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# **Assessing the December 2007 Elections in Kenya**

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The Case of Kenya**

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## **Abstract**

Many considered the finalization of the vote count and tabulation – and the subsequent presentation of these results – of the December 2007 presidential (and parliamentary and local) elections in Kenya to be the primary cause of the tragic violence and ethnic cleansing, which shocked not only Africa, but the entire world during January and February 2008. One of the instruments established to investigate what happened and what should be done to remedy the complicated and tragic situation was IREC, the Independent Review Commission (also known as the Kriegler commission, named after its chairman, South African retired Judge Johann Kriegler). The paper explains how IREC understood its mandate, describes some of the difficulties it encountered during its work, and repeats its key findings. The surprising conclusion of IREC's work was that the key problems were *not* primarily the finalization of the vote count and the tabulation – or the subsequent presentation of those results. One has to look, *i.a.*, to the country's ethnic composition and history, to Kenya's political culture, and to the incompetence of ECK (the Electoral Commission of Kenya) to fully understand why the expectations of an exemplary electoral process were turned into such a deplorable misery. The paper also touches briefly upon subsequent developments on the electoral and constitutional scene in Kenya.

The simultaneous presidential, parliamentary and civic elections in Kenya on December 27, 2007 were disastrous. They were not only disastrous because many of the politically most established and well-known losers did not accept their electoral fate – as they probably would have done if the elections results had been credible to them – but also because serious election-related violence erupted – in some places even before the results were known. However, most of the emotion and most of the violence only occurred after the official announcement of the winner of the presidential contest, *i.e.* the incumbent president, Hon. Mwai Kibaki, and the surprisingly low-key swearing-in ceremony immediately thereafter.

Estimates of the number of deaths due to the violence oscillate between 1,000 and 1,500, the number of rapes and other forms of harassment is unknown, and the number of internally displaced persons is everybody's guess, but it was somewhere between 300,000 and 500,000.

This amount of tragic violence was followed by increasing disbelief by the entire world as Kenya was considered by many to be a reasonably well-functioning country in East Africa, where democracy was taking root – as demonstrated at the 2002 general elections and the way the constitutional referendum in 2005 had been conducted and the popular dismissal of the proposed amendments subsequently accepted by the losers, *i.e.* President Kibaki and those allied with him on this issue. Kenya was also by many seen as a well-functioning economy, with substantial GNP growth, and as a regional economic locomotive, which meant that the developments in Kenya were expected to impact positively on developments elsewhere in Africa – but particularly so in the region.

The results of the elections was also a blow to the donor community, as the massive international election support effort, which was funded by very substantial contributions from most donor countries present in Kenya and which was coordinated by a special unit under the UNDP, turned out to be of almost no avail.

The intention of the UNDP and the donors had been to demonstrate to Africa – and in particular to East Africa – what a successful and well conducted election would look like – and overnight it became just the opposite: A disaster, which left Kenya in disarray and disrepute – and demonstrated to Africa and the world the hollowness of Kenyan democracy and the general instability of the Kenyan state. In this situation, it is not really a consolation that a few observers and analysts had actually pointed to the possibility of this outcome, as they were not listened to.

Kenyans themselves were not able to find a way of out this mess – and did also not want to accept the first attempts of international mediation – so it was only when a small group of eminent Africans, spear-headed by Kofi Annan, former UN SG, on behalf of the African Union came into the picture that solutions to the various problematic issues were identified and accepted by the parties to the conflict (for an overview of this process, see Khadiagala 2008). The key agreement was only hammered out on the very last days of February, 2008, i.e., two months after election day.

This paper focuses on one key element in the various attempts to settle the crisis, namely the analysis of the electoral process and – subsequent to that – the suggestions for remedies in relation to the future conduct of elections in Kenya.

This work took place within what was The Independent Review Commission (IREC for short), but became popularly known as the Kriegler Commission, after its chairperson, South African retired Judge Johann Kriegler. The six other members were four Kenyans, two from each side of the political divide, an acting Tanzanian judge and a very experienced electoral advisor from Argentina, who previously had been the head of the UN Electoral Assistance Division. Secretary to the commission was the author of this paper.<sup>1</sup>

IREC's brief was short and clear, as IREC should

- analyze the constitutional and legal framework for the conduct of the elections,
- examine all aspects of the ECK's preparedness and way of conducting the elections,
- examine the public participation in the electoral process,
- investigate all relevant aspects of the 2007 electoral operations,
- investigate the vote counting and tallying for the entire election with special attention to the presidential elections to “assess the integrity of the results and make recommendation for improvements ...”,
- “assess the functional capacity of the ECK and its capacity to discharge its mandate”, and
- “recommend electoral reform, including constitutional, legislative, operative and institutional aspects, as well as accountability mechanisms for ECK commissioners and staff pertaining to electoral malpractices, in order to improve future electoral processes” (*The Kenya Gazette*, 14<sup>th</sup> March, 2008, Notice No. 1983).

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<sup>1</sup> The paper is written in the author's personal capacity. JE

The brief did not ask IREC to establish who had actually won the presidential race, Kibaki or Odinga, even though exactly that question was probably what triggered the violence. The drafters of the brief of IREC – formally a Commission of Inquiry – understood only all too well how difficult – probably even impossible – it would be to answer that question and any attempt to declare who should “rightfully” have won the presidential contest, would in all likelihood only re-ignite the political and ethnic violence, especially if it turned out to be Mr Odinga. But the key point for the drafters of the brief – and for IREC – was that it would not be possible to tell beyond dispute who should have been declared the winner (for reasons to be developed below).

The picture painted by the international media – to a considerable degree fed by local Kenyan media as well as international and domestic election observers and monitors – was that the elections – and in particular the presidential election – had been marred by irregularities, rigging, and fraud, mainly committed by PNU, probably with some ECK staff at the National Tallying Centre in Nairobi and/or ECK commissioners guilty of some kind of complicity. Therefore, the outburst of popular dissatisfaction because of the non-election of the expected winner was seen by many as understandable, probably even justifiable.

The course of election related events in Kenya in late 2007 and early 2008 has triggered a considerable amount of writings on the topic, some of which are listed among the references. At least three academic journals (*Journal of East African Studies*, *Journal of African Elections*, and *Journal of Contemporary African Studies*) have even published special issues dealing with various aspects of the political and electoral developments, and there is no doubt that the December 2007 general elections in Kenya will for a good many years continue to be a contentious issue among Kenyans as well as among africanists, election advisors and experts from Africa and elsewhere, and many others.

One issue is how to separate what happened during the electoral process as such from more general political and social developments in the country, if at all these topics can and should be kept apart. Among those who argue that it is all integrated and part of the same overall development are Branch and Cheeseman (2008). They see the elections as the immediate trigger of the crisis, but argue convincingly that the roots of the crisis are to be found within three broad historical trends, which they term elite fragmentation, political liberalization, and state informalization.

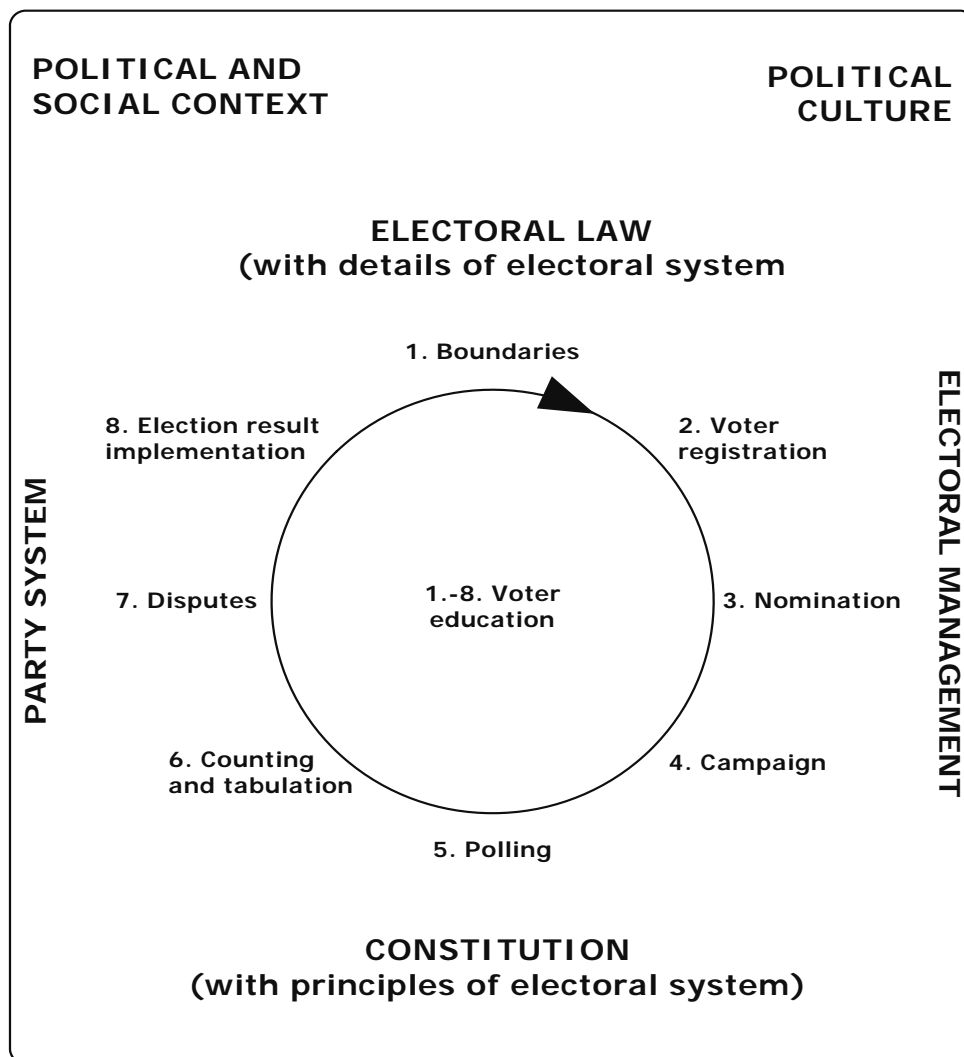
The approach of Branch and Cheeseman fits well into an analytical framework, which one can call the electoral cycle approach. This approach has been developed for the general analysis of electoral processes and has (in slightly different forms) become more or less common ground for the study of electoral processes, not least in processes of democratic transition. However, the framework as applied here (cf. the model on the subsequent page) contains three kinds of elements, which allow a more comprehensive understanding of the electoral process’s embeddedness in a set of important institutional and contextual factors:

- The nine iterative steps of the electoral process in its strictest sense (the circle in the middle). Step 9 (voter education) is – at least in principle – linked to all the other eight steps, which is why it is placed within the circle.
- The four institutional factors located around the electoral process circle, i.e. the electoral administration system (or EMB, electoral management body), the constitution, the electoral law,

and the party system. The EMB also encompasses all sorts of regional or international assistance to the running of the elections, whether fully integrated in the EMB or not.

- The two-three political, cultural, and social factors placed in the upper corners of the square. These broad factors reflect key characteristics of the society under scrutiny and the on-going development of those factors. No election can be fully understood without a good grasp of these factors.

Branch and Cheeseman (op.cit.; see also Smith, 2009) provide a useful account of relevant elements in the social and political development in Kenya, also trying to put the often claimed ethnic factor into proper perspective by drawing on their insight in elite fragmentation over recent decades, demonstrating convincingly that it is too simplistic to refer only to Kenya's ethnic composition (and the relationships between politicians, political parties, and ethnic groups) as the primary cause of the crisis. Behind the use of the ethnic factor, one finds elite fragmentation as it has developed, and which caused some elite fractions to behave differently in 2006 and 2007 from they might otherwise have done (for a useful survey of the relationship between ethnic groups and parties, see, e.g., Elischer, 2008; see also Leonard *et al.*, 2009, 79ff).



The various elements in the figure – whether electoral process steps, key institutional features, or basic political, social, or cultural factors – reflect to a very considerable degree the various areas of investigation, examination, analysis, assessment, and recommendation contained in the IREC brief. It is, therefore, tempting to use the elements of the figure above to structure the presentation and organization of IREC’s key findings, suggestions etc., as that will allow a more systematic understanding of what went so awfully wrong during the electoral process in Kenya, before as well as on (and after) December 27, 2007.

This approach will also support a key point of this exposition, which is that no individual factor can be singled out as responsible for the failure to conduct acceptable elections in Kenya, as all the nine + four + two (three) elements interacted in complicated ways , thereby contributing to the eventual mess. The three sets of factors are presented in the following.

## **Background Factors**

1. The political and social context of the December 2007 elections has already been referred to in general terms. The development since 1991-92 of a difficult introduction of a fully-fledged multi-party democracy and the remarkable ethnic composition with the largest ethnic group consisting of only slightly more than 20 per cent of all Kenyans – and the clear pattern of parties being formed and appealing for support on the basis of ethnicity – creates a situation with a substantial number of challenges for a harmonious development of an electoral, multi-party democracy.
2. The political culture as it has developed in Kenya suffers from a number of problems. Among the most important, one counts in particular a culture of impunity, the “Big Man”-syndrome known from many African countries, and strong elements of neo-patrimonialism. Space does not allow a further development of this theme.

## **Institutional Factors**

1. The Electoral Management Body was the Electoral Commission of Kenya with 22 members, of which as many as 19 had only been appointed shortly before the elections and by the President alone, i.e. without inter-party consultation. Many saw this as conscious violation of the 1997 IPPG agreement and it contributed to the ECK being considered by many –and not only ODM supporters – as biased in favor of the incumbent president. Some of the new members of ECK also lacked electoral and other relevant experiences, so it is easy to understand that many claimed that the ECK was not in 2007 a legitimate organizer and arbiter of election related issues. The chairman, Mr Samuel Kivuitu, was, however, considered both experienced and professional, so his eventual re-appointment as chair was seen – not least in the donor community – as a strong guarantee that professionalism would nevertheless prevail in the end and that the electoral process would be run as competently and unproblematic as the 2005 general elections and the 2005 referendum. However, most observers forgot that these two electoral events had been smooth sailing as there

2. The Constitution of Kenya has been debated for a number of years because it primarily reflects a political system, which has been under debate for a long period, and seriously so for at least 10 years. One item, which has taken on some symbolic value, is that the Constitution (in Section 33) is silent about the way the 12 Nominated Seats are to be filled. The ECK was not able to explain why the seat allocation after the 2007 parliamentary election was done differently from 1997 and 2007 – and apparently using a formula never used before in Kenya’s electoral history! The constitution limits the number of ordinary constituencies to 210. This fixed number has not made it easier to develop a constituency structure reflecting the current residential pattern in the country.
3. The electoral law itself is not in good shape. Only one full copy exists (in the Parliamentary Library) and it is therefore difficult to provide those interested with a complete and comprehensive legal text. The manuals produced to the various levels of election administrators were also missing in various respects – in particular because the law was changed after the printing of the various manuals (sic!). The change suddenly allowed voters who had registered more than once to vote (only once, of course), even though the prior provisions had made it a serious electoral offence, which should be punished accordingly (a heavy fine and/or imprisonment). This late change to the electoral law was extremely ill-timed and probably poorly implemented because of all kinds of communication difficulties.
4. The party system is highly relevant for the understanding of any election. This is particularly evident in the case of Kenya, where the weak nature of the political parties contributed to the problems. The weak support basis of the parties – with no formal party membership (or only a very narrow membership basis) – meant that it was not too difficult for those interested (and wealthy enough) to consider vying for a nomination to stand for parliament to convince those present at nomination gatherings to accept the person’s plea – in particular if it was supported by strong arguments (in the form of cash). The fluidity of the party concept and the relationship between ethnicity and party (Elischer, 2008) – among grass-roots supporters as well as some of the new candidates standing for election – did not make it easier for voters to find a party to vote for based on ideology and policy visions – even though it has been demonstrated convincingly that government performance and issues also influenced the electoral outcome (Gibson & Long, 2009).

## **The Nine Steps in the Electoral Process**

1. **Boundaries:** This is the first step in the systematic analysis of an electoral process because well-defined constituency and polling district boundaries must be in place before anything else, as these administrative units play a role in subsequent process steps. This was by and large the case in Kenya, even though there had been attempts to have a new constituency delimitation conducted before these elections, in particular because of the differences in constituency size. The largest constituency had 20 times as many registered voters as the smallest, which many saw as problematic – and detracting in legitimacy from the parliamentary body – especially as it was

parliament itself which had previously blocked the ECK attempt to have a least some kind of constituency structure and size revision.

2. Voter registration is the second step in the electoral process. It is also one of the most important elements – from a democratic as well as from an administrative point of view – as it is only through the system for voter registration that inhabitants fulfilling the various eligibility requirements become voters and full citizens. If the system for voter registration does not include all (or almost all) entitled to registration on the voters' roll, the entire system will – to a corresponding degree – lack in democratic legitimacy. Registration in most African countries is problematic, as it is not unusual that as many as 30-35 per cent of the voting age population have not been registered to vote.<sup>2</sup> Kenya combines a system of continuous registration (through the so-called *Black Books* kept at the constituency registration offices) with registration drives when an election is up-coming. The constituency registration offices do not function well as almost no prospective voters register in this way. The constituency registration offices are also in-effective when it comes to the purging of the voters' register because of deaths. One convincing estimate is that around 1,000,000 of those on the register were deceased voters (IREC, 2008: 279-281). The under-registration of young people and of women is not only seen in Kenya, but is a general phenomenon in Africa, even though that is a poor excuse for not securing that potential voters are actually on the register on election day. It was interesting to note that the registration for the recent by-elections in two constituencies (Bomachoge and Shinyalu) saw the number of registered voters decline considerably compared to the situation in December 2007.
3. Nomination of candidates for parliamentary and civic election was inundated by problems, mainly because of the low level of institutionalization of political parties. Candidates who could not get nominated by their preferred party, in many cases continued to seek nomination by other parties, often using the distribution of cash in their attempts to convince those present of their suitability as candidates. This obviously was possible because of the weak nature of most parties, with weak organizational structures, few, if any, card carrying members, and no always well-defined and regulated procedures for nomination of candidates at either level. The consequence was many candidates running in many of the constituencies, and consequently also at least some spread of votes on candidates with very small chances of eventually winning.
4. Election campaigning went reasonably well by many standards and according to most observers, even though it was also characterized by a strong element of hate speech, primarily in vernacular language radio programs.
5. Polling went reasonably well according to both domestic and international monitors. However, polling in some constituencies – and in particular in a number of polling stations – had a very impressive turnout of voters. The many dead voters on the register – spread all over the country, i.e. in all provinces and all constituencies – made it very unlikely that one would see turnout

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<sup>2</sup> The obvious consequence is that turnout percentages in many African countries are inflated, at least compared to what they should have been, had the basis for the calculation been the voting age population (VAP), which is a more useful calculation basis.

percentages of more than 90. But that was the case in many polling districts, and even turnout percentages of exactly 100.0 per cent were seen in a number of polling districts, also in constituencies outside the control of the incumbent administration and its ethnic basis. Such turnout percentages are extremely unlikely and were by the IREC seen as indicative of poor administrative competence and efficiency as there most likely was reason to believe that this was a sign of ballot stuffing. A returning officer from a constituency in Western Kenya explained to the IREC the occurrence of polling districts with a turnout of exactly 100 per cent in his constituency by pointing to the “impressive political interest in those districts”.

6. Counting and tabulation was a major concern for IREC to understand as the key claim from ODM had been that at least the tabulation process at the national level – at The *National Tallying Centre* at the KICC (Kenyatta International Conference Centre) in central Nairobi – was the arena for extensive manipulation by ECK staff and commissioners in some kind of illicit co-operation with PNU. Three elements appear to be worth of mention:
  - a. A key issue in all complaints about this election has been the surprising voter turnout discrepancies between presidential and parliamentary elections in the constituencies. In Kirinyaga Central – to take just one example – 80.4 per cent voted in the presidential contest according to official ECK figures, but only 64.5 per cent in the parliamentary election (see reproductions of the official result tables below). Many – including leading civil society organizations and the ODM itself in the submissions to IREC – saw this as evidence that about 11,000 votes had been added – at KICC – to Kibaki’s vote, as he had as many as 52,886 votes cast in his favor – of a total of 55,061 valid votes in the presidential race. Such turnout differentials are, however, very unlikely in simultaneous elections. However, IREC suddenly realized that the simple additions of the votes for the parliamentary and presidential candidates could be substantially wrong (sic!); if numbers were added correctly, discrepancies decreased considerably. Readers are kindly invited to add the votes obtained by the candidates in Karinyaga Central (for both kinds of elections)<sup>3</sup> and see how the sum compares with the number of valid voters published by ECK! The same picture emerges when one performs the same simple operation in some of the other cases used to by ODM and civil society to question the reliability and the integrity of the work of ECK.

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<sup>3</sup> I apologize for the poor quality of the reproduction.

## PRESIDENTIAL ELECTION RESULTS PER CONSTITUENCY

CONSTITUENCY: 090 KIRINYAGA CENTRAL

CANDIDATE'S NAME	POLITICAL PARTY	VOTES SCORED	% VOTES SCORED
KIBAKI MWAI	PARTY OF NATIONAL UNITY	52,866	96.01 %
KUKUBO NIXON JEREMIAH	REPUBLICAN PARTY OF KENYA	8	0.01 %
MATIBA KENNETH STANLEY NJINDO	SABA SABA ASILI	9	0.02 %
MUSYOKA STEPHEN KALONZO	ORANGE DEMOCRATIC MOVEMENT - KENYA	53	0.10 %
MWANGI PIUS MUIRU	KENYA PEOPLE'S PARTY	37	0.07 %
NGACHIA JOSEPH KARANI	KENYA PATRIOTIC TRUST PARTY	150	0.24 %
NGETHE DAVID WAWERU	CHAMA CHA UMA PARTY	2	0.00 %
ODINGA RAILA AMOLO	ORANGE DEMOCRATIC MOVEMENT	380	1.05 %
RAJPUT NAZLIN OMAR FAZALDIN	WORKERS CONGRESS PARTY OF KENYA	3	0.01 %
<i>Total Votes Cast:</i>	55,380	<i>Valid Votes:</i> 55,061	<i>Registered Voters:</i> 68,878
<i>Rejected Votes:</i>	319		<i>Percent Voter Turnout:</i> 80.40 %

## PARLIAMENTARY ELECTION RESULTS

CANDIDATE'S NAME	POLITICAL PARTY	VOTES SCORED	% VOTES SCORED
CONSTITUENCY: 090 <u>KIRINYAGA CENTRAL</u>			
ABUBAKAR HASIA IREBI	ORANGE DEMOCRATIC MOVEMENT	219	0.50
DICKSON DANIEL KARABA	PARTY OF NATIONAL UNITY	17,151	39.02
GATIMU PAULINE WANJIKU	NEW SISI KWA SISI KENYA	636	1.22
GICHUKI EVAN MUCHINA	FARMERS PARTY	126	0.29
GITURE ERIC KARANI	THE NURU PARTY	474	1.08
KAGONDU ANDREW MURIITHI	AGANO PARTY	226	0.51
KAPONDA DESIDERIOUS	KENYA NATIONAL DEMOCRATIC ALLIANCE	372	0.85
KARIMI DISHON KIRIMA	VIPA PROGRESSIVE ALLIANCE	336	0.76
KARIUKI JOHN NGATA	FORUM FOR THE RESTORATION OF DEMOCRACY - ASILI	17,219 (WINNER)	39.17
KERIRI JOHN MATERE	SAFINA PARTY	7,298	16.60
KINYUA EDWIN MURIITHI	KENYA NATIONAL CONGRESS	9,239	21.02
MBUI NICHOLAS KINYUA	DEMOCRATIC PARTY OF KENYA	948	2.16
MWANGI LAWRENCE RURIGE	CHAMA CHA MWANANCHI	199	0.45
MWANIKI HENRY MURIUKU J	MAZINGIRA GREENS PARTY OF KENYA	1,855	4.22
NJERU SAMUEL KAGDIYO	NATIONAL LIBERATION PARTY	257	0.58
NJIRU JAMES NJAGI	KENYA NATIONALIST PEOPLES DEMOCRATIC PARTY	309	0.70
NUOGU RICHARD MUGO	FORUM FOR THE RESTORATION OF DEMOCRACY FOR THE PEOPLE	24	0.05
THOMAS RAYMOND HARINGA	UNITED DEMOCRATIC PARTY OF KENYA	309	0.70
<i>Total Votes Cast</i>	44,446	<i>Valid Votes:</i> 43,957	<i>Registered Voters:</i> 68,878
<i>Rejected Votes:</i>	489		<i>Percent Voter Turnout:</i> 64.53 %

- b. In the case of Kirinyagi Central, it was decided to have a look at all the Form 16s, which were used to transmit polling station results to the constituency tallying center. The many results were entered in a simple spread-sheet and IREC thereupon realized that the official ECK figures for the two elections were all wrong. The published figures for total number of votes cast (i.e. the figures on the preceding page) were too high in the case of the presidential, and much too low in the case of the parliamentary election. Also, the number of votes was wrong for 17 of the 18 parliamentary candidates and for eight of the nine presidential candidates. Kibaki had actually been allocated *fewer* votes than he should have had<sup>4</sup> – and in the parliamentary race, the declared winner only came second (sic!) (IREC 2008, pp. 320-321). At the IREC hearings the returning officer from Kirinyaga Central stated officially that he accepted the correctness of IREC’s findings.

Similar results were found in most of the other constituencies scrutinized in this way, so it is very clear that the published ECK official elections results are not to be trusted.<sup>5</sup> The important finding, however, is that such problems were not only found in constituencies where Kibaki had massive support. It was also found in constituencies with strong support for Mr Odinga (and elsewhere as well), so the obvious conclusion is that the suspicious turnout differentials were not caused by Kibaki- og PNU biased ECK staff or commissioners adding extra votes to Kibaki’s votes at KICC, but was due to poor working conditions at constituency tallying centers, insufficient staff training, the late ECK decision not to use the computers (and software) obtained primarily and at great cost for this purpose, and probably also sloppy work by some returning officers or their deputies. IREC was only able to scrutinize a sample of constituencies in this manner as it is quite time-consuming, but the obvious conclusion arrived at by IREC was

“... that conduct of the transfers from polling stations to constituencies, the tallying in constituencies, the transfer of constituency-level presidential election results and the tallying at national level is – generally speaking – of incredibly low quality; it is actually not acceptable.

This scrutiny of the handling of results-transfers and tallying has not indicated any particular or discernible party bias in the demonstration of incompetence by constituency tallying centre staff, by national tallying centre contract staff at KICC, or by ECK permanent staff or commissioners” (IREC 2008, pp. 127-129).

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<sup>4</sup> Which of course is surprising in a Kibaki-stronghold!

<sup>5</sup> The document compiled by Toni Weis (2008) is therefore only of value if one wants to document the basis for the misperceptions and misunderstandings about the importance of turnout differentials in civil society, the ODM, and some of the election monitoring organisations.

- c. Other counting and reporting related problems also contributed to the confusion, which was noted by all observers of the process:
    - i. Reporting was late from some constituencies, and the debate over possible patterns in these delays has been intense,<sup>6</sup>
    - ii. the fact that some ROs did not abide by the very clear instruction that partial results should *never* be released by them and that total presidential results should only be considered as provisional<sup>7</sup> obviously contributed to misperceptions and confusion, even in the ECK itself, and
    - iii. some partial results even made it to the KICC, where some were being updated on paper forms, which gave the impression that “corrections” (read: illegal changes) were being entered in the ECK results computer.<sup>8</sup> It became evident during the IREC hearings that there was a most remarkable lack of understanding of the need of also being able to officially and transparently correct constituency results (both for the presidential and the parliamentary elections), which had been forwarded and published by mistake.
  - d. EU EOM monitors did not fully identify all of the above-mentioned problems related to counting, Tallying, and publication of results, which in itself contributed to setting the tone of the preliminary as well as the final EU EOM reports.
  - e. KODEF – the umbrella organization of domestic monitors – did also not understand the nature of the various mistakes made by the ECK. The full KEDOF report is therefore of little value – and it only appeared almost a year after the general elections.
7. Disputes. The time frame allowed for preparing election related complaints and the brief time frame for personally serving the winners contributed a lot of a high level of anger and frustration, in particular because the courts took a very legalistic approach to issues before them, even in cases where one would suspect that something might have been a problem. The low level of trust in Kenyan courts was thus substantiated. It was also telling – but also surprising for observers – that Mr Odinga did not want to present his complaints to the courts as allowed for in the electoral law.

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<sup>6</sup> See, e.g., Throup (2008a) and DT’s paper presented to IREC (2008b, references to be added).

<sup>7</sup> Because the ECK was responsible for the final result and therefore they were the only one who could declare final presidential results (for constituencies or for the entire country).

<sup>8</sup> Juja Constituency is a good example of this: The final result of the presidential elections in the constituency – in particular the 100,390 votes cast for Kibaki – was challenged by many, because another result – with 48,293 votes for Kibaki – had also been reported. However, the latter was only a partial result, based on 111 polling stations (see documentation in the ODM submission), while the constituency has 232 polling stations. Results for all other presidential candidates also more or less doubled between the partial and the final results; this adds to the credibility of this explanation of the differences noted by so many Kenyans and also by, e.g., the EU observers.

8. Result implementation was fast, in particular as Hon. Kibaki was sworn in only briefly after the ECK had declared him the winner with a few percentage points over Hon. Odinga. This surprisingly speedy procedure contributed in itself to an increasing level of suspicion of something being wrong.
9. Voter education was conducted to a considerable degree and at considerable costs. It was a little unclear why extensive voter education was necessary after several rounds of competitive elections (1992, 1997, and 2002), a considerable number of by-elections in constituencies across the country, and the 2005 referendum.

## Later Developments

One of IREC's many suggestions was the complete dismantling of ECK, which had demonstrated such levels of incompetence and integrity – and was seen by very many Kenyan voters – as the main wrongdoers. The ECK was eventually replaced by a nine-member Interim Independent Electoral Commission, which is now Kenya's EMB. The body was only made interim because of the constitutional reform process, as one could not know what the precise stipulations in the new constitution in this particular field – if any – would be. A new boundary delimitation commission was also established during 2009.

Many of the recommendations made by IREC will only come into effect in a new electoral law, which at least in part – must wait for the constitution to be accepted in a referendum, which may or may not take part in mid-2010. The time for conduct of a referendum on a new constitution obviously depends on the way the constitutional reform process will develop, but it also depends on what is going to happen in relation to the development of a new voters' register, which should be a *sine qua non*. Whether or not there will be a willingness to integrate the voters' register with a fully computerized ID system remains to be seen, but it would be a major step ahead if decided, financed, and implemented.

The publication in mid-November of the Harmonised Draft of the Constitution of Kenya, prepared by the Committee of Experts on constitutional Reform, allows one to study the Committee's suggestions.<sup>9</sup> One notes that the committee has not followed IREC's recommendation to establish a special Electoral Dispute Resolution Court, but one can hope that others will work for the establishment of such a court.

One also notes that the ideas about a future electoral system build on the so-called Bomas draft, i.e. has no element of proportional representation what so ever, at the same time as 74 special women constituencies are suggested, on top of the ordinary single-member constituencies. It is not clear if all voters will be allowed to vote in these constituencies, or only women.

A provision aiming at securing that at least one third of all MPs are women is commendable, but not well thought out, as it in its present form might lead to unforeseen and very unpleasant consequences.

IREC suggested that the regulations about the 12 Nominated Seats be clarified, but the Committee has scrapped them, which is commendable.

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<sup>9</sup> The publication was followed by an invitation to the general public to debate the draft and present submissions for further deliberation to the committee within 30 days.

The regulation of political parties is quite detailed – and probably more than is warranted – but it builds on – and provides the constitutional basis for the Political Parties Act, which came into force in mid-2008.

## **Conclusion**

IREC was able to fulfill its mandate within the time set aside and it could therefore pronounce on the electoral process in Kenya in its report, which was published on 18 September 2009 and then presented to Hon. President Kibaki and Hon. Prime Minister Odinga – and then to Kofi Annan at a separate occasion.

IREC was not able to establish that the outcome of the presidential contest was caused by fraudulent behavior at the KICC or elsewhere, but it was very clear that the ECK had not been able to ensure the integrity of the electoral process, which then contributed to the tragic outburst of violence which followed the declaration of the result of the presidential elections.

Sometimes elections in new or unstable democracies have been criticized for being characterized by certainty of the outcome, but uncertainty about procedures and processes. This is of course deplorable, since acceptable elections should be characterized by uncertainty about outcome, but certainty of procedures and processes. The general elections in Kenya in December 2007 provides a new variant as there were uncertainty about not only the outcome of the presidential election (and some parliamentary elections as well), but also about procedures and processes.

It also appears that not all actors on the political scene in Kenya have fully understood the implications of IREC's findings for the assessment of what happened in December 2007. This is regrettable and one can only hope that key actors might find the time to study the report carefully before the constitutional reform process and the implementation of a new electoral administrative system have been completed. The victims of the election related violence deserve that!

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