

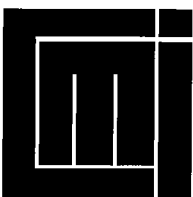
# **A Hobbled Democracy**

## **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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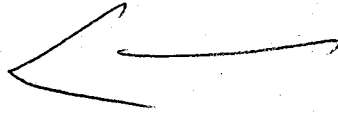
On 29 December 1992 the first multi-party elections since 1966 were held in Kenya. This report provides a critical assessment of the circumstances surrounding that event. The irregularities and problems encountered in the run-up to the elections and in the balloting and counting phases cast very serious 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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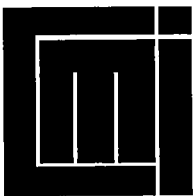
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# Executive Summary

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 1963-91<sup>1</sup>

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

<sup>1</sup> 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”.<sup>2</sup>

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.<sup>3</sup> 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

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

## 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

<sup>4</sup> 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.

