

**UNFAIR BEFORE A BALLOT IS CAST**  
**THE KENYAN PARLIAMENTARY ELECTIONS OF 27 DEC 02**  
**A report for Electoral Observers and Monitors**

**INTRODUCTION**

This report by a delegation to Kenya of the Center for Human Rights of the Robert F. Kennedy Memorial warns that structural problems with Kenya's election system may already have compromised the upcoming Parliamentary elections and urges international monitors and observers to guard against additional impediments to fair elections that may arise in the process of voting and counting the ballots. Despite a Kenyan High Court ruling<sup>1</sup> that wide disparities in the populations of current Parliamentary constituencies (of about 15 to 1) (see Chart 1) violate the nation's constitution, elections will take place without any redrawing of districts in accordance with the principle of one-person, one vote the High Court recognized is enshrined in the Kenyan Constitution<sup>2</sup>. Variations in district populations in Kenya are not politically neutral, but were crafted to heavily favor the ruling KANU party, which gained a Parliamentary majority in the latest elections (1997) with only 38 percent of the vote (see Chart 2). There is also the danger that the ruling party may enhance this structural advantage with other methods designed to illicitly augment its vote, rendering suspect Kenya's presidential election as well. These additional irregularities which may include vote-buying, intimidation of the opposition vote, and the rigging of the electoral tally, could be deterred by the vigilance of international observers and monitors provided they are dispatched in no time to Kenya, and that they act well before the balloting takes place.

---

<sup>1</sup> "There are some constituencies in this country that have more than 100,000 voters and others with less than 10,000 voters. Yet in both cases, their representatives have the same or equal voice in Parliament. We agree with the learned counsel for the applicant that, as matters stand now there is some imbalance in representation. . Republic of Kenya, In the High Court of Kenya at Nairobi, Misc. Application No 975 of 2001 at 11.

<sup>2</sup> "With profound respect therefore, section 5 of the District and Province Act that purported to amend/repeal section 4 of the Constitution of Kenya (amendment) Act, 1968 is null and void."

A delegation of scholars, judges, and districting expert from the Center for Human Rights of the Robert F. Kennedy Memorial was in Kenya when the country's Electoral Commission announced the electoral date of 27 December 2002 and when political alliances were being formed and candidacies announced (see Annex 1). The delegation met with key government officials, members of governmental commissions, leaders of civic and religious organizations, opposition leader, and ordinary citizens of Kenya (see annex 2). In this report, the delegation shares its findings, which fully reflect the views of all members.

As evidenced by our meetings and conversations and by media reports, Kenyans from every walk of life are keenly interested in the upcoming elections. Given that President Daniel Arap Moi is stepping down after more than two decades of rule, Kenyans anticipate that real change in the political, economic, and social situation of the country will flow out of the election results. Even representatives of the KANU ruling party at least acknowledge the need for change and reform. The stakes this year are most high for the people of Kenya and for international organizations observing and monitoring the elections. These international organizations must look both at the electoral process and the system's structural defects before certifying the elections as free and fair. Short of such an approach, the international monitors and observers may lose credibility and democratic reform in Kenya may be stymied indefinitely. Given that Kenya is currently undergoing a constitutional review, a full accounting of all problems with the realization of democracy in Kenya is yet more critical. There is the risk, and latent danger that violations of one-person, one vote may not be rectified by the constitutional review process. The situation in Kenya is worthy of special note this year given the poor state of the economy, the ruling party's dubious record on political and human rights, the high expectations of the people for positive change, and the nation's history of pre and post-election violence.

## CHALLENGES TO DEMOCRACY IN KENYA

The work of the delegation in Kenya points to critical structural and mechanical problems regarding the upcoming elections, including:

1. Violation of the principle of one-person, one vote by constituencies with widely varying populations that according to a ruling of the Kenyan High Court<sup>3</sup> violate the Kenyan constitution. Although this ruling has not been stayed by the Kenyan Court of Appeals (the nation's highest court) elections will take place under the existing constituency boundaries, in violation not only of the Kenyan Constitution, but also of Kenya's International Human Rights obligations under Article 25(b) of the ICCPR which provides that:

“To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;”

2. Voting registration problems due to inconsistent and unclear procedures for verifying citizen eligibility for voting.
3. Inefficiencies – perhaps deliberate – in the distribution of voter cards. Some ten of thousands of cards have not been distributed according to the Minister of Home Affairs in a meeting with the RFK team in Kenya.
4. Rampart on going voter-card buying according to media reports and the statements of civic activists with whom the delegation met.
5. Insufficient monitors to cover all of the polling places in Kenya, especially in the more remote and inaccessible areas.

---

<sup>3</sup> id at 11

6. The possibility that ballots may be lost or miscounted despite a new commitment of the Electoral Commission that ballots be counted at the individual polling places rather than at a central location within the Parliamentary constituency, as was done in the 1992, and 1997 elections.
7. The potential for violence or intimidation of voters.
8. Lack of equal media access for competing parties.

There is apparently a well-founded public perception in Kenya that the ruling party, given its past and current practices, and the very keen interest it has to maintain its grip on power, is not fully dedicated to free and fair elections that might threaten its long-standing control of government. Although many Kenyans worry that the vote will be “rigged” by the party in power, few are aware of the structural impediment to fair Parliamentary elections from constituencies that violate the principle of one-person, one-vote, and the impact the violation has on the final results of the elections. The delegation made numerous efforts to meet and discuss these concerns with KANU’s presidential candidate Uhuru Kenyatta; his representatives, however, insisted that he was unavailable for meetings.

Given an unprecedented uniting of opposition parties in a “Rainbow Coalition” there is a widespread belief that for the first time in decades, the opposition stands a real chance of victory at the polls. Nonetheless, there is equal widespread concern that the incumbent party may conclude that it can maintain power only by unfair means. Although every government official with whom the delegation met at least gave a verbal commitment to free and fair elections, the fact that the government has not moved to implement the High Court ruling speaks to its lack of interest that the elections be really fair and free. the role of international observers and monitors at this particular juncture is thus pivotal. Although they cannot repair the present structural flaw of unequal legislative constituencies – they can and should take this into account in their findings. They can, also, mitigate problems with the electoral process, provided they begin operations well before the scheduled election.

## **PARLIAMENTARY ELECTIONS AND ONE-PERSON, ONE VOTE**

The Center for Human Rights of the Robert F. Kennedy Memorial sent its delegation to Kenya in support of the public interest litigation of Gibson Kamau Kuria – winner of the Robert F. Kennedy Memorial Human Rights 1988 award – who is a constitutional lawyer seeking to enforce the application of one-person, one-vote in the Kenyan elections. Dr. Kuria won a High Court ruling on 10 May 2002 declaring unconstitutional the current geographic boundaries for electing members of Parliament, and mandating, in a supporting second ruling, issued by the Kenyan High Court on October 14, 2002, rectification according to the internationally recognized principle of one-person, one-vote. Despite these two unprecedented rulings, the Electoral Commission has not redrawn constituency boundaries so that the current Parliamentary elections will take place in constituencies that violate the Kenyan constitution and the international obligations of the Kenyan government.

Every government official with whom the delegation met had a different reason for the failure of the government to abide by the law and implement the High Court's rulings. The Chairman of the Electoral Commission said that he could not act without clear and specific guidance from Parliament; such guidance, although not needed since the constitution clearly defines the conditions under which the electoral districts boundaries should be redrawn, and entrusts the Electoral Commission with such a task, could not be given since the parliament has been dissolved by the head of state. The Attorney General said action by either Parliament or the Electoral Commission requires a constitutional amendment. The Minister for Home Affairs said that the Electoral Commission was solely responsible for redrawing constituency boundaries – and so the circle of inaction is closed. The current elections will be biased by vast and political consequential departures from equal representation for equal populations. The ruling party may once again win a Parliamentary majority with less than 40 percent of the vote.

Given these structural defects in the electoral base of Parliament, and given the fact that Kenya is a state party to the ICCPR, the 27 December 2002 Parliamentary vote violates Kenya's human rights obligations under the provisions of the International Covenant.

Although the Committee (the authoritative body that interprets the ICCPR) is divided as to whether Article 25 demands an absolute commitment to exactly equal legislative representation or permits some minor deviation to accommodate other factors such as women and minority representation (CCPR/C/SR 1460: 30 October 1995), the distortion of 15 to 1 present in Kenya's Parliamentary constituencies clearly violates Kenya's obligations under Article 25.

## **CONCLUSIONS AND RECOMMENDATIONS**

In sum, Kenya's pivotal first elections of the up coming post-Moi era are taking place in a context that severely challenges the realization of the will of the Kenyan people. Structural flaws in the nation's unconstitutional Parliamentary constituencies and potential problems with the conduct of the election both bias results in the same direction – toward perpetuation of rule by President Moi's incumbent party. If the unfairness in the construction of Parliamentary constituencies are to be minimized, then voting irregularities must be eliminated or at least minimized. In light of these findings we recommend the following:

1. Each monitor and observer should be apprised of the failure of Kenya's Parliamentary elections even to roughly reflect the principle of one-person, one-vote and of the unwillingness of the government to respond to constitutional rulings of the Kenyan High Court. Each of their reports should be informed by the de jure unfairness of the Parliamentary elections.
2. To minimize irregularities in the conduct of elections observers and monitors should be selected and briefed in anticipation of arriving as early as possible and staying as long as possible. Allegations of

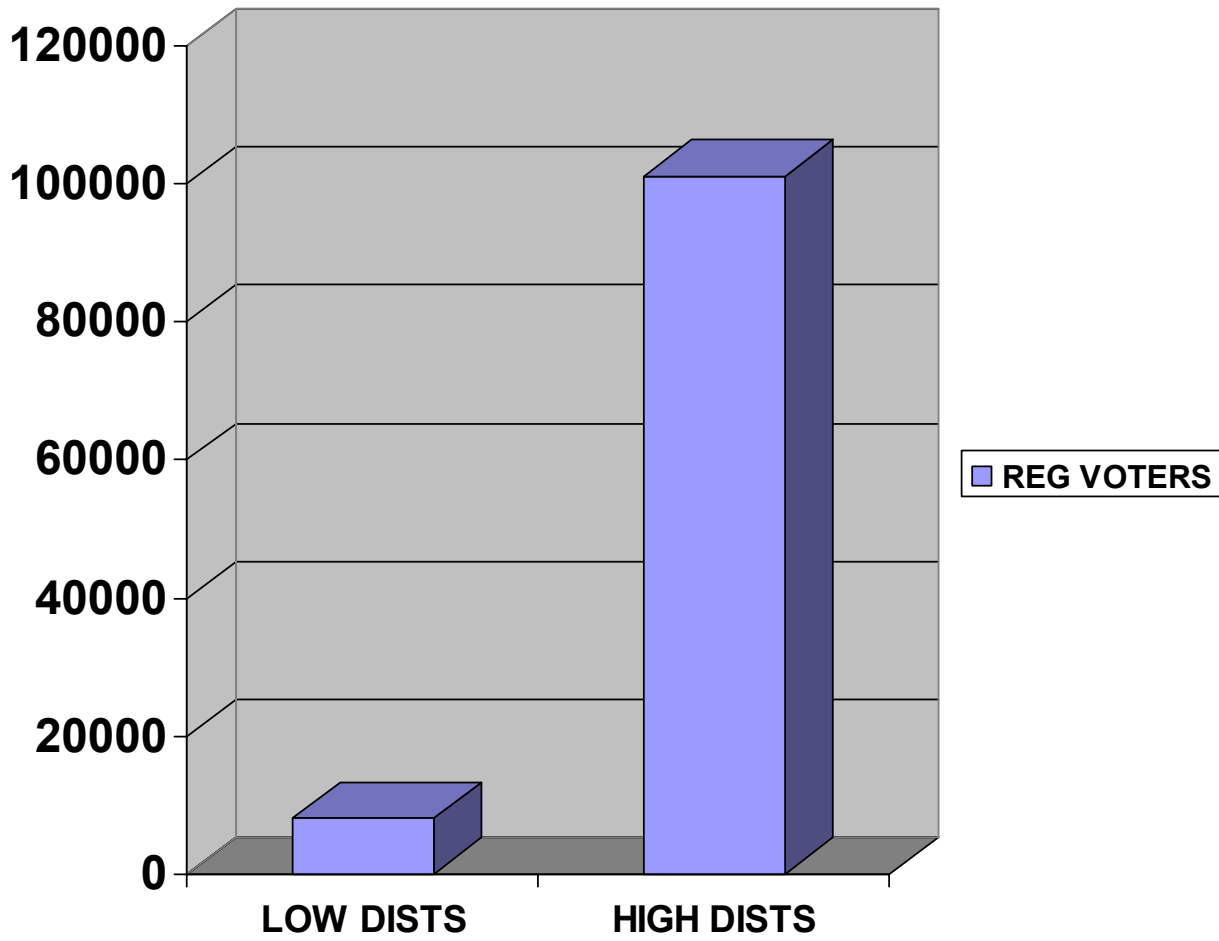
voting irregularities are already widespread in Kenya. The presence of international monitors and observers may help minimize such violations and reduce the potential for violence.

3. International organizations need to anticipate problems arising from the controversial date of December 27 that the Electoral Commission recently chose. This may require advanced, planned, and special efforts to find sufficient qualified personnel to serve in Kenya through the election date.
4. Given the widespread expectation in Kenya that control of Parliament may turn on a few competitive constituencies, observers and monitors should give special attention to these swing districts. Examples are the Rift Valley, Western Kenya, and Eastern Provinces

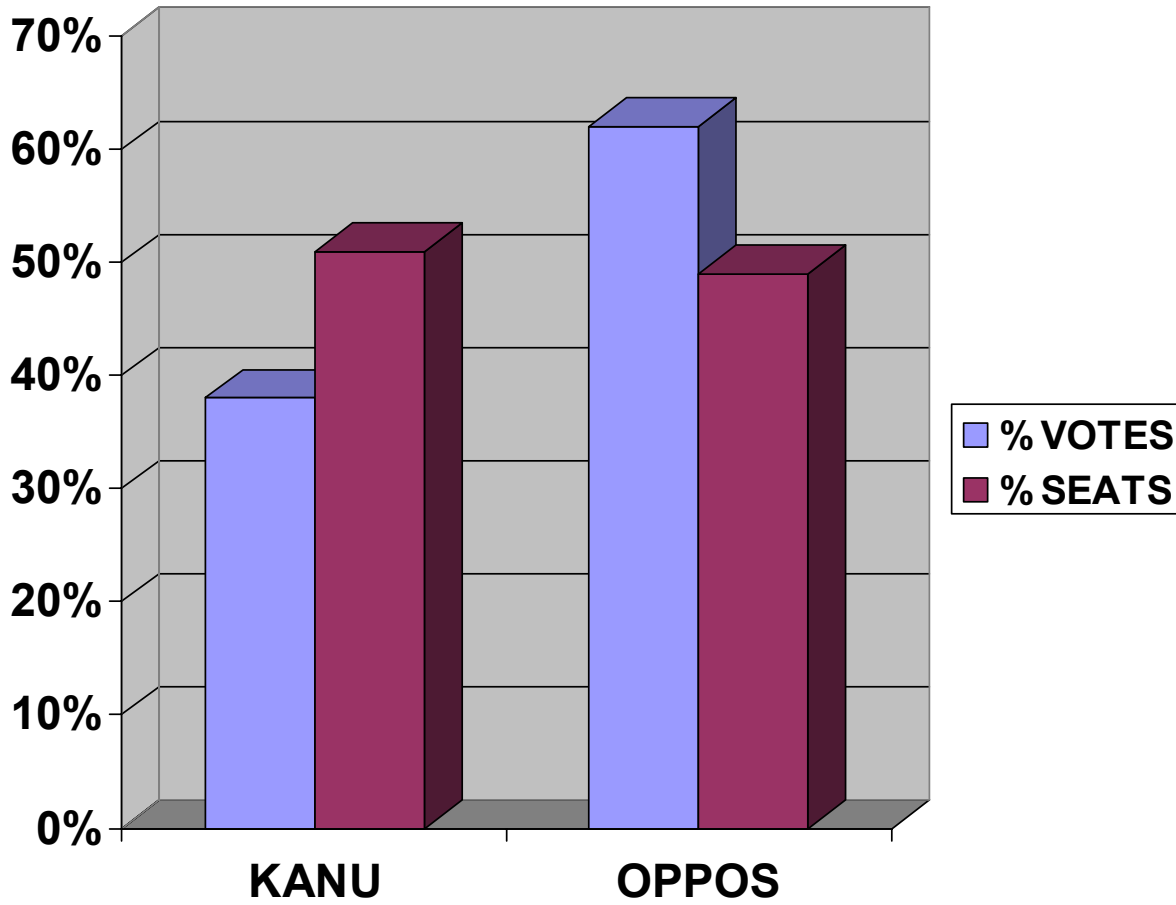
Nevertheless, given the import for the presidential election of irregularities across the nation, not all resources should be devoted to the pivotal constituencies.

Kenya has a narrow window of opportunity this year for an election that fully and fairly represents the will of the people. Given, however, the irremediable structural defects in Parliamentary elections, it is most critical to assure that voting irregularities will not additionally impair the functioning of Kenyan democracy. International observers and monitors along with the people of Kenya have a vital role to play in this effort.

**CHART 1: AVERAGE # REG VOTERS, 5 LOWEST & HIGHEST KENYAN DISTRICTS 1997 ELECTIONS**



**CHART 2: VOTES & SEATS 1997  
KENYAN ELECTIONS**



Annex 1

**The October 27, 2002 Delegation  
To Kenya  
List of the Members of the Delegation**

- **Professor Maxwell Kennedy**, son of Robert F. Kennedy, head of the delegation,
- **Mr. Andre Davis**, US District Judge , Baltimore, Maryland,
- **Mrs. LaJune Thomas Lange**, District Court Judge, Fourth Judicial District Court, Minneapolis, Minnesota,
- **Dr. Bill Calathes**: Criminology Professor, New Jersey State University,
- **Professor Allan J. Lichtman**, Professor of History, American University, and districting expert,
- **Mr. Todd Howland**, Director of the Center for Human Rights, RFK Memorial,
- **Mr. Abdelilah Kadili**, Senior Program Officer, Center for Human Rights, RFK Memorial.

## Annex 2

### Meetings the Delegation had in Kenya

- **October 27, 2002:**
  - Dr. Gibson Kamau Kuria, Robert F. Kennedy Memorial Human Rights 1988 Laureate, and members of the International Commission of Jurists
  
- **October 28, 2002:**
  - First meeting: Mr. Paul Muite, opposition party leader and member of the Rainbow coalition.
  - Second meeting: Mr. Johnnie Carson, US Ambassador in Kenya
  - Third meeting: Honorable John N. Michuki, member of the Kenyan Parliament, applicant in the case filed by Mr. Gibson Kamau Kuria before the Kenyan High Court.
  
- **October 29, 2002:**
  - First Meeting: Mr. Gichira Kibara, Executive Director, Center for Governance and Development
  - Second meeting: Raychell Awuor Omamo, Chairperson, Law Society of Kenya
  - Third Meeting: Samuel M. Kivuitu, Chairman of the Electoral Commission of Kenya
  - Fourth meeting: Honorable Mwai Kibaki, Chairman of the Democratic Party of Kenya, and Presidential Candidate, Rainbow Coalition
  
- **October 30, 2002:**
  - First meeting: Mr. Isaac Ruto, Minister of Home Affairs
  - Second meeting: Mr. Thuita Mwangi, Secretary/Chief Executive of the Standing Committee for Human Rights
  - Third meeting: The International Commission of Jurists
  - Fourth meeting: His Grace the Catholic Archbishop of Kenya
  
- **October 31, 2002:**
  - Honorable Amos Wako, Attorney General of Kenya
  
- **November 1, 2002:**
  - First meeting: Equal Justice Trust
  - Second meeting: Citizen Committee for Social Change
  - Third meeting: Chairman of the Kenyan Constitutional Review Commission
  
- **November 2, 2002:**
  - Dr. Gibson Kamau Kuria
  - Representative of the International Commission of Jurist