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Kenya after the 2007 “Post-Election Violence”: Constitutional Reform and the National Accord and Reconciliation Act

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Abstract

Immediately after the announcement of the re-election of President Kibaki on the evening of 30 December 2007, Kenya was thrust into the worst civil unrest experienced by the country since independence – a development that became known as the “Post-Election Violence” (PEV). However, after a subsequent process of reconciliation, the PEV came to an end within a relatively short period. The present-day politics of Kenya are being conducted within the framework of a provisional Constitution that took shape through peaceful mediation. How did Kenya manage to put a lid on a period of turmoil that placed the country in unprecedented danger? This paper traces the sequence of events that led to mediation, explains the emergency measures that were needed to maintain law and order, and indicates the remaining problems that still need to be solved.

Keywords: Kenya; violence; ethnicity; 2007 election; power sharing; constitutional reform

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Abstract

Immediately after the announcement of the re-election of President Kibaki on the evening of 30 December 2007, Kenya was thrust into the worst civil unrest experienced by the country since independence – a development that became known as the “Post-Election Violence” (PEV). However, after a subsequent process of reconciliation, the PEV came to an end within a relatively short period. The present-day politics of Kenya are being conducted within the framework of a provisional Constitution that took shape through peaceful mediation. How did Kenya manage to put a lid on a period of turmoil that placed the country in unprecedented danger? This paper traces the sequence of events that led to mediation, explains the emergency measures that were needed to maintain law and order, and indicates the remaining problems that still need to be solved.

Introduction

Early on the morning of 27 December 2007, a day of nation-wide elections in Kenya, the usual long queues of voters had already formed in front of the polling stations. Among the Kenyans waiting to cast their votes were many with memories of the defeat meted out in the election of 2002 to an administration that had ruled the country since independence. Many of those waiting to vote, moreover, were implicitly confident in the role of elections as a means of supervising and monitoring the performance of national government. In some people's minds, almost certainly, was the defeat in a referendum held in 2005 of the government's notorious proposals for a new constitution. Confident that elections formed a well-established feature of the democratic process, Kenyans waited to vote, many with the above thoughts running through their minds.

However, any optimistic hopes that voters may have entertained were dashed three days later when, on the evening of 30 December, in the midst of mounting suspicions of vote rigging, the re-election of President Kibaki was formally announced (Kibaki is a Kikuyu, and at the time of the election he was the presidential candidate of the Party of National Unity, or PNU). Immediately after the announcement, Kenya was thrust into the worst civil unrest the country had experienced since independence – a development that became known as the “Post-Election Violence” (hereafter referred to

as PEV). To begin with, the violence was associated with the discontent that erupted over fear that the election results may have been rigged, and that Raila Odinga (a Luo and presidential candidate of the Orange Democratic Movement, or ODM) might have been robbed of his rightful election victory. Nairobi, Mombasa, Kisumu and the other major cities of Kenya were the main centres of the unrest. In rural areas, violence against the Kikuyu (Kibaki's ethnic group) broke out with arson attacks and killings, while in retaliation, groups claiming to be Kikuyu youth organizations – the so-called *Mungiki* – launched revenge attacks against non-Kikuyu people in rural districts of the Rift Valley as well as in Nairobi.

The author received many heartrending reports over her cellular phone from Kikuyu families telling her how they had chosen to sleep outside because of their fears of arson attacks on their homes. As the unrest grew, the security forces blocked the main roads that ran through Nairobi, while elsewhere newly organized vigilantes, acting on their own initiative, threw up barriers across the roads to screen traffic for “hostile communities”. As a result, the circulation of traffic came to a complete halt. In urban areas, food shortages occurred and there was a rapid escalation in the prices of daily necessities such as milk, bread and vegetables. Pre-paid cards for cell phones disappeared from the shops. The author found herself unable to make contact with Kikuyu families in both Mombasa and Nairobi. The violence, the most severe and

widespread since independence, continued at a quickening pace. Over a thousand people died, and at its height, the figure for homeless refugees exceeded 600,000.¹

However, within a relatively short period, a process of reconciliation was able to bring the PEV to an end (at least when judged by external appearances). Kenya's present-day politics are being conducted within the framework of a provisional Constitution that took shape through peaceful mediation. How did Kenya manage to put a lid on a period of turmoil that placed the country in unprecedented danger? This paper, written in January 2010, was put together less than two years after the upheaval that followed the 2007 election, and in the midst of a somewhat fluid reality. It traces the sequence of events that led to mediation, explains the emergency measures needed for the maintenance of law and order (as of the time of writing) and indicates the remaining problems that still need to be solved.

1. The path to mediation

Kibaki and Odinga, the two rival contenders for power, clashed head on from the day that violence erupted. On 30 December, Kibaki forced through a presidential swearing-in ceremony in an attempt to solidify his position as the declared winner. For their part, the Odinga side held a press conference immediately after the ceremony,

¹ For a detailed account of the Post-Election Violence, see Tsuda (2009).

and while making allegations of misconduct in the way that the election results had been calculated, indicated that they themselves would hold a swearing-in ceremony in which Odinga would be declared president. Thereafter the PEV continued unabated into January 2008.

Details came out of an incident in the Rift Valley in which over 30 women and children, mainly Kikuyu, had taken refuge inside a church which was then attacked and set alight, killing everyone inside (BBC News, 2 January 2008). In all, the number of reported deaths increased to several hundred per week.

Despite the worsening violence and the mounting suspicion of election vote rigging by the government, on 7 January Kibaki made it clear that the Tenth Parliament would be convened,² and on 8 January he appointed seventeen cabinet members from his own faction, including the ministers for finance, defence, internal security, and justice. The Kibaki faction showed no sign of making any concessions whatsoever. Odinga and his supporters, meanwhile, made it clear that as a precondition for their cooperation in a mediation meeting, Kibaki had to resign. On 9 January, John Kufuor, head of the African Union (AU) at the time, attempted to arrange meetings with Kibaki and Odinga in an effort to mediate between the two men. His initiative failed.

² Power to convene the parliament rested exclusively with the president.

In the end, the body that succeeded in arranging mediation was the Panel of Eminent African Personalities, headed by Kofi Annan, the former Secretary General of the United Nations and the Panel's chairman. Annan arrived in Kenya on 22 January and set up the panel with himself as chairman and assisted by two eminent members – Benjamin Mkapa (former president of Tanzania) and the world-famous activist and international advocate of women's and children's rights, Graça Machel, wife of Nelson Mandela, then South Africa's president. These three persons were joined by four representatives from Kibaki's PNU and four from Odinga's ODM, thus establishing an organization known as the Kenya National Dialogue and Reconciliation (KNDR) committee.

Thereafter, the KNDR pursued negotiations through a series of meetings which explored the possibilities for compromise between the PNU and the ODM camps. As Kenya grew increasingly ungovernable, the meetings of the KNDR provided the only forum for conducting mediation between the two sides.

On 24 January 2008, encouraged by Annan, and in front of a large press conference, Kibaki and Odinga shook hands. By 1 February, agreement had been reached under KNDR auspices on a broad plan for ending the violence and for achieving rehabilitation. Specifically, this entailed Agendas One to Three, under which steps

would be taken to end the political crisis within a short period of between seven and fifteen days. Agenda Four was devoted to the resolution of longer term problems.

The immediate focus of the mediation effort was to find a short-term resolution of the political crisis, and this lay in two issues: a temporary sharing of power between Kibaki and Odinga, and the introduction of amendments to the Constitution to make this power sharing possible. Midway through February, the Odinga side withdrew its insistence that Kibaki should resign (see *Daily Nation*, issue of 19 February 2008), but the Kibaki side found it difficult to reach agreement because of its insistence on maintaining the present Constitution unchanged.

On 14 February, as part of the short-term agenda for settling the issue over the outcome of the 2007 presidential election, it was agreed to set up an independent review committee whose membership would include foreigners as well as Kenyans. This committee, it was finally agreed, should issue recommendations without delay with a view to reaching mutual agreement on a comprehensive reform of the electoral system.

2. Towards a resolution of the political crisis

At the end of February, the Kibaki side yielded and made concessions. On 28 February 2008, Kibaki and Odinga at long last reached an agreement to establish a coalition government consisting of the PNU, the ODM, and associated political parties. One of the key agreements between the two leaders was the establishment of the post of Prime Minister which, it was agreed, was to be taken by Odinga. They also agreed to bring about other necessary political changes including amendments of the Constitution that would make possible the establishment of a coalition government. Kibaki and Odinga formally signed the agreement in the presence of Kofi Annan and the other members of the Panel of Eminent Personalities.

From this point onwards the PEV began to end. In the Tenth Parliament, which convened on 6 March 2008, the members of parliament who were present unanimously approved the Constitution of Kenya (Amendment) Bill, 2008 and passed the National Accord and Reconciliation Bill, 2008, that gave substance to the power sharing arrangements that Kibaki and Odinga had agreed on. Having been duly signed by the president, the Bill became the National Accord and Reconciliation Act, 2008. The parliament that reconvened on 6 March reflected the anticipated coalition between the PNU and the ODM. Kibaki, the leader of the PNU, became the first president of Kenya to take his seat among the members of parliament as leader of the government

party next to Odinga, leader of the ODM.³ The vice president (a member of the ODM-Kenya, a party associated with the PNU)) who had occupied the place next to Kibaki, surrendered his seat to Odinga and moved to a seat that had been occupied by a member of the opposition parties. Meanwhile MPs from both the PNU and the ODM sat not in party groups, as hitherto, but amongst each other, a development indicative of the mood of reconciliation prevailing in parliament.

In this setting, the amended Constitution and the National Accord and Reconciliation Act provided the framework for the provisional coalition government. Let us now examine in brief the contents of the framework. According to the Constitution of Kenya (Amendment) Act of 2008 (section 15A [6]), should there be a conflict of regulations between the National Accord and Reconciliation Act and the contents of the Constitution, the National Accord and Reconciliation Act should take precedence. Moreover, as regards the sections of the Constitution dealing with the office of vice president, the amended Constitution contained regulations relevant to the new positions of prime minister and deputy prime minister (section 15A). It was further made clear that matters such as the appointment, dismissal, functions and powers of the prime minister and deputy prime minister, and the rules of establishing the coalition government, would be determined by a law passed by parliament (the

³ The President of Kenya usually sits in a chair next to the Speaker of the Parliament.

National Accord and Reconciliation Act). It was also made clear that as regards the composition of the cabinet, the prime minister and the deputy prime minister would automatically be members of cabinet (section 17).

The support of over 65 percent of all the members of parliament is needed to approve the amendment of Kenya's Constitution. This is far more stringent than that needed to change other national laws. The latter can be changed by a vote of over half of the parliament members present. In this regard, by amending the Constitution, the contents of the National Accord and Reconciliation Act were written into the Constitution to preserve the contents of the agreement signed on 28 February 2008. The preservation of the Act by amending the Constitution itself also had been agreed to as part of the accord between Kibaki and Odinga on 28 February.

Until early 2008 the legal system in Kenya contained no explicit regulations concerning coalition government and the president had the right to appoint and dismiss cabinet ministers and the vice president. These features could not be retained unchanged after the accord of 28 February, and the National Accord and Reconciliation Act necessitated the introduction of some temporary but detailed provisions. Three of these were especially important. First, the Act stipulates that the prime minister is the leader of the party with the largest number of members in parliament; second, the deputy prime ministers are chosen by each of the parties that

make up the coalition; and third, the heads of the parties that make up the coalition nominate the members of the cabinet. Moreover the composition of the cabinet reflects the relative parliamentary strengths of the coalition member parties in parliament. That said, in appointing cabinet ministers, not just party representation but also the importance of particular ministerial portfolios must be taken into account. Under the terms of the amended Constitution, the power of the president to appoint and dismiss cabinet ministers became purely nominal. That power is no longer vested in the president, and the president no longer retains his right to unilaterally appoint and dismiss members of the government. Instead, changes in the composition of the cabinet are made on the basis of a written agreement and signed, following prior consultation, by the head of the coalition party that has nominated the concerned minister and by the president.

Moreover, the amended Constitution and the National Accord and Reconciliation Act make it clear that the prime minister is not simply a minister who takes his orders from the president, but has the authority to co-ordinate and supervise the execution of the government, including the work of the ministries . Regarding the dissolution of the coalition government, it was agreed that such action can occur only in the following circumstances, namely, at the time when the Tenth Parliament is dissolved; or when the parties that make up the coalition agree in writing to a dissolution; or when one coalition partner withdraws from the coalition by a resolution of the highest decision-

making organ of that party and confirms the withdrawal in writing. It was also agreed that the National Accord and Reconciliation Act can expire in only one of the following three circumstances, depending on which comes first: in the event of the Tenth Parliament being dissolved; in the event of the coalition being disbanded; or in the event of a new Constitution being formally promulgated.

Relatively swift progress was made in implementing the above drastic legal changes. In April 2008 the coalition cabinet was formed with Kibaki as president, Odinga as prime minister, and with appointees of the PNU and the ODM serving as the respective deputy prime ministers (the PNU man was the leader of the KANU (Kenya African National Union), a PNU-associated party). However in order to allay differences of opinion over the distribution of cabinet positions, eight new ministerial posts had to be created, and the membership of the new cabinet, including the president, the prime minister, the two deputy prime ministers, and the various ministers and assistant ministers, expanded to no less than 94 individuals, equivalent to over 40 percent of the 222-strong membership of the parliament. Not surprisingly, keeping the coalition intact and preserving its maneuverability became major preoccupations. Nevertheless, thanks to the various changes outlined above, a political crisis in Kenya was successfully avoided.

3. Radical changes in the electoral system

On 4 March 2008 agreements were reached between Kibaki's PNU and Odinga's ODM on the need for an enquiry into the circumstances underlying the accusations of vote rigging in the 2007 presidential election and into the need for a thorough change in the electoral system. It was also agreed that there should be a comprehensive revision of the Constitution as well as an investigation into the PEV, to include recommendations for dealing with the perpetrators of the violence. It was further agreed to set up a Truth, Justice, and Reconciliation Commission. Kofi Annan had strongly recommended that the PEV be investigated, and that a Truth, Justice, and Reconciliation Commission be established. One of the points in this area of enquiry was the involvement of politicians in the instigation of the violence, but because of the fluidity of the situation at the time of writing, this topic will have to be left for a later paper.⁴

First, let us consider the radical changes that occurred in the electoral system. In March 2008, Kibaki appointed the South African senior judge Johan Kriegler to head an eight-member independent commission of enquiry (hereafter the Kriegler Commission) to investigate the electoral process that was in operation at the time of the 2007 election. The Kriegler Commission presented its report on schedule in mid-

³ For developments up to this point, see the paper by Matsuda (2010).

September 2008. The report's main conclusion was that it was not clear who had won the 2007 presidential election. Parliament unanimously endorsed the report's conclusion in December 2008 and thus the argument concerning the identity of the presidential election's victor formally ceased to exist, confirming the legitimacy of the coalition government with Kibaki as president and Odinga as prime minister. The general elections of 2007 had been organized by the Electoral Commission of Kenya (ECK, whose chairman and members were appointed by the president). The Kriegler Commission recommended the wholesale reorganization of the ECK. On 1 October 2008, only a few weeks after the submission of the Kriegler Commission report, the then the ECK chairman announced his effective resignation, and at the end of October, a cabinet committee was organized with the aim of carrying out the Kriegler Commission's proposals. It was agreed to dissolve the ECK and to set up a provisional electoral administration committee.

When the related bill came up for approval in parliament, following a detailed discussion of how best to make appointments to the provisional electoral administration committee, agreement was reached, and in December 2008, the proposed amendment of the Constitution to enable the dissolution of the ECK was approved in a vote by 169 MPs.

With the amendment of the Constitution, an Interim Independent Election Commission of Kenya (IIEC), immune from the erstwhile power of the president to appoint and dismiss commission members, was set up along with an Interim Independent Boundaries Review Commission (IIBRC). As their titles indicate, the IIEC and the IIBRC were established as temporary bodies. Section 41 (13) of the amended Constitution made it clear that both the IIEC and the IIBRC should be regarded as dissolved twenty four months after commencement of the amended Constitution or three months after the promulgation of a new Constitution, whichever being the earlier. Initially, the IIEC experienced a rough passage that was related to controversial personnel appointments, but in due course the IIEC and the IIBRC settled down to work, and have survived until the present day.

4. Towards the enactment of a new Constitution

In the “National Dialogue and Reconciliation” agreement, it was recognized that as well as dealing with the causes of the PEV, it was necessary to address key issues of a long-standing nature identified on 1 February 2008 (issues that lay within the remit of “Agenda Four”) and to proceed towards the enactment of a new Constitution. The final accord of the National Dialogue and Reconciliation Committee, on 4 March 2008, called for a) the setting up, within a period of eight weeks of the meeting, of a legally

binding timetable for a review of the Constitution; b) the completion of this review within a year of the publication of the timetable; and c) the holding of a national referendum to approve proposals for a new Constitution.

Thereafter, progress lagged behind schedule, and in November 2008 parliament passed the Constitution of Kenya Review Act 2008, which made provision for the formation of an expert committee to steer the process of constitutional revision and which involved a detailed schedule for the period up to the national referendum.

Members of the Committee of Experts, a body created according to the regulations of the Constitution of Kenya Review Act (2008), were appointed via parliamentary recommendation and comprised three non-Kenyans and six Kenyans (the chairman, Nzamba Kitonga, was a senior lawyer and a Kenyan). In November 2009, this committee published the Harmonized Draft Constitution, based on the main drafts that had been made hitherto.

At the time of writing (January 2010), the Committee of Experts, having obtained communications and proposals from all over the country, had forwarded its revised draft to a Parliamentary Select Committee (PSC). After the PSC has given its views to the Committee of Experts, the draft will have to be further amended before being sent forward for consideration by parliament. It is possible for parliament to propose changes to the Committee of Experts' draft, but approval of a proposed change to the

draft would require the support of not just a simple majority of the members of parliament present but of over 65 percent of all the parliament members (see Section 47A of the Constitution).⁵

If parliament agrees to a revision of the Harmonized Draft Constitution by a 65% majority, the Committee of Experts again revises the draft and re-submits it. Thereafter, apart from technical changes, the draft cannot be altered. Although the attitude of parliament towards the draft Constitution cannot be predicted with certainty, the outlook is for the final draft to be submitted by parliament to the attorney-general sometime during the first half of 2010. Within a period of 30 days following receipt of the draft, the attorney-general will submit the bill for a new Constitution of Kenya and

⁵ This procedure was introduced at the time of the amendment of the Constitution on 29 December 2008 (which also established the IIEC and the IIBRC as mentioned above). The procedure was adopted in wake of the experience of the 2005 referendum on a draft constitution. In 2005, a national-level meeting of representatives of the government and opposition parties and of NGOs examined a draft for a new constitution (which was known as the “Bomas Draft”) that won widespread agreement. The Bomas Draft tried to reduce the power of the president drastically. However, political maneuvering by those supporting the president and who were anxious to avoid this dilution of power resulted in changing the contents of the Bomas Draft to maintain the power of the president. Because the then “Constitution of Kenya Review Act” and Constitution of Kenya had no special clauses protecting the Bomas Draft, changing clauses of the Draft was possible with a simple majority of the parliamentary members present.

within 60 days of the issuance, and by way of the IIEC, the new Constitution will be put to the people of Kenya in a national referendum.⁶

As of 1 January 2010 (the time of writing), the draft Constitution prepared by the Committee of Experts incorporates contents of the Bomas Draft of 2005, and contains a number of key elements such as the establishment of the executive post of prime minister, a substantial reduction in the power of the president, and the decentralization of government through a binary system and a devolved government consisted of national and county governments. If the new Constitution is enacted, its introduction will signify the achievement of a substantial change from the framework of the previous Constitution of Kenya. However the future of the proposals cannot be predicted with certainty. As has been pointed out above, the IIEC's term of office expires at the end of December 2010 at the latest, and if the process for establishing the new Constitution runs out of time, yet more revisions of the current Constitution will become necessary. At the time of writing, it is not yet possible to be wholly optimistic about whether or not the contents of the draft Constitution will take into

⁶ A revision of the Constitution that came into effect in December 2008 laid down a new rule for interpreting the results of the referendum, namely that the proposed new constitutional draft had to be approved by not only over half of the votes cast in the referendum, but also by over 25 percent of the votes cast in five of the eight provinces of Kenya.

account the dilution of presidential power, nor even about whether the new Constitution will actually be promulgated.

Conclusion

Even though developments are running somewhat behind the planned schedule, Kenya after the PEV can be said to have succeeded in escaping from the political dangers that confronted it in early 2008. Among the accomplishments are the inauguration of the coalition government, with Kibaki as the President and Odinga as the Prime Minister, the dissolution of the ECK, and the setting up of the IIEC and the IIBRC. Unfortunately, however, all of these changes amount to little more than temporary expedients. As we have seen, Kenya managed to put a lid on the period of turmoil that followed the elections of December 2007. But as has been made clear, that lid consisted of the constitutional amendment of 2008 and the National Accord and Reconciliation Act of the same year. Both of these measures will shortly expire – in other words the lid will soon cease to do the job that it was designed for – and what happens then is impossible to predict.

Moreover, no one can predict what will happen after the IIEC's tenure expires at the end of December 2010, and after the Tenth Parliament reaches the date of mandatory

dissolution. Even the enactment of the crucially important new Constitution cannot be taken for granted.

More than anything else, the memories of the killing and maiming that arose out of suspicions of vote rigging in the 2007 election, and of the reversion to the ethnic question of “Are you, or are you not a Kikuyu?”, will not easily disappear. Moreover, for the refugees who cannot at present return to their homes, the problem is not so much one of “memories” as of fear and mistrust of progress – a feeling that originated in the mayhem that followed the election. Directly caught up in that issue is the very slow pace – slow to the point of serious delay – of the work of both the Truth, Justice and Reconciliation Commission, and the CIPEV, a body set up on the recommendation of the Independent Review Commission to enquire into the PEV.⁷ Old acquaintances, still homeless after the PEV, have told the author that “the criminals who attacked our houses and burned us out of our homes are still living on the land that belongs to us. There has been no apology. How can this be allowed? When the next election comes round there will be even worse trouble.”

“Kenya is on the way to becoming a failed state.” “There will be worse trouble in the next election.” “2007 was an exception in that the unrest was a prepared unrest.”

⁷ The Commission of Inquiry on Post Election Violence is often abbreviated to the Waki Commission. For details, see Matsuda (2010).

These are some of the opinions of Kenyan intellectuals who are still sharply divided in their views. Should the “2007 post-election violence” be understood as a “one off” event that was successfully contained? In fact, two hurdles still have to be overcome to achieve a lasting settlement. The first is the planned national referendum on the new Constitution. The second, and it is a hurdle of very great importance, is the next general elections scheduled for the end of 2012. Kenyan politics is setting out across a wasteland that was created by the great unrest that followed the 2007 election. The challenge is a substantial one, but it behoves everyone, us researchers included, to avoid viewing the government’s problems with a pessimism that may prove excessive.

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