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The Carter Center Finds Kenya Election Results Reflect Will of Voters

The Carter Center finds that in spite of serious shortcomings in the Independent Electoral and results, the paper-based procedure for counting and tallying presented enough guarantees to preserve the expression of the will of Kenyan voters.

The Center congratulates Uhuru Kenyatta on his election as the next president of Kenya, and praises outgoing Prime Minister Raila Odinga for taking his concerns with the conduct of the election to the Supreme Court and accepting their ruling, which upheld the final results announced by the IEBC on March 9. The presidential election petition proceedings conducted by the Supreme Court were held in a very professional and rigorous manner.

The Carter Center finds that several key areas related to the tabulation of results did not receive sufficient attention. The initial release of inaccurate figures transmitted by electronic means challenged citizen confidence in the IEBC. A lack of transparency in the national tally marred the final stages of the process. Party agents and observers were unable to observe these proceedings adequately, and the Center hopes that future tabulation processes will be organized in manner that allows for appropriate observer access.

While the IEBC met its constitutional obligation to publish final results within seven days of the polling station, thereby missing an additional opportunity for the public to confirm that their choice was accurately recorded and reported.

for Peace Programs Dr. John Stremlau.

The 2013 elections presented the Kenyan people with their first opportunity to exercise their rights under the new constitution and to elect representatives to new bodies at the national and newly-created county level. This experiment in democracy and devolution of authority is a work in

in coming months.

The Carter Center has observed 94 elections in 37 countries, including the 2002 elections in Kenya. A 60-member delegation was in Kenya at the invitation of the IEBC. The Center conducts election observation in accordance with the Declaration of Principles of International Election Observation and Code of Conduct for International Election Observation adopted at the democratic elections contained in their regional and international commitments and in their domestic legal framework.

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The Carter Center International Election Observation Mission to Kenya

Post-election Statement on Tabulation and Announcement of Final Election Results April 4, 2013

Introduction

On March 9, Ahmed Issack Hassan, chairperson of the Independent Electoral and Boundaries Commission (IEBC), announced the results of the presidential election, declaring Uhuru Kenyatta of The National Alliance (TNA) elected with 50.07 percent of the valid votes, ahead of his main challenger, Raila Odinga of Orange Democratic Movement (ODM), who garnered 43.3 percent of valid ballots cast. The tabulation of final results for parliamentarian, senator, female representative to parliament, county governor, and county assembly representative also had been completed at constituency and county level. The final turnout figures for the presidential election showed that over 86 percent of registered voters turned out to cast their vote.

that several key areas relating to the tabulation of results did not receive sufficient attention from the IEBC. The release of inaccurate figures from the electronic transmission of results and lack of transparency of the national tally marred the final stages of the process, however, the Center notes that in spite of discrepancies in early numbers released to the public, the IEBC managed to secure final results within the constitutional period of seven days. The Center welcomes the publication of results forms 34 and 36 on the IEBC website, although most of them were not effectively
ness to publish results by polling station.

In view of an electoral process marred by technological and operational failures, The Carter Center congratulates the Kenyan people for having kept the peace in spite of suffering very long queues on election day, receiving inaccurate electronic results and information on spoiled votes, having not been provided with a secure electronic voter identification system, and being presented with uneven turnout figures on Forms 36. The IEBC should conduct an internal review of its handling of the voter register and an audit of its tally procedure in order to avoid these deficiencies in future

information, The Carter Center finds that the paper-based procedure for counting and tallying presented enough guarantees to preserve the expression of the will of Kenyan voters.

Failure of Electronic Transmission of Results

Upon completion of the count at polling stations, the presiding officer was to key in the results on a
f results system was set up to display
provisional results as they arrived without any filter or verification of incoming figures from the
polling stations. In an effort to make the provisional results process transparent, the media received

these figures simultaneously. The information displayed was often inaccurate, displaying sums that did not match numbers on the screen and changes that were made overnight.

Two controversies in particular were created by the unchecked display of provisional results. The first originated from the display of more than 300,000 rejected ballots on March 5 that was reduced overnight to 30,000. The IEBC wrongly attributed the high number of rejected ballots on March 5 to the complexity of a simultaneous vote for six different positions, only later to state that the original high number was the product of a server malfunction that multiplied spoiled votes by a factor of eight. This controversy signaled an inadequate handling of numbers by the IEBC and undermined confidence in their capacity to tally final results with accuracy. The second controversy

the total sum of votes cast, which served as the basis for calculating the 50 percent threshold for the presidential election. This last-minute interpretation of the definition of "votes cast" in Article 138(4) of the constitution should have been taken well in advance and shared with stakeholders in order to avoid the confusion that followed this decision on such a crucial issue.¹

In the 2010 constitutional referendum, the use of an electronic data transmission system made the results available within 48 hours and strengthened public confidence in the IEBC. Since that referendum, technology has been used in biometric registration of voters, fingerprint scans at polling stations on election day to identify voters, and electronic transmission of provisional results from polling stations. In the use of electronic voter identification and electronic transmission of results, reliance on technologies that were only partially successful during the mock election exercise threatened to undermine the very trust they were designed to enhance. Although more thorough self-assessment by the IEBC and the collection of observer statements will hopefully yield lessons for the conduct of future elections, it appears that some of the problems encountered by the IEBC could have been avoided by using simpler, more reliable, and less costly solutions.

Conflicting Definitions of a Rejected Ballot

Another definitional issue further clouded the understanding of rejected votes. Rejected ballots were defined in different ways depending on which IEBC document was referenced. In the IEBC *Election Manual*, rejected ballots are defined as: a) ballots that were not stamped in the back, b) votes given for more than one candidate, c) uncertainty for whom the vote is cast, d) ballots that had different serial numbers than those issued to the polling station, and e) unmarked ballots. However, in the IEBC *Polling Day Guide for Election Officials*, rejected ballots are defined as a) unofficial ballot papers, b) those for which the intent of the voter was not clear, or c) the voter could be identified, thus breaching the secrecy of

only 143 of the 350 seats. In the Senate, Jubilee and its affiliates secured the majority of 34 of the 68 seats while Cord managed 27 seats.

Only 193 women were candidates for parliamentary seats in the race outside of the reserved seats. Compared to the 12 elected members of the previous parliament, 16 women got elected outside of the reserved seats resulting in the overall increase of women in parliament, especially considering the augmentation of reserved seats for women in both chambers of parliament from 10 to a total of 63 reserved seats. However, no women were elected as governor or senator, which shows that progress needs to be made in order to fulfill the condition that no more than two-thirds of elective⁸ and to provide equal opportunities for women and men in the political sphere.⁹ Of the seats reserved for women, both Jubilee and Cord

appointments by th

asked to approve cabinet nominees and diplomatic appointments. With Jubilee having the upper hand in both houses, it will find it easier to ensure proposals that require approval of the elected representatives are passed.

County Results

For the purposes of devolution, the constitution created 47 counties that are led by elected governors.

The official list of elected county assembly representatives reveals that parties allied to Cord enjoy

allied to the Jubilee coalition control Nakuru, Kiambu, and Uasin Gishu counties. The list shows that out of the 85 elected county assembly representatives in Nairobi, the two main Cord partners, ODM and Wiper Democratic Movement, enjoy a slim majority of 43 members against TNA and

ODM is in total control in Mombasa county with all the 30 county representatives elected on its ticket. The Jubilee coalition is in control of the Nakuru county assembly with TNA and its principal ally, the United Republican Party (URP), having a total of 47 out of the 54 elected county representatives.

In Kiambu county, one of the biggest in the country with 59 wards, TNA enjoys a huge majority of 56 elected representatives with the remaining three elected on the tickets of Agano, GNU and Farmers parties. Cord is in control at the Kakamega county assembly which, like Kiambu, has 59 wards. Out of these, 41 county representatives are from Cord affiliate parties while the other eighteen are from parties allied to the Amani coalition, UDF, and New-Ford Kenya.

In Kisumu county with a total of 34 wards, ODM commands a majority of 29 elected repres
another Cord affiliate, the Federal Party of Kenya has one county representative.

Further competition is expected in Bungoma county with a total of 44 wards, especially if the 18 members elected on parties allied to the Amani coalition decide to join forces with their three colleagues from the Jubilee coalition to face the 22 members elected on parties allied to Cord.

⁸ Art. 27 (8) and 21 (b) of the Constitution

⁹ Art. 27 (3) of the Constitution

Discrepancies in the Voter Register and Released Numbers

The comparison of final results for the presidential election (recorded on Form 36), which served as the basis for the compilation of results, showed worrying discrepancies. First, in some cases the recorded number of ballots cast differed by several hundred to several thousand for the different elections in the same polling station. This resulted in turnout figures being different for each elective position in a given polling station where voters were supposed to cast all six ballots without exception. Second, the Center notes that the number of registered voters published with the presidential results released by the IEBC on March 9 differed from the voter statistics per county published by the IEBC on Feb. 24.

The Center also observed discrepancies between the provisional list of voters registered published on Dec. 18, 2012, and the voter statistics per county published by the IEBC on Feb. 24. While small adjustments would have been expected, a total variation of about 100,000 voters between the two documents suggests that their data have been moved in the register from one county to another without an explanation from the IEBC or the possibility of public scrutiny.

Additional discrepancies in the number of registered voters have emerged from the tabulation process. A significant number of registered voters recorded on Form 36 by returning officers in constituency tallies differed from those listed in the national voter register. While the number of voters recorded on forms 36 should have matched the voter register, it was very often not the case.

This lack of transparency in modifications to the national voting register that served as the basis for the organization of the elections is inconsistent with national and international standards for democratic elections.

frivolous, vexatious, or scandalous. The deputy president-elect and the IEBC are automatically included as respondents to any petition against the results of presidential elections. The petition has to be submitted within seven days of the declaration of results and determined within 14 days after its filing.¹² At the time of the filing, the petitioner must deposit a sum of 1,000,000 KSH as security for costs otherwise the petition will be dismissed. Article 83 of the electoral law gives extended powers to the courts in deciding on the outcome of the judicial process: *"No election shall be declared to be void by reason of non compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution or that the non compliance did not affect the result of the election."* This article has clearly been written for the final results and is silent on non compliance effecting results of a first round election. The disposition makes it more difficult to void a presidential election that respected very broad constitutional principles. The Supreme Court has the power to make any order it may deem fit and just in the circumstance. Supreme Court decisions are not subject to appeal.

With regards to the other elections, a constitutional timeframe of 28 days after the declaration of results by the IEBC is set up in Article 87 for all petitions concerning an election other than the presidential. As the results for all other elections than presidential were gazetted on March 13, the deadline is therefore set for April 10. The high courts are responsible for hearing matters pertaining to parliamentary and gubernatorial elections. Magistrates' courts are receiving petitions against county assembly elections. A petitioner seeking to challenge a parliament or a county governor must deposit 500,000KSH, while a petitioner seeking to challenge the election of a member of a county assembly shall deposit 100,000 KSH.

Three petitions against the presidential election results were submitted to the Supreme Court within the time frame indicated in the constitution. One petition from Jubilee supporters challenged the inclusion of rejected votes in the final tally of the presidential poll, while those from Raila Odinga and from the Africa Center for Open Governance (AFRICOG) both sought to invalidate the election and instigate the organization of fresh presidential elections. Attorney General Githu Muigai was admitted as friend of the court or amicus curiae.

There were five main arguments brought to the court by the petitioners:

1. Poll books, the biometric voter register, and the system for electronic transmission of results were poorly procured and prepared so they were bound to fail from the very beginning.
2. The failures of the electronic system and consequent return to printed lists of voters opened the system to manipulation which effectively took place on election day.
3. In spite of having been finalized and closed for registration on Feb. 20, the number of voters on the register was increased without any known explanation.
4. Forms 36 were manipulated in order to forge results as illustrated by instances of higher number of votes cast than voters registered.
5. The total number of votes cast for presidential candidates was higher than for the other elections even when taking into consideration spoilt and rejected ballots.

The court rejected a request from AFRICOG to require the IEBC to produce the manual register used in polling stations on election day on the basis of a lack of time to scrutinize documents from 33,000 polling stations. The court also rejected a demand from Cord for a forensic audit of the electronic tally system used by the IEBC to compile the presidential results and refused to accept a lengthy affidavit raising new allegations, including evidence from 122 constituencies, because the

¹² Art. 140 of the Constitution

evidence was filed without the permission of the Supreme Court and because there was no time for respondents to file a reasonable answer.

At the beginning of the proceedings, the Supreme Court ordered a verification of forms 34 and 36 for 22 polling stations to verify the number of votes cast, valid votes, and rejected votes. The judicial verification under the supervision of the registrar of the Supreme Court was not open to international observation, however Cord and Jubilee were able to send 10 observers each to scrutinize the process. The report from the registrar did not make mention of the figures obtained during the operation. The judicial team also scrutinized forms 34 and 36 for a total of 18,000 polling stations and found that 10 Forms 34 were missing along with 75 Forms 36. The team did not report on discrepancies between numbers in forms 34 and 36, thereby considerably reducing the added value of the exercise.

The two day pre-trial conference started on March 25 and was followed by two days of hearings. After another two days of deliberation, the Supreme Court rejected all petitions and confirmed the results of the presidential election on the last day of the constitutional timeframe, March 30. The