

news coverage, particularly that of KBC, was heavily biased in favour of the ruling party KANU. It was found that not only did KANU receive disproportionately more air-time than the opposition, but also that news items about KANU were invariably positive and those about opposition parties always negative. It was also observed that the KBC and KTN television stations allocated considerable air-time to news items that depicted President Moi both as head of state *and* as party head of KANU, so that KANU party and state functions were imperceptibly mingled.³⁰ Between 22-26 October the news monitors found that KBC carried no report on the opposition; in KTN news transmissions the ratio between opposition and KANU news items was one to four, as well as offering no film footage with news items from the opposition.³¹

Despite many submissions by the opposition parties and local and international observers, the news coverage in the electronic media did not improve to any noticeable degree, and calls for the suspension of responsible media chiefs were not heeded. On the contrary, a KNT television news editor was dismissed for covering the defection by a prominent minister to the opposition and others were threatened with dismissal.³²

There is little doubt that their limited access to the electronic media greatly disadvantaged the opposition parties during the election campaign. Furthermore, despite the relative independence of the print media, their position was hamstrung by a certain degree of self-censorship, partly brought about by past experience of harassment of critical journalists and publications. Just how fragile independent and critical journalism really is has been underscored in the short period after the elections, which has seen the editor of a weekly magazine held by the police and questioned on charges of sedition and whole editions of critical weeklies impounded by the government.

2.8 The Contending Parties

Some parties had effectively been formed, though not registered as such, even before the December 1991 repeal of Section 2A of the Constitution,

³⁰ Professionals Committee for Democratic Change, Public Announcement Concerning the Manner in which the Kenya Broadcasting Corporation is Discharging its Role as an Independent and Impartial Broadcasting Organization, Nairobi, no date, appended to IHR LG report, *op.cit.*, appendix J.

³¹ *Ibid.*

³² IHR LG, *op.cit.*, appendix F.

which in 1982 had transformed Kenya into a *de jure* one-party state. This constitutional amendment led to the emergence of a number of additional opposition parties. Altogether nine new parties, in addition to the existing KANU, managed to secure registration under the Registration of Societies Act. Applications by three other parties were rejected. The most prominent among these was the Islamic Party of Kenya (IPK) with a following among Muslims in the coastal region; the other two were "green" environmentalist parties. The rejection of IPK was made on grounds that it was a religious group rather than a political party. The other two were rejected on vague grounds of national security.³³

The completion of the nomination process finally saw seven opposition parties contesting the presidential, parliamentary and civic elections. Three of these parties, FORD-Kenya, FORD-Asili and Kenya National Congress (KNC), could be traced back to the original loose opposition alliance FORD. Together with Mwai Kibaki's Democratic Party of Kenya (DP) the two FORD parties formed the three main opposition parties with the largest following. The Kenya National Democratic Alliance (KENDA), the Kenya Social Congress (KSC), the Kenya National Congress (KNC) and the Party of Independent Candidates of Kenya (PICK) remained localised and relatively insignificant in voter strength.

The DP had been formed in January 1992, only a month after its leader, Mwai Kibaki, a former Vice-President, had resigned from his ministerial post in President Moi's cabinet. The party was perceived to be dominated by the Kikuyu. Kibaki's belated resignation from Moi's Cabinet and the composition of the party leadership contributed to an image of DP as "composed of wealthy individuals who waited while others struggled and sacrificed for the establishment of a multiparty system, only to ... try and reap where they had never sown".³⁴

Meanwhile, FORD was beset by leadership rivalries, first among Oginga Odinga, Paul Muite and Martin Shikuku, and increasingly so with the return of Kenneth Matiba in May 1992 from convalescence in London after a stroke. Matiba received a tumultuous reception on his return and almost immediately announced his candidacy for the presidency, despite reported previous efforts by a delegation to London of prominent FORD members to dissuade him from such plans.³⁵

By June 1992 the situation within the opposition was tense. With Matiba, a Kikuyu, and Odinga, a Luo, FORD hoped to resuscitate the erstwhile

³³ IHRIG, *op.cit.*, appendix I.

³⁴ *Weekly Review*, 5 June 1992, p. 5.

³⁵ *Africa Confidential*, vol. 33, no. 9, 8 May 1992.

powerful Kikuyu-Luo alliance of the early 1960s, although it had been weakened by the emergence of DP under Kibaki, also a Kikuyu. FORD was in June 1992 reported to have denounced DP as being in secret collusion with KANU.³⁶ It was at the time suggested that KANU indeed hoped that DP would split the Kikuyu vote. To that end, the state-owned broadcasting network KBC apparently devoted extensive air-time to the first rallies of DP while ignoring those of FORD.³⁷ This soon changed, when KANU attacked both parties as elitist and tribalist.

The rift between the Matiba and Odinga factions in FORD widened during July 1992 with the two opposing camps establishing separate headquarters, earning them the names Agip House and Muthithi House factions after the respective buildings they operated from. The struggle came to a head over the FORD party elections at its founding congress in September 1992, both because Matiba unexpectedly announced that he would challenge Odinga for the position of party chairman, and because the two factions could not agree on election procedures. Whereas Odinga proposed election of the presidential candidate by a delegates' conference, Matiba insisted on direct election by all party members. In the end the Matiba faction boycotted the party elections and unilaterally declared Odinga's election to the chairmanship of FORD null and void. As a result, the two factions went their separate ways and later registered as different parties under the names of FORD-Kenya under Odinga, and FORD-Asili ("original FORD"), under Matiba.³⁸ At a later stage, prominent members of FORD-Asili, including Charles Rubia and Kimani wa Nyoike, left and formed the Kenya National Congress (KNC).

The split in FORD and the opposition seemed irrevocable, despite efforts to mend relations and bring about a reunification of the FORD factions. Rumours also circulated of other possible alliances. In early November 1992, for example, it was suggested that talks about an electoral pact between FORD-Kenya and DP was under way, with Kibaki willing to content himself with a subordinate role in the arrangement.³⁹ Nothing came of this, possibly because the future president would be

³⁶ *Weekly Review*, 5 June 1992, p. 6.

³⁷ *Ibid.*

³⁸ The Matiba faction referred to itself as the "original" FORD because it claimed to adhere to the original constitution of FORD which prescribed direct election of party officers among the party members.

³⁹ *Africa Confidential*, vol. 33, no. 22, 6 November 1992.

constitutionally required to form a government from his own party only, thus foreclosing any attempts at a future coalition government.⁴⁰

A more promising initiative surfaced in late September 1992 from Wangari Maathai, herself a FORD-Kenya member and a prominent environmental activist, who tried to reconcile the bickering factions, at least enough for them to rally behind one common presidential candidate. Having declined a party nomination herself, her initiative, known as the Middle Ground Group (MGG), tried to persuade both the voters and the parties that a united opposition was the only guarantee for defeating Moi at the polls. Her group, active until nomination day in December, did not succeed.

When Maathai urged the leaders of the opposition parties not to ignore the appeals of the electorate and not to “pursue their objectives and ambitions as if nothing else mattered”, she was addressing the very nature of Kenyan politics in that pre-election stage. The opposition parties were split not over fundamentally different political platforms, which were of little apparent relevance in the election campaign, but rather over their leaders’ personal ambitions to reach high political office. The ethnic divisions reflected in the party leaders exacerbated the problems — as noted by a member of FORD-Kenya who likened their executive meetings to geography lessons, and was quoted to have said: “We sit and look at maps and try to anticipate who will vote for who, according to their tribe. That is all that matters.”⁴¹ How little difference the party platforms and manifestos made and how much personal ambitions mattered, is also evidenced by the almost indiscriminate toing and froing between parties by some politician whose personal ambitions were not immediately satisfied in the nomination process as anticipated. In the event, all this lent some credence to the assertion by President Moi that KANU was the only viable national party.

⁴⁰ *Africa Confidential*, vol. 33, no. 21, 23 October 1992.

⁴¹ Quoted in *Africa Confidential*, vol. 33, no. 20, 9 October 1992, p. 4.

3. Events of Election Day

3.1 General Atmosphere on Election Day

All observers, monitors and the media agreed that election day itself proceeded with astonishing peace and quiet, thanks to what some observers termed the “dogged determination” of the Kenyan people to exercise their democratic right. However, tensions ran high and an atmosphere of extreme suspicion overshadowed the outwardly peaceful process, leading to frustration and in some cases outbreaks of violence in and around polling stations. The frustrations of the electorate were due largely to the clearly inadequate logistics of the elections, but in some cases — possibly fuelled or reinforced by the former problems — accusations of misconduct and allegations of malpractice led to clashes between voters and/or party agents and presiding officers as well as to clashes between party supporters.

It soon became evident on election day that preparations for the elections had been grossly inadequate, and organisation was poor. This related mainly to the late opening of most polling stations, the closing down of polling streams, and the lack of essential materials.

3.2 Late Opening of Polling Stations

The majority of polling stations opened later than the announced time of 6 a.m. While most stations started balloting during the morning, others did not until the middle or late afternoon. Some polling stations, e.g. in Kisumu and Nambale, were reported to have received ballot boxes as late as the early morning *after* election day.⁴² In Tana River elections could not take place at all on election day because of floods, and had to be postponed.

The late opening of stations was explained by the late arrival of election materials, be they ballot boxes, registers or ballot papers, or indeed the late arrival of presiding officers or election clerks. In many cases ballot papers or electoral rolls had been mixed up between polling stations or constituencies, and in some cases candidates were found to be missing on both parliamentary and civic election ballots, or candidates' names and

⁴² *Daily Nation*, 30 December, 1992.

party symbols had been transposed. Other polling stations received ballot boxes without lids.

Although these reasons may have seemed “harmless” enough, implying no malice or design, they created suspicion and fear on the part of the voters, many of whom had congregated long before opening time and had remained uninformed about the reasons for and the expected extent of the delays.

By contrast, in smaller polling stations, e.g. in Kangundo constituency, opening delays extended no more than about one hour. Balloting proceeded in an orderly fashion and was completed well ahead of the announced closing time. Presiding officers reported *hakuna matata* (‘no problems’).

3.3 Lack of Election Materials

Insufficient or wrong election materials continued to cause delays during the voting. In a good number of polling stations voting had to be temporarily halted because ballot papers ran out. In Nyahururu, for example, presidential ballots were reported to have run out after only 300 of the 1600 registered voters had cast their vote.⁴³ Necessary implements, such as ink and stamps, were also insufficient. In Embakasi, Nairobi, only four bottles of indelible ink for marking the fingers of those who had voted were available for thirteen streams of voters, and in other stations the stamps of the electoral commission wore out half way through the voting exercise.⁴⁴ In St. Xavier Primary School, Nakuru Town constituency, there was only one stamp to be shared by 14 streams, which naturally caused serious delays. In many cases delays continued to occur due to faulty or incomplete voter registers, which meant clerks and officers had to check voters’ names in master files.

3.4 Reduction of Number of Polling Streams

In many polling stations the announced number of polling streams was reduced, ostensibly because the polling station was inadequately staffed or had insufficient materials. The decision to close down prescribed polling streams was apparently left to the discretion of the presiding officer. The at times substantial reduction of voting capacity resulted in longer waiting hours. Such slow-down caused rumours of deliberate go-slow tactics, and

⁴³ *Daily Nation*, 30 December, 1992.

⁴⁴ *Daily Nation* and *Kenya Times*, 30 December, 1992.

raised fears that many voters would be unable to vote or be discouraged from waiting their turn. More serious were rumours that the unused ballot boxes of closed streams would be available for stuffing. In some cases, such as at Ngong polling station in Kajiado North constituency, these allegations were fuelled by differing opinions about the numbers of streams that had been closed or merged.

While in many cases allegations of malpractice and fraud were closely tied to the logistical shortcomings of the elections, they could also relate to the allegedly suspicious behaviour of election officials, party agents, candidates, and persons unknown.

3.5 Undue Influencing of Voters

Accusations that voters were unduly influenced were levelled against election officials and parties alike. They were heard from voters and candidates of both opposition and ruling parties, by the authors themselves and were also widely reported by the media. The KANU parliamentary candidate of Langata constituency in Nairobi, Richard Leakey, claimed, for example, that FORD-Kenya supporters had harassed voters in the vicinity of the polling stations. Similar allegations were directed by the opposition against Leakey's supporters and Leakey himself. In other instances voters claimed that returning officers and/or party agents were unduly influencing voters within polling stations, and that agents of parties were handing out money to voters.⁴⁵

Allegations of undue voter influencing were particularly strong with regard to the large number of illiterate voters, or those who appeared to require procedural assistance. The problem was exacerbated by the inability of such voters to be guided by the party symbols that appeared on the ballot. In many cases illiterate voters were openly and audibly asked for their preference by either an electoral official, a party agent, or a monitor, and the mark was then duly made in the presence of all. While this method precluded to some degree the fraudulent marking of ballots, it rendered the voting anything but secret, and the voters susceptible to all kinds of more or less subtle influencing. In other cases, election monitors — on the strength of their impartiality — assisted voters without witnesses in the polling booth, thus achieving somewhat more secrecy but less control. If many voters were uninformed about the meaning of the party symbols on their ballot, they also seemed uninformed about voting by secret ballot as

⁴⁵ Cf. Commonwealth Secretariat, *op.cit.*, p. 36.

such, and required further instructions, which again invited allegations of fraud. Stories abounded that voters were instructed that they cross off the party they did *not* wish to vote for. In one case voters refused to mark their ballots with the pencils provided, thus rejecting the claim by the presiding officer that this was necessary “in order to assist illiterate voters, contending that it would be easier to correct any mistake”.⁴⁶

3.6 Extended Polling Hours

Since most polling stations had opened late, polling hours were extended accordingly. In many cases this meant that polling station operated well into the evening and night. Lighting then proved a problem. Allocations of kerosene or gas lamps were insufficient and the proceedings had to take place in near darkness. In Ngong, one gas light was available for each stream — in that case a classroom. If the polling clerks had barely enough light to do their work, the polling booths were in almost total darkness, forcing voters to mark their ballots wherever they could find a ray of light. Later on, torches were provided to voters, but they did not provide the necessary secrecy either. The late hours caused voters, furthermore, to throng into the polling station in great numbers; voting speeded up considerably, but all in all confusion ruled. In such an atmosphere it was almost impossible to monitor the voting closely. In other cases it was reported that polling stations, such as in Amagoro constituency, closed for the night to reopen the next day, or they were closed early when no further voters seemed to be present.

3.7 Location of Polling Stations and “Importation” of Voters

Only one day before polling was to commence, the locations of 30 polling stations were changed and gazetted. The daily papers ran a list of the new locations, but these changes were not always announced properly at the polling stations themselves. The Commonwealth Observer Team reports that polling stations also had to be changed on election day itself, either because they proved to be inadequate or they were located in KANU-owned or used buildings.⁴⁷ These changes caused severe delays and confusion, and might have disenfranchised voters.

⁴⁶ *Standard*, 30 December, 1992.

⁴⁷ Commonwealth Secretariat, *op. cit.*, p. 33.

Many of the displaced victims of the ethnic clashes prior to the elections also seemed to have been effectively disenfranchised. Clash victims in Burnt Forest, Eldoret South constituency, for example, were on election day not provided with the mobile polling stations promised them by the Electoral Commission. An election observer at a debriefing session two days after the elections recalled having come across a large group of people in the Rift Valley who identified themselves as clash victims. They were escorted by armed policemen. According to the observer's reading of the encounter, the displaced people were being escorted to a polling station to vote. Members of the national monitoring team, NEMU, were inclined, however, to adopt the diametrically opposite interpretation that these people were thus being prevented from voting by armed coercion.

Allegations abounded about "importation" of voters across the country to particularly contested districts, implicating both KANU and opposition parties. Such malpractices were distinctly possible, as indicated by repeated comments and warnings on the matter by the Electoral Commission.⁴⁸ Unlawful voting by Somali refugees was also alleged.

3.8 Other Irregularities

Allegations of blatant rigging were also reported. In one polling station, a clerk was caught while putting a wrong mark on the ballot of an illiterate voter.⁴⁹ The Commonwealth Observer Group reported another clerk being caught while erasing marked ballots, and observed attempts at ballot stuffing. Voters in Langata constituency, Nairobi, were reported to have discovered ballot boxes in the car of the KANU candidate which were apparently filled with KANU T-shirts and pre-marked ballot papers. In Siaya town at least three ballot boxes for the presidential election were seized from a polling station by unidentified men.⁵⁰

3.9 The Counting of Ballots

The organisational shortcomings and irregularities of election day carried over into the counting process. The commencement of counting was in most cases seriously delayed; the counting procedure was cumbersome and slow; the announcement of results was in many cases also delayed; and

⁴⁸ *Daily Nation*, 29 December 1992.

⁴⁹ *Standard*, 30 December 1992.

⁵⁰ *Daily Nation*, 30 December 1992.

numerous irregularities were reported. All these factors contributed to an atmosphere of extreme suspicion in the counting halls and amongst Kenyan citizens, resulting in further delays while accusations of malpractice were negotiated and recounts demanded and ordered.

3.10 Delays in the Counting Process

Serious delays were experienced in the starting of counting due to the late arrival of ballot boxes from the polling stations to the counting centres. In Kajiado North constituency, for instance, counting was delayed by 12 hours because the ballot boxes from two stations arrived late. In other stations delays were even longer.⁵¹ At one polling station in Machakos Town a row arose between the presiding officer and the party agents over the transportation of the ballot boxes to the counting centre. Only one vehicle was available, and it could not accommodate the presiding officer, the armed security guards and the party agents in addition to nine ballot boxes. It was finally agreed that the party agents would escort the Landrover on foot to the counting centre which was relatively close by. In the end, however, another vehicle emerged and the matter resolved itself. Although in most instances transport problems were cited as the cause of the delays, they seemed inordinately long in urban or semi-urban constituencies alike, such as in Nairobi. The transport delays raised questions as to what had happened to the ballot boxes in the intervening time, particularly in cases where they were not accompanied by all party agents, such as was reported from Kajiado North.⁵²

Once counting had started, slowness and delays persisted. In Westlands, Nairobi, for example, only 25 per cent of the total votes cast had been counted after 14 hours. In Langata, Nairobi, the number of uncounted ballot boxes seemed still overwhelming when counting had been underway for well over 36 hours. Other counting centres were no different. In Machakos Town it took two and a half hours to complete the counting of five ballot boxes after several recounts, i.e. half an hour per ballot box. If counting each of the remaining 160 ballot boxes would have taken equally long, the entire process would have lasted another 80 hours continuously or more than three full days. To a large degree these problems resulted from interventions by party agents concerning both procedures and faults in the counting. In Kajiado North interruptions were caused by counts proven to

⁵¹ *Daily Nation*, 31 December 1992.

⁵² *Ibid.*

be erroneous, as well as in Westlands, Kamukunji and Makadara, Nairobi. In the latter two centres, recounts were ordered after three days of counting. Even though faulty counts could be attributed to lack of attention by exhausted counting clerks, allegations of deliberate malpractice also surfaced.

In Langata observers claimed to have witnessed the deliberate counting of opposition votes in favour of KANU, an accusation which heightened tensions in all Nairobi counting stations, causing agents to order recounts for every bundle and to check every ballot in every bundle. In Molo opposition agents allegedly discovered bundles of unfolded ballots with consecutive serial numbers in one of the polling boxes — and a national monitor who apparently photographed the ballots in question was, moreover, temporarily held in police custody.⁵³ Other allegations of fraud included the shifting of additional ballots onto the counting table; and as counting continued, persistent rumours circulated of marked or unmarked ballot papers being found under counting tables, on the streets or outside the windows of counting stations. In reaction to rumours of a KANU plot to sabotage the counting, the FORD-Kenya parliamentary candidate for Langata constituency, Raila Odinga, brought his own floodlight, generator and security guards into the counting hall. Incidents like these, however, appear to have been exceptions found in particularly tense areas, rather than reflecting a general situation.

The protracted and controversial nature of the counting procedure also led to deteriorating security conditions. In some counting centres large numbers of unauthorised people crowded around the counting tables, interfering in the work of the counting clerks and thus further hampering progress. In Langata constituency, unrest broke out when a group of FORD-Kenya supporters gained entrance to the counting hall, and persisted in making comments to the counting by loud cheering and shouting. Attempts of the returning officer, the parliamentary candidate, Leakey, and members of the Electoral Commission who were called in to remove the crowd, failed. How very serious the presence of unauthorised personnel in the counting halls could be, was exemplified by dramatic events in Kibwezi constituency, Eastern Province, where an unlawfully present District Officer, inside the counting centre, fired several shots at the winning DP parliamentary candidate, Agnes Ndeti, but missed. However, her companion was seriously wounded and had to be rushed to hospital.

The election results were slow in being announced, far beyond what could have been expected due to counting delays. The International Press

⁵³ *Daily Nation*, 1 January 1993.

Centre, established by the government, had promised to give journalists direct access to the results as they came in. But, in fact, reporters had to rely entirely on the intermittent television announcements. These failures further undermined confidence in the elections, particularly as it transpired that the results from KANU strongholds seem to have been relayed first.

The counting process remained flawed, and — as time wore on and counting clerks and observers grew more exhausted — offered opportunities for rigging, even though the encountered problems were, as the IRI has pointed out, “a necessary cost to ensure transparency”.⁵⁴ Many of the international elections observers had left the counting centres and some even the country long before counting was completed.

⁵⁴ International Republican Institute, Preliminary Statement of Findings, Kenyan General Elections, 29 December, 1992.

4. Immediate Aftermath

4.1 Results of the Presidential Contest

As counting proceeded and results were announced constituency by constituency, it became increasingly clear that the incumbent government party, KANU, was doing far better than expected. In fact, the presidential elections, with a turn-out rate of 68.4 per cent, provided President Moi with a fresh mandate for another five-year term, given the country's plurality system of election. With 1,962,866 votes Moi beat his closest rival, Kenneth Matiba, by a comfortable margin of 558,600 votes.⁵⁵ The number of votes garnered by Moi accounted for 36.3 per cent of the votes cast, whereas Matiba got 26 per cent. However, a casual glance at the table below will reveal that an alliance of any pair of the other three major contenders would have out-voted Moi. Together the three of them accounted for 63 per cent of the total vote. In other words, *Moi does not enjoy the support of the majority of the Kenyan people, just over one-third of the electorate.*

A winning presidential candidate had to satisfy *three* requirements to get elected:

- (a) Being elected a member of Parliament from his/her parliamentary constituency;
- (b) Getting a plurality of the votes in the presidential election, i.e. the largest number of votes among the presidential contestants, though not necessarily a majority;
- (c) Garnering at least 25 per cent of the vote in five of the eight provinces.

All the four main presidential contenders were elected MPs in their constituencies, and any pair of them would have garnered a plurality of the votes if they had joined forces in an alliance. However, only the Matiba/Odinga and Matiba/Kibaki alliances would have met the 25 per cent criterion in five provinces. The Kibaki/Odinga alliance would have barely

⁵⁵ See table 1 in appendix B for detailed results by province and presidential candidate.

missed the mark by falling slightly short in Coast and Western provinces.⁵⁶

It is also revealing to look at the distribution of votes for Moi. His home province, Rift Valley, repeatedly declared an exclusive "KANU zone", is clearly his Kalenjin stronghold, although in percentage terms he also carried North Eastern (inhabited predominantly by ethnic Somali) by a wide margin. In the latter province the opposition parties were effectively kept out, partly due to very real security problems, which were also used as a pretext by the Provincial Administration to bar the opposition from campaigning. By contrast to his success in Rift Valley and North Eastern provinces, Moi had negligible support in Central Province; his support was also very weak in Nairobi and Nyanza provinces. Despite these disparities of support, Moi garnered at least 25 per cent of the vote in five of the eight provinces as required by the Constitution. With some justification Moi may thus claim broader support nationwide than any of his competitors, despite faring dismally in Central and Nyanza provinces.

Support for the other presidential candidates mirrors Moi's pattern of support. The Kikuyu heartland of Central Province was divided between Matiba and Kibaki, who mustered 96.2 per cent combined, Matiba leading with 60.1 per cent and Kibaki trailing behind with 36.1 per cent. Similarly Odinga carried Nyanza Province, the Luo heartland, with 74.7 per cent. DP also performed well in Eastern Province, notably in Embu and Meru districts.

This geography of support also testifies to the persistence of the politics of ethnicity in Kenya. Ethnic affiliation was widely used as a basis of mobilisation during the electoral campaign, and presidential election figures confirm that Kenyans still vote largely along ethnic lines.

4.2 The Parliamentary Constellation

Basically the same pattern is found in the results from the parliamentary elections.⁵⁷ The distribution of seats by province shows that KANU won 36 of the 44 seats from Rift Valley, 17 of the 20 seats in Coast Province, eight of the ten seats from North Eastern and 21 of the 32 seats in Eastern. FORD-Asili, by contrast, won 14 of the 25 seats in Central province and 6 of the 8 seats in Nairobi. With the 10 seats in Central Province won by

⁵⁶ See table 2 in appendix B for calculations with regard to hypothetical alliances in the presidential election.

⁵⁷ See table 3 in appendix B for a distribution of parliamentary seats by party and province.

DP, FORD-Kenya was the only other party that managed to win a seat in Central Province, but its candidate was a Kikuyu.

Up to a point, the four major parties can thus be said to be regionally based. It is a historical irony that after this 1992 election the Kikuyu-Luo alliance is in opposition whereas the former KADU ethnic groupings rally around Moi's leadership, but this time under the KANU umbrella. Still, the politics and policies of KANU of 1993 are reminiscent of KADU at around independence.

Apart from the ethnic composition of Parliament, the overall parliamentary constellation in the aftermath of the elections is such that KANU has a majority, whereas the opposition commands 88 seats. In addition the President may nominate 12 MPs, but even with this addition the incumbent party falls short of the three-quarter majority required to amend the Constitution. Conversely, the opposition is even further away from succeeding in making amendments to the Constitution, with which they are highly dissatisfied.

4.3 To Acknowledge Defeat or Not?

The opposition was reluctant to acknowledge defeat. Before the counting was completed, the three leaders of the major opposition parties on 1 January 1993 called a joint press conference to announce their rejection of the results on grounds that the election had been massively rigged. This move met with criticism from within their own ranks and among clergymen who seemed to feel that Parliament would be a better arena for continuing the struggle, rather than risking more civil strife and harsh reprisals by the victor, Moi, even to the point of declaring a state of emergency.

Although despondent at the prospects of another five years until a next chance at the polls, elements of the opposition also directed criticism against their leaders for not having realised the dangers of splitting the opposition vote three ways and thus serving victory on a silver plate for Moi. Repeated calls in the run-up to the elections for unity in the opposition, notably by the Middle Ground Group (MGG), the NCCK and the Catholic Secretariat, had fallen on deaf ears.

5. Conclusion

5.1 An Overall Assessment: Free and Fair?

The irregularities and problems encountered in the run-up to the elections and in the balloting and counting phases cast very serious doubts indeed on the freeness and fairness of the general elections held in Kenya on 29 December 1992. The credible and corroborated evidence adduced, even if part of it may be merely circumstantial or impressionistic, will go a long way towards supporting such a conclusion. It is doubtful, however, whether it is sufficient for passing a definitive judgement. Such a judgement is made all the more difficult by a situation which does not lend itself to distinct dichotomous verdicts of free and fair, or *not* free and fair. From the perspective of analysis and recognised international standards regarding the conduct of elections, such a dichotomy is no doubt useful. Social reality is more complex, however, and does not generally fit into simple dichotomies. At what point are the irregularities so numerous and so grave that elections cease to be free and fair? What is the tolerance level with respect to irregularities? There are no clear-cut, universally agreed, answers to those questions. Ultimately, it is a matter of weighing the positive aspects of the conduct of an election against the flaws and irregularities and then arriving at an assessment, however subjective or arbitrary it might be.

Reference to complex social realities which differ from one country to another and which defy neat categorisation does not mean that dual standards are being applied. The standards are universal, yet modified and adapted to local conditions as the case may be. All the same, when embarking on a journey from authoritarian rule towards democratic governance, one cannot reasonably expect all the standards to be met instantaneously. Democracy is a continuous struggle; it is not something to be acquired and owned once a set of formal institutions are in place, such as periodic elections. More than anything else, democracy is about nurturing a political culture of compromise and tolerance, and that is a long-term project.

Even if answers to the initial questions above were available, the difficulty is further compounded by the brevity of the visits by international observers and their limited number which were hardly commensurate with the task. There were in excess of 7,000 polling stations across the country,

many with several streams and a few with as many as 20 streams. Altogether the Electoral Commission established 10,449 streams nationwide.⁵⁸ The international observers numbered about 165 only and local monitors at least 6,000.⁵⁹ Information is patchy as to the percentage of polling stations monitored and particularly as regards the geographical distribution of observers and monitors. In fact, indications are that international observers sought out particularly contested constituencies or "trouble spots". By doing so a bias of coverage may have been introduced, perhaps unwittingly. It is safe to say, therefore, that coverage was inadequate relative to the mandate. If election monitoring were to be likened to conducting a sample survey one might say that the sample was small and biased, the response rate was low, and the margin of error correspondingly wide. The political sensitivity of the situation did not make it any easier to validate responses.

The countless irregularities noted *could*, theoretically, be attributed to the inexperience, incompetence or negligence of the Electoral Commission, rather than design on the part of the incumbent government allegedly working through the Electoral Commission or otherwise. Kenya had not held a multi-party election since the "Little General Election" in 1966. The magnitude and logistics of conducting the 29 December 1992 elections were colossal for an inexperienced Electoral Commission, and for the scores of electoral officials whose dedication to their duties was generally commendable. It is exceedingly difficult, or well-nigh impossible, to distinguish between irregularities attributable to inexperience and logistical problems in trying circumstances from those springing from political design by any party to the process, be they the Electoral Commission, electoral officials, counting clerks, contending parties or state officials.

Legal responsibility for the conduct of the elections rested, of course, with the Electoral Commission; its competence and performance were decisive for the final result. However, the Electoral Commission also operated within certain constraints for which it cannot be blamed, strictly speaking. Two sets of circumstances were particularly important in that respect. The failure by the government to ensure timely issuance of national

⁵⁸ International Republican Institute, *Kenya: The December 29, 1992 Elections*, (Washington D.C.: IRI, n.d.), pp. 41-42

⁵⁹ It has not been possible to obtain information about the exact numbers of international observers and local monitors accredited by the Electoral Commission. But the National Election Monitoring Unit (NEMU) alone reports to have recruited a total of 5,000 pollwatchers. Cf. National Election Monitoring Unit (NEMU), *A Report on Kenya December 1992 Multi-Party Elections*, Nairobi, February 1993, draft, appendix 5: NEMUs Monitoring Activities, p. 3.

ID cards to an unknown but probably high number of young persons who had reached voting age since the 1988 election, led to the effective disenfranchisement of a sizable proportion of the electorate. Although the voter registration period was too brief and faulty in other ways, the Electoral Commission could do little to redress this particular problem once registration had started. The government, on the other hand, had known, at least since the repeal of section 2A of the Constitution, that elections were forthcoming. It was to be expected, therefore, that the appropriate government body, in a democratic spirit, would have seen to it that no citizen of Kenya would be disenfranchised on a practical technicality. If the cost of such an operation were a serious stumbling block, several donors would have been likely contributors to overcome cost constraints.

Nonetheless, the Electoral Commission cannot be completely exonerated with respect to the ID card scandal. The Electoral Commission knew just as well as the government that ID cards for all adult citizens above the age of 18 were a precondition for successful registration. Hence, the Electoral Commission should have alerted the government to this potential problem and pressed for its resolution at an early stage, well in advance of the registration period in mid-1992. The present team is not aware that the Electoral Commission made any such representations vis-à-vis the government.

The second set of mitigating circumstances from the viewpoint of the Electoral Commission relates to the security of candidates. The provision of security rested with the government, i.e. the police. The kidnapping of a number of candidates en route to the relevant returning officers in order to submit their nomination papers at the announced time, and the snatching of briefcases containing nomination papers, clearly show that security precautions were grossly inadequate. Such negligence on the part of the police led to the automatic declaration of a considerable number of KANU candidates as winners of the election since they had stood unopposed.

It is difficult to say whether a substantial reduction in irregularities, whatever their nature and gravity, would have yielded a qualitatively different result in the end. It should be recalled that nearly two-thirds of the electorate said no to Moi's continued reign for another five years. Is it inconceivable that slightly more than one-third of the electorate, considering its geographical distribution, would see their interest furthered by a KANU government?

In these circumstances the present team is not prepared to state, *in unequivocal terms*, that the Kenyan general elections of 1992 were free and fair, or that they were *not* free and fair. The opening statement of this concluding section is as far as the evidence will carry us.

Notwithstanding international standards for the conduct of elections and the duty to judge events and processes against those standards only, international observers cannot divorce themselves entirely from the *Realpolitik* of the situation in the aftermath of an election. Extreme circumspection should be exercised in order not to influence that situation directly. On the other hand, any team of international observers cannot escape influencing somehow the course of events in an indirect way, simply by making a statement, whatever its content. In a charged political atmosphere international observers have little control over the interpretation of their statements by the contending forces, and the use or abuse of them for various political purposes. In the specific case of Kenya, a losing and despondent opposition would, naturally, have liked critical statements by international observers to support calls for a fresh election. Conversely, the victorious incumbent government party would have preferred lenient statements to lend legitimacy to the exercise just completed. By implication, the benefit of the doubt would tend to accrue to the recorded election results and thus contribute to legitimising them. The inadequacy of the evidence would, therefore, willy-nilly work to the benefit of the victor.

Analogous to the problem of classifying elections as free and fair or not free and fair, it is also problematic to categorise societies or political systems as either democratic or dictatorial. It is more fruitful to place a given society on a continuum between the two extremes. In other words, societies may be more or less democratic at given points in time. Subsequently they may move progressively in either direction. The elections of 29 December 1992, despite flaws and irregularities, no doubt signify that Kenya is moving in a democratic direction relative to the situation obtaining prior to the repeal of section 2A of the Constitution. The run-up to the election and the period of political fermentation before that time, the campaign and the elections themselves have created a wider democratic space in Kenya. The embryo of a new democratic political culture is discernable and from it is likely to emerge a genuinely democratic practice. True, there will continue to be setbacks and hurdles to be overcome. But the path and direction has been charted and it is now for the people of Kenya to move along, however arduously and painstakingly.

5.2 A Self-Critical Note

The problems of coverage and evidence resulting in the inability of observer team to pass definitive and unequivocal judgements as to the freeness and fairness of elections, warrants a self-critical note. When making an auto-critique it is necessary to distinguish between election

observing as an institution in itself and the professionalism, or lack of such, of the election observers in discharging their task. This note addresses the latter.

Inadequate attention has thus far been devoted to specifying a set of criteria to be satisfied in order to inject more professionalism into election observing. There ought at least to be clear rules of thumb on a number of requirements.

First, an appropriate ratio of observers to the number of polling stations in a country or the size of the electorate should be established. As noted above, in the Kenyan case the ratio was too low.

Second, an even geographical distribution of international observers should be ensured. Although the distribution in Kenya on and around 29 December 1992 is not known precisely, there is enough evidence to suggest that certain critical parts of the country were hardly covered at all.

Third, a coordinated effort should be mounted by all observers to facilitate easy flow and processing of information. This would require centralising detailed reporting on incidents and specification of visits to polling stations. It would, furthermore, give the coordinating body a mandate to direct operations, including deployment of observers during all phases of the exercise. In Kenya such coordination was done by the Commonwealth and IRI teams for their own members. But there were only rudimentary, albeit commendable, efforts by a UN unit at coordinating the smaller teams and facilitating liaison with the operations of the larger ones. It should be considered whether overall and firmer coordination in the future could be done under UN auspices. Although such a proposal is likely to be resisted in some quarters because it entails recognition by teams of various origins and persuasions of a UN body to take on the task, it should, nevertheless, be explored.

Fourth, procedures for liaising with local monitoring teams should be worked out, since local knowledge of the situation is a precondition for successful observation. The complementarity of international observers and local monitors should be emphasised. In Kenya such liaison was generally poor and mostly left to individuals.

Fifth, the period of stay for most observers was much too brief. An observer can hardly get a feel for the situation and appreciate its intricacies if arriving a few days before election day and leaving shortly thereafter. Although this is largely a question of funding, as a general rule about two weeks before election day and one week after would appear a minimum. Shorter periods can partly be compensated for by pre-election visits. At any rate, advance preparation through pre-election visits is indispensable.

Sixth, prior to the actual elections, each of the teams should ensure that they include expertise regarding the political, social and cultural fabric of the country in question. It does not mean that all team members need to be country experts, but a fair proportion should be.

Seventh, the role of the international donor community in funding various NGOs and local monitoring outfits should be scrutinised with a view to ensuring better coordination. Although an informal donor forum did exist in Kenya for some time in the run-up to the elections, its main purpose appears to have been information sharing. As such it had a certain coordinating effect, although it was not mandated to coordinate activities in a stricter sense. Rather, donors tended to pursue their own agendas.



Appendix A:

Interim Statement by the Scandinavian-Canadian Observer Team on the Kenya General Elections 1992

An independent team of six Scandinavian-Canadian election observers representing non-governmental organisations visited on and around election day a total of 45 polling stations and five counting centres in Rift Valley and Eastern provinces and Nairobi area. Some team members also made visits to Kenya during the run-up to the elections. Drawing on our own observations and evidence from credible reports by a large number of voters, local monitors as well as on returning and presiding officers, party agents and written sources, we would like to make an interim statement of our findings.

We commend the Kenyan voters for their untiring patience in the face of frustrating delays and their relentless commitment to the democratic process in exercising their rights. Not least did their peaceful conduct at the polling stations bear witness to their democratic spirit. Vigilance and alertness on the part of voters and party agents alike made a significant contribution to reducing the number and gravity of irregularities. We also commend the many electoral officials who in trying circumstances for the most part exhibited dedication in the discharge of their duties.

Serious delays in the opening of polling stations, which were caused by logistical deficiencies, poor organisation and inexperience on the part of election officials, were noted. In many instances lack of election materials further slowed down the process. These problems were exacerbated in some places by the closing down of streams and the shifting of polling station locations at a very late stage. Despite commendable efforts in recent weeks the preparation by the Electoral Commission of this ambitious election exercise was clearly inadequate and its execution was marred by numerous irregularities, particularly during the counting phase.

The events of polling day must be placed in the broader context of the entire electoral process from registration onwards.

The registration process was flawed due to the allocated time period being too short and the issuance of national identification cards being very cumbersome and slow, leading to the effective disenfranchisement of large numbers of youths. It is evident that the names of many citizens who registered were not found on the lists on polling day. Moreover, anomalies were noted in the voters' register, suggesting importation of voters.

Ethnic clashes in some parts of the country and incidents of provoked political violence created an environment not conducive to free elections.

The declaration of some areas as the exclusive zones of particular parties was inimical to competitive politics and free political expression. The use of intolerant and threatening language by politicians across the political spectrum had a similar effect. Coercion and intimidation of voters and candidates were found in areas dominated by particular parties, both the ruling party and opposition parties.

Unequal access to the electronic mass media did not contribute to the fairness of electoral campaigning. However, this was to some extent compensated for by the vibrant printed media which recently have achieved a wider scope of expression.

The use by the Government of legal and administrative measures to prevent or obstruct the holding of campaign rallies by the opposition, through its refusal to issue required permits as requested, introduced unfairness into the campaign. In some constituencies chiefs and other local officials acted as virtual agents of the ruling party, thus introducing pressure and intimidation of opposition candidates and voters at the local level. Such discriminatory malpractices emanate from the failure to de-link state functions from the structures of the incumbent Government party.

Harassment of candidates continued throughout the campaign period, and obstruction of candidates upon their presentation of nomination papers reduced the democratic competitiveness and fairness of contestation. The number of pending court cases pertaining to abduction of candidates on nomination day points to an undemocratic climate of electoral competition. Credible and corroborated allegations about the widespread use of money to influence voters unduly were noted. So-called defections — whatever their causes — by candidates after completion of the nomination process are likely to have caused confusion on the part of voters and may have influenced voting patterns.

Taken together, the above irregularities and problems have compromised the electoral process and cast serious doubts on its freeness and fairness. However, there is not as yet adequate information available to justify a definitive assessment in this regard. Furthermore, it is not yet possible to evaluate to what degree flaws in the electoral process affected the general outcome of the elections. Candidates and parties with grievances should seek redress through appropriate channels, including the judiciary.

On a self-critical note international observers should acknowledge that they paid inadequate attention to the counting phase of the process during which opportunities for rigging were greater than during balloting. The delays and the accompanying climate of extreme suspicion characterising balloting and counting tended to wear out clerks, officials and party agents, thus rendering the process more open to error and malpractices.

Furthermore, the international observers have been too few in number to secure adequate coverage in a country of Kenya's size. Coordination between observer groups could also have been better.

Regardless of the final outcome of the 1992 elections Kenya has without a doubt taken a critical step towards democratic rule. The determination of the Kenyan people to forge ahead towards nurturing a democratic political culture has been expressed and should not be stopped.

Notwithstanding possible setbacks and frustrations that may be experienced in the future towards that end, it is hoped that these historic events have set Kenya on the path to a genuinely democratic system of governance.

Arne Tostensen
Team Leader

Nairobi, 2 January 1993

The Scandinavian-Canadian Election Observer Team was drawn from the following institutions:

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International Center for Human Rights and Democratic Development,
Montreal, Canada;
Norwegian Institute of Human Rights, Oslo, Norway;
Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund,
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Appendix B

Table 1
Kenya's Presidential Election 1992: Valid Votes Cast by Province and Candidate.
Absolute Figures and Percentages.

Province	Moi Kanu	Matiba Ford-A	Kibaki DP	Odinga Ford-K	Ng'ang'a Kenda	Anyonya KSC	Tsuma KNC	Mwau Pick	Valid votes cast	Reg. voters	Turn- out rate %
	Valid votes cast	Valid votes cast	Valid votes cast	Valid votes cast	Valid votes cast	Valid votes cast	Valid votes cast	Valid votes cast	Valid votes cast	Valid votes cast	Valid votes cast
Nairobi	62,402 16.6 %	165,533 44.1 %	69,715 18.6 %	75,898 20.2 %	362 0.1 %	552 0.1 %	619 0.2 %	473 0.1	375,574	673,814	55.7
Coast	200,596 64.1 %	35,598 11.4 %	23,766 7.6 %	50,516 16.1 %	372 0.1 %	467 0.1 %	1,493 0.5 %	185 0.1 %	312,993	661,427	47.3
North Eastern	57,400 78.1 %	7,440 10.1 %	3,297 4.5 %	5,237 7.1 %	27 0.0 %	21 0.0 %	16 0.0 %	22 0.0 %	73,460	141,088	52.1
Eastern	290,494 36.8 %	80,515 10.2 %	398,727 50.5 %	13,064 1.7 %	765 0.1 %	1,633 0.2 %	2,593 0.3 %	1,441 0.2 %	789,232	1,221,196	64.6
Central	21,882 2.1 %	621,368 60.1 %	327,937 36.1 %	10,765 1.0 %	462 0.0 %	2,229 0.2 %	3,295 0.3 %	1,078 0.1 %	1,034,016	1,224,981	84.4
Rift Valley	994,844 67.8 %	274,011 18.7 %	111,098 7.6 %	83,945 5.7 %	874 0.1 %	1,164 0.1 %	1,030 0.1 %	537 0.0 %	1,467,503	1,919,712	76.4
Western	217,375 40.9 %	192,859 36.3 %	19,115 3.6 %	94,851 17.9 %	1,141 0.2 %	1,377 0.3 %	912 0.2 %	3,529 0.7 %	531,159	851,191	62.4
Nyanza	117,873 14.4 %	26,922 3.3 %	51,962 6.4 %	609,921 74.7 %	1,763 0.2 %	6,830 0.8 %	263 0.0 %	853 0.1 %	816,387	1,205,132	67.7
Total	1,962,866 36.3 %	1,404,266 26.0 %	1,050,617 19.5 %	944,197 17.5 %	5,766 0.1 %	14,273 0.3 %	10,221 0.2 %	8,118 0.2 %	5,400,324	7,898,541	68.4

Source: At the time of writing (May 1993) the official election results had not yet been published in the *Kenya Gazette*. The figures emanate, therefore, from press reports. Some inconsistencies have been noted but they do not alter the overall picture.

Table 2
Distribution of Votes by Pair of Opposition Candidates.
Absolute Numbers and Percentages

Province	MATIBA + KIBAKI	MATIBA + ODINGA	KIBAKI + ODINGA
Nairobi	235,248 62.6 %	241,431 64.3 %	145,613 38.8 %
Coast	59,364 19.0 %	86,114 27.5 %	74,282 23.7 %
North Eastern	10,737 14.6 %	12,677 17.3 %	8,534 11.6 %
Eastern	479,242 60.7 %	93,579 11.9 %	411,791 52.2 %
Central	994,305 96.2 %	632,133 61.1 %	383,702 37.1 %
Rift Valley	385,109 26.2 %	357,956 24.4 %	195,043 13.3 %
Western	211,974 39.9 %	287,710 54.2 %	113,966 21.5 %
Nyanza	78,884 9.7 %	636,843 78.0 %	661,883 81.1 %
Total	2,454,883 45.5 %	2,348,463 43.5 %	1,994,814 36.9 %

Source: At the time of writing (May 1993) the official election results had not yet been published in the *Kenya Gazette*. The figures, on the basis of which the percentages have been calculated by the authors of this report, emanate from press reports. Some inconsistencies have been noted, but any corrections required after the official publication of the election results are unlikely to alter the overall picture.

Table 3
Kenya's Parliamentary Election 1992: Distribution of Seats
by Province and Party

Province	Seats	KANU	FORD- K	FORD- A	DP	Others
Rift Valley	44	36	2	4	2	-
Nairobi	8	1	1	6	-	-
Central	25	-	1	14	10	-
Eastern	32	21	1	-	9	1 (KNC)
North Eastern	10	8	1	-	-	1 (PICK)
Nyanza Coast	29 20	7 17	20 2	- -	1 1	1 (KSC) -
Western	20	10	3	7	-	-
Total	188	100	31	31	23	3

Source: Various press reports.