

## Leadership Crisis and the Debacle of Kenya's 27<sup>th</sup> December 2007 General Elections

Korwa G. Adar

This brief puts into perspective the 27 December 2007 electoral debacle through an analysis of its causal factors and implications on the country's multi-party democratic electoral system. The analysis proceeds from the premise that the country has been plunged into political crisis due to the lack of leadership committed to the principles of good governance, accountability, and the rule of law. This is the core of the problem, which is likely to hamper progress towards the holistic implementation of the Kofi Annan-brokered peace process.

### Introduction

At the time of writing this policy brief in April 2008, the African Union (AU)-brokered mediation process led by the former United Nations Secretary General, Kofi Annan and his team of eminent Africans including former Tanzanian President Benjamin Mkapa and the former South African First Lady, Graca Machel had been reached. It led to a power-sharing agreement signed by President Mwai Kibaki of the Party of National Unity (PNU) and Raila Amolo Odinga, the leader of the Orange Democratic Movement (ODM). The agreement could not have been reached without the overwhelming and unswerving internal and international pressure brought to bear on the two leaders, particularly on Mwai Kibaki who holds the key to the success, failure and future durability of the agreement. The agreement signed by the two leaders comprises of the following key elements:

- A prime minister of the government of Kenya, with executive authority to coordinate and supervise the execution of the functions of the government
- The prime minister shall be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party does not command a majority
- The PNU and the ODM are to elect one deputy prime minister each
- The cabinet will consist of the president, the vice-president, the prime minister, the two deputy prime ministers and other ministers
- The prime ministers and the deputies can only be removed by a majority vote of no confidence by members of the National Assembly
- The removal of any ministers of the coalition will be subject to consultation and concurrence in writing by the leaders

The solution is to fast-track the Accord and hold general elections in two to three years time once the Kriegler Commission has completed its work

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There shall be  
in Kenya only  
one political  
party, the  
Kenya African  
National Union

- The coalition government will reflect the principle of portfolio balance and party strength in the National Assembly
- The National Accord and Reconciliation Act (2008) is to be passed in the National Assembly and entrenched in the Constitution
- The coalition will be dissolved if the Tenth Parliament is dissolved or if the parties agree thereto in writing or if one coalition partner withdraws from the coalition.

The Constitution of Kenya Amendment Bill (2008) has already been expeditiously passed by the National Assembly and signed into law by President Kibaki. The other parts of the agreement, the National Accord and Reconciliation Bill (2008), the Ethics Relations Bill (2008), and the Justice and Reconciliation Bill (2008) are still being debated in Parliament. *The optional clause, which allows any of the partners to, inter alia, withdraw from the coalition, is a delicate one, which if invoked by any of the partners, can easily plunge the country back to the crisis.* The solution is to fast-track the Accord and hold general elections in two to three years time once the Krieglerr Commission has completed its work.

### A Brief Synopsis of President Mwai Kibaki's Political Past and its Relevance to the Crisis

For the most part of his political life Mwai Kibaki has hardly been part of the movement for democratic change in Kenya, which spans over four decades. Therefore, it was a misconception to expect him to preside over his removal from power without national and international pressure.

He served in various Cabinet portfolios until the death of President Jomo Kenyatta in 1978. The former President Daniel arap Moi appointed him Vice-President in 1978, a position in which he served until 1988.

Mwai Kibaki used his authority as a leader of Government Business in the National Assembly to rush a bill through Parliament which transformed Kenya from a *de facto* to a *de jure* one-party state in 1982. Section 2A of the 1983 Constitution states: "there shall be in Kenya only one political party, the Kenya African National Union".<sup>1</sup> He passed other constitutional amendments in Parliament during his tenure as the Vice-President, which transformed Kenya into a monolithic and autocratic state, which included Act No. 14 of 1986, Act No. 20 of 1987 and Act No. 4 of 1988.<sup>2</sup> While Act No. 14 of 1986 removed the security of tenure of the Attorney General and the Controller and Auditor General, Act 20 of 1987 made capital offences non-bailable. On the other hand, Act No. 4 of 1988 gave the Kenyan Police authority to hold suspects for 14 days without trial. Therefore, arbitrary arrests of opponents of the system, extra-judicial killings and detentions, which began during the Kenyatta era, became more rampant in the 1980s.<sup>3</sup>

Daniel arap Moi had already conceded the internal and international pressure to remove Section 2A of the Constitution and to institute multi-party elections in Kenya by the time Kibaki joined the bandwagon to vie for the presidency in 1992. Specifically, Kenya's pro-democracy and human rights movement and the international community had already succeeded in forcing President Moi to introduce multi-party electoral system in the country.<sup>4</sup> However, President Moi only instituted the repeal of Section 2A of the constitution, with the state machinery still under his control.

**Table 1: The Outcome of the 2005 Referendum on the Draft Constitution of Kenya 2004.**

Province	Yes	% Votes	No	% Votes	Registered Voters	Voters Turnout	% Turnout
Central	1 023 219	93,2%	74 394	6,8%	1 795 277	1 097 613	61,1%
Coast	64 432	19,3%	269 655	80,7%	967 518	334 087	34,5%
Eastern	485 282	49,5%	494 624	50,5%	1 977 480	979 906	49,6%
Nairobi	161 344	43,2%	212 070	56,8%	961 295	373 414	38,8%
North Eastern	12 401	24,1%	39 028	75,9%	237 321	51 429	21,7%
Nyanza	114 077	12,2%	822 188	87,8%	1 664 401	936 265	56,3%
Rift Valley	395 943	24,5%	1 218 805	75,5%	2 668 981	1 614 748	60,5%
Western	240 582	40,2%	358 343	59,8%	1 322 604	598 925	45,3%
<b>Total</b>	<b>2 532 918</b>	<b>41,7%</b>	<b>3 548 477</b>	<b>58,3%</b>	<b>11 594 877</b>	<b>6 081 395</b>	<b>52,4%</b>

Source: Electoral Commission of Kenya, *Kenya Constitutional Referendum, 2005* (Nairobi: Electoral Commission of Kenya, 2006).

**Table 2: The 2007 Presidential Election Results Per Candidate**

Political Party	Presidential Candidate	Votes (Figures by Electoral Commission of Kenya): 08 January 2008	Votes (Figures by Government Spokesman)	Percentage
Party of National Unity (PNU)	Mwai Kibaki	3 270 433	4 584 721	46,000%
Orange Democratic Movement (ODM)	Raila Odinga	3 270 063	4 352 993	44,000%
Orange Democratic Movement-Kenya (ODM-Kenya)	Kalonzo Musyoka	413 296	879 903	9,000%
KPTP	Joseph Karani	14 232	21 171	0,200%
KPP	Pius Muiru	5 662	9 667	0,090%
WCPK	Nazlin Omar	4 868	8 624	0,087%
SSA	Kenneth Matiba	4 561	8 046	0,081%
CCUP	David Ng'ethe	3 941	5 976	0,060%
RPK	Nixon Kukubo	3 769	5 927	0,060%

Source: [http://en.wikipedia.org/wiki/Kenyan\\_presidential\\_election%2C\\_2007](http://en.wikipedia.org/wiki/Kenyan_presidential_election%2C_2007). Accessed 15 January 2008.

The outcome of the 1992 and 1997 elections remained questionable and were best characterised as a “democracy experiment”.<sup>5</sup>

The minimal constitutional reforms passed in Parliament following the 1998 Inter-Parties Parliamentary Group (IPPG) agreement did not meet the expectations of the advocates for comprehensive constitutional transformation and multi-party electoral system in general. The National Rainbow Coalition (NARC – a conglomeration of a number of political parties) which swept Mwai Kibaki into the presidency in 2002 was an offspring of years of this movement for comprehensive constitutional reform and tangible transformation of Kenya into a multi-party democratic society. This movement for change led to the defeat of Moi's handpicked Uhuru Kenyatta and the independence nationalist party, Kenya African National Union (KANU) and Mwai Kibaki's ascendancy to the presidency in 2002. The onus is on Mwai Kibaki to put this bleak political history behind him and leave a legacy associated with a stable, prosperous and democratically governed country where the tenets of the rule of law are the core operational and functional values. The success of the AU-brokered and Kofi Annan-led peace process is, therefore, a litmus test for the Kibaki presidency. However, given his indecisiveness and lack of leadership characteristics amenable for good governance,

it is unlikely that his administration is going to honour and implement the agreement in full.

### Prelude to the 2007 General Elections

The ODM's defeat of President Kibaki during the 2005 referendum on a minimal draft constitution prepared by the Attorney General, Amos Wako, was an expression of unhappiness by the electorates over his administration. The discontent was about his failure to fulfil the 2002 campaign pledge to institute and implement a comprehensive constitutional reform. The Wako draft constitution ignored a number of sections of the Draft Constitution of Kenya 2004 (also known as the Bomas Draft Constitution), which deal with the devolution of power, limiting the characteristics of the imperial presidency entrenched in the Constitution of Kenya since independence.<sup>6</sup> President Kibaki and his NARC allies (or the ‘banana’ coalition) campaigned on a minimal constitutional reform platform or a “Yes Vote”. On the other hand, the ODM, a number of whom were President Kibaki's own allies in the NARC government and Cabinet Ministers (or the ‘orange’ coalition), supported the adoption and implementation of comprehensive constitutional reform and together with their supporters voted “No” in the referendum.<sup>7</sup> Table 1

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The president reacted by dismissing the entire cabinet and ministers, a decision that took Kenyans by surprise

indicates that except for Kibaki's home province, Central, the ODM won the remaining six provinces in the referendum with a clear margin, with more than an average of 60% of the votes cast.

During its 2002 general election campaigns, NARC had promised Kenyans that it would implement the new constitution *in toto* within 100 days if elected to govern the country. Therefore, the referendum provided the only viable forum and option for the electorates to register their frustration and dissatisfaction with the leadership of Mwai Kibaki. The ODM gained its campaign momentum in preparation for the 2007 general elections, albeit with internal differences among its ranks, following the outcome of the referendum.<sup>8</sup> President Kibaki reacted by dismissing the entire cabinet and deputy ministers. It was a decision that took Kenyans and those concerned with Kenya's economic stability and path towards the consolidation and institutionalisation of multi-party liberal democracy, accountability and the rule of law by surprise.

### Reflections on the 2007 General Elections

Authorities charged with statutory duties and responsibilities failed to ensure free and fair elections as a result of lack of leadership committed to the consolidation of institutions amenable for good governance, accountability, multi-party democracy, and the rule of law. It culminated into sporadic civil unrest across the country claiming over 1 500 lives; affecting more than 500 000 people, most of whom are internally displaced persons (IDPs); causing over 100 000 refugees, the majority

of whom crossed into neighbouring countries; and leading to the loss of over US\$ 900 million in the economy. Kenyans, along with international observers, did not anticipate that the country would be plunged into such a crisis, particularly because of the smooth transfer of power by the former President Daniel arap Moi to Mwai Kibaki in 2002 after the defeat of KANU. The relative peaceful nature of the voting process throughout the country on the 27<sup>th</sup> December 2007 was also an indicator of a potential positive electoral outcome. The unprecedented quick reaction by the ordinary Kenyans that led to the bloodletting across the country was caused by a number of factors:

- Kenyans and observers perceived the defeat of the Vice-President, Moody Awuori and a number of cabinet ministers as well as the allies of the government in the elections as a pointer towards the government's brink of total defeat. Therefore, the majority of Kenyans were unprepared for anything less than the defeat of PNU
- The Chairman of the Electoral Commission of Kenya (ECK) Samuel Kivuitu announced presidential results which contradicted the results announced by his own officials at the constituency level. A number of ECK officials also denounced the results, putting the credibility and legitimacy of the results into question
- The ECK decided to deliberately delay the announcement of the presidential results from the constituencies considered to be President Kibaki's strongholds; particularly the Central province. The ODM had been in the lead against Mwai Kibaki in the total votes for most part of the evening as the ECK continued to announce the results
- Samuel Kivuitu's decision to prematurely announce Mwai Kibaki the winner of the presidential elections under questionable circumstances and in contravention of the electoral laws
- The Chief Justice secretly swore-in Mwai Kibaki as the president in the State House the night the Chairman of the ECK announced him the winner
- The majority of the electorates were of the view that they voted for change. Thus they were not prepared to accept the ECK's decision to declare Mwai Kibaki the winner of the presidential elections
- The ECK Chairman – who is the custodian of the electoral laws – renounced his decision a few days afterwards by declaring that he did not know who won the presidential elections. He is nevertheless bound by the oath of office and personally responsible and accountable to

Table 3: The 2007 Presidential Election Results Per Province

Province	Mwai Kibaki	Raila Odinda	Kalonzo Musyoka
Central	97,4%	1,9%	0,7%
Coast	34,4%	58,9%	6,7%
Eastern	54,7%	6,4%	38,8%
Nairobi	41,5%	53,3%	5,1%
North-Eastern	47,9%	49,6%	2,4%
Nyanza	14,6%	85,0%	0,3%
Rift Valley	28,7%	70,3%	1,0%
Western	30,0%	69,2%	0,3%
Total (%)	46,4%	44,1%	8,7%
<b>Total (Votes)</b>	<b>4 584 721</b>	<b>4 352 993</b>	<b>879 903</b>

Source: [http://en.wikipedia.org/wiki/Kenyan\\_presidential\\_election%2C\\_2007](http://en.wikipedia.org/wiki/Kenyan_presidential_election%2C_2007). Accessed 15 January 2008.

Kenyans despite his claim that he announced the presidential results under duress. This was a dereliction of duty on his part and in contravention of the code of conduct for the electoral commissioners prescribed in the constitution and the electoral laws of Kenya.<sup>9</sup>

The presidency, out of its own volition, announced election results whose figures contradicted those of the ECK. The announcement was considered even more unusual and in contravention of the constitution and electoral laws and ethics. Section 41 (9) of the Constitution, for example, provides: "In the exercise of its functions under this Constitution, the Commission shall not be subject to the direction of any other person or authority".<sup>10</sup> Table 2 indicates the variations between the results announced by the ECK and the presidency.

Table 3 shows that the ODM won in most of the provinces. This trend should under normal circumstances have also been reflected in the popular vote. However, these figures and the outcome of the disputed elections in general, among other contentious issues, are yet to be determined by a team of six experts led by the former South African judge, Justice Johann Kriegler. The other prominent members include Horacio Boneo (Argentina), Lady Justice Imani Daudi Aboud (Tanzania), and Prof. Marangu M'Marete, Mrs. Catherine Muyeka Mumma, and Ms. Lucy Kambuni (Kenya). The Kriegler Commission of Inquiry has already been sworn in and is expected to complete its work as soon as possible to prevent any further anxiety among Kenyans and the international community about the December 2007 electoral debacle.

The ODM, PNU and ODM-Kenya had won 99, 43 and 16 parliamentary seats respectively when vote counting was put on hold due to the controversies and sporadic conflict. The PNU affiliated political parties, KANU, independent candidates, and the ODM affiliated NARC, secured 21, 14, 11, and 3 seats in parliament respectively, bringing the total members of the legislators to 207.<sup>11</sup>

## Recommendations

It is now incumbent upon President Mwai Kibaki and Prime Minister Raila Amolo Odinga to ensure that the peace accord is holistically and successfully implemented. In addition to the peace accord, the leaders need to take cognisance of the following recommendations:

- The ECK should be disbanded as soon as possible and be replaced with an independent and credible one
- Presidential elections should be held in two to three years time once the Kriegler Commission has submitted its report which either states that there is no clear winner in the 2007 presidential elections or if the report is not conclusive
- The government should fast track the implementation of comprehensive constitutional reforms, which has eluded Kenyans since independence
- Irrespective of their status and political affiliation, the people who were involved in extra-judicial killings through direct or indirect mobilisation of militias following the 2007 electoral debacle should be held accountable for their actions
- The government should establish a Truth and Reconciliation Commission (TRC) using the South African model. However, blanket amnesty to offenders should be discouraged as much as possible. If implemented, Kenyans will be in a position to know the truth behind the assassination and extra-judicial killings of many citizens some of whom include, for example, Thomas J. Mboya (1969), J. M. Kariuki (1975), Robert Ouko (1990), Bishop Kipsang Alexander Muge (1990), and Father John Kaiser (2000)
- An independent body with full statutory powers should be established to expose corruption scandals (Goldenberg and Anglo-Leasing, etc) that have rocked the country since independence
- An enduring resolution on the land question, which the country has struggled with since independence, should be holistically tackled.

## Conclusion

If the crumbling of NARC under President Mwai Kibaki's leadership in the post-2002 general elections and his dismissal of the entire Cabinet in 2005 are anything to go by, then Kenyans and the international community must watch with anxiety the extent to which his administration is going to adhere to and implement the Kofi Annan-led peace process. The role Kenyans and the international community played in questioning the legitimacy of the 2007 presidential electoral outcome paved the way for the support for and the conclusion of the peace process. However, the practice by Kenyan leaders (with Presidents Moi and Kibaki as good examples) whereby the international community has to put pressure on the government under their leadership through withholding of donor funds before they acquiesce to a transparent and good governance should be a thing of the past.

It is now incumbent upon President Mwai Kibaki and Prime Minister Raila Amolo Odinga to ensure that the peace accord is holistically and successfully implemented



To equate Kenya's electoral debacle with that of the USA in 2000 and to suggest that legal redress in the courts of law is the best way forward is academically inept and fundamentally misplaced

The former President Daniel arap Moi's thesis while he was still in the office that *Kenya is not ethnically cohesive enough and as such the country is not ready and amenable for multi-party participatory electoral system* did not withstand the test of time. Sadly, his views were given credence at the time by 140 unnamed and so-called pro-establishment Kenyan professors and academics who published a memorandum in the Kenyan dailies in support of government.<sup>12</sup> This trend by such academics seems to be re-emerging in relation to the 2007 electoral saga. To equate Kenya's electoral debacle with that of the USA in 2000 and to suggest that legal redress in the courts of law is the best way forward is academically inept and fundamentally misplaced.<sup>13</sup> By the time President Moi implemented multi-party electoral system more than 2 000 people had been killed through state sponsored violence and over 300 000 people internally displaced.<sup>14</sup> The aftermath of the 2007 electoral debacle is not any different. Kenya has to find solutions to the recurrent interlocking centrifugal and centripetal forces that have the potential of balkanising the country along ethnic lines and move forward in its quest for durable stability.

If the AU is to make a difference on issues similar to the Kenyan situation, it should amend the Constitutive Act for purposes of intervention irrespective of whether or not war crimes, genocide and crimes against humanity (grave circumstances) arise as a result of military or civilian *coup d'état*. The AU decided not to recognise Togo's government after Gnassingbe Eyadema's son took over the leadership unconstitutionally. This should be the guiding principle in Africa. The AU should have invoked the same principle with regard to the situation in Kenya.

## Notes and References

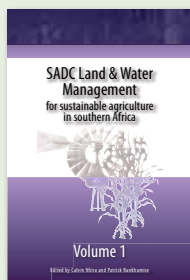
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- 5 Ajulu, Rok, 1998. "Kenya's Democracy Experiment: The 1997 Elections", *Review of African Political Economy* 38(3) (November), pp. 103-130.
- 6 The draft constitution was adopted on 15th March 2004, at Bomas, Nairobi, Kenya. For details on the Bomas Draft constitution, see Kenya, 2004. National Constitutional Conference, *The Draft Constitution of Kenya 2004*. Nairobi: Constitution of Kenya Review Commission.
- 7 The electorates who voted "Yes" and "No" used banana and orange symbols in the referendum respectively.
- 8 A detailed appraisal of the numerous political parties established over the years prior to the 2007 elections cannot be included in this study due spatial constraints.
- 9 For details on electoral laws, see Kenya, 1998. Laws of Kenya, *The National Assembly and Presidential Elections Act, 1998*, rev. ed (Nairobi: Government Printer).
- 10 Kenya, Laws of Kenya, 2001. *The Constitution of Kenya 2001*, rev. ed (Nairobi: Government Printer).
- 11 President Kibaki abandoned NARC, the party that brought him to power in 2002 elections and instead formed PNU in preparation for the 2007 general elections. Elections are yet to be held in the remaining 3 constituencies, which will bring the number of MPs to 210. A total of 12 MPs will also be nominated according to the strength of the political parties in parliament.
- 12 See, Adar, Korwa G., 1999. "Human Rights and Academic Freedom in Kenya's Public Universities: The Case of the Universities Academic Union", *Human Rights Quarterly*, 21 (1)(February): 179-206 and "A Memorandum Issued by 140 Unnamed Academics to the Press", *Nairobi Law Monthly*, November 1991 at 27. For a detailed critique of the memorandum see, Peter Anyang-Nyong'o, 1991. "Academics and Government Critics: The Peoples Intelligence Has Been Abused for Too Long", *Nairobi Law Monthly*, November at 29-30.
- 13 See, Kagwanja, Peter, 2008. *Breaking Kenya's Impasse: Chaos or Courts*. Africa Policy Brief.
- 14 See, for example, Kenya, 1992. *Report of the Parliamentary Select Committee to Investigate Ethnic Clashes in Western and Other Parts of Kenya* (Nairobi: Government Printer) and Article 19, 1998. *Kenya: Post Election Political Violence* (London: Article 19).





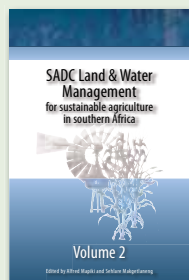
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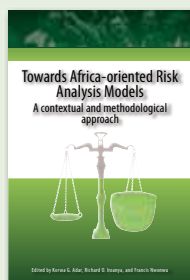
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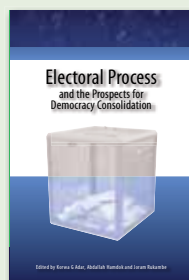


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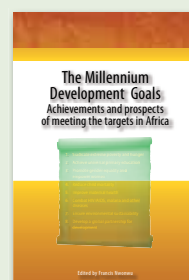


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