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Report

of the

Independent Review Commission

on the

General Elections held in Kenya

on 27th December, 2007

Independent Review Commission

17 September 2008

Hon. Mwai Kibaki, C.G.H., M.P
President of the Republic of Kenya and Commander-in-Chief of the Armed Forces
Harambee House
NAIROBI

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Your Excellency

REPORT OF THE INDEPENDENT REVIEW COMMISSION

We, the members of the Independent Review Commission, appointed by you to inquire into all the aspects of the general elections held on 27 December 2007 with particular emphasis on the Presidential Election, and to report to both your good self and the Panel of Eminent African Personalities within a period of six months, hereby submit our final report to you. We shall also be submitting the report to the Chair of the Panel.

The task has been carried out to the best of our abilities and in accordance with our Terms of Reference. Our report indicates our conclusions and recommendations on the various issues considered.

We take this opportunity to thank Your Excellency for the trust you have shown in us. Accept, Sir, the assurances of our highest regard.

Yours faithfully

Judge Johann Kriegler (Chairperson) .....

Lady Justice Imani Daudi Aboud (Vice-Chairperson) .....

Professor Marangu M'Marete (Member) .....

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EXECUTIVE SUMMARY

On 30 December 2007, following announcement of the presidential election results, violence broke out in several places across Kenya amid claims that the Electoral Commission of Kenya (ECK) had rigged the presidential election. Sporadic eruptions continued for many weeks, bringing death and destruction to thousands of Kenyans. An African Union-sponsored Panel of Eminent African Personalities led by former United Nations Secretary General Kofi Annan brokered a settlement which heralded a government of national unity between the main political parties and a common commitment to urgent constitutional reform. The settlement included the appointment of two commissions, one to examine the violence and the other, the Independent Review Commission (IREC), to examine the December 2007 Kenyan elections from various perspectives.

In conformity with its terms of reference (ToRs) IREC now presents its findings and recommendations, based on its analysis of the legal framework for the conduct of elections in Kenya, the structure, composition and management system of the ECK and its organisation and conduct of the 2007 electoral operations. The report specifically examines the integrity of the whole electoral process, from voter registration and nomination of candidates through voting, counting, transmission and tallying to dispute resolution and post-election procedures, deals with the role of political parties, observers, the media, civil society and the public at large, and comments on the independence, capacity and functional efficiency of the ECK.

Main findings

Kenya's constitutional and legal framework relating to elections contains a number of weaknesses and inconsistencies that weaken its effectiveness. This legislation needs urgent and radical revision, including consolidation.

The electoral management process as a whole needs revision

During the preparation and conduct of the 2007 elections the ECK lacked the necessary independence, capacity and functionality because of weaknesses in its organisational structure, composition, and management systems.

The institutional legitimacy of the ECK and public confidence in the professional credibility of its commissioners and staff have been gravely and arguably irreversibly impaired. It lacks functional efficiency and is incapable of properly discharging its mandate.

The conduct of the electoral process was hampered and the electoral environment was polluted by the conduct of many public participants, especially political parties and the media.

There were serious defects in the voter register which impaired the integrity of the 2007 elections even before polling started:

- it excluded nearly one-third of eligible voters, with a bias against women and young people
- it included the names of some 1.2 million dead people

Serious anomalies in the delimitation of constituencies impaired the legitimacy of the electoral process even before polling started.

There was generalised abuse of polling, characterised by widespread bribery, vote-buying, intimidation and ballot-stuffing.

This was followed by grossly defective data collation, transmission and tallying, and ultimately the electoral process failed for lack of adequate planning, staff-selection/training, public relations and dispute resolution.

The integrity of the process and the credibility of the results were so gravely impaired by these manifold irregularities and defects that it is irrelevant whether or not there was actual rigging at the national tally centre. The results are irretrievably polluted.

Main recommendations

All political role-players in Kenya should recognise that materially defective elections accompanied by public violence will remain a feature of life in their country absent a concerted and sustained commitment to electoral integrity by all Kenyans.

Radically reform the ECK, or create a new electoral management body (EMB), with a new name, image and ethos, committed to administrative excellence in the service of electoral integrity, composed of a lean policy-making and supervisory board, selected in a transparent and inclusive process, interacting with a properly structured professional secretariat.

Devise, implement and maintain appropriate executive, legislative and political measures to enable the reconstituted or new EMB to initiate, popularise and sustain a national commitment to electoral integrity and respect for the inalienable franchise rights of Kenyan citizens.

Empower the EMB, by means of executive, legislative and political measures properly to perform the essential functions entrusted to it under sections 42 and 42A of the Constitution (delimitation and the conduct of elections and associated activities).

Adopt a new voter registration system.

Agree (as part of the constitutional review process) on an electoral system, which puts to rest the continuous discussion about a new electoral system for Kenya.

Choose and implement the necessary constitutional and other legal amendments to give effect to whichever of IREC's recommendations are accepted.

Minority Opinion

Two members of the Commission held a dissenting view on some of the findings reported in Chapter 6. Their opinions are presented in italics at the end of each of the relevant paragraphs.

CHAPTER 1

THE 2007 ELECTIONS IN KENYA: INTRODUCTION

1.1 Background

On 27 December 2007 some ten million Kenyans went to the polls in what was generally anticipated to be the most hotly contested and close-run presidential, parliamentary and civic elections in the country's 45 years since emerging from British colonial rule. The register of voters had been swelled since the previous elections by several million new registrations, many of them young first-time voters, and the Electoral Commission of Kenya (ECK) had doubled the number of voting stations to 27 555, arranged in some 20 000 polling centres.

Campaigning at all three levels of the contest had been vigorous, characterised by robust language occasionally lapsing into ethnic hate-speech and deteriorating into violence. Since the constitutional referendum in 2005, political discourse in Kenya had been sustained at a high pitch and tended to focus on the presidential contest. The two main presidential candidates, incumbent President Mwai Kibaki and former ally Mr Raila Odinga, had led opposing sides in the referendum, which was won handsomely by the Odinga side. It was therefore hardly surprising that a prominent feature of the ODM parliamentary and presidential campaigns was the claim that only rigging could prevent their taking power at the elections. This was particularly serious as public comment on the manner and timing of the appointment of the majority of electoral commissioners during 2007 had already cast a shadow of suspicion over the ECK's impartiality. State power in Kenya, harking back to the country's colonial past and decades of one-party rule, remained vested in a centralised executive exercising control through a network of provincial administrators/district commissioners, a vocal but relatively powerless legislature and a compliant judiciary exercising few checks and balances. The presidency was, rightly, seen as the ultimate political prize. Elections in Kenya have been characterised by intensified awareness of ethnic divides and deep-seated historical land grievances, especially among rural communities. President Kibaki, heading the Party of National Unity (PNU) ticket and drawing his support mainly from the Kikuyu, Embu and Meru communities of Central and central Eastern provinces, campaigned principally on his socio-economic record.

Mr Odinga at the head of the Orange Democratic Movement (ODM), with the support of largely the Luo, Luhya, Kalenjin and some smaller ethnic communities, vocalised the need for fundamental political and socio-economic reform and devolution of state power. Although the emphasis was more pronounced at the civic and parliamentary levels, and in

the rural areas, the ethnic configuration of the PNU and the ODM, and the origins of the two main contenders in the presidential contest, remained a factor. Opinion polls predicted a close contest, Odinga leading but Kibaki later narrowing the gap. The PNU, though registered as a political party under Kenyan law as it then was, was in reality an electoral alliance. The ODM, though also recently assembled, was a fully-fledged political party, more cohesively organised and hence generally posting a single candidate in each of the provincial and civic contests. The PNU, though uniting behind their single presidential candidate, in the other two elections allowed the party's various components to field candidates under their individual banners, often in competition with one another.

Having regard to the scope and complexity of the undertaking, polling, counting and announcement of results seemed satisfactory – wholly unjustifiably, as would become only too apparent in due course. All also seemed well (once again deceptively so) with the transmission of the requisite documents to returning officers at constituency level and the onward transmission by them of data to the Kenyatta International Convention Centre (KICC) in downtown Nairobi where the ECK had established its national data tally and media centre.

There, however, there were ominous portents from the outset. Commissioners and staff of the ECK proved ill-prepared for the relatively straightforward but highly sensitive exercise of receiving, verifying, tallying, tabulating and announcing the presidential results. The ensuing spectacle left an indelible impression on visitors to the media centre and on millions of television viewers. Six months later, informant after informant around the country could vividly recall their astonishment and anger at the fiasco and could mimic and quote the ECK chairman verbatim.

In the event the PNU and its scattered array of allies were defeated in the parliamentary and civic elections. Also, as results trickled in, first from ODM strongholds and only later from the PNU heartland, President Kibaki trailed most of the time and only started catching up well into the tallying exercise. He was ultimately announced the winner (by 231 728 votes) in the late afternoon of 30 December 2007, and then hurriedly sworn in, notwithstanding vociferous protests that the result had been rigged by the ECK. These protests and an ODM press conference were abruptly silenced by a news blackout and summary security clampdown as armed soldiers bustled candidates, party agents, diplomats and domestic as well as international observers out of the KICC.

Some observers were aghast, others who had been allowed into the tally centre were volubly incensed by what they regarded as evidence of malfeasance on the part of the ECK committed in their very presence. Upward adjustment of already announced results from some populous pro-Kibaki constituencies, seemingly favouring the President, fanned the flames of suspicion. Televised utterances by Chairman Kivuitu only served to

make matters worse, as did a hurriedly composed media statement released by four out of twenty-two commissioners, commenting on the turn of events and calling for calm.

Widespread and often ethnically motivated violence erupted and rapidly spread. Over the ensuing six or seven weeks approximately 1,150 people were killed, property damage ran to billions of Shillings and some 300 000 Kenyans were forced to flee their homes and livelihoods.

1.2 Scope of mandate

- Pursuant to the political pact brokered by Mr Annan and his colleagues, the seven members and the secretary of IREC were consensually identified and formally appointed by President Kibaki under the Commissions of Inquiry Act (Cap. 102). IREC's terms of reference (ToRs) were published in Gazette Notice 1983, *Kenya Gazette* of 14 March 2008 (annex 1.A) and mandated examination of the 2007 elections from a number of different angles:
- The constitutional and legal framework to identify any weaknesses or inconsistencies.
- The structure and composition of the ECK in order to assess its independence, capacity and functioning.
- The electoral environment and the role of the political parties, civil society, the media and observers.
- The organisation and conduct of the 2007 elections, extending from civic and voter education and registration through polling, logistics, security, vote-counting and tabulation to results-processing and dispute resolution.
- Vote-tallying and -counting to assess the integrity of the results of the entire election with special attention to the presidential contest.
- Assess the functional efficiency of the ECK and its capacity to discharge its mandate.
- Recommend electoral and other reforms to improve future electoral processes.
- Within six months to submit to President Kibaki and the Panel its findings and recommendations which are then to be published within 14 days.

1.3 Overview of report

This report first outlines how IREC set about executing its mandate, then details some of the salient aspects of its activities and findings, broadly discussed by reference to the ToRs, and concludes with a number of specific recommendations aimed at preventing a

recurrence of the tragic events that gave rise to IREC's appointment. The discussion and recommendations broadly follow the ToRs under the following headings:

- *Constitutional and legal framework*, describing Kenya's existing legal framework and past efforts to reform it.
- *The organisational structure of the electoral management system*, reviewing the electoral system, the composition of the ECK commission and secretariat, their appointment, functions and interaction, the functional efficiency of the ECK and its funding.
- *Public participation in the 2007 elections*, examining in turn the role of political parties, the media, civil society and observers.
- *The organisation and conduct of the 2007 general elections*, starting with boundary delimitation, voter and civic education, registration of voters and political parties, nomination of candidates, recruitment of election-day personnel, electoral logistics, provisioning, security, campaign regulation and technical assistance received by or offered to the ECK.
- *Counting, tabulation, transmission, tallying and verification of results*, examining complaints raised in this context by the ODM and the reactions of the PNU and the ECK, criticisms by observer groups, an overall evaluation of ECK procedures, comment on system integrity, a statistical analysis of a sampling of results and developing a finding on the integrity of the results, with special reference to the presidential election.
- *Post-election procedures*, including swearing-in and assumption of office, dispute resolution and review, audit of results, custody of balloting material and analysis of post-election procedures.
- Lastly and most importantly, detailed *recommendations* concerning each of the topics listed above.

1.4 Method adopted

1.4.1 Phases of activity

IREC, having met formally for the first time on 19 March 2008 (and being sworn in the following day) set about performing its mandate in relation to each of the ToRs as follows –

- A first phase of analysing the ToRs, delineating and disaggregating the tasks thus identified, reviewing documents made available by the United Nations Development Programme (UNDP), which had implemented a Joint Election Assistance Programme funded by a group of eight foreign donors and by the co-

ordinator in charge of the Programme Management Unit, the International Foundation for Electoral Systems (IFES), the ECK and diverse NGOs and members of the public; devising a work plan and constituting committees to implement such plan; identifying human and material resource requirements; interviewing, recruiting, engaging and briefing staff; finding, furnishing and equipping office accommodation. (IREC wishes to record its gratitude to UNDP and the Government of Kenya, both of which gave invaluable assistance in getting IREC started.)

- A second phase of drafting and promulgating rules and procedures (see annex 1.B) providing for both inquisitorial and adversary procedures for receipt of both oral and written sworn and unsworn evidence while observing the elementary rules of fair play; engaging assisting counsel to lead investigations and present evidence. (Here IREC wishes to record its gratitude to the Attorney General of the United Republic of Tanzania, and through him to his government, for seconding Advocate Yohane Masara to assume this office.) Concomitantly it was decided to adopt an adversary system of determining disputed facts and/or opinions, affording the ODM, PNU and ECK standing. During this phase, a personnel structure was created making provision for legal and other researchers, investigators, rapporteurs and support staff.

- The third phase comprised, first, a series of preliminary meetings with the principal role players, namely the ECK and the three main parties that contested the presidential election, a breakfast meeting with media representatives, and briefing sessions with UNDP and IFES staff who had been intimately involved in the Joint Election Assistance Programme and a USAID-sponsored assistance programme. Then followed a series of publicly advertised meetings in Nairobi with various selected categories of stakeholders, e.g. human rights agencies, professional organisations, civil society and faith-based organisations, the business sector, extending open invitations to them and the general public to submit factual and/or opinion material relevant to the ToRs. IREC also participated in two full-day sessions and subsequent briefings with service providers and donors engaged in reviewing the Assistance Programme. A number of intensive briefing sessions were held with the co-ordinator of the programme management unit responsible for the Assistance Programme in the course of which IREC gained informed, first-hand information about the ECK's planning and preparation for the 2007 elections, which information was then explored in correspondence and meetings with the ECK.

- The fourth phase was an extensive five-week programme of public meetings at 36 venues throughout the country, starting in Nairobi and covering the widest

feasible cross-section of Kenyan society, from Mandera to Homa Bay and Turkana to Kwale, IREC mostly splitting into two committees, noting the experiences, concerns, opinions and proposals of over 1,200 speakers of all political persuasions, age groups, walks of life and communities. These meetings were enormously instructive, affording the IREC teams a unique cross-section view of Kenyan society and an invaluable sense of public opinions, perceptions, fears and aspirations. The members attending these meetings were deeply impressed with the determination of ordinary citizens to make a contribution to IREC's data-gathering. Of particular significance was that, despite this wide spectrum of interlocutors, a number of common themes were encountered virtually everywhere. The most striking was the call for change, change to the Constitution, to the political system, to the electoral system, often an inchoate longing for things to be done differently. Deeply impressed though they were by these communications, the commissioners remained conscious that they were not hearing and testing formal evidence. The speakers were often biased, obviously self-selected and at times had clearly been put up to it by party agents. Their communications were often subjective, ill-informed and/or manifestly unsubstantiated, at times even deliberately untruthful. Many proposals were radical, utopian or far-fetched. Interventions were often characterised by anger at what was seen as irrefutable televised evidence of rigging by the ECK at the KICC, coupled with demands for punitive action against the chairman and his colleagues. It is also important to record repeated reports of rampant bribery, vote-buying, intimidation, abuse of government resources (both human and material), partiality and incompetence of ECK field staff.

- The fifth phase entailed, first, analysing, distilling and evaluating the mass of information garnered in the course of the country visits, and then conducting a programme of six technical workshops with experts in various fields pertaining to the ToRs. An additional day of expert debate was devoted to the presentation (followed by discussion with selected participants and interested parties) of papers presented by political analysts dealing with the integrity of the election results.

- The sixth phase was devoted to a succession of formal hearings in which a number of key witnesses were questioned under oath by IREC's legal staff, cross-examined by the ODM, PNU and ECK legal representatives and then questioned by IREC commissioners. An extended day was devoted to the evidence of Ms Koki Muli, a foremost Kenyan electoral expert with many years of experience observing Kenyan elections who had moreover witnessed many of the happenings at the KICC during the vital period. The further witnesses were Mr Kivuitu, chairman of the ECK, Commissioner Tumwa, who chaired the ECK committee responsible for the setting-up of the national tallying centre, Mr Chege, the ECK

secretary who was in charge of the centre, Mr Imbira, the ECK IT manager, Ms Agnes Kisero, the day-shift leader of tally team 5 in the national tally centre, which had dealt with twenty-one Central Province constituencies, including several that had been contentious during the tallying process. The formal hearings then dealt with a number of persons who had been returning officers in problematic constituencies. Interrogation of further witnesses and detailed follow-up of information conveyed at the country meetings was not possible within the time constraints of IREC's mandate.

- A further half-day was devoted to a statistical analysis of the presidential election results and an eyewitness-based chronology of events at the KICC, presented on behalf of Kenyans for Peace with Truth and Justice (KPTJ), an umbrella of legal, human rights and governance organisations that have been playing an important role in Kenya's electoral process and politics for the last fifteen years and which was formed after the 2007 elections.

In summary: essentially five methods were used to gather relevant information: (i) a review and evaluation of published material and of internal documents of the ECK, the UNDP project management unit and IFES; (ii) public meetings to receive opinions, comments, factual allegations, complaints, recommendations and whatever else the people of Kenya wished to convey; (iii) more formal meetings and workshops with professional bodies and experts; (iv) consideration and debate of written submissions and oral adumbration by the legal representatives of the ECK, ODM and PNU; and (v) formal hearings where witnesses were examined under oath. Save in the case of one witness, all these proceedings were held in public.

1.4.2 Inquisitorial/adversary method

IREC decided to adopt a flexible approach to its data-gathering activities and crafted its rules and procedure accordingly (see annex 1.B). Although the IREC rules include provision for formal hearings in the nature of court proceedings, intended for determination of disputed questions of fact, the IREC rules also made provision for information to be gathered in less formal ways. This proved most useful in relation to the information of a general nature that was gleaned in the course of the public meetings.

As far as specific allegations of fact were concerned, IREC sought to co-opt the principal role-players, especially the two political adversaries, in a quasi-judicial procedure where the legal representatives would participate in formulating defined issues arising out of their respective sets of contentions and then identifying the relevant witnesses to be called to testify on such issues. Unfortunately this proved unattainable.

Although the two political parties and the ECK, acting through their respective counsel, reciprocally served copies of their formal representations outlining their contentions, and

reciprocally responded to such contentions, a precise delineation of issues proved an elusive goal and ultimately IREC relied on the good sense and professional judgment of assisting counsel and his team to identify the questions of fact on which oral testimony was to be presented and the witnesses to be called. The two political parties and the ECK, having been granted formal standing, were invited to cross-examine such witnesses. The resultant discourse proved useful in respect of some of the issues.

1.4.3 Interaction with the ECK

In conformity with its policy to seek the willing co-operation of all potential contributors to its researches, IREC established a sound working relationship with the ECK which was maintained throughout and with one notable exception (relating to minutes of certain meetings) afforded IREC ready access to information, documents and witnesses within the ECK's control. Two avenues of communication were established, one at a formal level via the legal representatives, one at a more direct and informal technical level. As appears from chapter 6, access to constituency files and analysis of their contents proved extremely useful.

1.5 Summary of conclusions

In the chapters that follow, IREC's conclusions are presented in their appropriate context. They are, however, summarised here for the convenience of the reader:

The voter register The voter register, which has been updated from time to time since 1997, is materially defective in three respects that in themselves already impair the integrity of the election results: (i) Registered voters represent only 71% of .the voting-age population of Kenya. (ii) The register probably includes the names of some 1.2 million deceased persons. (iii) Women and voters between 18 and 30 years of age are significantly under-registered. Furthermore, members of certain marginalised communities encounter difficulties in obtaining their national identity cards, a pre-requisite for registration as a voter.

Delimitation The gross disparity in the voting populations of Kenya's constituencies breaches the fundamental equality principle of democracy, which is clearly articulated and enshrined in section 42(3) of the Constitution of Kenya, namely one person, one vote. This long-standing discrimination in itself impairs the integrity of the electoral process, mainly, but not only, in relation to parliamentary elections.

Fraud Numerous implausibly high turnout figures reported in the strongholds of both main political parties evidence extensive perversion of polling, probably ballot-stuffing, organised impersonation of absent voters, vote buying and/or bribery. This inference is supported by numerous eyewitness accounts given to IREC of various forms of manipulation as well as election observers' observation reports and ECK submissions.

Indeed, vote-buying and ballot-stuffing appear to be such extensive and universally condoned practices in Kenyan elections that the question can rightly be asked whether genuinely free and fair elections are at all possible.

Permitted irregularities A likely facilitator and catalyst for ballot-stuffing (of which effect the political parties and the ECK could hardly have been unaware) was the indulgence granted by the ECK shortly before the elections for "black books" (in which the names of voters had been entered at the time of registration) to be used in certain circumstances and for double registrants to be allowed to vote, contrary to previous regulation..

Exclusive strongholds A further contributor and facilitator for manipulation at polling stations is the disturbing feature that in many instances (in the strongholds of both main political parties) effectively only the majority party was represented during polling and counting. The alert self-interest of competitors is all but indispensable for honest elections and it is a matter for serious concern that this safeguard was absent in many instances.

Defective planning The system of tallying, recording, transcribing, transmitting and announcing results was conceptually defective and poorly executed. The ECK had long since been aware of the need to revise the system fundamentally by introducing readily available information and communications technology. Its failure to do so was grossly remiss and contributed to the climate of tension, suspicion and rumour in which the violence erupted.

Electoral system The first-past-the-post electoral system carried over from colonial days, with its potential for distortion, real or perceived, compounded the problems caused by the originally gerrymandered, outdated and grossly skewed constituency delimitation pattern. In particular the circumstance that the ODM, which did not scatter its support in the parliamentary contests, beat the PNU and its motley array of allies constituted proof positive of rigging for many observers unfamiliar with the vagaries of the first-past-the-post system, the more so where constituency sizes differ materially.

Delays The gross disparity in constituency sizes also contributed to defects and delays in tallying, recording, transcribing and transmitting results (having moreover to be done by outdated methods) in the large constituencies, which defects and delays also contributed materially to the explosive political climate which then built up as the country awaited the transmission and announcement of results.

Incompetence The conduct of the 2007 elections was so materially defective that it is impossible – for IREC or anyone else – to establish true or reliable results for the presidential and parliamentary elections. IREC has, however, established by means of statistical analysis of a sample of constituencies that innumerable elementary mistakes in

tallying and/or transcribing results as well as patent mistakes of omission, duplication and confusion were made.

Integrity of result Therefore, although there is room for honest disagreement as to whether there was rigging of the presidential results announced by the ECK, the answer is irrelevant, as (i) the process was undetectably perverted at the polling stage, and (ii) the recorded and reported results are so inaccurate as to render any reasonably accurate, reliable and convincing conclusion impossible.

Law enforcement and dispute resolution The system of electoral law enforcement and dispute resolution are conceptually defective and were executed poorly if at all by the ECK and the ordinary law-enforcement agencies of government.

Communication There was no effective communication between the ECK and political parties, observers, the media or the public, particularly regarding the national tally centre, the lack of transparency resulting in misconceptions, suspicion, rumour and anger.

The ECK The manner of appointment of commissioners and the structure, composition and management system of the ECK are materially defective, resulting in such a serious loss of independence, capacity and functional efficiency as to warrant replacing or at least radically transforming it.

Constitutional and legal framework Although Kenya has a legal framework for the conduct of elections, material defects in the framework combined with a culture of lawlessness at election time bring into question the capacity of the law to provide a sufficient framework for political competition.

Wider responsibility Though the ECK is primarily responsible for the flaws in the 2007 general elections, Kenyan society has long condoned, if not actively connived at, perversion of the electoral process.

Long-term commitment This culture of electoral lawlessness has developed over many years and cannot be reversed without a concerted, non-partisan commitment to electoral integrity on the part of political leaders, which commitment will need to be sustained and monitored over time.

CHAPTER 2

CONSTITUTIONAL AND LEGAL FRAMEWORK

2.1 Introduction

The first term of reference of the Independent Review Commission (IREC) is: "[to] analyze the constitutional and legal framework to establish the basis for the conduct of the 2007 elections and to identify any weaknesses or inconsistencies in the electoral legislation". In trying to meet its obligation under this mandate, IREC commissioned a study on the analysis of the constitutional and legal framework for elections in Kenya (attached as annex 2.A) and solicited the views of members of the public, legal and constitutional experts and the ECK at public hearings, technical workshops and formal hearings. Contributions were also drawn from in-house research papers, written submissions and the IREC commissioners' own analysis of the constitutional and legal framework. The audit of the legal and constitutional framework guiding the electoral system in Kenya sought to measure how adequately this framework meets the standards of the key electoral and democratic principles of universal suffrage, equal suffrage, free and fair elections, secret vote and direct suffrage. More importantly, we sought to measure how adequate it was for purposes of conducting a free and fair election in Kenya in 2007. Whereas the adequacy of the constitutional and legal framework with respect to the various activities involved is dealt with in the separate chapters, we try to address the general question as to whether the constitutional and legal framework for the conduct of the 2007 elections was adequate for conducting a free and fair election.

2.2 Relevant international standards

The international standards relating to elections and electoral processes are derived from a number of international instruments that describe the various components of civil and political rights and freedoms. They are the key principles universally accepted by the family of nations which believe in democracy as the basis for good governance in each State. The standards are mostly at two levels, global (or universal) and regional.

The universal standards are found in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPWD). For Kenya the regional instruments include the African Charter on Human and People's Rights (ACHPR) (although the relevant article 13(1) is not explicit in its

definition of the right to participate in free and fair elections), the Organization of African Unity (OAU – now the AU) Declaration on the Principles Governing Democratic Elections in Africa (2002) and most recently the African Charter on Democracy, Elections and Governance (2007). Kenya is a party to all the treaties cited above except to the African instruments of 2002 and 2007, but she is a member of the African Union (AU), which adopted these two instruments. Kenya has a legal obligation to enforce the rights in the instruments to which she is party.

The international standards describe the rights associated with voting and participation in governance. Article 21 of the UDHR states that:

> "1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> ...
>
> 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."

The ICCPR is more descriptive and states as follows at Article 25:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 (this is the non-discrimination clause that prohibits discrimination on the basis of race [which includes ethnicity], colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status) and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) 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;
>
> (c) To have access, on general terms of equality, to public service in his country."

The key election elements that can be derived from articles 21 of the UDHR and 25 of the ICCPR are:

1) Periodic elections (meaning that elections are held at regular intervals)
2) Genuine elections (meaning that voters can participate freely in elections and that results are free of manipulation or fraud)

3) Standing for elections (the right to participate as a candidate)
4) Universal suffrage (that everyone who meets the acceptable minimum conditions has the opportunity to vote)
5) Voting on the basis of the right to vote
6) Equal suffrage (the principle that each vote carries the same weight)
7) Secrecy of the vote
8) Free expression of the will of the voters

Other electoral rights and freedoms stipulated in the UDHR and the ICCPR include the right to the freedoms of expression, to hold opinions, to receive and impart information and ideas through media and to freedom of peaceful assembly and association. Article 20 of the ICCPR provides for prohibition of "Any advocacy of national, racial [includes ethnic] or religious hatred that constitutes incitement to discrimination, hostility or violence".

2.2.1 Equal participation by special groups

Additional to the general provisions in the UDHR (articles 19 and 20) and the ICCPR (articles 19, 21 and 22), especially the non-discrimination clauses, other thematic and specialised international treaties provide for the specific inclusion in the electoral process of special groups. It is in this regard that the ICERD (in article 5(c)) prohibits exclusion on the basis of race from participation in political processes, including voting and standing for election on the basis of universal suffrage. The CEDAW (in article 7), on the other hand, makes a similar case for women and also provides for affirmative action measures to breach inequality gaps where necessary. The affirmative action measures would facilitate proportional representation on the basis of gender. The CRPWD, not in force for Kenya in 2007 but ratified by Kenya in 2008, also guarantees to persons with disabilities political rights, including the right to participate fully in political processes on an equal basis with others. Article 29 specifically requires States parties to facilitate the enjoyment by persons with disabilities of the rights associated with elections including:

(i) "Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

(ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate."

Article 21 of the CRPWD also emphasises the rights, freedoms and liberties relating to elections.

2.3 The constitutional and legal framework of the electoral process in Kenya

The Kenyan laws that have relevance to elections include:

- The Constitution of Kenya
- The National Assembly and Presidential Elections Act (Cap. 7 of the Laws of Kenya)
- The Local Government Act (Cap. 265)
- The Registration of Persons Act (Cap. 107)
- The Election Offences Act (Cap. 66)
- The Kenya Broadcasting Corporation Act (Cap. 221)
- The Penal Code (Cap. 63)
- The Public Order Act (Cap. 56)
- The Societies Act (Cap. 108) (this Act provided the regulatory framework for the political parties in 2007 – it is referred to in chapter 4 and analysed in annex 2.A)
- The Political Parties Act, 2007 (this Act was not in force at the time of the 2007 elections)

The Constitution of Kenya

The Constitution entrenches the protection of a number of fundamental rights and freedoms in chapter V. A number of these rights are associated with elections and they include the right to liberty (section 72), right to secure protection of the law (section 77), the freedoms of conscience (section 78), expression (section 79), assembly and association (section 80) and movement (section 81). Of great importance for special groups is the protection from discrimination on the basis of race, tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex (section 82).

The right to vote

Interestingly the Constitution does not entrench the right to vote and to stand for elections. Article 32(2), which is sometimes erroneously thought to describe the right to vote, provides only for the entitlement to vote for those who are registered as voters in a particular constituency.

Inclusion of persons with disabilities

Closely related to the need to provide for equal participation for all in the electoral process is the issue of including persons with disabilities. Section 34 of the Constitution touches on the question of the full participation in all electoral processes of persons with disabilities. It provides that "blindness or other physical cause" that prevents reading shall not be a barrier to election as a member of the National Assembly, but it simultaneously bars anyone who is not "able to speak ... the Swahili and English languages well enough to take an active part in the proceedings" from election. This might be interpreted as discrimination against an individual with a speech defect. People with disabilities have been effective members of parliament around the world and should not be excluded from Parliament by such provisions.

2.4 The political system in Kenya

The political and government system in Kenya are provided for in chapters II, III and IV of the Constitution. Chapter II describes the executive arm of government and provides for procedures relating to the election of the President. Part III provides for Parliament and describes matters relating to elections of members of the National Assembly; it also establishes the Electoral Commission of Kenya and stipulates its functions. Part IV establishes the Judicature. Kenya is a multiparty state with a mixed parliamentary and Presidential system. The President of Kenya is both head of State and head of government. The political system in Kenya has been and is still one of the big political debates in Kenya, having continued for the past seventeen years. How it evolves will be determined by the constitutional review process that will soon recommence after a lull of some three years.

2.4.1 Presidential elections

The election of the President is provided for under section 5 of the Constitution. This section stipulates the eligibility criteria for presidential candidates and the manner in which a presidential candidate may be nominated for election. The section also sets down procedure relating to the conduct of the presidential election. Section 6 lays out the procedure to be followed with regard to the filling of a vacancy in the office of the President. Sections 7 and 8 provide for the procedures to be followed after a person has been declared duly elected to the office of the President. Section 9 lays down the duration of the term of office of the President and also limits the number of terms that a President can serve to two. Section 10 provides the procedure for determining any question whether a person has been validly elected as President.

2.4.2 Functions of the Electoral Commission of Kenya (ECK)

Sections 42 and 42A of the Constitution set out the functions of the Electoral Commission. These are:

- To determine and review constituencies' boundaries and names at eight-to-ten- year intervals. The function similarly applies with respect to the local authorities. Section 10 of the Local Government Act (Cap. 265) also gives power to the ECK to divide local authorities into various electoral areas and prescribe their boundaries and names.
- To register voters, and maintain and revise the voter register
- To direct and supervise the presidential, parliamentary and local government elections
- To promote free and fair elections
- To promote voter education throughout Kenya
- To carry out any other functions as may be prescribed by Parliament

The Constitution further confers power on Parliament, under sections 42(10) and 42A(e), to provide for the orderly and effective conduct of the ECK's operations and business. It also provides for the election of the President and members of the National Assembly, and for citizenship, which provides the basis for recognition as a voter.

2.4.3 The National Assembly and Presidential Elections Act

The National Assembly and Presidential Elections Act (Cap. 7) is the operational statute that governs the electoral process for presidential and parliamentary elections. The Act elaborates the functions of the ECK as provided under section 42A of the Constitution by adding:

1. Matters relating to the registration of electors (see chapter 5 of this Report)
2. The regulations relating to the protocols on election procedures (see chapters 5 and 6 of this Report)
3. The code of conduct for campaigns
4. Procedures relating to elections after a vacancy
5. Election expenses
6. Dispute resolution

2.4.4 The Kenya Broadcasting Corporation Act (Cap. 221)

This is an Act of Parliament important to the electoral process as it covers the public medium of communication that reaches most Kenyans. The Act defines the "campaign period" as the period between the initiation of an election under the relevant law and the eve of election day. It then provides that the public media shall, during the campaign period, maintain a fair balance in the allocation of broadcasting hours as between different political viewpoints. In undertaking this responsibility, the Corporation (KBC) is to consult with the ECK. The allocation of free airtime is to registered political parties participating in the election.

2.4.5 The Election Offences Act (Cap. 66)

The Act deals with various electoral offences and provides for penalties with respect to the electoral process. The offences include:

- ***Electoral offences in part II of the Act:*** including falsification of information with respect to registration of electors, fraudulent acts with respect to nomination papers; the sale and purchase and supply of the ballots and voter's cards, manufacturing/importation of fake ballots; unauthorised printing of the electors' register; falsification by election officials of records during polling; abetting of the abuse of the process of assisting voters by electoral officers; deliberate miscount of ballots with the intent of influencing the final result ;and allowing malpractices that breach the secrecy of the vote. These offences are punishable by a maximum of five years' imprisonment.
- ***Corrupt practices in part III:*** the offences here include attempts to vote more than once or in the name of other registered electors; employment of acts of undue influence (including threats, force, violence, spiritual injury, damage, trick etc.) to get others to vote a particular way or not to vote; compelling a person to refrain from running for a particular office or to step down as a candidate; bribery of voters with money or anything else so as to influence their decision on who to vote for; facilitating campaign propaganda at polling stations on polling day; printing, publishing or distributing advertisements, placards or posters which refer to any election and do not bear on the face the names and addresses of the printer and publisher; and prohibits the transportation of electors. These offences are punishable by a maximum of five years' imprisonment.

The prosecution of offences relating to corrupt practices under part III of the Electoral Offences Act can be instituted only with the permission of the Attorney-General.

2.4.6 The Public Order Act (Cap. 56)

This is one of the two Acts amended as a result of the Intra-Parties Parliamentary Group (IPPG) negotiations in1997. The amendment to the Public Order Act removed the need for licences and permits with respect to the holding of public meetings. The only current requirement for persons intending to hold campaign meetings is to notify the officer commanding the police station nearest the area of campaign. The notice must be given not less than three and not more than fourteen days before the meeting. The police can refuse permission if they have good reason to believe that there will be a breach of the law or disperse the meeting if a breach of law takes place during it. The Act also provides that no person shall be restricted from holding public meetings on account of political beliefs or opinions. This is one of the IPPG wins that sought to curb the misuse of public offices and resources to crush any opposition to incumbency.

2.4.7 The Penal Code (Cap. 63)

Most election malpractices related to campaigns are also prohibited under the Penal Code. Offenders could be prosecuted under any of these laws. Violence, assault, carrying of offensive weapons in public places and bribery, among other offences, fall under the Penal Code

Under section 34A(5) of the National Assembly and Presidential .Elections Act, the Electoral Commission has powers to designate "any of its officers to conduct any prosecution for an offence under this section and the electoral code of conduct and such officer shall for that purpose have all the powers conferred upon a public prosecutor by the Criminal Procedure Code."

2.5 Efforts to Review the Electoral System in Kenya

Electoral systems are those procedural rules, which govern the transformation of votes to seats in the National Assembly (or any other elected body), so one cannot conduct elections without having some sort of electoral system. A brief general introduction to electoral systems is to be found in annex 2.B, while this section presents various issues related to this topic as it has developed in Kenya over recent years.

The choice of an electoral system should always be based on a careful consideration of a relevant set of criteria, such as they are presented in the annex 2.B. The choice among the various criteria is difficult, because some of them are incompatible and cannot be fulfilled at the same time. The choice also has far-reaching consequence for the way in which the political system develops.

The Mixed Member Proportional (MMP) system was discussed in Kenya as part of the previous constitution review process. MP is a system based on the casting of two ballots, one for a national list of candidates from each of the political parties, one for one of the

candidates in one's single member constituency (like the current First-Past-The-Post system in Kenya). The national/party votes are used to provide for proportional representation in parliament, and the seats obtained in the constituency contexts are deducted from the overall national proportional entitlement of the parties to establish their entitlement of compensatory seats. In this way, the MMP system attempts to secure the best of both worlds, i.e. proportional representation simultaneous with representation of local interest.

The key content of the two electoral system for the National Assembly proposals from the previous constitutional review process was a complicated combination of (1) another set of single-member constituencies (as now), (2) single-member constituencies (the districts were to be used as this second kind of constituencies), each to elect one woman, and (3) representatives of marginalized groups (the Bomas draft suggested 14 such members, to be indirectly elected by electoral colleges of the respective marginalised groups; Wako a more complicated procedure aiming at the same, but also aiming at securing a better gender balance, to be based on lists submitted by political parties and allocated in proportion to votes obtained).

Neither of these proposals has anything to do with MMP. The reason is that there is no attempt to ensure overall proportionality in the allocation of seats and there is also no attempt to ensure that compensatory seats actually go to parties underrepresented after the allocation of constituency seats.

Special seats for specifically identified marginalized groups is complicated to arrange for in a constructive and manageable way. The establishment of a legitimate group of electors is complicated and easily becomes discriminatory; furthermore, such representatives will almost by their very nature be seen as defendants of special interests and *might* therefore contribute to the increase of the level of political tension. And why should – e.g. – members of trade unions be more entitled to special representation than farmers? Representation of special, deserving interests is more easily achieved through a closed list PR system, where parties can demonstrate their social profile by placing representatives of groups in need of special attention in winnable positions.

Special seats for women is another complicated issue. More equal representation of the two genders is important, and it is well documented that a fair level of representation of women does not go well with FPTP. Also, special seats often entail the perception that those holding them are only second order MPs. Sustainable female representation is primarily seen in countries with list PR, where women – in their own right – can attract additional votes to their parties.

The Case against MMP

Since the early 1990s, there has been a trend in electoral system reform in the direction of MMP. One important reason for this has been that retaining the FPTP/SMDs (single member districts) has been attractive to many incumbent parliamentarians, while many reform-interested parties have been attracted by the idea of approaching overall PR (i.e., at the national level).

This has usually has been attempted by using two different ballots as indicated above. It is, however, also a possibility to use the constituency ballot as the sole basis for allocation of compensatory seats, even though that creates a more difficult decision situation for voters. The attraction of this suggestion is that it makes voting simpler and that it takes away the possibilities for manipulating the system which are discussed below. However, almost all known cases of MMP has operated with two ballots, even though it has been argued that many illiterate and politically less experienced voters might not understand the different reasons for having two different ballots in one election.

However, a traditional MMP system can easily be circumvented by unscrupulous political parties, either by arranging for a more or less informal agreement between two parties, where the expectedly bigger party (A) only presents candidates at the constituency level, while the expectedly smaller party (B) only presents a party list. If supporters and followers of the two parties now vote for Party A in the constituency election and for Party B in the national election (because they are being told to do so), then whatever number of constituency seats Party A gets over and above its proportional share of the total number of seats cannot be deducted from whatever number of compensatory seats Party B is allocated on the basis of its share of the PR votes. Therefore, it's a win-win situation for A as well as B – at the expense of other parties entitled to compensatory seats on the basis of *their* share of the national PR votes.

This is exactly what happened in Lesotho in the February 2007 parliamentary elections. The problems following from this circumvention of the 2001 constitutional settlement and the ensuing the parliamentary impasse have created a huge number of political problems in Lesotho since early 2007. A recent High Court judgment only postponed the finding of a proper solution to the complicated political and legal problems, which are now waiting for SADC mediation.

Similar problems arose in the 2005 parliamentary Elections in Albania, even without a formal MoU between the two participating parties, one big, one small, because voters were easily educated to do as their political leaders suggested: Trick the MMP system!

The key point is that the introduction of MMP is not necessarily a good thing. For it to function adequately there must be (1) a strong political party system, with well-

established norms and traditions, which political parties and leaders adhere to; (2) the legal drafting of constitutional amendments and electoral law changes must foresee all eventualities, but also maintain the basic principles of the system, and (3) a considerable period of adjustment to the new parliamentary system, which will not go well together with Kenya's traditionally strong presidential system. There is also no need to deny that a new balance between the Presidency and the National Assembly will have to be defined as proportionally elected legislatives function differently from Westminster-style parliaments.

There is no easy solution to the issue of the future electoral system in Kenya (cf. the criteria listed in Annex 2.B), but the main options appear to be these:

(1) continue with FPTP, but redistribute constituencies (delimitation in the traditional way, by using a GPS-based system, or by employing combination of principles)

(2) change to a two-round system at the parliamentary (and presidential) level. Will be understandable for voters and will in itself contribute to a further reduction of parties. Constituencies to be redistributed.

(3) MMP based on one ballot only (which will also require changes to the constituency structure)

(4) PR (closed list, some kind of gender zipping) at the provincial level. The district level can also be considered for this, as that will allow for smaller distances between voters and representatives.

(5) PR (with closed list and some kind of gender zipping) at the national level

All five options have advantages and disadvantages, including that the constituency boundary delimitation will be an important element in the first three options. The MMP system is in any case not an obvious choice because of the in-built risks for misuse.

Obviously, several other electoral systems are available, including systems allowing voting for individual candidates and their parties – or individual parties and the alliances they belong to – at the same time (different kinds of so-called double simultaneous voting, DSV). However, the IREC finds that simplicity is of the essence and therefore cannot recommend such systems for use in Kenya yet.

2.6 Concluding remarks and recommendations on the constitutional and legal framework

Kenyan electoral legislation provides the basic framework for conducting elections and did so for the 2007 elections; however, it has a number of gaps and weaknesses that warrant some radical review if it is to provide a solid foundation for the conduct of free and fair elections. The review needs to take into account the need to consolidate the

electoral provisions scattered among various statutes, the importance of independent but interrelated activities such as political party election-related activities and the need to have effective enforcement mechanisms for any laws put in place.

1. *IREC recommends that the right to vote and to be elected at genuine periodic elections be included in the Bill of Rights in the Constitution (chapter V) and that voting by universal and equal suffrage and by secret ballot should also be guaranteed for all without discrimination. To go hand in hand with this is the right to citizenship which is also important and is not included in the constitution.*
2. *IREC recommends that section 34(c) of the Constitution be amended so as not to be perceived as discriminatory to any group of persons.*
3. *IREC recommends that all laws relating to the operational management of elections should be consolidated under one statute.*
4. *IREC recommends that a separate law be enacted to facilitate the establishment of a special Electoral Dispute Resolution Court to handle appeal matters from the initial stages of dispute resolution by the ECK. These would include matters that cannot be resolved by the ECK, or matters to which the ECK is a party, and post-election disputes, including election petitions. The law should entrench a statutory limit to ensure that election petitions are finalised in good time – a limit of six months should be adequate. The current rules and regulations on the procedures of election petitions should be repealed and replaced with new rules that ensure that petitions are heard in a just and timely manner.*

A final reflection

Was it the regulatory framework for campaign supervision and EDR that were deficient, or is it that our institutions of governance have simply failed us?

(Ms Immaculate Njenga- Kassam of IED asked this question during a presentation at one of the technical sessions)

At the public hearings and the technical workshops IREC heard, time after time, cries for societal change by means of statutory amendment. "Change the Constitution to cut down the powers of the presidency." "Change the Constitution to strengthen the separation of powers." "Change the Constitution to do away with the pernicious winner-take-all system." "Change the Constitution to promote devolution of power." "Consolidate the diverse body of laws governing Kenyan elections." "Confirm the IPPG arrangement statutorily." "Have the ECK commissioners appointed by Parliament" – no, "by a multidisciplinary body, not by the President alone."

Even as we recommend constitutional and legislative changes, it is important that Kenyans honestly asses all the activities relating to the 2007 general elections so as to

distinguish those that can be attributed to anomalies, failures and malpractices traceable to gaps or provisions in the Constitution and laws of Kenya from those that can be attributed to a bad culture encompassing impunity, disrespect for the rule of law and institutional incompetence.

It is important for Kenya to realise that change for the sake of change is folly. Change without having established the ill is worse. Unless and until one has made a proper diagnosis, the prescription is unlikely to be efficacious and might well prove fatal. The diagnosis in this instance is extremely complex and it is important that it not be oversimplified. The weaknesses in the Kenyan body politic are complex, caused by the insidious developmental ills of decades of misrule. It is easy for everybody to succumb to the temptation to play God and imagine that with the stroke of a pen what is defective will be made good, that it will be easy to reverse 45 years of post-colonial, stumbling democracy. It cannot be that easy.

Nearly two decades after nominal disavowal of one-party rule (in fact one-man rule), the day-to-day running of the country was until recently left essentially undisturbed. That is still the system of administration that IREC witnessed everywhere, with the image, name and influence of the all-powerful President extending down to the grassroots, where the DC and the galaxy of uniformed and plainclothes agents of the Commander-in-Chief hold unquestioned sway.

It is therefore not surprising that elections too still bear many of the scars of the former dictatorship. Elections under President Moi were not supposed to be free and fair. They were not supposed to be the genuine expression of the choice of free men and women as to their governance. That had been decided for them. Elections were a charade, a form of national grand opera where everybody had to express their support for the Man. Stuffing the ballot box was not a sin. On the contrary, it was good to show how enthusiastic the people of a particular district were in their endorsement of the party and its leader. Nominally that has changed. Nominally elections are now fundamentally different.

Elections in modern-day Kenya are supposed to be not only free and fair, as befits the model democracy of East Africa, but also smooth and slick, befitting one of the most technically advanced countries in sub-Saharan Africa. Sadly, this was very far from what happened in December last year: the 2007 general elections in Kenya were a resounding failure.

What IREC sadly found out was that the ECK and the elections it delivered in December 2007 are no more and no less than the people of Kenya deserved. Whereas Kenyans and their leaders were content to go through the motions of a democratic election, they knew in their heart of hearts that they did not care to guard this democracy. They together with their leaders engaged in unacceptable practices:

- vote-buying and -selling
- unapologetic use of public resources for campaigns
- participation by public servants in campaign activities of certain camps
- ballot-stuffing
- organising marauding gangs and bully-boys to "zone" regions and electoral areas and intimidate opponents
- using and cheering and uploading hate speech and ethnic sentiments
- demonising opponents and presidential candidates of opponent camps
- using sexist tactics and violence to keep women out of the race

Was this happening because there is no legal framework in place to govern such conduct? Of course not. IREC's analysis of the laws indicates that there is a legal framework to curb all the above itemised offences. And the true reason of the failure for the 2007 elections was the failure to protect the electoral process from these unacceptable deeds.

Nobody would have dreamt of seriously acting against people in high places, or even highish places. The Attorney-General certainly didn't lie awake at night worrying about all those crimes being committed with not a finger being lifted to stop them. If the police were concerned about this state of affairs, they were certainly very patient. The ECK, with its powers under the National Assembly and Presidential Elections Act, the Code of Conduct thereto and the Electoral Offences Act which include powers to prosecute never really bit anybody. Public opinion cheered the impunity on so long as it seemed to benefit the side they supported.

In order to start trying to prevent a recurrence of the tragic aftermath of the 2007 general elections, Kenyans, from President to peasant, will have to do an agonising stocktake of where their country stands. They will have to show their commitment to the rule of law, and its equal applicability to all citizens irrespective of economic, social and political or any other belief.

No! The solution does not merely lie in constitutional and legislative changes. The culture of impunity in Kenya needs a fix too. The relevant law-enforcement institutions also need to do their jobs properly.

CHAPTER 3

THE ORGANISATIONAL STRUCTURE OF THE KENYAN ELECTORAL MANAGEMENT SYSTEM

3.1 Overview of the Kenyan electoral management system

The management of electoral processes usually involves the interplay of diverse institutional responsibilities. All these efforts should, ideally, converge towards the common purpose of delivering free and fair elections – elections in which the average citizen, contesting political parties and candidates, and society at large are able to perceive that their various interests are reasonably respected and protected.

Broadly speaking, the Kenyan electoral management system is no different. But, as is often the case, there are differences in the dispersal of responsibilities among various institutions, the nature and structure of the agencies involved, the level of independence the lead agency enjoys vis-à-vis the government and the degree to which the central electoral responsibilities are concentrated in the hands of one principal agency, generically described as the electoral management body (EMB). In Kenya's case, this is the Electoral Commission of Kenya (ECK).

Though its mandate and powers are dispersed between the Constitution and other statutes, the ECK is the central institutional player in managing the electoral process. It is solely responsible for the principal managerial/administrative functions in the process, such as the delimitation of constituencies, voter education, the registration and identification of voters, the reception and recording of candidate nominations and the organisation and conduct of polling and related operations. The ECK maintains operational independence from governmental structures to the extent that it recruits its own staff down to the grassroots and does not depend on existing local administration structures, as is often the case in countries where elections are organised through a ministry.

In regard to voter registration, the ECK's work depends on a civil registry function (issuing of national IDs) which falls under a separate agency (the Registrar of Persons), whose mandate is not in itself electoral. The difficulties faced by this office in registering and issuing identity cards to all eligible Kenyans have negatively affected the ECK's ability to capture the entire mass of Kenyans who have the legal right to register as voters. Proposals to rationalise the efforts of both agencies are already under consideration, with the aim of enfranchising as many as possible of those eligible to vote. This deserves priority attention, even if a complete fusion of the two agencies' respective databases is not yet possible (see chapter 5 for a fuller discussion of voter registration).

SUMMARY OF INSTITUTIONAL RESPONSIBILITY FOR KEY ELECTORAL FUNCTIONS			
Electoral activities/functions	**Nature of function**	**Common international practice**	**Responsible agency in Kenya**
• Registration of candidates	**MANAGERIAL**	Always assigned to EMB	ECK
• Organisation of the elections			ECK
• Registration of voters	**MANAGERIAL**	Frequently – but not necessarily - assigned to EMB	ECK
• Identification of voters			ECK
• Constituency delimitation			ECK
• Decisions on complaints	**QUASI-JUDICIAL**	Frequently two-tier arrangements	COURTS
• Civic and voter education	**INFORMATIONAL**	Frequently – but not necessarily – assigned to EMB	ECK, CIVIL SOCIETY
• Regulation of electoral campaigns	**REGULATORY**		ECK (weak powers)
• Regulation of political party funding			ECK (since 1 July 2008)
• Regulation of media during campaign			MEDIA COUNCIL
• Regulation of political party registration			ECK (since 1 July 2008)
• Regulation of candidate nomination		Rarely assigned to EMB (not considered good practice)	PARTIES

The ECK does not have any significant quasi-judicial powers, with the adjudication of complaints regarding election results being handled exclusively by the Judiciary (both first instance and appeals). The ECK's involvement in election review is limited to ordering recounts and retallies, at the request of candidates and parties, within very specific time limits after the close of the poll. Voter registration complaints of a purely administrative nature are handled by the ECK, while claims and objections are dealt with by the Judiciary.

The ECK's regulatory functions are also fairly limited, not being backed by robust legal provisions. Much has been said, for instance, about the ECK's "toothlessness" when faced with errant parties and candidates flouting the Electoral Code of Conduct uninhibitedly in the lead-up to the December 2007 elections. The ECK lacked adequate powers to enforce even its own decisions on such infractions.

The regulation of the media falls under the Media Act (regarding all media houses) and the Kenya Broadcasting Corporation Act (regarding the public broadcaster [KBC] only), and is not an ECK function – save that the ECK must be consulted by the KBC in allocating free airtime for political parties to expound their policies during the campaign period. The ECK does, however, have a regulatory function in relation to the conduct of political parties, especially during campaigns. This arises from the Electoral Code of Conduct, to which all parties subscribe, but enforcement has been difficult.

It might be argued that ECK adopts a self-restrictive reading of some of its powers. For example, it has consistently maintained that once a returning officer has declared election results at the constituency level (particularly in the case of parliamentary and civic elections), it is limited to receiving and eventually gazetting them. This creates a situation in which "errors" can be committed in the tallying of polling station results, safe in the knowledge that they are subject to neither review nor sanction at a higher level.

This leaves the ECK itself in an awkward position (although it seems not to realise this) in which it implicitly certifies results without necessarily verifying them. There is perhaps justification here for an explicit legal provision for the certification by the ECK of results as a distinct step in the electoral process. Indeed, in many countries, especially those following the French tradition, certification is very often the function of a separate body, frequently at the highest judicial level or even parliament itself.

In assigning electoral dispute settlement exclusively to the Judiciary, Kenya's electoral management system moves justice further away from interested parties. With the ECK not reviewing the work of its temporary staff, the brief (48-hour) period allowed it to review its own decisions, exorbitant filing fees and security for costs levied on election petitions, all this coupled with unlimited time for the hearing of election petitions, the potential that wrongs will never be righted is very high, as has been seen in the past (and in the 2007 elections as well).

3.2 The ECK's legal framework

Establishment, membership and tenure

The ECK is established under section 41 of the Constitution, which provides for an electoral commission consisting of a chairman and between four and twenty-one members appointed by the President for renewable five-year terms. While the Constitution provides that the chairman and vice-chairman of the ECK should be persons who have held or are qualified to hold the office of judge of the High Court or Court of Appeal, there are no additional qualifications other than Kenyan citizenship for any commissioner, save that no member of Parliament, the public service or the armed forces may be a member of the ECK.

Commissioners enjoy security of tenure and can be removed from office "only for inability to exercise the functions of [their] office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with [section 41]". (This is the same security of tenure enjoyed by judges of the High Court [section 62] and the Court of Appeal [section 64], the Attorney-General [section 109] and the Controller and Auditor-General [section 110].) Should the question of removal arise, the President is authorised to appoint a five-member tribunal to "inquire into the matter and report on the facts thereof to the President and recommend to him whether the member ought to be removed". Pending the tribunal's report the President may suspend the commissioner in question from office.

The ECK's institutional independence is provided for in subsection 41(9): "In the exercise of its functions ... the Commission shall not be subject to the direction of any other person or authority." The only limitation on this institutional freedom is in the power provided to Parliament in subsection 41(10) – explicitly "without prejudice to subsection (9)" – to "provide for the orderly and effective conduct of the operations and business of the Commission and for the powers of the Commission to appoint staff and establish committees and regulate their procedure". Utilising this power, Parliament has authorised the ECK to appoint such staff as it may deem necessary to perform its functions, in addition to the substantive electoral process requirements in the National Assembly and Presidential Elections Act, the Election Offences Act and related election legislation. Added to this are the Code of Conduct for Members and Staff of the Electoral Commission (Second Schedule, Cap. 7 of the Laws of Kenya) and the Proceedings of the Electoral Commission (Third Schedule, Cap. 7) as well as other subsidiary legislation enacted pursuant to powers conferred on either the ECK or other institutions in the foregoing laws.

Functions

Sections 42 and 42A of the Constitution confer upon the ECK the power to –

- divide Kenya into such number of constituencies having such boundaries and names as it may prescribe by order, subject to its reviewing the number, names and boundaries of constituencies at eight-to-ten year intervals and on certain other occasions (this is limited only by Parliament's power to determine the minimum and maximum number of constituencies)
- register voters and maintain and revise the register of voters
- direct and supervise the presidential, parliamentary and civic elections;
- promote free and fair elections
- promote voter education throughout Kenya

The Constitution gives Parliament the power to prescribe through further legislation such other functions for the Electoral Commission as it may deem fit. Parliament has used that power to mandate the ECK to determine the proportion of nominated members of Parliament and

councillors that each political party should nominate and to ensure the observance of the principle of gender equality in such nominations (section 33, Constitution of Kenya; section 26, Local Government Act). Parliament has also conferred upon the ECK the power to divide any municipality, county, township or county division into electoral areas having such boundaries and names as may be prescribed by order (section 10, Local Government Act) and to supervise party nominations on request (section 17(3), National Assembly and Presidential Elections Act). More recently, Parliament has again used that power to establish the office of Registrar of Political Parties within the ECK and to confer upon it wide-ranging powers to regulate the establishment, organisation, management and funding of political parties. In addition, section 17A of the National Assembly and Presidential Elections Act accords the ECK "overall conduct of elections" and the power to "give general directions and exercise supervision and control thereof and take the necessary measures to ensure that the elections are transparent, free and fair".

Assessment of the ECK's legal framework

Institutional design and management: A review of the legal framework for the ECK reveals a number of institutional structure issues that require legal attention. Examples, drawn from comparative Kenyan semi-autonomous government agencies and EMBs elsewhere, include: incorporation; chief executive (by whatever name called); oath of office; principal office; meetings and procedure; officers and other staff; guiding principles; powers (including quasi-judicial powers); finances; investment of funds; financial year; annual reports; annual estimates; accounts and audit; and holding of property. Beyond the Constitution and sections 3-3B of the National Assembly and Presidential Elections Act, there is no law governing many of the ECK's institutional and operational aspects. This is in stark contrast to the situation in some countries in Africa (such as Malawi and Ghana) and elsewhere where this is provided for in a dedicated law to back up constitutional provisions on, for instance, establishment and security of tenure. It is also in contrast to the position of a number of Kenya's own constitutional bodies, such as the Judiciary and the Parliamentary Service Commission.

Security of tenure: Although the security of tenure provisions exist to good purpose and should be maintained, they have not been interpreted so as to ensure institutional service delivery. This applies not only to ECK commissioners but also to other constitutional office holders. It seems that, with the exception of the case of John Harun Mwau (then Director of the Kenya Anti-Corruption Commission), whose removal after only six months in office was recommended by a tribunal in 1997 on account of incompetence, security of tenure has been interpreted to mean non-removal on any ground that does not point to a serious criminal offence, such as corruption or other economic crime. This attitude must change if constitutional office holders are to respect their oath of office and be fully accountable to the public. Suffice it to say that security of tenure does constitute ***difficulty*** in removing officers, but its higher goal is to establish *justice* in the process of removal, rather than make removal almost impossible.

Institutional independence: The ECK has sufficient institutional independence to discharge its mandate. However, by its own account, this is limited by its lack of financial independence and the general political behaviour of the various actors in Kenyan elections. The former is covered substantively in section 3.6 below, so here we concern ourselves only with the latter. In our

analysis, the paper provisions give the ECK the institutional independence to do its work. What is needed is an appointment process that inspires public confidence in the Commission and selection criteria that ensure commissioners have the integrity, sense of judgment and mettle to referee a political contest without being unduly influenced by political pressure. (Section 3.3 deals with this issue.)

Conclusions/findings

Institutional design and management: Certain important institutional matters of design and management are not covered in the Constitution (with good reason, since that is not the place for such detail) and the National Assembly and Presidential Elections Act, and cannot be properly managed merely with the aid of operational manuals and common-sense. They will require more ample legal provisions, following the practice of public institutional design in Kenya as well as best practice elsewhere. This is becoming increasingly essential since, with its additional legal functions, today's ECK is a far more sophisticated organisation than the one that managed the 1992 general elections, or the ones before that.

3.3 Composition of the ECK and appointment of the commissioners

With a chairman and twenty-one members, the ECK is currently at the full strength constitutionally allowed. While section 41(10) of the Constitution states that "Parliament may provide for the orderly and effective conduct of the operations and business of the Commission and for the powers of the Commission to appoint staff and establish committees and regulate their procedure", no distinct legislation exists further elucidating in any comprehensive manner the mode of appointment, powers and tenure of the ECK (although the National Assembly and Presidential Elections Act contains provisions describing its mandate in relation to those elections).

Contrary to what has become customary in many countries with independent electoral commissions, the President is not required to consult with any other institution or persons in appointing ECK members. It is also worth noting that there are no legal criteria to guide the President in making such appointments (whether in terms of professional profile, representation of diverse interests or otherwise). This apparent lacuna in the legal framework has been the subject of much controversy over many years.

Commissioners are appointed for (renewable) five-year terms. Because the first set of commissioners was appointed in an election year (1992), and another set appointed in the next election year (1997), this time very shortly before the elections, the end of each five-year cycle has recurrently coincided with an election year, potentially causing significant disruptions in planning and implementation. Ten commissioners were replaced in January 2007 and another five in October 2007, with elections scheduled for December that year (the chairman's mandate was renewed only in December, after some uncertainty and public debate). Quite apart from the effect of the eventual new appointments (time was, for instance, too short for new commissioners to acquire sufficient familiarity with their functions), uncertainty as to what the President would decide vis-à-vis retaining or replacing the vacating commissioners, as well as the absence of

consultation when he did make new appointments, contributed to pre-election tension and undermined the ECK's credibility as an independent body capable of delivering fair elections.

This was not the first time such a public debate had taken place on this issue. In 1997, dissatisfaction with the President's exclusive *de jure* role in appointing ECK commissioners (focusing, in particular, on his partisan status as a candidate in the elections and as the leader of a contesting political party), with mounting pressure from political parties and civil society, resulted in agreement on alternative arrangements for the nomination of members. In terms of this Inter-Parties Parliamentary Group (IPPG) agreement the parliamentary opposition would supply the President with a list of nominees, from which he would appoint ten commissioners. This was the basis on which additional ECK members were appointed prior to the 1997 elections. (It was also the backdrop to the topping-up of the Commission in 1997 to its full complement of twenty-one ordinary members; the Constitution provides only for minimum and maximum numbers, and the maximum number of members had not been appointed before that occasion.) It could be argued that the increased number of members in itself makes reaching consensus on an issue more difficult than it otherwise would have been.

Although the IPPG accord was never entrenched in law, with the terms of the commissioners appointed under the arrangement approaching expiry in 2002, President Moi renewed their appointments. After 2002, when commissioners died or concluded their terms President Kibaki replaced them without reference to the 1997 IPPG accord. This caused little initial acrimony, but as he continued to replace commissioners in this manner – especially as the 2007 general elections drew closer – discontent surrounding the matter was rekindled. The President preferred to follow the letter of the Constitution, using his exclusive prerogative to appoint new members, while the opposition demanded he observe the spirit of the IPPG agreement. The issue became particularly acute in 2007, in which year the President appointed fifteen members.

As has been mentioned, in the absence of any consultative requirement, the Constitution grants the President total latitude in appointing ECK members. The only criterion stipulated – and even then this applies solely to the chairman and the vice-chairman – is that they "shall be persons who have held or are qualified to hold office of judge of the High Court or judge of appeal" (section 41(2A)). In practice, this means that a Commission could comprise a majority of members lacking any professional experience or expertise in election management or other skills that could contribute to the judicious and evenhanded management of an electoral process.

International practice in the composition of EMBs tends to revolve around certain major principles which are sometimes combined, such as professional competence, political balance and consensus. These principles tend to reinforce EMBs in terms of professional stature, credibility and political acceptability (although in certain circumstances, some can create other problems, such as the risk of a deadlock in a consensus-based EMB). As the legislation now stands (and is practised, with the exception of the brief romance with the IPPG arrangements), Kenya's electoral commission does not seem to conform to any clearly defined appointment principles. Inevitably, its credibility suffers, since key stakeholders cannot feel a sense of (part) ownership of the structure, nor can they place much faith in its inherent professional competence.

Conclusions/findings

In IREC's public meetings and formal hearings, the ECK and some stakeholders advocated several reforms to be introduced in the way its members are appointed, their security of tenure, duration of their term of office, staggering of the terms and the size of the commission, among other issues. Various models have been proposed and carefully considered by IREC in comparison with EMBs around the world. The most recent constitutional proposal on this question suggested a total of between three and nine Commissioners appointed by the President and approved by Parliament. There is no doubt that this is an area that is ripe for major changes, if future elections are to enjoy the trust of the various stakeholders in Kenyan society.

3.4 The ECK's operational procedures

There are a number of practical and political features of the process that an EMB needs to bear in mind in planning and conducting elections. These include:

- Elections are *high-pressure* events. Once an election date is set, election management involves meeting a series of deadlines; the political penalty for missed deadlines is high, for election managers, government and citizens. In Kenya's case, although the election date is not known well in advance, events following the dissolution of Parliament are all time-bound, exerting a great deal of pressure on the EMB.
- Elections involve *high stakes.* Their credibility is tied to national stability, and the winning and losing of elections is tied to political party power. As is evident in many parts of the world, elections can precipitate an outbreak of violence or, where this has occurred before, a recurrence of violence.
- Elections are *periodic or occasional* events. National elections usually take place at widely spaced intervals. While an EMB needs some permanent staff all the time for planning and other continuous activities, an enormous short-term staff is required at the time of elections (and down-scaled between elections). In Kenya, presidential, parliamentary and civic elections are held every five years.
- The electoral process should be *predictable*; it should be governed by laws and rules that are not only commonly understood but also universally applied.
- Elections must ultimately be a *nation-building* exercise, rather than a divisive one. Since elections provide a means by which political power can change hands peacefully, they need to be managed in such a way as to deliver not only an arena for peaceful political contest but also to ensure general acceptance of outcomes and stability for other nation-building activities.

Because of these features, any EMB requires – and usually develops – procedures to guide its work, both in election years and in the years between. The ECK has, over time, developed certain procedures to guide its work. Some are written while others are organisational practices that have emerged over the life of the ECK.

An EMB's success lies in how greatly it inspires public confidence in its role as an impartial manager and referee of elections. An EMB's procedures can be evaluated according to these criteria:

a) how transparent all its processes are

b) how simple and accessible its procedures and service are to all

c) how much it respects the principles of equity and equality as a measure of ensuring free and fair elections

d) how well it asserts its independence

e) how well prepared it is for all its activities

f) how well it anticipates and deals with any electoral disputes and hitches

g) how well it keeps learning from its experiences for the improvement of its processes

h) how well it can enforce or ensure enforcement of its decisions and processes

With the foregoing in mind, an EMB should also invest in procedures that ensure adequate long-term (even up to twenty years) and operational (at least annually) planning for elections, efficient and effective execution of tasks in the electoral process and a strong system of inter-agency coordination with other government bodies whose support it requires to fully discharge its mandate. In this section, we discuss key aspects of the ECK's election procedures, both at election time and in the periods between elections.

Between-election procedures

ECK procedures between elections are tailored to the execution of a range of activities, both routine and time-specific. These include election planning, voter education, election petitions, by-elections, voter registration, boundary delimitation, materials design, training, research and electoral law reform. These are easily governed by the procedures developed for the day-to-day management of any organisation.

Commissioners set policy in plenary meetings. Policy is implemented through committees chaired by specific commissioners on which departmental heads serve as secretaries. The ECK technical paper on its organisational structure submitted to the IREC technical workshop in August 2008 lists the following committees:

- General Purposes Committee
- Finance and Logistics Committee
- Electoral Programmes Committee
- Legal and Electoral Reforms Committee
- Public Education and Outreach

- Human Resource and Manpower Development Committee
- Electoral Research Committee
- Audit Committee
- Committee on the Administration of Political Parties

From time to time the ECK also establishes *ad hoc* committees to deal with various matters. Such committees are disbanded once they have discharged their mandate. Committees, which average six members, meet regularly and make decisions which are then submitted to Plenary for decision.

As to strategic management, the ECK had no strategic plan until 2004 when the current 2004-2008 Strategic Plan was adopted. The Plan, which places a premium on the attainment of free, fair, credible and professionally managed elections, aims to achieve a number of high-level results. These are reduced electoral violence and malpractices, more equitable representation, informed choices, increased participation (particularly by women and other marginalised groups), professionally managed elections, strengthened political parties, increased Government sensitivity to the electoral process and equitable and responsible media coverage of the electoral process. These are sought to be achieved via a number of strategies: organisational development, mainstreaming gender and diversity, resource mobilization, managing strategic partnerships, public relations and marketing, voter education, and information technology strategies. The achievement of the Plan's results is to be monitored through a range of predetermined processes.

In regard to other aspects of its work, the ECK has produced a plethora of manuals and other publications over the years to guide its staff and other stakeholders through legal and other requirements. These include various election manuals, a sourcebook on voter registration, a voter education facilitators' manual, guidelines for election observers, media guidelines, a voter registration leaders' guide, a returning officer's guide, a presiding officer's guide, guidelines for peace committees, guidelines for elections security officers (police), guidelines for polling and counting clerks, various versions of a voter's handbook, a review of constituencies and electoral areas handbook, a voter education curriculum, an election handbook for political parties and candidates on parliamentary and civic elections, and a polling station operational manual.

For internal use, the ECK has produced guidelines for recruiting permanent staff and for recruiting temporary election officials. Of particular interest is the latter, which are not only detailed but appear to have been drafted to ensure an open and competitive recruitment process. In summary, (a) all posts are to be declared vacant and advertised as and when they fall vacant or when the need arises; (b) detailed job descriptions and job requirements are to be assigned for each category of personnel/election officials to assist in recruitment; and (c) panels for shortlisting and interviewing candidates are to be constituted after receipt of applications to ensure that the exercise is transparent.

Procedures in the 2007 general elections

By contrast, the procedures in an election year require a higher degree of sensitivity to timelines. They work well only if there has been adequate prior preparation. By the ECK's own account,

preparations for the 2007 general elections began in 2004 with boundary delimitation. Since this is a routine between-elections activity based on the intervals prescribed in the Constitution, real preparation must have begun in 2005 with the ECK chairman's memorandum enquiring into the ECK's preparedness for the coming elections. In 2007 alone, the ECK concluded its review of constituencies, electoral areas and polling stations, registered voters, procured election materials, recruited and trained election officials, conducted voter education, received nomination papers from candidates and conducted the presidential, parliamentary and civic elections. As part of the preparations, a number of consultative meetings, conferences and workshops were held, some with key stakeholders, including the 13-15 March 2007 conference with political parties.

Owing to the nature and scale of activities in 2007, and in keeping with previous practice in election years, the ECK established a number of *ad hoc* committees to supplement the standing committees. These were the Code of Conduct Implementation Committee, the Party Liaison Committee and the Steering Committee. The first was responsible for receiving complaints on violations of the Electoral Code of Conduct and enforcing the Code, the second was established in accordance with rule 9 of the Proceedings of the Commission to facilitate consultations with political parties on any matter concerning the elections while the third was in charge of overall preparations for the election.

Conclusions/findings

The ECK has made efforts ever since its establishment to improve its procedures for managing and conducting elections. As things now stand, it is a functioning institution with policies and procedures. However, those policies and procedures– at least in the 2007 general elections – have not managed to deliver a satisfactory election. Structural weaknesses in the relationship between the commissioners and the Secretariat (in terms of the delineation of roles), bureaucratic procedures; and an unwieldy committee structure in some ways hampered smooth preparations for the elections and interfered with staff selection, recruitment, training and deployment.

The manuals for election staff and their training, though improvements on previous versions, still granted some discretionary power to lower-level staff (for instance, whether to give a voter one ballot paper at a time or all three at once, whether to count the presidential or the civic ballot papers first, etc). As a general practice, electoral procedures ought to anticipate the environment in which they will operate and provide as much operational detail as is required to inform decision-making. When matters are left to the good sense or judgment of the field staff, breakdowns in communication (resulting for instance in the reporting of partial results when this had not even been discussed) and non-compliance with laid-down procedure are the likely result. Training seems to have been conducted more or less uniformly, though in some areas implementation did not go according to script. For instance, some election officials went through a comprehensive programme that included simulation (very useful and important for adult learners) while others seem to have been taken through a hurried briefing rather than training. This introduced uneven implementation that in some cases gave rise to uneven performance (this was one reason some regions delayed presidential results significantly, for example). Certainly the tallying staff at the national tallying centre either had not received adequate training or, if they had, did not quite do as they had been instructed. One team leader even used briefing instructions

that were later repudiated by the ECK in the formal IREC hearings. The result of this uneven performance and the chaos at the national tallying centre was suspicion and the sullying of the overall integrity of the electoral process.

3.5 The ECK Secretariat

The ECK Secretariat has been built up over many years. Although the Independence Constitution (1963) created an electoral commission, it played a subdued role because the office of Supervisor of Elections, which fell under the Attorney-General, supervised elections instead. Although the Supervisor of Elections had wide powers to conduct elections and register voters, the office was not independent: it neither had operational autonomy from the Executive nor did its officers enjoy security of tenure. The result was most evident in the much discredited *mlolongo* (queue-voting) elections of 1988. After much agitation for political and legal reform, and with the resumption of multiparty politics, Parliament abolished the office of Supervisor of Elections in 1992 and recognised the ECK's role as the sole body responsible for the conduct of elections. While commissioners were appointed from 1992, it was not until 1998 that the ECK Secretariat began to take shape.

The period before 1998

According to the ECK, the 1992 elections were conducted by the commissioners assisted only by a skeleton staff seconded from various government departments. The commissioners of the time and their few "borrowed" staff carried out the day-to-day tasks of the ECK through a number of committees. The 1997 elections were conducted by this same staff, although by then some 41 District Elections Co-ordinators (DECs) had been employed on a casual basis.

The lack of permanent staff constrained the ECK to use commissioners for day-to-day work. It could not develop a functional secretariat. In an early publication, *Towards Free and Fair Elections* (1999), the ECK decried the fact that most of its staff were on secondment from the government, stating that this was "not an ideal situation as it may jeopardise the desired commitment and confidence on the part of the officers". Thus, with split loyalties, it was as difficult to retool this skeleton cadre to the new institution's values and mode of work as it was to ensure their operational independence from their mother departments. The ECK therefore continued pressing Treasury for resources to establish an independent secretariat.

The period from 1998 to the present

By July 1998, these efforts had borne fruit and by the end of that year the ECK had 112 permanent staff following an increase of DECs to one for each of the 70 districts on three-year renewable contracts. By 2002, the ranks had swelled to 448.

In terms of structure, the ECK began with an Administrative Secretary as head of the Secretariat. There were also a Deputy Administrative Secretary and heads of departments, each with a basic staff. The first departments were Accounts, Supplies, Personnel, Public Relations, Computer and Legal. Later on, the Administrative Secretary became the Commission Secretary, with accounting officer status once the ECK had its own independent vote. The Deputy Administrative Secretary

became the Deputy Commission Secretary, and a second deputy was appointed, while some of the departments were renamed or split to form new departments. The current departments are Finance, Procurement and Supplies, Human Resources, Public Relations, Elections, Cartography, Elections Training, Information Technology, Legal and Registration of Political Parties. Each department is headed by a professional recruited according to the ECK's hiring procedures. More recently, each DEC has had an Assistant Registration Officer and an Election Officer II added to the original basic structure of a DEC, a secretary and a driver/messenger. The ECK currently has a permanent staff of over 500.

As have the commissioners, the Secretariat staff have their own "management standing committees" that meet regularly to deliberate on various issues and implement decisions in consultation with commissioners. These are the Appointments and Selection Committee, the Tender Committee, the Disciplinary Committee, the Training Committee and the Budget Committee.

As the Secretariat has evolved, so too have roles, although some roles still overlap, resulting in commission-management tension within the organisation. This tension was admitted by the Chairman of the Commission in his evidence to IREC and though it has been downplayed by senior members of staff such as the Commission Secretary (in his evidence to IREC), it is real. It results not from ill-will on either side but from the conflict of roles bound to occur when commissioners who were used to day-to-day management of the ECK's affairs found themselves with a permanent staff cadre including professionals. Though originally muted, it came into the open in the course of the development of the ECK's first strategic plan and would need to be addressed, through a re-examination of commission-management roles, if institutional harmony were to be established. In his evidence to IREC, the ECK Chairman stated that consideration could be given to commissioners' filling both policy-making and executive roles so long as executive lines of responsibility were clear.

On the basis of technical assistance provided by the International Foundation for Electoral Systems (IFES), the Secretariat has drawn up job descriptions for all staff. A human resources manual, which includes gender integration policies, has been developed. Annual operational planning is gaining currency, and the introduction of performance measurement criteria is being discussed. Also under discussion is the improvement of the Secretariat structure, as part of the organisational development process accompanying the implementation of the current strategic plan.

Conclusions/findings

The ECK has professional staff in many of its departments - all departmental heads at least are professionals. Given the Commission's committee system, however, they will continue to be nothing more than "senior assistants" to the commissioners if they are not given room to apply their professional minds to the issues. This does not bode well for the ECK; in a body where policy-makers come and go according to the appointing authority's preferences, the need to professionalise the Secretariat and make it the repository of the institutional memory of the ECK cannot be gainsaid. Indeed, one of the ECK's weaknesses in the run-up to the 2007 elections –

that most commissioners had insufficient experience in running an election – could have been offset by a professional secretariat of election workers with substantially devolved decision-making authority on the management of the electoral process.

The current Secretariat structure lends itself to administrative inefficiency and waste. Standing committee business, for example, seems to take up time that would be better spent on operations (some committees do not even keep minutes). The present system makes it possible, as in the approval of the proposal to transmit election results electronically, for a decision to be communicated to the implementer over a month after it has been made! The committee approach to work also reduces departmental multitasking, which puts unnecessary pressure on the organisation every time a major exercise is undertaken. It would be much more efficient for some of these exercises (say the annual voter registration drive) to take place at the same time as other regular business, such as coordination of voter education. Between elections, the effect of this *modus operandi* is not really felt, save for the wasteful involvement of non-professionals in professional tasks. In an election year, however, when time is of the essence, it can be debilitating. Consultations in committee are necessary, but they should be a prelude to implementation and not take time away from implementation itself.

The role of district staff (DECs and their support staff) is provided for in pre-election (and non-election year) activities. However, when it comes to election-day activities, district staff are conspicuous by their absence. There is no role for them in a formal sense save as logistics personnel. Even this is a role they seem to lapse into; it is not an allocation on the basis of which they can be held accountable. Yet (subject to the reforms IREC proposes on the ECK's devolved structure below) they could perform some of the tasks conducted by temporary election officials, although in certain constituencies, depending on geography, they might well be confined to the constituency tallying centre. This would not only reduce expenses, but would also lessen the risk associated with introducing temporary election officials in key areas such as tallying.

3.6 Funding the ECK permanent structure

In order to discharge its constitutional responsibilities, the ECK requires a great deal of money. Commissioners and staff, both permanent and temporary, need to be paid; the ECK's daily operations and election materials, their delivery and use in the electoral process have to be financed. Funding is therefore required not just for recurrent expenditure but also for development and to support electoral exercises. Commissioners' salaries and allowances are a charge on the Consolidated Fund and are determined in accordance with the Constitutional Offices Remuneration Act, so they raise no issue regarding independence. It is all the other costs that form the subject of this review of the ECK's financial independence.

In the course of its investigations, IREC was informed by the ECK and other interlocutors that the ECK had no financial independence. It was recommended that this situation be addressed by making the ECK's expenses a charge on the Consolidated Fund. As this is a matter that affects the ECK's independence, capacity and functioning, we examine those arguments in the light of all the available information and the Government Financial Regulations and Procedures.

Current ECK funding modalities

The ECK's funding mode has been in place since 1998. When the ECK was provided with finances to establish its own secretariat, it was also allocated its own vote (according to its Secretary, this is Vote 33) in accordance with the Government Financial Regulations and Procedures.

The process of funds acquisition begins with the ECK preparing budget proposals for each financial year and submitting them to Treasury. The ECK takes into account all the activities it plans to conduct in the year in question and adds in contingencies and routine costs such as staff emoluments and transport. Treasury may then open discussions with the ECK on the entire budget or on specific items. The agreed budget is then included in the Ministry of Finance financial estimates tabled in Parliament. (In the case of unanticipated expenditure, the Minister includes the additional costs in supplementary estimates.)

Parliament then scrutinises the estimates and, although it has the power to approve an amount lower than that indicated in any vote, it has never in fact made any changes to the ECK's vote. Once the estimates have been approved, the money can be paid into the ECK account. Treasury does this on the basis of monthly allocations. If lump sums are required (say, for the purchase of motor vehicles), these are included in the monthly requests in addition to recurrent monthly items.

The ECK has, over the years, expressed a number of difficulties with this funding method. One problem has been the need to observe financial procedures "some of which are difficult to apply to elections" because they cause "severe operational limitations". It is also claimed that Treasury officials sometimes slash budgets on the basis that "there is no adequate funding". Low allocations to such items as voter education are given as an example of how Treasury consultation has worked against the ECK's objectives. In the course of the IREC investigation, delays in ensuring that "sufficient funds are made available in good time to the Commission for effective management" of its operations was added to this list.

Assessment of ECK financial independence

The ECK enjoys operational independence but relies on public funds for its operations. That is why it is subjected to the procedure described above and why it agitates for its expenses to be a charge on the Consolidated Fund. What, then, does financial independence mean in this context? Does the ECK have financial independence? If not, how should it be instituted?

Section 99 of the Constitution establishes the Consolidated Fund, into which "all revenues or other moneys raised or received for the purposes of the Government of Kenya shall be paid [and] from which no moneys shall be withdrawn except as may be authorised by this Constitution or by an Act of Parliament (including an Appropriation Act) or by a vote on account passed by the National Assembly ...". The section goes on to provide that moneys for certain authorities may be paid into other accounts established for that purpose so long as they are managed in accordance with the law and that "Parliament may prescribe the manner in which withdrawals may be made from the Consolidated Fund ...".

Payments are made from this account to meet various kinds of expenses:

(1) public debt

(2) salaries of constitutional office holders

(3) international subscriptions

(4) other government expenditure

With respect to (1), section 103 authorises its payment as a charge. With respect to (2), section 13 of the Constitution provides for "[t]he salary and allowances payable to the President and any pension or gratuity payable to him on retirement" to be a charge upon the Consolidated Fund, while section 104 authorises payment in this manner for judges of the High Court and the Court of Appeal, members of the Public Service Commission, members of the Electoral Commission, the Attorney-General and the Controller and Auditor-General (all referred to in the Government Financial Regulations and Procedures as Consolidated Fund Services). The respective scales are set out in the Constitutional Offices (Remuneration) Act. By dint of chapter 4 of the Government Financial Regulations and Procedures, expenses in relation to (3) are paid with the same authority granted for (1). All other government expenditure is paid out either through an Appropriation Act (passed annually upon presentation of estimates of Government revenues and expenditure for the following financial year by the Minister for Finance) or through a specific Act of Parliament other than an Appropriation Act or a Vote on Account for a specific body, either directly or through a line ministry.

There is no precedent for charging the entire expenses of an institution to the Consolidated Fund. The Kenya National Commission on Human Rights (KNCHR) derives its funding from "such sums as may, from time to time, be appropriated by Parliament for that purpose". It may receive grants and donations from any other source "provided that such grants and donations shall not be made or received for purposes of influencing the decision or ability of the Commission in any way and shall be disclosed in the annual report of the Commission". The National Commission for Gender and Development (NCGD) derives its funding from moneys provided by Parliament for the purposes of the Commission; such moneys or assets as may accrue to the Commission in the course of the exercise of its powers or the performance of its functions; and all moneys from any other source provided for or donated or lent to the Commission. Even the Parliamentary Service Commission – one of the examples the ECK relies on in its technical paper on the subject – does not enjoy the suggested funding modality.

Since the ECK currently has a funding modality similar to those of all other independent institutions, it may seem difficult to support the argument that all its expenses be a charge upon the Consolidated Fund. That argument becomes especially difficult in the light of the fact that the ECK has not been the epitome of financial efficiency. The upshot is that, were the entire expenses of the ECK to become a charge on the Consolidated Fund, this would be a radical departure from the conventional mode of financing semi-autonomous government agencies with operational independence (such as the ECK). However, the necessity for financial independence for whatever electoral management body (EMB) may result from the implementation of the IREC recommendations should be carefully weighed against any fears arising from the ECK's financial management history. This is probably why the drafters of the Proposed New Constitution of Kenya (2005) provided that:

278. (1) The funds of a constitutional Commission include –

(a) money voted by Parliament for the purposes of the Commission; and

(b) any other money received by the Commission in the performance of its functions.

(2) The administrative expenses of a constitutional Commission, including remuneration and benefits payable to, or in respect of, persons serving with the Commission, are a charge on the Consolidated Fund.

Conclusions/findings

The ECK has as much financial independence as all Kenya's other independent institutions, such as the Judiciary and the Parliamentary Service Commission. Noting the direction that the Proposed New Constitution of Kenya took in making the administrative expenses of all constitutional commissions (such as the ECK) a charge on the Consolidated Fund, it is difficult to understand how this was going to work in practice. IREC, having considered the practice in other jurisdictions, is not prepared to recommend a provision amounting to financial *carte blanche*.

3.7 The ECK's advisory role on legal reforms

Besides the roles discussed in section 3.2 above, a role common to EMBs the world over is to advise governments and/or lawmakers on desirable changes to electoral law. Though it is not provided for by any of the Kenyan laws that IREC reviewed, this power has been inferred. IREC was interested in exploring any work the ECK has conducted in this area since in much of its testimony and technical presentations the ECK attached much importance – and rightly so – to enabling legal provisions. A review of letters and memoranda addressed by the ECK since 2002 to various offices within the executive and legislative branches of government tells a sad tale.

Over the years a number of carefully reasoned and cogently substantiated submissions and recommendations by the ECK urging fundamental reform of virtually every aspect of Kenya's constitutional and legal framework for elections came to naught. A letter dated 3 May 2002 from Chairman Kivuitu to the secretary of the Constitution of Kenya Review Commission, is prefaced with the observation that "it is difficult to separate [electoral law] from the rest of the Constitutional provisions and other laws that indirectly affect the electoral process". It made a number of recommendations which could sensibly be repeated verbatim today. They relate, to name a few of those more salient in the present context, to the assumption of presidential office, gaps in the enforcement of the Electoral Code of Conduct, the empanelment of an electoral court, service of an election petition and, crucially, the size of the commission, criteria for the selection of commissioners and an inclusive and transparent appointment process. Many other proposals were made, relating, for instance, to reinforcing the ECK's independence by having it report directly to Parliament, staggering the three elections, establishing a truly professional secretariat with "specialist skills and competencies" and providing for "effective enforcement of electoral rights". One can but speculate as to the course of events in December 2007 if these recommendations had been taken seriously

Conclusions/findings

It is indeed ironic that the ECK, the composition and legitimacy of which has been so trenchantly criticised since the 2007 elections, itself made proposals for reform which could have prevented the fiasco. However, these proposals were not pursued, or they were frustrated by a political agenda that did not give them the attention they deserved. As things stand now, there is nothing in law to prevent the relevant policy- and law-makers from taking the ECK's advice, discussing all or aspects of it with the ECK, and then incorporating the final result of those deliberations into electoral law reform proposals. However, owing to the lukewarm response the ECK's proposals have received, IREC is constrained to make recommendations on an issue that probably does not require more than a change of attitude. There are other matters, however, on which the ECK requested legal reform that IREC does not believe require such reform – for instance, the use of modern technology for transmitting results.

3.8 Assessment of the functional efficiency of the ECK and its capacity to discharge its mandate

Three basic problems confront those organising elections: credibility, sustainability and efficiency. Credibility is the litmus test of an electoral structure: unless trust in the system is developed, the whole electoral exercise loses significance. A non-credible system does not confer democratic legitimacy upon those elected. Credibility is also a universal problem of electoral organisations, although it is frequently forgotten in consolidated democracies where it is taken for granted. The ECK's credibility was severely dented in the 2007 elections, and one of the main challenges that the Commission will face is how to restore it.

Sustainability can be defined as the ability to conduct an electoral process with domestic human and financial resources. This is not a major issue in Kenya, and the support that the ECK has been receiving from external sources is limited and could easily be substituted by domestic resources.

The last of the basic problems – efficiency – is a universal problem confronting all types of organisations. It may not be very polite to discuss the efficiency of entities that perform good deeds, particularly those that should be cornerstones of the democratic process. However, this is an inescapable issue: an electoral organisation must strive for the most cost-effective way to achieve a defined level of credibility.

These three challenges are interrelated in a somewhat perverse way. Credibility is the essential consideration, and sustainability and efficiency are frequently sacrificed on the altar of credibility. Inefficient solutions are frequently adopted because they seem to contribute to credibility. For instance, expensive printing of ballot papers abroad is adopted because it contributes in the short run to credibility. But such inefficiencies then become entrenched as cultural givens after two or three elections.

It is extremely difficult to assess the ECK's efficiency without conducting a specialised study. However, we shall attempt to evaluate three areas which provide reasonable pictures of the overall efficiency of the organisation. The first such area will be the cost of the electoral process in Kenya, as compared with that in other countries. Secondly, we shall make an evaluation of the efficiency of registration, since we have fairly complete data on the subject. Registration is a

useful example, as it is one of the few electoral activities conducted between general elections. Thirdly, we shall examine one specific – and important - case of decision-making in the organisation which we have been able to reconstruct in detail. The case provides an opportunity to look, even if only superficially, at planning and innovation in the organisation.

Comparative costs of elections: Common-sense and experience would lead one to expect the cost of elections in Kenya to be comparatively low. The following factors should support this expectation:

- Kenya conducts the three elections (presidential, parliamentary and civic) simultaneously.
- Kenya has significant experience in elections; this tends to correlate with a decrease in costs. It has conducted four general elections since 1992, and a considerable part of its key personnel has been involved in the organisation of elections for ten years or longer.
- The costs of temporary personnel are reasonably low.
- Registration is a one-step process and voters' cards, which do not incorporate photographs or sophisticated security elements, are not expensive.

For a rough estimate of the cost of the electoral process throughout a five-year cycle, we have used data from three financial years: 2005/6, which can be considered as a normal year without general elections, and 2006/7 and 2007/8, which correspond to financial years during which practically all the activities related to the 2007 general elections took place. We have added the cost of the Commission itself, which is a direct charge on the Consolidated Fund and does not appear in the budget estimates. The amounts used are probably conservative, since they do not include potential upward revision of the 2007/8 estimates, which might still occur. The costs are as follows:

Commissioners' salaries (approx. KSh 100m/yr x 5 yrs)	KSh 500m
Budget 2005/6 (KSh 1,936m/yr x 3 non-election yrs)	KSh 5,808m
Budget 2006/7 (includes registration & other expenses)	KSh 4,872m
Budget 2007/8 (most of the election expenditures)	KSh 8,195m
TOTAL	KSh 19,375m

The total cost of this full electoral cycle is thus KSh 19,375m, approximately equivalent to US$ 290m. It should be noted that this amount does not represent the full cost of the elections since the estimates do not include:

- the cost of security (provided through a different budget)

- the contributions made by foreign donors to the ECK or to civil society organisations (CSOs) involved in voter education
- contributions to the funding of political parties, as is the case in some countries with which comparisons are made
- the full cost of building a voter register, since the register used for the 2002 elections was the basis and registration expenditures only cover additions to that register between 2003 and 2007

The cost of the election (without the additional costs mentioned above) is thus US$ 20.4 per registered voter (or US$ 29 per cast ballot). If we do not consider the whole electoral cycle, but limit the calculations to the costs sustained in 2006/7 and 2007/8, in which period the general elections took place, the cost per registered voter is US$ 13.74. How does this compare with other countries?

Comparison is somewhat difficult, because the data from other countries may not correspond with the items we have considered when estimating Kenyan electoral costs. However, these quotations from the article, "How much do elections cost?" in the *ACE Encyclopedia* (produced by the Administration and Cost of Elections [ACE] Electoral Knowledge Network) go some way to providing an answer:

> "Low electoral costs, approximately US$ 1 to US$ 3 per elector, tend to manifest in countries with longer electoral experience: the United States and most Western European countries; Chile (US$ 1.2), Costa Rica (US$ 1.8) and Brazil (US$ 2.3) in Latin America; Benin (US$ 1.6), Botswana (US$ 2.7), Ghana (US$ 0.7) and Senegal (US$ 1.2) in Africa; India (US$ 1) and Pakistan (US$ 0.5) in Asia; and Australia (US$ 3.2)."
>
> "In most countries that have less multi-party experience, costs tend to be higher, even taking into consideration elections that have taken place as part of peace-keeping operations, where the cost per elector is highest: Mexico (US$ 5.9), El Salvador (US$ 4.1) and Paraguay (US$ 3.7) can be mentioned in Latin America; Lesotho (US$ 6.9), Liberia (US$ 6.1) and Uganda (US$ 3.7) in Africa; and Russia (US$ 3.7) in Eastern Europe."

The costs in Kenya are comparable only to very special cases of post-conflict elections like Angola, Afghanistan or Cambodia. They are even higher than those observed in cases like Bosnia-Herzegovina under the Dayton Accords (US$ 8). The high cost does not speak highly of the ECK's efficiency.

The efficiency of the registration process and activities in the non-election period: Registration of voters constitutes a significant part of the expenses of any EMB. In the case of Kenya, they can be estimated at around 30% of the total electoral cost. As is discussed at length in annex 3.A the ECK has established a system that incorporates the cost of continuous registration while maintaining those of periodic registration. Although the ECK has established a network of 71

district offices, only some 2% of voters opt to register there. The remaining 98% do so at the annual registration drives.

While it is true that the ECK registered 1,767,000 voters during the two registration drives in 2007, the cost per registered voter was KSh 1,233 (around US$ 18), which is extraordinarily high. Although it is difficult to make precise estimates, the cost per registered voter of the 1,078,000 voters registered in the registration drives or through continuous registration in 2003 through 2006 was much higher, probably by as much as 50%.

As mentioned in annex 3.A, the productivity of the district offices is very low in non-election periods. In the first four months of 2008, the network of district offices conducted only 553 transactions: 129 new registrations, 110 transfers, 23 cases of persons missing in the register, 275 deceased and 16 changes in particulars. There was not much else to do in those offices during that period, so we can conservatively estimate that half of the cost of these offices is related to these 553 transactions. Since the cost of these offices for that period amounted to close to KSh 100m (according to the 2007/8 estimates, the annual budget of the district offices is KSh 402m), the cost of each of those transactions comes to KSh 90,000. While this is an extreme example, given that the period analysed was immediately after the general elections, the cost is staggering.

As discussed in annex 3.A, the best alternative for future voter registration is to move from continuous registration to a system that would relate voter registration to other population databases. One of the suggested alternatives would be to register voters when they request their national IDs. It is important to mention that this is not a new proposal. In its report on the 2002 general elections (p. 91), the ECK asserted that voter registration "would be made easier if voter registration was incorporated into the issuance of National Identity Cards. The cost would be reduced and the ECK's goal of registering all eligible Kenyan voters would be realised. There is need to ... [i]ntroduce major amendments to the process of registering persons to include the registration of voters [and to] [f]ormulate a long term policy on centralised registration of persons for issuance of a single identification card." However, nothing was done and the statement could well be repeated in its entirety in the forthcoming report on the 2007 elections.

Decision-making in the ECK: This section provides a detailed analysis of the way in which the ECK handled a major issue: the counting and tallying of votes at the constituency level. The problems of counting and tallying had already been identified in 2005, and it is worth quoting from the ECK's *Report on the National Referendum Evaluation Workshop* (held in March 2006):

> "To speed up the tallying process, the Commission should consider procuring computers for this purpose. Those to do the tallying must be computer literate ... There should be a mechanism for verification during counting and tallying of votes ... [A]dvance planning for communication protocol to be utilized in the 2007 general elections [should] commence immediately" (p. 26).
>
> 'The plenary stressed that the plans to decentralize the computerization process ... should be aggressively pursued. In addition, the plan to procure/hire 210 computers for the constituency level should commence immediately in readiness for the 2007 general elections. ... It was suggested that there is need to brief the

commissioners on ICT activities regularly to enable them [to] understand the technological advancements and make informed decisions" (p. 36).

Nothing much seems to have been done in the succeeding few months, and the topic of computer use for tallying at constituency level re-emerged only in the second meeting of the steering committee on assistance to the 2007 general elections, held on 25 October 2006. The Committee approved the use of assistance funds to procure computers and requested the ECK to submit a list of the required equipment. (An additional use was mentioned in a later ECK funding proposal to UNDP – "voter registration education".)

Seventy-two days after the October approval, on 5 January 2007, the ECK chairman sent the United Nations Development Programme (UNDP) the specifications for 210 laptops and 210 high-capacity printers, without any description or justification for the proposed use of the equipment. Within the next ten days, UNDP prepared the Invitation to Bid and other arrangements and the Invitation was published on 15 January 2007, calling for proposals to be submitted by 6 February 2007. The proposals received were analysed and, as the ECK specifications were somewhat exacting (2 x 12-hour internal batteries, TV output, and both a touchpad and a pointing nub), 32 out of 33 proposals for the laptops and 53 out of 55 proposals for the printers were rejected.

As the procurement was for more than US$ 1 million, it required the approval of UNDP's Advisory Committee on Procurement (ACP) in New York. The ACP initially rejected the proposal, indicating concerns about the large proportion of rejected proposals and the lack of justification for the special requirements. Having received explanations, however, the ACP authorised the procurement on 26 April 2007 and the procurement order to the single approved supplier was issued by UNDP on 2 May 2007 for delivery within one month.

Well before that, the ECK had been receiving advice from two external experts, Michael Yard (IFES) and Paul Anderson (UNDP), both emphasising the importance of improving the effectiveness of the transmission and the counting/tallying of results and suggesting a procedure based on the direct transmission of results from the polling stations – a procedure that had been successfully used in the 2005 referendum.

In late May, the ECK IT manager, Ayub Imbira, proposed a revised solution that "eliminates the PO [presiding officer] from the communication of results to ECK HQs and only leaves it to the RO [returning officer]. The following shall be the procedure of communicating the elections' results to ECK computer servers (for the 'call centre').

- The RO receives results from the PO and resolves any disputes.
- The RO, with his/her staff, shall capture these data into the computer provided to them by ECK. Each election's results are captured individually for each polling station. The RO will also tally the results as has been traditionally done. The emerging totals for each candidate in each election, among other computations e.g. number of cast votes per station, number of spoilt votes, shall be computed by the computer system and comparisons made to manual tallies. Differences should be resolved there and then.

- The data is then transmitted to ECK HQs through a secure telecommunication link.
- The computers servers at ECK HQs will receive these data, accept it into the database and re-transmit a copy of it (for each polling station) back to the RO. This is a handshaking process through which ECK HQs is acknowledging the receipt of the data.
- These results can then be made public.
- A failure in the system for any constituency will lead us to using the traditional system that uses voice telephony. Failures in the system may arise from telecommunication link failure, RO's computer system failure, inability by the RO and his/her staff to use the computer system and scepticism in the use of the system."

As can be seen, the system proposed is simple enough and would practically eliminate arithmetical errors. Mr Imbira proceeded to enumerate the main advantages of the proposed solution in relation to the traditional way of doing things:

- "Data is transmitted over a secure telecommunication link.
- Handshaking by the ECK HQs computer system and the ROs' computer systems provides more authentic results.
- ECK HQs will receive and store elections' results for each polling station contrary to the tradition of only capturing the final tally for the constituency.
- Duly signed elections' results per polling station will be scanned and archived.
- Partial elections' results for a constituency can be made public before all the counting centres have submitted their results."

A further advantage of the proposed solution is that requirements would be quite modest. The proposal lists them as:

- one computer for each constituency
- software for capturing and tallying the results
- secure telecommunications links (wireless links using GPRS - Safaricom and Celtel or CDMA - Telkom Wireless preferred)
- electricity supply back-up generators
- at least one ICT competent staff member (among the RO's clerks/staff in each constituency)

It should be noted that the necessary software is not particularly complex. Furthermore, IFES had offered to develop it within the framework of the support provided to the ECK. Similarly, since the assistant returning officers (AROs) and clerks had not yet been recruited, it would have been possible to recruit persons with a basic knowledge of computers and, in that case, their training in the use of user-friendly software would not have taken more than a day or so. The proposal was submitted to the ECK Plenary by the Chairman of the Research and Technical Committee on 14 June 2007 and adopted without amendment. It should be noted that the laptops had been delivered to the ECK three days earlier.

Both Mr. Imbira, the ECK IT manager, and Suleman Chege, now ECK Secretary but at the time an ECK Deputy Secretary, testified that they learned of the decision of the Plenary only by 8 August 2007. According to Mr. Imbira's written statement, "the tender for elections results tallying software was finalized on 23rd October 2007 and a purchase order raised". As to "the General Packet Radio Service (GPRS) and the Virtual Private Network (VPN), it was necessary to wait until 30th November". It seems that the requirement of some computer literacy for the recruitment of AROs and/or clerks, as well as the eventual addition of one or two days so that they could be trained in software use, were not included by the ECK units in charge of recruitment. In the event, the computers and printers were stored in the ECK warehouse until mid-December 2007, when they began to be distributed to the constituency offices. In some cases, they arrived only a few days before election day. It should not come as a surprise that, when the returning officers gathered in Nairobi on 22 December 2007, some complained about the problems they would have in using the computers, and the decision of 14 June 2007 was revoked in circumstances that are unclear. Since the ECK consistently failed to provide IREC with minutes of its Plenary meetings, IREC could not establish the status of this decision.

This analysis, although far from complete, provides some glimpses into the internal functioning of the ECK. In any organisation, when a decision is made by the top decision-making organ, it is supposed to be implemented without further ado by the rest of the organisation. Clearly, this was not the case with the computerisation of the results transmission and tallying process.

The need had been perceived after the 2005 referendum, but nothing seems to have been done for several months, in spite of the approaching 2007 elections. The advice of external experts was not taken into account. However, an adequate solution was developed internally and approved in time. When the proposal was adopted by the Plenary on 14 June 2007, enough time remained to ensure that computers could be used for tallying results at constituency level in the December elections: this required only the full support of all the relevant units in the organisation – procurement, personnel, training, etc. But nothing seems to have worked efficiently. There were delays in informing the officials concerned that the proposal had been approved, and all the necessary processes seem to have proceeded at a snail's pace.

If the proposal had been implemented, it would have been possible to issue partial results for *all* constituencies in an adequately programmed sequence, which would probably have eliminated most of the tension build-up created by the use of a slow, error-prone and old- fashioned approach to the tallying and relay of election results.

Conclusions/findings

The overall picture of the ECK depicted by these three partial analyses does not show an efficient organisation which plans in advance and implements crucial decisions expeditiously and transparently. The image is the opposite: a traditional organisation, with inadequate flows of information, averse to even minimal risks and to the use of technology, functioning in a compartmentalised fashion. Whatever the decisions to be made concerning the electoral system and other aspects of the electoral process, one thing is sure: the ECK's internal management processes deserve a thorough overhaul.

Recommendations

On the ECK's legal framework

IREC recommends that urgent consideration be given to drafting and enacting more detailed provisions on the ECK's institutional aspects, taking into account the relative complexity of the organisation and also its responsibilities, which have increased exponentially since the early 1990s. These provisions could be added to the existing National Assembly and Presidential Elections Act (as sections 3-3B have been) or contained in an Electoral Commission of Kenya Bill or in a consolidated electoral law, such as the Electoral Bill currently being drafted by the Kenya Law Reform Commission (KLRC).

On the composition of the ECK and the appointment of commissioners

IREC recommends that the requirement for a broad consultative process prior to the appointment of ordinary members and the chairman of the ECK be given legislative grounding; consultation should include political parties and civil society in its broadest sense. It is not essential to any purpose that the actual appointment be made by the President. Alternative means should be considered, including appointment by Parliament.

IREC recommends that the maximum number of commissioners be reduced to such a number as are functionally able to do the work. The currently bloated structure at the top should be trimmed radically.

IREC recommends that expiry of the terms of office of ECK members not coincide with election years. Ideally, a fully composed commission should be in office for two years prior to the conduct of general or presidential elections.

IREC recommends that the ECK be made accountable to Parliament, without prejudice to its status as an independent body; this should affect the channels by which it establishes and seeks approval for its budgetary requests.

On the ECK's operational procedures

IREC recommends a review of the ECK's administrative procedures, with a view to introducing as much certainty – and as little discretion – as possible in key operational areas so as to ensure uniformity of performance throughout the electoral process, from polling station level up to the

various teams at the national tallying centre. These procedures should be codified, well-known to staff and form the basis of training.

IREC recommends that the ECK review its overall training/briefing procedures in order to improve on their utility for adult learners. Training should, as a standard and not good-to-do measure, include simulations with the tools of work that the election staff are being prepared to use in the forthcoming elections. Commissioners and senior staff should all receive basic training in election management, such as Building Resources in Democracy Governance and Elections (BRIDGE) or Basic Election Administration Training (BEAT), at the earliest possible opportunity after joining the ECK and also receive such refresher training as may be necessary in the course of their service to the ECK.

IREC recommends that, in the recruitment of temporary election officers, commissioners should themselves vet only returning officer recruitment; they should establish clear procedures for the recruitment of other staff and ensure these are strictly implemented.

On the structure of the ECK Secretariat

IREC recommends an urgent re-examination of the roles of commissioners vis-à-vis those of staff, with a view to establishing a clearer commission-management separation of roles. Once clear lines of authority and responsibility have been established, investment in staff training should be increased with a view to vesting in the Secretariat much of the institutional memory needed to conduct a genuine election. Greater, if not all, implementation responsibility should be delegated to the Secretariat while greater, if not exclusive, policy-making responsibility should remain with the Commission.

To ensure accountability, IREC recommends the establishment of clear lines of individual responsibility for service delivery among both commissioners and staff.

IREC recommends that the ECK operating structure be rationalised to reduce time devoted to committees. Some committees can be consolidated or even abolished altogether. Their procedures should also be clarified, clear terms of reference should be drawn up for each committee and minutes should be kept for institutional memory.

IREC recommends that the district offices be disbanded. Instead, the ECK should decentralise only down to the provincial level, since eight well-equipped provincial offices would be able to function both at election time and between elections.. The provincial staff should include the right mix of skills, including information and communication technologies (ICT) literacy.

IREC recommends that the ECK revise its secretariat structure with a view to introducing performance management across the board. Staff should be on three-to-five-year contracts, renewable on the basis of performance. They should have clear job descriptions and the space to perform their roles on the basis of the responsibilities set out therein. Annual performance appraisals and performance-improvement measures should also be put in place.

IREC recommends that the Commission Secretary, among other qualifications, be an experienced election manager, competitively recruited from the open job market and have the status of Permanent Secretary.

On ECK funding modalities

IREC recommends that the issue of the ECK's expenses being a charge on the Consolidated Fund be considered carefully in the constitutional review process, which is expected to begin soon. Any measures agreed in that process to deal with the question of the financial independence of constitutional commissions would, of necessity, apply to the ECK.

On the ECK's advisory role

IREC recommends that in the constitutional review debate, enumeration of the ECK's roles should include advising the government, Parliament and other stakeholders on electoral law reform.

Though the ECK's role will be advisory, IREC recommends that its advice henceforth be taken more seriously than has been the case in the past and that the relevant institutions charged with law reform proceed to deliberate such proposals expeditiously with both the ECK and other stakeholders, with a view to incorporating them into the law.

On the ECK's functional efficiency

IREC recommends that a new or transformed ECK undertake a thorough management systems review as a matter of urgency. Such a review should aim to tailor the institution to implement critical decisions expeditiously and transparently.

CHAPTER 4

PUBLIC PARTICIPATION IN THE 2007 ELECTORAL PROCESS

4.1 Introduction

IREC is required by term of reference 1(c) to examine public participation in the 2007 electoral process and the electoral environment, including the roles and conduct of political parties, the media, civil society and observers. A peaceful and successful electoral process is dependent on the faithful discharge of duties and obligations by all. The wananchi were fertile recipients of whatever ideas carried the day in the marketplace of politics. Political parties hugely mobilised their supporters and a record turnout of voters was recorded. The media, fully liberalised and jostling for prime reportage, kept the public glued to television screens. FM stations transmitted vibrant call-in dialogues in the various languages of our communities throughout the entire electoral season. Civil society took the electoral message to the grassroots.

But there was a dark side too. Divisive tribal sentiments propagated by political parties and their supporters were spread and relayed to the public by the media. Civil society was accused of partiality; the faiths abandoned the true message, instead leading their flocks to their respective ethnic nests. Observers to some extent assumed the role of participants, with regrettable consequences. The electoral environment was expectant and fully charged. The ECK, as discussed elsewhere in this report, was ill-prepared to deal with the challenge of its lifetime.

This chapter interrogates the roles of the various constituents. It is a dialogue also with each other as each constituency tells the other what worked and what did not.

4.2 The role and conduct of political parties

The Constitution under section 123 recognises political parties which register as provided by law and comply with requirements of the law as to their constitutions or rules for nominating candidates for the National Assembly. Section 17 of the National Assembly and Presidential Elections Act (Cap.7 of the Laws of Kenya) governs the nomination of candidates for the National Assembly and presidential elections. The Local Government Act (Cap. 265) makes a similar demand of political parties with regard to nomination of candidates for local authorities. Until 30 June 2008 political parties were registered under the Societies Act (Cap 108).

Political parties are an essential component of Kenya's electoral system. The Constitution provides that party sponsorship is a prerequisite in presidential, parliamentary and civic elections: independent candidates are not recognised. Political parties represented in parliament nominate candidates to the National Assembly in proportion to the seats won

at elections. Political parties, therefore, are the only vehicles for political representation. Indeed, under section 40 of the Constitution, members who resign from their parties lose their parliamentary seats.

4.2.1 Evolution of Kenya's political parties

The party system in Kenya is nascent. While in the older western democracies parties evolved over several centuries as mass parties, the experience in Kenya has been that parties are either owned or ultimately controlled by individuals. The Kenya African National Union (KANU) was founded in 1960 and formed the first government at independence in 1963. In the years following, apart from some brief periods in the 1960s, other political parties were excluded from competitive politics. From 1982 to December 1991 Kenya was a *de jure* one-party state. Following the registration of a number of political parties, and a split in the Forum for Restoration of Democracy (FORD), at the time general elections were held in 1992 there were ten political parties. KANU won the election on a plurality.

In September 1997 Parliament adopted the recommendations of the Inter-Parties Parliamentary Group (IPPG) for reforms that were to be enacted before the 1997 elections. As a result of one of the recommendations, sixteen new parties were registered. Fifteen presidential candidates were nominated in all. The incumbent, Daniel Arap Moi, won with slightly over 40% of the vote. Opposition politicians realised that the only way to gain power successfully was through alliances, which has been the pattern since. Thus, prior to the 2002 general elections, alliances were formed, notably the umbrella opposition electoral platform, the National Rainbow Coalition (NARC), whose presidential candidate, Mwai Kibaki, was victorious.

NARC largely remained a conglomeration of some fourteen distinct parties but soon after Kibaki was sworn in, internal squabbles arose. Following the constitutional referendum in 2005, a dissenting faction broke away from the Kibaki administration. After the defeat of the banana ("yes") side in the referendum, Kibaki reconstituted the cabinet and excluded all the dissentients. In August 2007, as the general elections approached, the Party of National Unity (PNU) was formed as the banner under which Kibaki would stand for re-election. Several parties joined the coalition while retaining their separate identities. Controversy surrounding the nomination of parliamentary and civic candidates resulted in many politicians, on failing to get a PNU nomination, securing nomination instead by their individual parties.

In early September 2007, one of the factions in the Orange Democratic Movement-Kenya (ODM-K) took over an earlier registered party, the Orange Democratic Movement (ODM), and nominated Raila Odinga as its presidential candidate, while ODM-K nominated Kalonzo Musyoka as its candidate. The three main contestants in the

presidential contest were eventually Kibaki (PNU), Odinga (ODM) and Musyoka (ODM-K). Nine parties fielded presidential candidates, 117 parliamentary candidates and 118 civic candidates. Several reasons, including protracted power-struggles within parties, ethnicity, personality differences, personal ambitions and self-preservation, have seen the number of parties registered in Kenya grow from ten in 1992 to 160 by the end of June 2008.

The electoral campaign was, as is shown elsewhere in this report, extremely robust and at times violent and unruly. Indeed, this was no surprise. Political parties in Kenya have over decades been guilty of such conduct. Comparison with the well-known and respected *Code of Conduct for Political Parties Campaigning in Democratic Elections* published by the International Institute for Democracy and Electoral Assistance (International IDEA) shows that they have been breaching each and every international norm for many years. To cite a few examples:

- Recognise the right and freedom of all other parties to campaign, and to disseminate their political ideas and principles without fear.
- Use its good offices to ensure reasonable freedom of access to all potential voters.
- Ensure that none of its supporters are permitted to do anything that is prohibited.
- Organise and conduct its election campaign in a congenial and peaceful atmosphere.
- Avoid using language that is inflammatory or threatens or incites violence.

These internationally recognised norms have also been routinely breached in relation to the polling and counting processes, for example:

- Co-operate with election officials to ensure peaceful and orderly polling, and freedom of voters to exercise their franchise,
- Not procure votes by forcible occupation of polling stations or through illegal activities in polling stations.
- Ensure the safety and security of electoral officials before, during and after the polls, and not interfere unjustifiably or in bad faith with the duties of election officials.
- Respect and co-operate with official or accredited election observers.
- Maintain and aid in maintaining the secrecy of the vote.
- Accept the outcome of an election that has been certified.
- In the event of grievance, submit any grievance only to the relevant dispute settlement agency.

- Accept and comply with the final decisions of the dispute settlement agency.

There has also been scant respect for international norms relating to abuse of state resources for political advantage:

- Not abuse a position of power, privilege or influence for political purpose by offering a reward, threatening a penalty or by any other means.
- Not use official state, provincial, municipal or other public resources for campaign purposes.
- Not coerce or offer monetary or other kinds of inducements to persons to stand or not to stand as candidates.

4.2.2 Political parties as tools of governance: the Kenyan experience

An examination of political parties in Kenya (as at 30 June 2008) reveals that they are, as currently constituted, incapable of providing democratic space to their membership. By and large, they are characterised by lack of transparency in choosing leaders. Elections for office- bearers are rarely held or when held are cosmetic and therefore undemocratic. As a result, leadership is often arbitrary, autocratic and unaccountable. Parties are also dogged by flawed and poor party nomination rules and processes. The leadership interferes with party electoral processes, especially in nominating candidates for elective positions. After an analysis of the 2007 parliamentary and civic nominations by political parties, the Centre for Law and Research International (CLARION), a Kenya-based NGO, observed that numerous direct nominations were given to candidates mainly in PNU and ODM. In the result, other candidates who wished to contest the elections in these parties had to seek alternative parties or desist from vying altogether. The report argues that some candidates got certificates because of their "good connections" with the party headquarters, party election boards and/or party leaders.

Parties are formed merely to serve as vehicles for elections. A vibrant membership is the energy that drives a party and therefore members ought to be recruited on a continuous basis. Kenyan parties, however, lack an identifiable party membership and in 2007 anyone who had a voter's card could participate in the nominations for all political parties in the constituency. Parties have historically been aligned to the seven or eight numerically dominant ethnic groupings.

During the electoral period, parties consistently lack respect for laws or regulations and the Electoral Code of Conduct is blatantly violated. The ECK has confirmed to IREC that the few politicians who were fined for breaches under the code in the run-up to the 2007 general elections have refused to pay the fines. ECK has had to file proceedings in the High Court in order to enforce its orders but to date these cases remain undetermined. Parties condone, without censure, their candidates' violation of electoral regulations. For

example, a report of the "National Voter Bribery Survey" indicated that up to KSh 907 million may have been spent in bribing voters (*Daily Nation*, 30 November 2007). Parties also suffer an endemic lack of equality and equity in the representation of women, persons with disabilities and other special interests.

4.2.3 How political parties conducted themselves in the 2007 elections

The verdict by election observers: Election observer groups and citizens closely monitored political parties in the 2007 general elections and their assessment of the conduct of political parties is largely damning. The Commonwealth Observer Report states that many party leaders (particularly among the opposition) began their campaigns in an unofficial sense after the 2005 Referendum. Campaigns were generally largely personally driven, with little interest in the party manifestos. Ethnic violence was one of the negative aspects. At certain times there were clashes between party supporters and also even intraparty clashes.

The report also cites abuse of state resources for party political purposes, such as use of official vehicles during campaigns. The observers noted reports of vote-buying and exceptionally high campaign expenditure. They also reported overcrowding in polling stations by dominant parties' agents, many of these without visible identification. Both PNU and ODM were castigated for holding press conferences and announcing their own final results for the presidential race, each claiming victory. While all parties generally called for calm, these actions appear to have led to significant unrest on the streets.

The European Union Election Observer Mission (EU EOM) reports that primaries for parliamentary and civic elections were seriously marred by irregularities, chaotic administration and interference from party headquarters in individual constituencies. Unsuccessful aspirants and their supporters protested against both the process and the outcome, in some cases violently. Many MPs from the previous parliament who failed to gain nomination defected so as to accept nomination by smaller parties. The lack of permanent party structure and membership was seen as the cause of the incapacity of political parties to conduct primaries. The confusion of the primaries led to a number of complaints being lodged with the ECK, which, however, ruled that many of the complaints were misdirected in terms of the respective parties' rules.

With regard to campaigns, the EU EOM reports a generally free environment, but strong ethno-political polarisation particularly between supporters of the two main contenders created a hostile atmosphere towards the other side in their respective strongholds. Candidates distributed money and goods widely, an activity that appears to be entrenched in the political culture of the country. Parties played in a populist way with the fears and aspirations of the voters where issues such as devolution were concerned.

The Kenya National Commission on Human Rights (KNHCR) in its monitoring report dated August 2008 names numerous ministers of government and other public officers who misused and misappropriated public resources in furtherance of partisan politics for the incumbent administration. Over thirty incidents are cited. It also gives examples of hate speech on the campaign trail. With regard to nominations, the report cites four constituencies where party leaders imposed on the electorate candidates who had failed in the primaries.

The East African Community Observer Mission reported that political parties exhibited varying states of unpreparedness and that there was re-alignment of political parties and party affiliations during primaries. It also reported instances of political intimidation at various polling stations throughout the country.

The Pan-African Parliament Election Observer Mission reported agitated political party agents engaging ECK officials at the national tallying centre in heated confrontation, in some instances becoming physical among political players.

The verdict by wananchi: The wananchi expressed several concerns over the conduct of political parties during the pre- and post-election periods. These are views that IREC captured during its public meetings around the country. Voter bribery, vote-buying, electoral violence and voter intimidation were rife during the 2007 elections. There were also complaints of the widespread use of hate speech by politicians and harassment and intimidation of party supporters, especially women, by supporters of competing parties. Owing to many reasons, including violence during party nominations, there were few women candidates. There is consensus that political parties lack democratic practices. The wananchi from Garissa specifically complained that the multitude of parties confused them.

What political parties think of themselves: Counsel for both PNU and ODM presented IREC with the political parties' views on how parties conducted themselves in the 2007 elections. A telling submission read that "political party leaders in Kenya are their own worst enemies, the parties are seen as an end in themselves rather than a means to an end".

It is common cause between ODM and PNU that nominations have always been marred by blatant rigging and allegations of rigging, and that the 2007 nomination exercise was no different. These parties also agree that the primaries are the "real" election because, if a candidate is nominated in a constituency by a popular and dominant party, the seat is as good as won. Political parties, however, do not have adequate financial, infrastructural and manpower resources to organise primaries. As the funds to sustain parties and manage processes are donated by individuals, the nomination process becomes an endorsement affair. In the meanwhile, "briefcase" political parties engaged in political mercantilism by camping outside ECK headquarters offering losers an alternative

platform to pursue their political ambitions. There were also cases of parties issuing nomination certificates to multiple candidates, the ECK then accepting the first candidate to present his/her certificate. The "big" parties waited until the last minute to carry out their nominations to stall party-hopping by those not selected. The ECK's planning, and particularly its printing of ballot papers, was therefore hampered.

The parties considered the 2007 elections the most competitive in Kenya's history. In the campaign one of the dominant parties pronounced through its presidential flag-bearer that these elections would be "the mother of all battles". Some parties complained that the incumbent president was misusing government resources and civil servants holding high positions in government were deployed in partisan campaigns. Ethnic hate speech and stereotyping was propagated and communities living outside their "indigenous" provinces were threatened with eviction. There was "zoning" too, which meant that dominant parties' strongholds were out of bounds to the opposing party candidates. Incessant claims of rigging and highly inflammatory language were heard several months before the polls. Some weeks to polling day, there were a number of reports of party supporters being maimed or killed for wearing their party apparel or campaigning in opposition territory. Several administration policemen were killed in Nyanza province for being suspected PNU agents, an allegation the PNU and the government denied, saying that the officers had been deployed to oversee security in the handling of electoral documents.

A charge was levelled against the ECK itself. Early in 2007, and again shortly before the elections, new commissioners had been appointed by the President without consulting other political parties in the spirit of the Inter-Parties Parliamentary Group (IPPG) agreement. The ECK could therefore, so it was contended, never be impartial. After the announcement of President Kibaki as winner of the presidential poll on 30 December 2007, ODM publicly rejected the result as fraudulent and declared that it was not possible to receive justice from a partisan judiciary that was known to subvert justice in electoral matters. They also viewed the appointment of judges on Christmas Eve as preparation for a biased consideration of the anticipated election petitions.

In conclusion, political parties breached most of the rules in the national and international books regarding the orderly conduct of campaigns and elections. While Kenyans must improve the entirety of the regulatory regime that currently governs elections, the greater challenge is to inculcate an ethical and responsible political culture. The culture of impunity maintained by all political players would certainly strain any law-enforcement mechanisms that are established.

4.2.4 Regulation of political parties

Until 30 June 2008 political parties were regulated in a *laissez faire* manner. The operative statute was the Societies Act. Registration of political parties was the responsibility of the Registrar of Societies, an officer in the Attorney-General's office. Everyone was free to found a political party, the Act largely treating political parties as mere societies. Even though the Registrar had powers to refuse to register a society if satisfied that it did not exist (section 11(2)(e)), there are still many registered political parties that exist only in name which the Registrar did not seek to deregister..

The Political Parties Act (PPA) came into force on 1 July 2008 and seeks to address some of the problems inherent in political parties. The office of Registrar is created to manage the provisions of the Act. This is, however, to be an office within the structure of the ECK. A political party's registration is to be denied where membership is restricted to or includes only members of a particular ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious group or if the proposed party's structure or mode of operation is not national. The initial registration by the Registrar is provisional and is given within thirty days if all conditions are fulfilled. To gain full registration a political party must have obtained membership signatures in each province of at least two hundred voters registered for parliamentary elections and the governing body must include a member from each province who is ordinarily resident or registered to vote in that province. Existing parties are required to apply for full registration under the Act within six months.

Upon full registration a political party must submit a written declaration of its assets and expenditure including all contributions, donations or pledges of contributions or donations. The declaration must state the sources of all funds and assets. A fully registered party loses its status as a political party or body corporate if it has not participated in a parliamentary or local government election for a period of six years or where it fails to participate in the next general election following its registration. Coalitions must deposit their instruments with the Registrar for purposes of arbitration.

A most important innovation is that the Act establishes a Political Parties Fund, 15% of which is to be distributed equally among political parties, 85% proportionately to the total number of votes secured at the last general election by each party's candidates and 5% retained for administration of the Fund. The Act in addition lays down the various purposes for which such funding may be used. The accounts of political parties are to be audited annually by the Auditor-General and the audit reports forwarded to Parliament and the Registrar.

The Act could be misused to offer people a financial benefit for registering a party. Many people would happily pay to have a party registered if they could then share equally with all other parties in the 15% distributed equally under section 30(3)(a) of the new Act. The

formation of parties could arguably be discouraged by devising barriers, such as requiring a fairly large deposit in order to be allowed to participate in an election. This could be coupled with a requirement that a given number of signatures of voters registered in the particular constituency have to be lodged at the time of nomination of a candidate.

4.3 Role and conduct of the media

There cannot be free and fair elections unless freedom of information is secured and the media allowed to operate without undue hindrance.

The 2007 elections were held amid unprecedented media attention. The print and electronic media sought to outdo each other in election coverage from the campaign stage right through to the transmission of election results. The elections came at a time when the media arena had been fully liberalised. The consequence was the entry of exciting new players, mainly in the form of frequency modulated (FM) radio stations. Many of these went straight into interactive vernacular radio broadcasting complete with call-in facilities. Millions of anxious and excited Kenyans who for years had been only passive listeners to one state-owned radio station could now access a wide choice of radio stations including those that broadcast in their respective home languages.

ECK accredited 2,964 local and international journalists to cover the 2007 elections. Accredited journalists were given ECK election kits, including Media Guidelines, and were briefed by the ECK. Training and orientation was carried out by the Media Council of Kenya (MCK), the consultant for the Media and Elections Project managed by UNDP.

4.3.1 The regulatory framework and international standards on the behaviour of media during campaigns and democratic elections

The Constitution in section 79 secures the individual's freedom of expression and freedom to receive ideas and information. The Media Act 2007, the first attempt at self-regulation for the media, set up the MCK as the professional enforcement body. The second schedule to the Act sets out a code of conduct for the practice of journalism which emphasises the main tenets of ethics in journalism including accuracy and fairness, independence, integrity and accountability.

Kenya is also a signatory to several international and regional conventions that secure the freedom of expression. These include the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the African Charter on Human and People's Rights and the Declaration of Principles on Freedom of Expression in Africa. This last stipulates that any restrictions on the freedom of expression must be provided by the law and must serve a legitimate interest that is necessary for a democratic society.

The ECK's media guidelines highlight the following:

- a direction to the Kenya Broadcasting Corporation (KBC) to comply with the provisions of its constituting Act
- a responsible media that provides fair and impartial coverage to all contestants
- upholding standards by journalists
- resisting bribery

In September 2007 media correspondents in Kenya published a guidebook on election coverage in Kenya which covers salient principles of ethics in journalism including accuracy, impartiality and fairness.

4.3.2 The Kenya Broadcasting Corporation

The Kenya Broadcasting Corporation (KBC), a State corporation established during one-party rule, existed as a broadcasting monopoly and was widely viewed as a propaganda arm of the government. It was therefore hardly surprising that KBC came under serious criticism over the way it covered the 2007 general elections. The station was specifically accused of favouring PNU. Aggrieved political parties raised their concerns with ECK but it had neither the power nor the resolve to force KBC to change and merely issued statements agreeing with the complaint of the opposition parties. Equally controversial was the official announcement of the presidential results via KBC. The swearing-in of the president, also carried live by KBC, was unacceptable to some Kenyans. Much of the criticism of KBC has arisen not just from its former monopoly status but also because of its strategic position as the only broadcaster covering virtually the entire country and its failure to make a clean break with the past.

The station has been reluctant to act independently and, since it is a creature of the political establishment, its management, operations and funding have been at the mercy of the government. Its board of directors is chaired by a presidential appointee, board members are appointed by the minister in charge of information and its managing director by the minister in consultation with the board.

Fairness in electoral competition requires that candidates be given reasonable access to those media channels that are more likely to be the most effective in delivering their arguments to the voters, and particularly when that channel happens to be public.

4.3.3 Opinion polls

The impact of opinion polls on the outcome of the 2007 presidential elections was controversial. While politicians sought to downplay the significance of opinion polls on the outcome of the presidential race, it was obvious that the polls were being taken seriously by political campaign strategists, voters and even the presidential contestants.

Every time the various poll results were released, a storm brewed. Opinion polls conducted within the last three months before the 2007 elections confirmed the prediction that the elections would be a hotly contested affair between Kibaki and Raila.

In the public meetings held by IREC many Kenyans doubted the value of opinion polls. Some even averred that the polls were manufactured by partisan pollsters in order to influence them to vote one way or another. Several interlocutors proposed that if opinion polls could not be avoided altogether, then they should cease several months ahead of the poll. Many Kenyans took a different view: the polls predicted that their particular presidential candidate would win the election: this did not happen: therefore the elections must have been rigged.

While a ban on opinion polls would be an infringement of the freedom of expression and of the citizen's right to receive information, there could arguably be justification for some limited regulation. The solution should not, however, be sought in regulation but in maximising journalists' skills and knowledge vis-à-vis electoral reporting. The media should be adequately briefed on both public opinion and exit polls; forums should be arranged, if necessary by the ECK, to interrogate the authors, producers and sponsors in open debate, the debates in themselves becoming opportunities for educating voters and training journalists.

4.3.4 Hate speech

In the run-up to the 2007 elections and in their aftermath, political leaders and Kenyans at large were guilty of a truly alarming level of hate speech. Manifestly degrading, intimidating and inciting language targeted Kenyans on the basis of their gender, age, ethnicity, religion, socio-economic class and political views, and was aired by the media uncurbed. Several FM stations are allegedly owned by politicians. Responsibility for these unacceptable broadcasts could be enhanced by lifting the veil on ownership of such media. Regulation of the freedom of expression is covered in chapter 5 of this report. It suffices to state here that this all- important right should be explored substantively in the constitutional review debate and a full discussion of hate speech legislation by all stakeholders should be encouraged.

4.3.5 How the media conducted itself

The media made a commendable contribution to voter education and civic awareness. The country enjoyed the highest voter turnout in its history. During IREC's public meetings many people hailed the media for being vigilant and exposing rigging and malpractices. Other Kenyans expressed the view that the media had betrayed the people of Kenya. Yet others appeared to be appreciative of whatever media was available to them and had no complaints at all – this was the case in Garissa, Mandera and Wajir. The

EU EOM reported high levels of neutral and positive media coverage of the election preparations and candidates.

The banning of live coverage after the announcement of presidential results was perceived as suspicious, wrong and provocatively high-handed. IREC's impression is that this ban was a kneejerk reaction by securocrats who did not deign to consult the ECK, which was supposed to be in charge of the whole electoral process, including the crucially important tallying and announcing component being conducted at the KICC. This action may well have contributed inadvertently to the eruption of violence. Indeed the information blackout, engrafted on to the ECK's lamentable failure to keep the people of Kenya informed, could well be seen a direct link in the chain of causation that led to the tragedy. The ECK and the security agencies knew that rumours of rigging had been flying for months. Tensions had risen alarmingly and the ECK knew, or should have known, that only transparent truth could save the credibility of the elections and defuse the dangerously charged atmosphere.

Views expressed by electoral observers: The EU EOM report states that:

- There was an absence of a satisfactory degree of equitable coverage on a number of radio and television stations in breach of the MCK's code of ethics.
- KBC's coverage demonstrated a marked failure to fulfil, even its minimal obligations as a public service broadcaster.
- KBC Radio's English- and Swahili-language services also demonstrated a high level of bias in favour of the PNU coalition of partners.
- Vernacular radio stations' coverage demonstrated a tendency to grant greater access to the parties and candidates with close links to the tribal and political affiliations of their listeners.

The Commonwealth Election Observer Group on Kenyan Elections 2007 observes that in the lead-up to the elections, the MCK and the ECK developed guidelines aimed at ensuring responsible media coverage, upholding professional standards, impartiality and independence. These were, however, often flouted. The observers particularly noted the unethical publishing of anonymous advertisements by some media houses.

The verdict by media consultants: Strategic Public Relations and Research Limited, the media consultant for the media monitoring project under the UNDP-managed Electoral Assistance Programme made the following findings in its final report:

- Even though the leading newspapers, television and radio stations were not very openly biased for or against any of the candidates, there were discernible preferences shown by the tilt they gave in favour of or against the candidates and their campaign issues.

- In the run-up to the elections there was silent endorsement by the various stations and publications of the various parties and candidates. KBC showed obvious preference for President Kibaki and PNU with consistent coverage of over 50% of air-time with the other parties and candidates sharing the rest. The FM stations and the print media gave preference to either one of the two candidates.
- The amount and nature of coverage given to the main parties and candidates significantly improved in balance and fairness after the bias was reported in the initial presentations.
- Election-day coverage concentrated mainly on the occurrences at individual polling stations with reports of sporadic violence invariably reported by the media.
- As election results started trickling in, the stations competed with each other to be the first to announce the results from various constituencies. Some stations relied on unspecified sources to broadcast and announce results ahead of the ECK.
- Most media houses avoided hate speech but several FM stations incited ethnic animosity, particularly during call-in programs.

The MCK, the consultant for the UNDP-managed Media and Elections Project, noted the following challenges:

- Prevalence of untrained people practising as journalists in media houses, and particularly reliance on correspondents who in most cases were untrained.
- Media owners who influenced the content and facilitated bias towards specific political parties and candidates.
- Embedding of correspondents with politicians.
- Partisan vernacular FM stations.
- Religious broadcasters who exhibited clear bias in favour of certain candidates and political parties.
- Corruption of journalists covering elections.
- The conflict between profit-making and adherence to the ethics of journalism.

The verdict by wananchi: In the IREC public meetings there was trenchant censure of the media: partisanship, bias, factual incorrectness and even false reporting; communication of unsubstantiated and unverified results and allowing parties to announce winners and losers; propagation of hate campaigns and messages (especially in the case of FM stations); politically divided newsrooms where story-lines would depend on which news

anchor was on shift; blogs that were intensely tribal and exacerbated negative ethnic feelings.

IREC's review of newspaper coverage during 2007 revealed many instances in which highly sensitive stories were reported in language that had the potential to heighten public anxiety. An egregious example is this report in *The Standard* on 26 December 2007:

"Apart from what our undercover team witnessed, an AP officer, who was drafted into the squad, turned up at KTN studios yesterday and gave fresh insights into the plot...Last Saturday, KTN ran an exclusive story on how some 2,500 APs were being trained to interfere with tomorrow's General Election...This was after a whistleblower leaked information to the station that some police officers were allegedly marking ballots at the AP Commandant's house in Embakasi and at the fourth floor of Harambee House... The Standard established that the recruits held Bibles then uttered the following words in unison: 'I ...swear that I will not at the General Election taking place on December 27, 2007 do anything forbidden by Section 5 of the Election Offences Act which has been read to me.' Sources said this vow, which is the standard ECK pledge, was taken to make them look like just harmless agents..."

4.4 Role and conduct of civil society, faith-based organisations and election observers

A vibrant civil society is a vital player in checking the excesses of the State through advocacy and lobbying. Kenya has enjoyed an energised civil society particularly from the early 1990s, when this segment of society contributed immensely to the interventions that led to the restoration of multi-party democracy. Civil society organisations (CSOs) have since continued to play an invaluable role in sustaining a growing democratic culture. CSOs, including faith- based organisations (FBOs), contributed immensely in the promotion of voter registration. They also participated in the election observation process. The visibility of civil society in an electoral observation process is critical in ensuring compliance and respect for the rule of law and deterring irregularities. A consistent and effective domestic observation programme is one of the key components in measuring electoral performance and enhancement of frameworks, monitoring use of public resources for private benefit, assessing media coverage; checking electoral violence and observing party behaviour and voter attitudes.

"Vijana Tugutuke Ni Time Yetu", a process funded by AUSAID, recorded great success in voter education and promotion of voter awareness, particularly among the youth. Under a community-based voter education programme funded through the United Nations Development Programme Joint Donors Elections Assistance Programme (UNDP EAP), the ECK approved 42 civil society voter education facilitators. They included those able to operate at grassroots community level using locally identified educators.

The UNDP EAP co-ordinator, while reporting a very successful outcome that far exceeded expectations, noted that voter education was started only near election time. As a result, partisan political messages tended to compete with wholesome voter education messages. IREC also noted complaints by some CSOs that they were unfairly excluded from participation as voter education facilitators. While the ECK explained that the exclusion was by reason of failure to qualify on neutrality, it was not clear what criteria it applied to determine that issue.

4.4.1 Electoral obsèrvation

International IDEA defines electoral observation as the purposeful gathering of information regarding an electoral process and the making of informed judgments about the process on the basis of the information collected. Electoral observers will usually be domestic, regional and international. Election observation may be either short-term, covering election-day activities, or long-term, covering all the phases of the electoral process from evaluating the existence of an enabling environment to the processing of post-election complaints and petitions.

One of the most common purposes of electoral observation is to assess the legitimacy of an electoral process. In most cases, only long-term missions with significant resources can effectively reduce fraud and manipulation. Electoral observation may also help build and reinforce democratic practices and institutions. It may also contribute to the resolution of conflict or to the solution of technical problems. Observation organisations may also mediate or provide assistance if requested by the observed target. In sum, electoral observation ought to be the impartial barometer that evaluates whether elections have been credible, free and fair. It must, however, be noted that the impact on legitimation is not always achieved by carefully thought-out reports, based on the information collected by observers and carefully analysed and chronicled by the media. Nor should it be assumed that the higher the quality and accuracy of the information on which the report is based, the greater the impact on public opinion. Opinions are in many cases shaped by observer mission statements issued shortly after polls close and based rather more on overall political evaluation of the after-poll situation than on careful and detailed analysis of the information collected by the observer mission.

The ECK accredited 24,063 election observers. These included 15,000 local observers under the Kenya Elections Domestic Observation Forum (KEDOF) (which, however, itself cites a figure of 16,595). The international and regional observer groups accredited included the European Union, the Commonwealth International Conference of the Great Lakes Region, the East African Community and the Independent Republican Institute (IRI). The ECK gave all observers accreditation badges and bags containing election materials which included the guidelines on observation. The observers were expected to

be impartial. They were also expected to have the financial and logistical capacity to carry out the observation process. IREC has found these observer reports very helpful.

4.4.2 Domestic observers

An evaluation of the genesis of national election observations establishes that in all cases observation groups are born out of the suspicion that the government of the day will be involved in fraudulent manoeuvres, and that the monitoring role of party agents will not be sufficient to provide adequate safeguards. There are many examples that indicate a close connection between domestic observers and the opposition. This does not, however, mean that domestic observers are necessarily partial or biased. They have also on occasion proved their impartiality by helping a winning incumbent reaffirm the legitimacy of the victory.

A key component of the preparations for the December 2007 elections was the organisation of effective domestic observation. Domestic observation is crucial in assessing the fairness, transparency and effectiveness of general elections. Over the years, domestic observation has been increasingly influential in facilitating citizens' active participation in elections and holding of their leaders to account.

In consultation with stakeholders, the UNDP EAP identified a technical planning group representative of professional, religious, youth, women's, disabled and marginalised groups and organisations working in the area of governance, elections and domestic observation. The partnership operated under the name Kenya Elections Domestic Observation Forum (KEDOF). Its mission was to observe and determine the credibility, peacefulness, freeness and fairness of the 2007 general elections. KEDOF intended to deploy over 35,000 trained observers/ poll watchers but only some 16,000 were in fact deployed, of whom 3,000 failed to submit their observation checklists after the exercise.

KEDOF faced serious challenges. There was deep-seated antagonism within KEDOF between a number of groups, each of which felt it was uniquely placed to manage the coordination and funding. Its work was dogged throughout by internal differences, weak leadership and delayed implementation. The EAP report states that KEDOF "reflected in microcosm the ethnic, political, personality and other divisions that exploded so dramatically after the election".

Granted the challenges that KEDOF faced, it is not surprising that its final report remains unpublished. A draft of the report was, however, made available to IREC at the eleventh hour, has been taken into account to the limited extent possible.

The KEDOF case is particularly unfortunate as domestic observers enjoy several advantages over international ones. KEDOF had the potential to convert itself into a formal long-term institution with strong structures and the ability to mobilise increased

human and financial resources for long-term observation of future elections. Setting up an entirely new organisation will be time-consuming and most likely suffer the same turmoil of infancy that KEDOF suffered. The ability to attract future funding for similar activities is also a concern. The real threat to this enterprise, however, is the strong interest nurtured by organisations for separate reporting to reinforce organisational identity and increase media exposure.

4.4.3 The regulatory framework and international standards on the behaviour of election observers in democratic elections

International IDEA, in its *Code of Conduct for the Ethical and Professional Observation of Elections,* enumerates some basic principles which include respect for the observation target's sovereignty and culture and a faithful, comprehensive and accurate account of the events. To like effect the *Principles for Election Management, Monitoring, and Observation in the SADC Region* recommends *inter alia* that all observer missions:

- ensure that participants declare any conflicts of interest prior to taking part in the mission
- produce and distribute widely impartial, credible and professionally written press releases and interim and final assessment reports
- refrain from actions that could lead to a perception of sympathy for a particular candidate or political party
- uncover and make public any observed irregularities and malpractices in the electoral process for possible redress by the relevant institutions

The ECK *Guidelines for Election Observers* sets out the role, rights and privileges of observers comprehensively and gives a summary of principles and practices for election observers, which by and large accord with the international principles.

The Presidential and Parliamentary Elections (Amendment) Regulations 2002 mandate the ECK to accredit individuals and organisations to act as election observers and to issue guidelines accordingly.

IREC considers that the current regulations that govern the conduct of election observers are adequate as drafted. The ECK should undertake a neutrality test for all persons seeking accreditation as observers and enforce the regulations properly. IREC has not identified a single case where the ECK withdrew the accreditation of an observer or even sought to enforce some of the key provisions in the regulations.

4.4.4 Complaints against CSOs and election observers

The ECK has to date received eleven observer reports. The ECK made the submission to IREC that some observers turned into monitors and some showed open support for certain political parties and their respective candidates. They demanded to talk to department heads and commissioners of the ECK and further demanded confidential documents such as budgets for various election programmes. Some foreign missions purported to act as monitors while they had not even been granted observer status by the ECK. ECK Commissioner Tumwa, under cross-examination at one of IREC's formal hearings, singled out part of an EU EOM press statement regarding the Molo presidential results which trashed the results that ECK had just announced. The passage in the Mission's preliminary statement on 1 January 2008 (EU EOM) reads:

> "The 2007 General Elections have fallen short of key international and regional standards for democratic elections. Most significantly, they were marred by a lack of transparency in the processing and tallying of presidential results, which raises concerns about the accuracy of the final result of this election. ... Serious inconsistencies and anomalies were identified in the results announced by the ECK. For example, in Molo and Kieni, there were significant differences between presidential results reported by EU EOM observers at the constituency level and results announced by the ECK at national level. Additionally, at the ECK headquarters, the EU EOM Chief Observer was shown forms on which the election results for constituencies 205 (Lari) and 096 (Kandara) had been changed. It was unclear by whom, where, and especially when these changes were made ... Furthermore for Kerugoya, EU observers reported a discrepancy of more than 10,000 votes in the official turnout given for Presidential and Legislative elections."

Some observer reports published locally and internationally had the potential of exacerbating an already intensely volatile post-election period. The most potent and influential of these is a document authored by some four domestic election observers, titled *Kenyans for Peace with Truth and Justice (KPTJ): Kenyan Elections Observers' Log: December 29-30, 2007.* Under the sub-title "Countdown to deception: 30 hours that destroyed Kenya", the authors made a number of bold and emotive statements, some of which, unfortunately, lack a credible basis. Others evidence a basic misunderstanding of the procedure they had observed. They reportedly "noticed transgressions at once brazen and shocking" with regard to the presidential ballot tallying. They referred to "invented figures", in reference to Molo constituency, and further that the ECK did not "provide any evidence to the contrary" when faced with a complaint that in 48 constituencies results had been reported without supporting documents and Kibaki's votes had been inflated. The document was reproduced widely by the international press and has become the received wisdom on the subject. In annex 4.A IREC provides an analysis of the KPTJ

document, pointing out the various mistakes and misunderstandings that have been identified.

The ECK is largely to blame for these mistakes and misunderstandings. Against the advice of experienced external advisors, it rejected the announcement of "partial" or "progressive" results that would have kept data flowing from the constituencies by the morning of 28 December 2007. Instead the ECK, realising the need for expeditious announcements, (a) opted for a system of announcing results based on faxed or phoned-in data, which was inherently prone to misinterpretation by the uninformed, and then (b) failed to explain the system adequately, not only to political parties, observers and other members of the public, but even to its own staff. The resultant torrent of vilification to which it was subjected was not entirely undeserved.

The IRI, in a report, quoted with approval the testimony of David Mozersky, Horn of Africa Project Director, with regard to "election fraud" and rigging by both PNU and ODM. Further that:

> "the results were arbitrarily changed to give President Mwai Kibaki a 230,000-vote victory. The disappearance of returning officers in PNU strongholds in particular ... and lack of either stamps or proper signatures of party agents on the statutory forms presented in the last two days of the count are damning indications of rigging."

The Law Society of Kenya (LSK) in its preliminary statement of 7 January 2008 concluded that the 2007 elections:

> "marked an unfortunate and sad step backwards in the process of the death and strangulation of democracy in Kenya and that Mr. Mwai Kibaki was illegally and/or illegitimately in office ... [his] conduct of the elections was below and under the expected international standards ... because the final tabulation and tallying of the Presidential votes was done fraudulently leading to a hasty swearing in of an illegitimate president. The elections also showed a number of shortcomings especially on the part of the Electoral Commission of Kenya inter alia ... ignoring its Returning Officer in charge of Molo at KICC, who was trying to say that the results being announced were not those that he had recorded and announced at his constituency."

The LSK reference to the Molo returning officer and his identity in the above statement is factually incorrect. The *bona fide* returning officer for Molo, Mr Laban Arupe Korellach, testified at the IREC formal hearings that he was shocked when friends called on 30 December 2007 to inform him that there was an impostor at KICC passing himself off as the returning officer for Molo.

Political parties' verdict: While ODM in its submissions to IREC did not have any complaints regarding observers, both local and international, PNU submitted that the observers were biased. PNU recommended that the electoral observation guidelines be strictly observed in accordance with the law.

Wananchi's verdict: During IREC's public meetings countrywide, many Kenyans expressed the view that religious leaders right across the country were partisan, depending on their ethnic community. Kenyans across the political divide also stated that many of the accredited CSOs used the opportunity to propagate partisan ideas under the guise of educating citizens on their civic duties.

With regard to election observers and civil society, PNU's supporters accused observers of having been partisan, unprofessional and interested only in furthering their selfish agenda. It was averred that both domestic and international observers, including ambassadors, openly supported one political party and therefore did not give an objective assessment of the elections. NGOs were also reportedly biased in their involvement in the process and their final evaluation. It was further averred that some of the NGOs were specifically constituted for the purposes of advancing partisan positions in the 2007 general elections and that thereafter they ceased to be operational.

Recommendations

Concerning nominations

i) *IREC recommends that a standing liaison committee be set up comprising the ECK and political parties as a first step towards the enactment of nomination rules which must be strictly adhered to*

ii) *IREC recommends that once Parliament has been dissolved, no more political parties should be registered and no new symbols allocated*

iii) *IREC recommends that campaign period be specifically defined to assist the ECK in ensuring compliance with the Electoral Code of Conduct*

iv) *IREC recommends that the election date should be pre-set, taking into account all the required timelines for efficient conduct of the elections*

v) *ECK should enforce the provisions of section 17 of the National Assembly and Presidential Elections Act and the Local Governments Act (Cap. 265), which empower it to deny political parties' nominations made contrary to their own constitutions or nomination rules*

Concerning media

i) *The MCK should oversee the conduct of media and enforce its Code of Conduct*

ii) *IREC recommends that a media and elections policy should be developed, to include guidelines for verifying data before going on air, vetting of live broadcasts and screening of paid-for advertisements, responsibility to announce accurate results and training of journalists on the Electoral Code of Conduct, and elections reporting and the manner of reporting on opinion polls*

iii) *IREC recommends that disclosure of the real owners of media be made on a regular basis*

iv) *IREC recommends that KBC Act be amended to provide the ECK with the commensurate power to compel KBC to act in accordance with the law*

v) *IREC recommends that mechanisms be set up to ensure the independence and public accountability of KBC*

vi) *IREC recommends that access to KBC by the Presidential Press Service be reviewed, particularly in an election year*

vii) *IREC recommends that key provisions in the KBC Act pertaining to free access slots for party political broadcasts be clarified and precisely defined as to the rights of the parties and candidates in law*

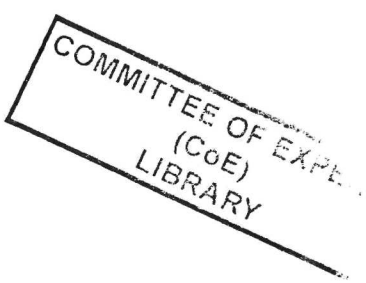
viii) *IREC recommends that a substantive Act prohibiting hate speech be drafted and enacted*

Concerning CSOs and EOs

i) *IREC recommends that the ECK and CSOs be encouraged to work together, particularly in voter education in an arrangement whereby the ECK coordinates and CSOs provide delivery*

ii) *IREC recommends that ECK's selection of ECK trainers and facilitators should be done through a transparent process and the criteria for a neutrality test determined in advance and published*

iii) *IREC recommends that bodies (including FBOs) with contractual or financial relationships with either the ECK or political parties, or which are established to have acted in a partisan manner in an immediately preceding election, should be excluded from domestic observation*



iv) *IREC recommends that a permanent domestic observer group should be constituted comprising diverse civil society interests*

v) *IREC recommends that co-operation and co-ordination of observer groups, local, regional and international, be encouraged.*

vi) *IREC recommends that the Regulations be amended to provide for observation of the tallying process at all levels and provide copies of all authentic statutory forms to observers*

CHAPTER 5

ORGANISATION AND CONDUCT OF THE 2007 GENERAL ELECTIONS

5.1. Introduction

This analysis of the organisation and conduct of the 2007 general elections will follow the standard sequence of the electoral process. It will thus cover boundary delimitation, voter registration, candidate nomination by political parties, electoral preparations (dealing with both voting materials and recruitment and training of temporary staff), voter information and education, regulation of political campaigns, regulation of freedom of expression and equitable access to media, the technical assistance received by the Electoral Commission of Kenya (ECK) and the management of election day operations. It does not include a discussion of the organisational structure of the ECK, which was the subject of chapter 3, nor of the counting and tallying of results, which will be analysed in detail in chapter 6.

Although the central concern of this chapter relates to the 2007 elections, it is necessary to review the evolution of each of the subjects since the advent of multiparty elections. Many of the problems experienced in 2007 were already identified in previous elections, but nothing was done to solve them. The depth of treatment is differential, coverage being more extensive in areas where problems are identified. Recommendations are reserved for the last section.

5.2. Delimitation of boundaries

5.2.1 The fundamental tenet

The fundamental tenet of democracy is the statement in article 21 of the Universal Declaration of Human Rights: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." The principle is repeated in many other international instruments.

Proportional representation (PR) electoral systems aim to ensure the equality of the vote, at least to a considerable degree. However, in the case of systems based on plurality (or

majority), as is the case in Kenya, the drawing of constituency boundaries is a central issue. There are several related aspects that will be analysed in this section:

- the reasons for departure from the principle of equal votes, and the extent of such departure
- the number of constituencies, and whether the allocation of seats is directly done for the entire country, or in two stages, beginning with an initial allocation to provinces/states
- the frequency of re-delimitations, and the authority responsible for such

5.2.2 Reasons for departure from general principle

Practically all legal electoral frameworks establish equality of the vote as the main principle, and enunciate several reasons for departure. Kenya is no exception. Section 42(3) of the Constitution requires that "All constituencies shall contain as nearly equal numbers of inhabitants as appears to the [Electoral] Commission to be reasonably practicable, but the Commission may depart from this *principle* to the extent that it considers expedient in order to take account of (a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely- populated areas; (b) population trends; (c) the means of communication; (d) geographical features; (e) community of interest; and (f) the boundaries of existing administrative areas...." [emphasis added].

5.2.3 Limit of permissible departure

Both the principle and the reasons for departure are standard in comparative practice but there are significant differences in the extent of the permitted departure from the basic principle of equality of the vote. The USA is the classic example of allowing only minimal departure from the average. The Supreme Court, in Karcher *vs.* Dagget, considered that even a 0.7% deviation from the mean was unacceptable. The UK is probably the case were the largest departures are admitted: up to 25%.

The problem in Kenya is that the maximum permitted departure is not fixed and has been seen to allow extreme differences in size: Embakasi is 351% greater than the average while Lamu East is only 18% of the average. As a consequence, the weight of the vote cast by a Lamu East voter is nineteen times greater than that of one in Embakasi. In no other country in the world is the difference of such magnitude. The reasons for the present situation are related to the introduction of the multiparty system – the skewed size of constituencies was related to the splitting up of small and sparsely populated constituencies in KANU strongholds of Rift Valley, Western, North Eastern and Coast provinces. The lack of a maximum permissible departure has led the High Court to task

the ECK with ensuring the representation of rather small ethnic minority groups on the occasion of the next redelimitation of boundaries.

5.2.4 Redelimitation

In Kenya any increase in the number of seats must be approved by Parliament, but the ECK can proceed with redelimitation if the number is not changed. In 2006 the ECK made an attempt at delimitation, based mostly on the subdivision of the largest constituencies, but Parliament refused to accept the increase in the number of seats. Although the Constitution empowers the ECK to do so, it shied away from redelimiting constituencies while maintaining the 210 limit.

As to the principles to be applied, the basic one, as argued above, is the equality of voting strength. Subsidiary criteria to be considered are those established in the Constitution – density of population, demographic trends, means of communication, geographical features, community of interest and boundaries of existing administrative areas. Other principles that should be respected in the process are those enunciated by the Southern African Development Community (SADC): management by an independent and impartial body that is representative of the society, comprising persons with the appropriate skills, conducted on the basis of clearly identified criteria (such as those listed above), made accessible to the public through a consultation process, devoid of manipulation to favour political groups or political interests, be conducted by one body and include all spheres of government, both national and local.

Findings: The delimitation of boundaries in Kenya as presently established does not respect the basic principle of the equality of the vote. The differences are unacceptable in terms of international standards. The Kenyan legal framework does not establish, as is accepted international practice, the maximum possible departure from the principle of equality of the vote. The delimitation of constituencies is left to the ECK, which has not performed its role adequately, ascribing its non-performance to Parliament's reluctance to increase the number of constituencies.

5.3. Registration of voters

According to section 32 of the Constitution, a person is entitled to vote in a constituency if s/he is registered in such constituency as a voter (with a few standard disqualifications). The qualifications established involve residence (at least five months in the twelve preceding months), conducting business or being employed in the constituency for similar periods, or possessing land or residential buildings there. The qualifications for voting in the civic elections are quite complex, but in practice they are not applied by the ECK.

For the first multiparty elections in 1992 the ECK conducted a national registration drive. The data of registrants was entered in the so-called "black books" from which mimeographed lists for use at the polling stations were derived. In 1997 the ECK computerised the registers using optical mark recognition (OMR) forms, although the black books were kept as a back-up. The 2002 elections were based on the 1997 register, updated in registration drives in 2000, 2001 and 2002. The use of black books was forbidden in those elections. (The same approach was to apply in the 2007 elections but shortly before the elections it was decided that black books could be used as back-up.)

Thereafter the 1997 register was further updated through continuous registration (introduced in 2002) and yearly registration drives. In 2007, the ECK conducted a massive registration effort, which took place in 20,655 centres. There were two registration drives in 2007, from 1 to 30 March, reinforced by a second drive from 11 June to 31 July (with 30-day inspection periods following each drive). The unusually long period of registration (67 days) produced good results. The number of registered voters increased by 1,767,212, resulting in a total number of voters for the 2007 election of 14,296,180. This represented 71% of the 19.8 million persons over 18 years of age who had been issued national ID cards. In 2007 the Government had acquired equipment which enabled it to produce national ID cards in large numbers, which facilitated the access to the ID cards by many young Kenyans. The average productivity of the registration teams was exceptionally low, however, only 1.1 registered voters per day per registration team (and just 0.8 in the first of the two periods).

5.3.1 Evaluation of voter registration

The introduction of continuous registration, perceived as a forward step in 2002, has in practice created a system that combines the cost of both the periodic and the continuous systems of registration. It has resulted in an extended network of district offices whose main purpose, in non-election years, is registering voluntary applicants. But the ECK still conducts yearly registration drives that in magnitude and cost are similar to those conducted in the case of a periodic register.

The system as it exists today is open to serious criticism:

- Continuous registration has not worked – only 2% to 3% of the registration took place at the ECK offices. The ECK alleges that this is because the number of field offices is too small (and aims to have an office in each constituency). This is not correct: a significant proportion of the Kenyan population lives within a reasonable distance of an ECK district office (located in populated areas) yet only a minimal fraction of that part of the population opts to register at ECK field offices.

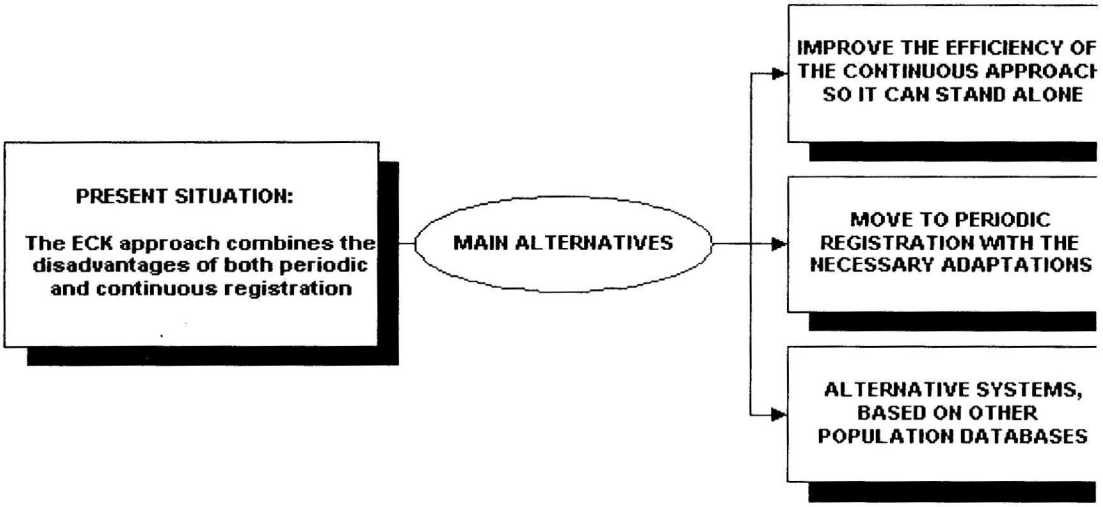
- The system has very low productivity. During the 2007 registration drives before the elections, the average number of voters registered per registration centre was about one per day. The productivity of the continuous registration is even lower. In the four months after the 2007 elections, the ECK network of offices recorded 553 transactions, of which only 129 were new registrants (the rest being transfers, detected deceased voters, etc.). This means that the ECK offices conducted only one transaction every two weeks per office.

- The voter register has a low and biased coverage. Registered voters represent only 71% of the 19.8 million persons over 18 years of age who were issued national ID cards. Women are significantly under-registered: they represent 51.4% of the population and only 47.1% of the voter register. Worse, the proportion has been declining: in 1997 the proportion of women in the register was 47.9%. Young people are similarly under- registered: the proportion of persons between 18 and 30 years of age is 46.2% of the population and only 32.1% of the registered voters. Furthermore, the deletion of names of deceased voters from the register is ineffective: the Central Bureau of Statistics estimates that 1,733,000 persons have died since 1997 but the ECK has been able to eliminate the names of only 513,000 deceased persons from the register. Statistically, therefore, the names of some 1.2 million dead persons swell the voter register.

- There is an almost complete lack of controls by the ECK. One of the main reasons for maintaining a voter register is that the verification of entitlement to vote is conducted in advance, as it takes significant time to verify residence, etc. The ECK system operates entirely on trust regarding residence. Form B (application to register as an elector) includes a declaration of residence, but no further proof is required, nor does the ECK conduct any *post facto* investigation or any other form of verification (except for the notoriously ineffectual period for exhibition of the list of registered voters).

- The system is outrageously expensive. The cost of the field offices, mostly devoted to voter registration in non-election years, was KSh 309 million in 2006 and it is expected to reach KSh 377.4 million in 2008. The cost of the 2006 registration drive was KSh 412.2 million, the two registration drives in 2007 required KSh 2,179 million and the allocation for voter registration for 2007/2008 is KSh 596.6 million.

The present situation is far from adequate, and there are three possible change strategies, depicted in the figure below:



The first two alternatives can be discarded. It would be very difficult and expensive to improve the efficiency of the continuous approach, and the move to periodic registration, even if efficient, would be perceived as a backward step. A permanent solution will necessarily involve moving to an alternative system, based on other population databases, particularly that related to the national ID card and, when implemented, to the proposed Integrated Population Registration Systems (IPRS). Further detail is provided below under the heading of recommendations.

Findings: The continuous registration of voters introduced in 2002 has not worked, as the number of people who register at the ECK district electoral offices is minimal. The available evidence suggests that the solution will not be found in increasing the number of offices, as the ECK suggests, but rather in a change of system. The voter register, as is stands today, has a low and biased coverage, as women and youth are heavily under-represented. The registration system is outrageously expensive and has very low productivity. The permanent solution will involve moving to systems based in other population databases, including the transfer of ECK human and financial resources to support the prompt implementation of such solution.

5.4 Nomination of candidates

As Kenya does not currently have provisions allowing the participation of independent candidates, only candidates nominated by political parties are eligible to contest presidential, parliamentary and civic elections. Nomination is an important stage in the electoral process not only because of eligibility to participate in the contest but also because, in certain party strongholds, it may very well be a straight ticket to winning the seat. Be that as it may, the election that ensues from the nominations is as good as the

nomination process itself. If the nominations are marred by violence, this feature often continues into the election campaign, especially if the loser defects to another party (as is usually the case) and obtains a ticket to remain in the race. The legal standard for a valid nomination is established in the Constitution (sections 5 and 34) and the Local Government Act (section 53), as read together with section 17 of the National Assembly and Presidential Elections Act. As long as the nomination in question has been conducted in accordance with the constitution or rules of the political party concerned and is certified by a person whose specimen signature has been deposited with the Commission, that nomination will be deemed valid.

Nominations by Political Parties: In 2007 the nomination of presidential candidates went without much incident, save for the fall-out in the Orange Democratic Movement-Kenya (ODM-K) over the party flag bearer, and the eventual departure of Mr Raila Odinga and his supporters to the Orange Democratic Movement Party of Kenya (ODM). The Party of National Unity (PNU) had a short while before settled on Mr Mwai Kibaki as its flag-bearer. The presentation of nomination papers by the respective presidential candidates took place on 14 and 15 November 2007. There were no major problems and, of the sixteen aspirants who presented their nomination papers, the ECK accepted those of nine.

With respect to the parliamentary and civic elections, ECK's statutory notice required political parties to nominate candidates to contest the elections by 16 November 2007 and to send certified lists to the ECK headquarters by 19 November 2007. ODM and ODM-K set 16 November as the date for their primaries, coinciding with the ECK deadline, while the PNU nominations were held over a number of days between 14 and 16 November. In anticipation of defections to their parties after these nominations, the smaller parties outdid each other in promising the losers an easy alternative eligibility vehicle to participate in the electoral race.

All the parties conducted the primaries themselves using party rank and file officials and other people hired for the purpose. From observers' accounts, citizens' views obtained during IREC's public hearings and political party submissions, it is clear the nomination of parliamentary and civic candidates was decidedly not without incident. According to media reports, the primaries of the major political parties were chaotic and marked by logistical challenges. Claims of vote-buying were rife. In others there were claims that the real winners had been replaced by others. Some candidates received "direct nomination" after their parties waived the requirement for primaries in their constituencies, eliciting protests. Not unsurprisingly, some of these problems culminated in violence. In some cases, this violence sealed some aspirants' fate, when their parties denied them nomination certificates on account of sponsoring and/or being engaged in violence.

Disputes arising from the nominations: A number of complaints were filed with the ECK, while some candidates actually went to court. While the ECK originally set up a nine-member committee to listen to aspirants' complaints, it later decided the complaints were misdirected (since the proper forum for these complaints was the respective dispute resolution bodies established under each party's constitution or rules) and disbanded the committee. As for the court cases, many failed to surmount the now well-established judicial view that the only option open to aggrieved aspirants was to file an election petition after the election – and were dismissed – while others were overtaken by events as the cases had not been heard by the time their opponents were gazetted as the candidates.

Owing to the proximity of the primaries to the deadline established by the ECK, most parties were late in submitting their certified lists of candidates. The ECK agreed to shift the deadline by a few days and the candidates' nomination papers were formally submitted to the ECK on 23 and 24 November 2007. A total of 117 political parties sponsored some 2,547 candidates in the parliamentary elections alone.

Findings: Party nomination exercises in Kenya have traditionally not been without fault. The shortcomings discussed above are not restricted to the 2007 primaries but are part of a decades-long, probably longer, experience in conducting party primaries. The standard of validity established by the law, namely the certification that the certified nominee was chosen in the manner provided by the party's constitution or rules, does not seem to provide adequate protection for people who invest considerable sums in electoral contests (in the form of nomination and other fees) and yet are robbed of their entitlement by party gatekeepers.

Moreover, the time between the party primaries and the ECK deadlines has been shrunk by the parties over the years so as to preempt defections engineered by the opposite side. This has made it almost impossible for the party machinery to respond adequately and timeously to all complaints arising from the nomination exercise. Even assuming they had, the time left for judicial review, if any aspirant is still dissatisfied with the decision of the electoral court, is almost non-existent.

The legal standard for valid nominations does not seem to take into account the primacy of fair nomination procedures for the fairness of the overall election itself, even as established in the constitution and rules of the political party. For instance, if a party were to write in its constitution or rules that a nomination certificate will be handed out to the candidate who pays the highest amount as nomination fees, would this not be something that a tribunal should be empowered to look into? As a result the rights of aspirants are not only routinely violated, but some of this manoeuvring at the party

political level (e.g. violence) gets carried through to the election and generally breeds impunity in the electoral process.

5.5 Electoral preparations

5.5.1 Voting streams

As the number of registered voters in some of the registration centres exceeded the maximum number established by the ECK, the voters were divided into "streams" (or polling stations within a centre) and allocated to one or the other according to the first letter of their surnames. This caused confusion. Voters were not properly informed of the stream to which they were allocated; some streams ran dry while others were backed up. This trivial issue had more publicity than it warranted because it temporarily embarrassed a presidential candidate.

5.5.2 Ballot papers

Ballot papers were printed in England and arrived in time despite a minor hitch caused by the belated withdrawal of an identified ballot supplier. It is noteworthy, however, that the ECK saw fit to send some nine commissioners, two senior ECK officers and a Government Printer representative on a mission to the UK – lasting several weeks and during the crucial run-up to the elections – on the strange basis that they were needed to supervise the chosen expert printers in the printing and packing of the ballots. Save for the printer, none of the delegation appears to have had any appropriate training or experience that could have equipped them for this task, which could and should in any event have been done perfectly simply and quickly – and at a fraction of the cost – via the internet. Indeed, external consultants had suggested the development of a database from which master ballots could have been printed.

5.5.3 Design of forms

There were substantial problems with the forms used. Although it had been agreed that form 16A should include the results both in numbers and in words, to avoid mistakes or fraud, the procurement section of ECK apparently ordered forms using the old model (which included only numbers). It is also normal good practice to have the names of the candidates pre-printed in the counting forms, but this was not done. The ECK's excuse that there was not enough time since nominations were too close to the elections is not valid in the case of the presidential contest; in the other elections it would also have been possible, provided the sequence of activities had been adequately planned. The real reason for not pre-printing names seems to be that the forms had already been ordered and distributed long before.

It is also customary that the forms used at the polling station, and distributed to agents, are printed on self-duplicating paper, so as to avoid writing several copies separately. Similarly, it is customary to provide agents with tally sheets, which they can use to record the votes when the counting is conducted at the polling station.

5.5.4 Staff recruitment and training

The most serious deficiency in the electoral preparations related to the recruitment and training of temporary electoral officers. The ECK, like other election management bodies (EMBs), follows a pattern of seasonal surge and contraction of its staff, in accordance with the needs of the electoral calendar. At key periods in the electoral process, i.e. during voter registration, polling and counting, it recruits several categories of temporary personnel in addition to its headquarters secretariat staff and the permanent field staff. In preparation for the registration of voters, the ECK engages registration officers and assistant registration officers, registration clerks, trainers and support staff. To meet the demands of polling, it engages returning officers, deputy returning officers and assistant returning officers at the constituency level; presiding officers, deputy presiding officers and polling/counting clerks for each polling station, nomination clerks and trainers, among others. In addition to these essentially field-based personnel, its headquarters staff is also reinforced as needed (for example, logistics and warehouse personnel, data entry staff and other tallying centre staff). The ECK also recruits "code of conduct enforcement officials" who serve on the peace committees.

The manner in which all such staff are selected, trained and deployed can have a significant impact on the quality and credibility of an electoral process. In fact, the process of recruiting temporary election personnel and arrangements for their orderly and timely remuneration, quite apart from the quality of the electoral operations themselves, have been known in other countries to mar electoral processes and contribute to a fractious security situation. The perception, by the selected personnel themselves or those who are not selected, that the selection process or the management of the staff while in employment has not been transparent can also have negative effects on elections.

As with most EMBs, the ECK has developed job descriptions and qualifications requirements for each post. The posts are advertised, and selection panels are set up at each level, as appropriate. Returning and deputy returning officers, for instance, are selected centrally by the ECK itself, from a database of personnel who have had similar experience in the past, as well as fresh applicants who meet the established criteria. It appears that those with prior experience have a clear advantage. Presiding and deputy presiding officers, as well as registration clerks, are selected by a panel established at the district level, comprising the key permanent staff in the district office and the assistant

returning officer. The selection is subject to the endorsement of the ECK commissioner having supervisory responsibilities for the district office concerned.

The selected personnel are usually trained by the widely used "cascade" method (training of trainers), given the huge numbers involved. Training takes place reasonably close to the actual activity involved, to minimise loss of personnel and to ensure that the acquired instructions remain fresh in their memories. Observer reports indicate that the selection of staff seemed to have been conducted transparently, though instances of favouritism (in particular tribalism and nepotism) were alleged in some areas. A more worrisome allegation involves the last-minute replacement of some returning officers, apparently by the Area Commissioner.

5.5.5 Recruitment, training and equipping

Considering the electoral process from the perspective of what became its most controversial aspect – the management of the collation, transmission and tallying of results – what causes most concern is the inadequate definition of the requisite qualifications for some key personnel (returning officers, presiding officers) and the non-provision of very basic equipment to facilitate their work. As discussed in a previous section, the decision adopted on 14 June 2007 by the Plenary of the Commission to use laptops and a WAN network for the tallying and transmission of results from constituencies to the national tallying centre required some important innovations in the recruitment and training of returning officers and their staff. It seems that the recruitment and training of those temporary officers did not take into account such decisions, and the result was the reversal of the decision at the last minute. As is analysed in detail in chapter 6, the recruitment of returning officers and their staff did not ensure minimal capacity in handling simple arithmetical operations, as evidenced by the number of errors committed. Furthermore, the lack of calculators in the polling kits (the use of which should have been incorporated into polling staff training) also contributed to a flawed exercise.

Arrangements for the deployment of personnel at the national tallying centre deserve particular mention. From the information available to IREC, it did not seem as if adequate preparation had been made for this part of the operation, especially in terms of definition of clear procedures and training of staff on those procedures. The staff at the tallying centre comprised some fairly senior officers of the ECK, in the role of team leaders, but also included a substantial number of temporary staff, recruited solely for that purpose. Not all staff in the centre had undergone the required training, nor even had all the supervisors. On the whole there is a doubt as to the adequacy of the training, considering the sensitive nature of the assignment. Such an exercise would normally require at least one dry run, not only to test absorption of the information but also to

ascertain the adequacy of the procedures established and to make whatever modifications might have been found to be necessary. It would also appear that not all staff members at the tallying centre were following the same procedure, probably as a result of the fact that not all of them had attended the training provided.

Improvements in the selection, recruitment and training of ECK temporary personnel can, along with other reforms, contribute significantly to increasing the institution's credibility and the transparent management of electoral operations.

5.5.6 Abnormal voter turnouts

A worrisome feature of the 2007 elections was the incidence of abnormally and suspiciously high voter turnout figures reported from many constituencies in certain areas. As discussed above, the deletion of the names of deceased voters from the register was not effective. On the basis of the Central Bureau of Statistics estimates, it is probable that the names of some 1.2 million deceased voters were still on the register. To this should be added that because of the age of the register, the currency of the data is otherwise far from satisfactory and many persons whose names still appear have probably emigrated or moved to a distant location within the country without the changes being processed by the ECK. Over and above these notorious facts of electoral administration, there is always a percentage of persons who do not vote because they are sick, otherwise committed or are temporarily far from the polling station. It follows that the statistical prospect of having voter turnouts higher than 85% is extremely small. The turnout was over that figure in a significant number of polling stations (with many showing voters turnouts of 100%), concentrated in certain constituencies. This clearly suggests the existence of "ballot stuffing", which requires collusion between the polling station staff – a clear indication of biased recruitment compounded by inadequate training and supervision.

In regard to training, while it is difficult to judge the quality of the training objectively, it is quite apparent that there were cases in which selected personnel did not participate in the entire exercise (including some returning officers).

Findings: Owing to the extensive – and expensive – efforts of the ECK, the registration of new voters in the months before the 2007 general elections proceeded smoothly. There were, however, a number of identifiable problems related to the wasteful supervision of the printing and packing of ballots, as well as with the design of some of the key forms used in the process. However, the worst problems seem to have occurred in relation to the recruitment and training of temporary personnel. The recruitment did not take into account the requirements of the approved method for the tallying and transmission of results at constituency level, as it did not include the required qualifications in the

process. This lack of foresight resulted in the reversal, at the last minute, of the tallying process approved months before.

5.6 Voter information and education

Elections are said to be free if the voters clearly understand the election process and are able to exercise their political rights free of threat from intimidation and in secrecy. Therefore voter education and information are necessary to ensure that all voters understand their rights, their political system, the contests they are being asked to decide, and how and where to vote. Voter education needs to take into account factors such as high rates of illiteracy or the use of different languages. Young people eligible to vote for the first time may require special attention, for instance special messages explaining how to register and cast a ballot. Voter education should also include publicity encouraging people to vote.

Voter education addresses voters' motivation and preparedness to participate fully in elections. It involves more complex information about voting and electoral process and is concerned with concepts such as the link between basic human rights and voting rights, the role, responsibilities and rights of voters, the relationship between elections and democracy and the conditions necessary for democratic elections, secrecy of the ballot, why each vote is important and its impact on public accountability, and how votes translate into seats.

Civic education involves educating citizens about their obligations and rights within a given political or ethical tradition. It is suggested that voter education is an amalgam of voter information and some civic education programmes, specifically those dealing with elections. *Voter information* refers to basic information enabling qualified citizens to vote, including the date, time, and place of voting, the type of election, identification necessary to establish eligibility, registration requirements and mechanisms for voting.

Promotion of voter education as a function of the ECK is mandated by section 42A of the Constitution and section 15 of the National Assembly and Presidential Elections Act. The ECK undertakes this responsibility with government funding and in strategic partnership with the international donor community and civil society. Civic education is also implemented by civil society, political parties and candidates, media and religious institutions. The ECK is required by law to co-ordinate those organisations/ persons offering voter education.

In the run-up to the 2007 elections the ECK conducted an extensive voter education programme. The ECK received KSh 54 million allocated from public funds and UNDP allocated US$ 4,424,367 to civic education from the donor basket fund it managed. The voter education programme was aimed at achieving increased participation in the

electoral process, particularly in the case of women and other marginalised groups. The programme also aimed to inform voters' choices, reduce electoral violence and increase voters' knowledge as to when, where and how to vote.

In order to fulfil these objectives, a number of activities were carried out by the ECK in 2007, including training of trainers, training of facilitators, development of voter education materials and delivery of voter education countrywide. In its education campaign, the ECK targeted election officials and voters, using a sustained multimedia campaign, community-based voter education (CBVE) and a documentary film on the voting process acted by Kenyan leading actors and entertainers. Intensive multimedia campaigning was done during the voter registration exercise through TV stations, newspapers, billboards, posters, stickers, fliers and newsletters. The campaign was reinforced by the accelerated issuance of ID cards and contributed to the registration of 1.7 million additional voters.

The main themes used for the campaign were the following:

- **Anti–violence campaign**: the messages in this campaign were designed to inform Kenyans about the dangers and futility of electoral violence and were exhibited just before the election campaign. Messages with the following text were aired in TV commercials:

  > "Bad people came to our house, they started beating mummy and daddy; they slashed them, and burned our entire house. I don't blame the people who killed my parents; I blame the politician who paid them."

  The good taste of the message might be debated. Furthermore, it puts politicians – as a class – in a bad light, and attributes violence directly to them, reinforcing old grievances between ethnic groups.

- **The leadership campaign**, which was designed to educate voters on the need to make informed choices and was exhibited during the period of nomination of candidates. The audio- visual showed a campaign rally in which voters rejected a candidate who tried to bribe them with money and announced that it was time for his tribe to rule.

  Such messages created a perception that ethnicity was one of the main bases for the choice of party/candidate. While it was proper to discourage bribery in the election, the message should have focused on issues rather than on tribal supremacy.

- **The "Kimya" campaign,** aimed at achieving the highest possible voter turnout, was rolled out two weeks before polling day. The advertisement said: don't complain about bad leaders if you don't vote.

Civil society and the media were fully involved in this activity. Some forty civil society organisations (CSOs) – non-governmental organisations (NGOs) and faith-based organisations (FBOs) – were selected to facilitate voter education across the country and were funded by the donor community. These CSOs targeted groups such as the general public, women, young people and religious leaders. For instance, the Institute for Education in Democracy (IED) launched an ambitious voter education campaign known as "Vijana Tugutuke" targeting the youth who had previously shown extreme apathy. The campaign utilised roadshows and music sessions in all provincial towns and attracted the youth who flocked to these sessions where the entry requirement was merely a voter's card. A large percentage of the new voters registered in 2007 consisted of young people.

The voter education programmes were severely criticised during the public meetings IREC held throughout the country. Participants frequently asserted that civil and voter education as well as information campaigns were limited and inadequate since they did not focus on the special needs of some voters, such as illiterate voters in rural areas. Posters, for instance, could only be interpreted properly by those able to read. It was quite easy for an illiterate voter to misinterpret a poster which included in its design a coffin or weapons. IREC was also frequently told that voter education and information was undertaken by the ECK and other stakeholders in haste and that some educators were not impartial.

Findings: For the 2007 elections the ECK conducted an extensive voter education programme aimed at achieving increased participation in the electoral process, particularly in the case of women and other marginalised groups.

In order to fulfil this objective, a number of activities were carried out by the ECK in 2007, including training of trainers and facilitators, development of voter education materials and delivery of voter education countrywide. In its education campaign, the ECK targeted election officials and voters, using a sustained multimedia campaign, community-based voter education and a documentary film on the voting process. An intensive multimedia campaign was conducted during the voter registration exercise and fully involved civil society and the media. Some forty CSOs funded by the donor community facilitated voter education across the country and targeted groups such as the general public, women, young people and religious leaders.

The voter education programmes were severely criticised as limited and inadequate during the public meetings IREC held throughout the country.

5.7 Regulation of political campaigns

Election campaigns provide candidates and their political parties with the opportunity to hold political meetings, organise meet-the-people tours, produce and distribute posters and other publicity material, produce and air radio and television advertisements and otherwise to sell themselves and the ideas of their parties to the general public. In the course of this "selling" effort, voters have an opportunity to interact with the candidates and other party officials and to evaluate (even question) the leadership qualities of the candidates and the programmes (or promises) of the parties participating in the election.

Campaigns, properly conducted, can therefore be beneficial to both candidates (in terms of giving equal access to potential voters and the ability to garner support in the form of votes on election day) and voters (in terms of giving them sufficient information to make an informed choice). Political parties are key to the success or failure of any election. The perception of political parties and their candidates of the fairness of the electoral process can influence the perception of the overall genuineness of the election. As key participants in and beneficiaries of the success or failure of any election, they should be guided by ethical considerations in making statements and/or decisions regarding any election during the election campaign. In order for this to happen, there is a need for rules and practices that govern how campaigns should be conducted – and Kenya is no exception.

5.7.1 Overview of the campaign regulatory framework

The campaign period in Kenya is a rather fluid concept. While the current provisions of the law (supplemented by the ECK's administrative action) are to the effect that it normally begins immediately after formal nominations and ends twelve hours before polling day, the fact is that political campaigning happens throughout the period between one election and the next. The ECK, in its technical paper on the subject, confirms this fact when it surmises that the 2007 campaigns were "unregulated" since they began in 2005 with the referendum. It only varies in terms of the issues canvassed, the style in which they are canvassed and the intensity of political activity – which normally heightens considerably once Parliament has been dissolved and writs issued for all the 210 seats (with the Minister for Local Authorities dissolving local authorities soon thereafter).

Once writs are issued to the ECK, section 13 of the *National Assembly and Presidential Elections Act* requires the ECK to (amongst others) publish a notice in the *Kenya Gazette* specifying the day(s) for political parties to nominate candidates, the day on which the formal nomination will be conducted and the election day. Other than the procedures for the returning officer at the close of the period for nomination and the bar against propaganda on polling day (in section 14 of the Election Offences Act), the definition of

the "campaign period" was left to the ECK, until the requirement for fair balance in the allocation of broadcasting hours between differing viewpoints found its way into the Kenya Broadcasting Corporation Act in 1997, section 8(1A) of which provides:

> "In subsection (1) (j), the expression 'campaign period' means the period between the initiation of an election under the provisions of the relevant law pertaining to the election and the eve of the polling day."

The other aspects of the campaign have ampler provisions, though many of these are again fairly recent in Kenyan electoral history. The Electoral Code of Conduct, which is the Fourth Schedule of the National Assembly and Presidential Elections Act, was a direct response to the regulatory vacuum then existing in terms of managing political conduct at election time. The Electoral Code of Conduct (rule 4) requires all registered political parties and other persons bound by the code to endeavour to promote the object of the code to enable free political campaigning and open public debate to take place in all parts of Kenya during an election. Rule 5 requires all political parties and candidates to commit themselves to *inter alia* condemn, avoid and take steps to prevent violence and intimidation and generally affirm the rights of all participants in an election to express divergent political opinions and hold public meetings. Rule 6 requires participating political parties to recognise the ECK's authority in the conduct of elections and to co-operate with the ECK at all stages of the process, including implementing ECK's orders. The political parties' authorised leaders are required by section 34A of the National Assembly and Presidential Elections Act to subscribe to the Code so as to signify acceptance to be bound by the provisions of the Code, as a condition precedent to participation in the election. Parties are also required to discipline errant party members.

Under the provisions of rule 8, the ECK is empowered to issue a formal warning, impose a fine, issue an order prohibiting the use by the errant party of public media time and restrict campaign freedom for the said party. Under rule 9, the ECK is at liberty to institute proceedings in the High Court and the political party in breach stands the risk of the High Court issuing an order cancelling the right of such a party to participate in the election concerned. A leader, office bearer, member or supporter of such an errant political party also stands the risk of disqualification from participating in the election as a candidate.

Rule 10 provides that there shall be no appeal from an order of the ECK imposing a penalty or sanction under rule 8, but an aggrieved party may file judicial review proceedings in the High Court. The court is entitled, in these circumstances, to take into account any civil or criminal proceedings that may have arisen as a result of the aggrieved party's conduct.

Use of the state-sponsored media is provided for by the Kenya Broadcasting Act, which not only requires the public broadcaster to provide an independent and impartial broadcasting service, but also to keep a fair balance in all respects in the allocation of broadcasting hours, as between different political viewpoints and in consultation with the ECK, during the campaign period preceding any presidential, parliamentary or local government election and to allocate free airtime to registered political parties participating in the election to expound their policies.

Public meetings (of which electoral campaign meetings are part) are regulated under the Public Order Act (Cap. 56). Political parties are required to notify the police within three to fourteen working days before the date of a proposed meeting or public procession and provide the necessary particulars. A meeting may be stopped if it becomes disorderly, a security threat or a threat to peace. Candidates have the right to enjoy security, peace and order at such meetings or in such processions but they must finish by 6 p.m., failing which the police may stop the meeting or procession. The Chiefs' Authority Act (Cap. 128) supplements these powers through the wide powers enjoyed by chiefs as local administrators.

The Penal Code (Cap.63) and the Election Offences Act (Cap.66) prohibit violence, as well as a range of conduct categorised in the latter as election offences (e.g. violation of the secrecy of the vote), corrupt practices (e.g. bribery) and illegal practices (e.g. engaging in propaganda on polling day). In the course of Kenya's political development from a single party to a multiparty state, a number of laws have been passed barring public (or civil) servants from engaging in partisan political activity. Examples of this are section 17B of the National Assembly and Presidential Elections Act, section 15 of the Public Officer Ethics Act and rule 6 of the Electoral Code of Conduct (which also bars the use of state resources to campaign for particular candidates). All the foregoing provisions aim at levelling the electoral playing field, preventing administrative waste of public resources and ensuring that campaigns are generally orderly, peaceful and free of intimidation and other forms of undue influence.

5.7.2 Campaigns and campaign malpractice

According to the ECK and many other IREC interlocutors, the 2007 election campaigns involved media advertisements; public rallies, marches and demonstrations; mass meetings with designated speakers; church prayer meetings; burial meetings; breakfasts, dinners and lunches; unsolicited bulk emails (or spam); impromptu meet-the-people tours; door-to-door campaigns; posters, billboards and stickers; and other means. The array of methods used carried from party to party and candidate to candidate, based on financial means and other factors.

As was expected, given previous history, there were a number of breaches of electoral law relating to campaigns, particularly the Electoral Code of Conduct. Violence (including violence against women) was witnessed in certain areas, with or without the use of the patently undemocratic practice of "zoning" to keep competitors away from perceived strongholds. Spam messages were used to circulate defamatory propaganda, hate speech and viruses. Hate speech was also disseminated at rallies, through short text messages (SMS) and internet blogs. By most accounts given to IREC in its public meetings, the campaign period also witnessed bribery, vote- buying and -destruction, and other unfair, if not illegal, activities (see further discussion of this in section 4.3).

The practice of using state resources in partisan campaigns was again witnessed (as in previous elections, in the Moi and post-Moi era, including the 2005 referendum). This included use of government vehicles and aircraft in the campaigns (some disguised with civilian number plates) and use of high-ranking (and some low-ranking) public servants in the campaigns of the incumbent candidates (and, surprisingly, some opposing candidates). These have been widely reported on by various media, feature in a report of the state-funded Kenya National Commission on Human Rights (KNCHR) and have also been confirmed by the ECK (which had occasion to issue media statements on the practice) in its evidence before IREC. All this happened despite the assurances of the Minister for Finance to the country on 4 October 2007 that state funds would not be used in the campaigns. Another avenue through which state funds were misappropriated in partisan politics was in the use by some incumbent MPs of the Constituency Development Fund for political campaigns. Although IREC did not summon any of the named personalities in its formal hearings, there is sufficient documentary proof and eyewitness testimony to at least lead to the conclusion that, personal liability aside, the misuse of public resources has been a thorny problem in Kenyan elections, and was a feature of those in 2007 as well.

In 2007, in keeping with practice since the promulgation of the Electoral Code of Conduct, the ECK set up the Electoral Code of Conduct Implementation Committee to receive complaints relating to political campaigns. These were received from candidates, voters and returning officers. Investigations were carried out, witnesses summoned, and some candidates from Mathira, Malava, Ikolomani and Kilgoris constituencies called to answer to the various charges. The offences ranged from meting out violence to fellow candidates to zoning of areas to prevent other candidates' access. The Committee imposed a fine of KSh 100,000 on each of the culprits. These refused to pay up and continued to participate in elective politics without any impediment at all. The ECK, through its chairman and some of its senior officers, testified at IREC's formal hearings that the ECK was pursuing the matter in court as a civil claim (in the same way, say, that one would recover a debt), though this is yet to be determined.

5.7.3 Campaign financing

Running an election requires resources and, as the Kenyan elections show, the cost rises in keeping with expectations, advertising trends and other factors. Some of the literature on campaign financing attempts to make a clear distinction between financial resources (mostly money) collected and spent on the campaigns (campaign finance in the strict sense) vis-à-vis financial resources collected and spent in the ordinary course of a party's day-to-day operations (also referred to by some as "routine" or "political" finance). It is necessary in this case, however, to adopt a more inclusive use of the term on the basis that funds could be mobilised even five years in advance for an electoral contest or spent well in advance of some period strictly regulated by laws. With this is mind, the number of ways that money is poured into politics (read elections) can determine not only the result of electoral contests but also their nature. Finances may, for instance, be made available not only for routine activities such as hiring public address systems, but also for bribing election officials and voters alike; or in exchange for favourable treatment in regard to a process that is supposed to be managed fairly (e.g. public procurement); or they may be coming from public coffers for partisan political activity of no benefit to the ordinary taxpayer.

Political parties relied heavily on private donors to bankroll their political campaigns as well as other party activities. Typical private sources include wealthy party members, business people, ordinary party members and the sale of party memorabilia (such as T-shirts, caps, key rings, etc). Parties mobilised this funding without disclosure that would have allowed policing of undue donor influences. The ordinary wananchi in Kenya had no information as to which entrepreneur had funded or sponsored any political party or candidate, to what extent and for what motives. Yet the evidence reviewed by IREC, including that of the ECK chairman and the Coalition for Accountable Political Finance (CAPF), points to a significant use of money in the 2007 elections to influence voters in various ways.

Political parties with lots of money collected from various sources were free to make use of it without disclosing the source. There were no disclosure rules, no ban on foreign donation, no campaign spending limits, no disclosure of individual donors, no contribution limits, no ban on corporate donations etc. As such, political finance cannot be said to have been free from "corrupt" political financing, for instance:

- the use, for campaign or party objectives, of money that a political office holder has received from a corrupt transaction
- unauthorised use of state resources by parties for political purposes which are a common feature of ruling parties' campaigns in many democratic countries, i.e. the resources available to office holders, national and local, are blatantly used for

electioneering, use of state-owned vehicles to ferry electors to governing party rallies and party supporters employed on the public payroll and expected to spend their time on political campaigning

- acceptance of money in return for an unauthorised favour or promise of a favour in the event of election to an office (quid pro quo donations)
- contributions from disreputable sources
- spending of money on illegal purposes such as vote-buying or unfair purposes such as treating voters (especially ordinary voters) by giving food, drinks and/or accommodation

That being the case, it is likely that political parties poured in money which led to severe spending inequalities in the electoral process. Seeing that bribery is a common phenomenon in Kenyan elections, the use of huge amounts of money then adds to the unfairness of the campaign finance equation because those candidates or parties with wealthy supporters are able to spend far more than their opponents. Add to this the fact that some state resources were applied in the election in favour of specific candidates and/or parties and an ugly picture of skewed campaign financing emerges even more clearly.

In the absence of legislation or rules to regulate collection and expenditure of campaign funds (except the inadequate provisions of the Public Collections Act, which was designed with ordinary harambee donations in mind), the ECK remained toothless in regard to the regulation of campaign finance, and politicians had the leeway to apply the law of the jungle in respect of finances. The effect was that the political environment was saturated with money without any form of expenditure control. Such unregulated political finance should not be allowed in a young democracy, where it can easily have adverse impacts on an election.

The Political Parties Act of 2008 was enacted before the 2007 general elections but came into force on 1 July 2008. The Act establishes the Political Parties Fund, with eligibility for the funds based on both proportional representation (80%) and an equal distribution formula (15%). The law regulates the sources of political financing, including the use of public resources and party funds for political campaigns and political activities. Political parties and candidates are also accountable to the ECK for the expenditure of such resources. The main challenge of the Act is that it provides only for objectives such as financial disclosure of income and expenditure without providing sufficient detail as to how to implement those objectives. Left this way, there is too little material to ensure satisfactory enforcement. Yet, even with the best rules, political finance is generally difficult to regulate.

Findings: Current regulations on many aspects of political campaigning are sufficient to run a credible election. What is mainly lacking is adequate enforcement powers by the ECK, hence the impunity with which its orders are treated. Campaign finance also remains an arena that will require some control, given concerns about unclean money being used in elections, possibly in illegal or unfair ways.

Misuse of public funds for political purposes is actually an unfair practice and (at least with respect to public human resources) an illegality according to three Kenyan laws at the time of the 2007 general elections. Yet all the claims on use of public resources were either ignored or flatly denied. This would then have proceeded in typical fashion if things had not got out of hand, and tragically so, at least in one respect. Administration police officers were accosted by members of the public (ostensibly with the accusation that they had been deployed as presidential election agents) and a number were lynched in these encounters. These murders were criminal acts, but it is difficult to deny the argument that they were some form of self-help in the face of what was perceived as an unfair political advantage by their principals. Impunity may get short-term results but it also breeds public anger that an electoral process can ill afford.

Perhaps in recognition of the intractability of the problem, section 15 of the Political Parties Act now bars public servants (except MPs and councillors) from being founder members or office bearers of political parties, engaging in activities that may compromise or be seen to compromise the neutrality of their offices or publicly indicating support for or opposition to any political party or candidate in an election. Four laws on a single issue should not only be indicative of the existence of the social mischief; it behoves law-enforcement agencies, including the ECK, to implement the law.

With regard to political finance (including campaign finance), the Political Parties Act provides a sufficient enabling framework for regulatory input in an area that threatens the quality of Kenyan elections. It is not lost on IREC that even provisions that would have provided some modicum of a check, such as section 8 of the Election Offences Act (against treating) and sections 18A-18L of the National Assembly and Presidential Elections Act (on capping campaign expenditure) were repealed, ostensibly because they were "difficult to enforce" or the limits "unrealistic". In order to ensure that both political funds mobilisation and expenditure are closely monitored, more detailed provisions will have to be made in the regulations contemplated in section 43 of that Act, and enforced rigorously.

IREC has taken note of the likelihood that, for an election to have experienced problems on the scale witnessed in the 2007 elections, a large number of election offences were committed. Take the question of bribery, contrary to section 10 of the Election Offences Act, for example. It was shocking to hear one commentator remark during IREC's public

hearing in Machakos: "The elections here were smooth. Of course, there was the usual vote-buying, but that is normal." When an activity that is barred by the law is referred to as "normal", the law-enforcement machinery has broken down or is at least not functioning as it should. Other possible offences, of some of which we would have sufficient evidence if we had a full audit and others that circumstantial evidence seems to point to, are impersonation, contrary to section 7 of the Election Offences Act (when dead voters vote), participation in elections by public officers, multiple registration, transportation of voters, murder, rape, arson, assault, trespass (all contrary to various sections of the Penal Code) and so on.

Of all the requirements in the electoral process, the one observed more in the breach than with compliance is the Electoral Code of Conduct. It probably needs to be re-designed so that it only contains the values underpinning the participation of political parties in the campaigns. All actionable legal obligations should be incorporated into the relevant election law(s).

The nature of parties and their operations in Kenya led to a creation of political parties based mostly on alliances of convenience between wealthy 'political entrepreneurs' rather than political parties based on ideology or political platforms. As such the regulation of political finance should take into account the realities of the Kenyan political landscape and define adequate controls to ensure safeguards against unfair, corrupt and illegal financing.

5.8 Regulation of freedom of expression and equitable access to media

The principle behind freedom of expression in a democracy such as Kenya can be summed up in the following points:

- Everyone has the right to free expression freely in the medium of one's choice.
- This implies the right to access, receive and disseminate information, ideas and messages of all types regardless of the border, through all communication systems and media – be they aural, visual, print or electronic.
- The media should enjoy editorial independence from undue influence from both state and corporate actors.

In Kenya, freedom of expression is provided for under section 79 of the Constitution in the following terms:

> "79.1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information

without interference (whether the communication he to the public generally or to any person or class of persons) and freedom from interference with his correspondence.

"79.2. Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision--

(a) that it is reasonably required in the interests of defense, public safety, public order, public morality or public health--

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public or upon persons in the service of a local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

It has not been easy to legislate on freedom of expression in Kenya. The Freedom of Information Bill has been pending for quite some time. The current Bill (2007) is yet to be approved by Parliament. While it is understood that the media is difficult to legislate upon, it is imperative that the media operates within a recognised legal framework to guarantee both its freedom and the citizens' right to privacy.

5.8.1 Media as a tool for freedom of expression

Proponents of freedom of expression in democratic states describe the principles in three phrases: *Freedom is when the people can speak. Democracy is when the government listens. The media is the messenger.* For citizens to make well-informed decisions in an election there must be a free media, but the media must be more than free, it must be reliable and must be trusted. The media must be able to form independent and diverse views while at the same time avoiding comments that may generate violent conflict, as was witnessed before and after the 2007 general elections in Kenya. This can be achieved if the media is run in a professional manner and is not compromised by the state or other corporate interests.

Media as a messenger for freedom of expression is tasked with difficult choices. It has to decide whether the message it transfers to the consumers should be censored or given raw as received from the expresser. This becomes even more difficulty when the media is broadcasting live. In such circumstances a professional media, sensing the sensitivity of the materials or the subject' may decide to have a delay of at most five minutes to give room for censorship. These are difficult choices, but they are bound to be made because while it is true that freedom of expression ought to be respected, the freedom should be exercised in a manner that does not interfere with other rights of individuals.

5.8.2 Misuse of freedom by the media

Media has been a source of both good and bad information. The 1994 genocide in Rwanda has partly been attributed to the incitement of an FM radio station that generated information demonising the minority Tutsi. Kigali's Radio-Télévision Libre des Mille Collines referred to the Tutsis as "cockroaches" that needed to be eliminated in order to purify Rwanda. Media was likewise blamed in the mass killings in Bosnia. These are some examples of how media freedom can be abused by media houses, leading to catastrophic results.

One of the solutions to curb misuse of the media has been regulation by way of legislation against abuse by the media. However, it is difficult to make media regulatory frameworks that are compatible with fundamental adherence to freedom of expression. In 2007, the Media Act was enacted. It includes in its second schedule a Code of Conduct. The Media Council of Kenya (MCK) is opposed to the Code and insists that it is the only body that should regulate the conduct of the media. In the pipeline is the proposed Prohibition of Hate Speech Bill, 2007 prepared jointly by the KNHRC and the Kenya Law Reform Commission.

Media regulation has become even more difficult with the increased use of the internet as a source of information. People freely interact through the internet and several blogs have been developed and attract a number of readers in Kenya. The internet combines the right to receive with the right to express and disseminate information at a faster pace. Unfortunately, the internet has not been exploited only for good. It is also not uncommon to find that very serious and inflammatory information is spread throughout the world via mobile phones.

5.8.3 Media and the conduct of the 2007 elections

The 2007 general elections were widely covered by both local and international print and electronic media. The media is reported to have engaged itself in a fierce battle, each trying to outwit the others in covering the elections from the campaign period to the transmission and announcement of the results. Some of the media houses, unfortunately, did not observe media ethics and standards. They did this understandably to win a larger

audience for commercial purposes or for prestige. As a consequence, they ended up not helping Kenyans but added fuel to the flames.

5.8.4 Pre-election campaigns

Kenyans are undoubtedly good consumers of media materials. Media houses utilise momentous occasions to generate more money and gain more readers, listeners or viewers. Kenya is hailed as having the most dynamic advertising markets in East Africa and a population that consumes news and information voraciously. In 2007, call-in FM radio stations and live television interviews and talk shows attracted an enormous amount of interest from listeners and politicians in their droves during the campaign period. Politicians used the occasions to lure their voters and attack opponents. The challenge facing the ECK was the difficulty of controlling the materials aired by both the print and electronic media. They admitted before the elections that some of the materials aired by some media houses were highly unacceptable. But the ECK never censured any media house.

5.8.5 Hate speech

The Kenya National Human Rights Commission defines hate speech as "any form of speech that degrades others and promotes hatred and encourages violence against a group on the basis of religion, race, colour or ethnicity. It includes speech, publication or broadcast that represents as inherently inferior, or degrades, dehumanises and demeans a group on the basis of the criteria above." The Constitution does not expressly prohibit hate speech in its section dealing with freedom of expression.

Hate speech is said to have characterised the 2007 general elections in party rallies: text messages, emails, posters and leaflets were other vehicles of incitement. When travelling around the country, IREC noted that this problem was widespread. There is a general view that most radio stations lack professional journalists able to control an audience or regulate talks. Their journalists lack training in conflict reporting or moderation. Talk shows and call-in programs require media personnel who are versed in moderation and who are able to predict a change of tone that may lead to negative results. Words and phrases such as "settlers", "let's claim our land", "people of the milk to cut grass", "mongoose has come and stolen our chicken", "madoadoa" and "get rid of weeds" aired by Kass FM and songs such as "talking very badly about beasts from the west", "Kiiji" and the song by Miuga Njoroge sung in Kikuyu dialect on Kameme and Inooro FM stations which implied that Odinga is a murderer, power hungry and does not care about other tribes but only his own tribe, and that Luos are lazy, they do not work, they do not pay rent and that they are hooligans, were received by Kenyans with mixed feelings. Luo stations also played a song "the leadership of the baboons" which vilified the Mount Kenya people.

The solution to hate speech by the FM radio stations should, in our view, be found elsewhere not by banning them. Most blame was directed at those media serving the big ethnic groups. These are Kameme FM and Inooro FM for the Kikuyu, Ramogi FM and Lake Victoria FM for the Luo, Kass FM and Chamgei FM for the Kalenjin, Muuga FM for the Embu and Meru, Mulembe FM, West FM and Chettambe FM for the Luhya community, Musyi FM and Mbaito FM for the Akamba and Egesa FM for the Gusii. Major concerns were directed at their popular talk shows such as "Baraza"(informal assembly) for Ramogi FM, "Just say it" for Lake Victoria FM, "Hagaria" (sharpen) for Inooro FM and "Arahuka" (Wake, Up) for Kameme FM. Even from the titles of the programme allow one to sense that the message is bound to be divisive. These programmes are aired raw and are moderated by persons who have no training and skills in managing such shows, some having been recruited merely because they are entertaining or attractive. The solution is therefore to have trained personnel manage these shows and control the contents of the message broadcast for public consumption. Training in conflict reporting and moderation is likewise crucial.

5.8.6 Pre-election polls

The 2007 elections were replete with opinion polls from the moment the candidates of the main protagonist parties, PNU and ODM, were known. In fact the polls had started before. The polls sent different messages and actually helped shape the campaigns and people's perceptions. The *Sunday Nation* newspaper commissioned weekly polls which sparked heated debates in the run-up to election-day. Polls were conducted *inter alia* by Infotrack Harris, Consumer Insight and Strategic Public Relations and Research. The polls predicted a close contest between Kibaki and Odinga and most showed the incumbent losing to his challenger. This was not well received by the government and sparked heated attacks on the media and the pollsters, who were labelled biased.

5.8.7 The ECK and the media in 2007

The relationship between the ECK and the media is a substantive topic on its own that deserves more time and space than are available here. IREC's assisting counsel and his colleagues have conducted considerable research and have prepared a detailed and reasoned overview which will be made available as a supplement to this report. At this juncture and for present purposes it will suffice to make some basic observations:

- The absence of a sound working relationship between the ECK and the media in no small measure contributed to the explosive atmosphere that built up as the electoral process unfolded and then erupted in the violence that brought death and destruction to so many. The ECK has argued with great conviction that the root cause of the violence was the inflammatory conduct of the media. The media, in turn, hold the ECK liable for the disaster that befell the country.

- This is a sterile and futile debate – and the sooner it ends, the better. Neither side is completely blameless, but that is beside the point. The ECK and the media are bound together by mutual interests and reciprocal rights and duties.
- Many journalists still do not know or understand how the ECK functions; they still do not know the ECK's procedures, their purpose or significance, and can therefore not report responsibly on these matters. The ECK is at least partly to blame for this dangerous state of affairs.
- A good working relationship with the media is an indispensable element of sound electoral administration and the ECK was seriously remiss in not realising this and vigorously addressing the challenge.

5.9 Technical assistance received by the ECK

External assistance for the 2007 electoral process had several components. First, several donors (USAID, the British Department for International Development [DfID], the European Commission, Canada, Denmark, Sweden and the Netherlands) set up the 2007 Kenya Election Assistance programme, which was implemented by UNDP. The programme aimed to strengthen the overall capacity of the ECK, civil society, media and other agencies critical to the achievement of free and fair elections, and to enhance citizens' participation in the electoral process and understanding of their rights and duties.

The International Foundation for Electoral Systems (IFES) had been providing support to the ECK since 2002, particularly in relation to the communication network and its organisational structure. IFES also submitted proposals on the use of technology, particularly to facilitate and control the nomination and counting/tallying processes, which are discussed in section 6 of this report. The National Democratic Institute (NDI) conducted training for the political parties, and the International Republican Institute (IRI) was responsible for several opinion polls and an exit poll.

The UNDP-managed program had several components, with a total budget of US$ 10.5 million. One of the largest components was the support provided to the Domestic Observation Process, through a grant of US$ 2.1 million to a group of organisations coalescing under a common umbrella: the Kenya Elections Domestic Observation Forum (KEDOF), which is discussed in detail in section 4 of the report. The UNDP project also assisted, through the Project Management Unit (PMU), the coordination, deployment and training of international diplomatic missions resident in Kenya.

The UNDP programme also supported capacity-building within the ECK (by providing laptop computers and printers for every constituency). Voter education was a key area of support, for instance via the MCK and the Anti-Violence Campaign. The ECK, with the

aid of the programme, implemented a voter education programme aiming to supply Kenyans with information on key aspects of the electoral process, details of which are given in chapter 4 of this report.

The ECK also received support for the establishment of a Media Election Results Centre (MERC) at the Kenyatta International Conference Centre (KICC). The MERC should have commenced operations just prior to election day and continued operations until all results for the presidential and parliamentary elections had been received and declared. The primary focus of the MERC was to provide the media and other stakeholders with results and other information on the election. MERC facilities also included personal computers with internet access for use by the media and other stakeholders. The MERC was also to be utilised for press conferences, announcements and pre-election briefings.

Another focus of the programme was the development of a harmonised media strategy, coordinated by the Media Focus in Africa Foundation (MFAF). The campaign sought to promote objective, unbiased and impartial media coverage and support the objectives of free and fair elections and increased voter turnout. As part of the campaign, MFAF sponsored close to 400 voter education radio programmes on ten radio stations and thirty programmes on three national television stations. The media campaign was focused on key electoral thematic areas of governance and political accountability, ethnicity and nationhood, youth and women's leadership, management of electoral process, human rights and rule of law. There was also an important component related to the monitoring of the media, conducted through Strategic Public Relations & Research Ltd (SPPR). The overall objective of the component was to ensure enhanced, fair and accurate media reporting on electoral issues, to be evidenced by improved electoral coverage in terms of balance, accuracy, impartiality and fairness. To achieve this key objective, SPRR provided independent, impartial observation of media behaviour throughout the election period. This involved an objective, neutral, accurate and comprehensive monitoring of both electronic and print media and an assessment of their compliance with the agreed codes of conduct and standards for access to media by political parties and candidates.

The last component relating to media involved the training of journalists, conceived as a response to the need to equip media with skills to play their agenda-setting and opinion-shaping role effectively, making journalists conversant with the various codes of conduct and ethics and the electoral process. The programme was implemented by the MCK, which organised training workshops across the country, targeting some 300 journalists. The training was directed at editors, reporters, sub-editors, political writers and correspondents of both genders working in the mainstream as well as the alternative press, drawn from both private and public media houses (print and electronic).

Other smaller components of the programme were:

- support for increased engagement of people with disabilities through a workshop that came up with a disability manifesto and through the establishment of a Disability Task Force made up of representative organisations
- town-hall based meetings designed particularly to further issues-based discussions, concentrating on constituencies where marginalised groups' candidates did not have the same access to funding or to media as had more prominent candidates
- a grant provided to the Centre for Governance and Democracy relating to accountable political finance: this programme had its origin some years ago, funded by DfID, but the programme contributed some funding for a focus on political party campaign financing and related issues

A small grant was provided to the Kenya National Commission on Human Rights for projects such as one on hate speech.

Findings: External assistance for the 2007 electoral process had several components. First, several donors set up the 2007 Kenya Election Assistance programme, which was implemented by UNDP. This aimed at strengthening the overall capacity of the ECK, civil society, media and other agencies critical to the achievement of free and fair elections and improving citizens' participation in the electoral process and understanding of their rights and duties. IFES had been providing support to the ECK since 2002, particularly in relation to the communication network and its organisational structure. IFES also submitted proposals on the use of technology, particularly in order to facilitate and control the nomination and counting/tallying processes, which are discussed in another section of this report. The NDI conducted training for the political parties and the IRI was responsible for several opinion polls and an exit poll.

5.10 Management of polling day operations

Voters' perceptions are largely shaped by their experience at the polling station. A positive experience – and voters will tend to believe the elections were fair. A negative experience will translate into complaints and voters may extrapolate their own experience to the entire election. It is therefore important to provide a positive experience by conducting the voting process in a professional way. Election day, 27 December 2007, proceeded without much of a problem in most of the country. However, there were some persistent issues that must be dealt with here.

Bribery: Testimonies collected during the country visits suggest that bribery was rampant throughout the country. But perhaps the best testimony comes from the autobiography of a participant in one of the parliamentary races:

> "We ... appointed 2 or 3 locational coordinators and 4 'pillars' (key supporters) per polling station – a total of 450 people. We gave each of these people 72 packets of ugali flour and Ksh 50 for mboga (vegetables). Theoretically, we were guaranteed 23,760 voters from all 99 polling stations. The exercise generally went well, although there were a few shortcomings from the dishonesty of some of the pillars. ... My major rivals spent a lot more than I did on their campaigns. I was disadvantaged in my source of money."

Assisted voters: The complement of bribery is the use of the regulation concerning assistance to illiterate voters. While voters with physical disabilities might need help to vote, this should not apply to illiterate voters. Many countries have a high illiteracy level and deal with it by using symbols for candidate choice and ballots of different colours for distinguishing between the various simultaneous elections. While it might be argued that an illiterate voter cannot distinguish between two written words, it is incorrect to assume that s/he cannot distinguish between a table and a chair (or between different fruits).

Use of the black book: The use of the black book should be discontinued, as it is a source of potential malpractice. The ECK might consider the introduction of tendered ballots in the case of persons whose name does not appear in the list of voters.

Security and access to polling stations by agents: It was reported during the country meetings as well as in the political parties' submissions that agents of certain political parties were not allowed access to polling stations in other parties' strongholds. It is necessary that the ECK and the security forces put an end to this practice, as it seriously affects the credibility of the election exercise. The presence of party agents is an essential safeguard and so-called "no go" zones should not exist.

Handling of ballots: At present, whether the three ballots are given to the voter at the same time or separately is an option left to the polling station staff. The main effect of the practice of giving the three ballots separately is that the discrepancies in voter turnout for the different elections tend to increase significantly. The voter's options do not diminish if s/he is handed three ballots at once. If s/he does not want to vote in any one of the elections in question, s/he can just leave the ballot blank. This is standard international practice, and it is applied without problems in countries with lower levels of literacy than Kenya. Any problem that may exist should be easily solved through voter education. In this way, one of the major sources of suspicion – differences in voter turnout in the various elections – would disappear.

A number of other practical recommendations are provided under their respective section-heads at the end of this chapter.

Findings: Certain persistent problems were found: (a) bribery connected to the abuse of assisted voting to ensure the fulfilment of the agreement (b) misuse of the "black books" (c) problems of access for agents of opposing parties in certain party strongholds (d) inadequate handling of ballots. These problems will have to be dealt with in future elections.

Recommendations

Concerning constituency delimitation

- *IREC recommends that the basic principle for the delimitation of constituencies should be the equality of the vote, and the maximum departure from that principle should be clearly defined in the law (equality of voting strength should be aimed at in all cases, although in rare specially justified circumstances a 5 to 20% deviation range could be accepted). Criteria such as density of population, population trends, means of communication, geographical features and community of interest should be retained, but they should interfere minimally with the basic principle of equality of voting strength.*

- *IREC recommends that the process of delimitation be made accessible to the public through a consultation process and enough time provide for it to discuss and challenge ECK decisions. The process should be as transparent as possible.*

- *IREC recommends the establishment of an independent commission - the Boundary Review Commission (BRC) – with responsibility for establishing, reviewing and drawing new constituency boundaries. The persons appointed to this commission should be non-partisan (non-political) public officials with some having a background in election administration, geography and statistics and some being retired judges, clergy or other non-partisan citizens. The term of the body should end with establishment of the new constituency boundaries. The establishment of constituency boundaries should be separated from the administration and management of elections, the responsibility of the ECK. Separating the two functions will remove the politics involved in boundary delimitation from the ECK. Parliament should not have the power to override BRC decisions. Parliamentarians should be allowed to provide their views only before the commission makes its decision.*

- *IREC recommends that the first delimitation exercise take place as soon as possible. Afterwards, delimitation should follow the population census. The delimitation process should be completed at least eighteen months before a general election.*

Concerning registration of voters

- *Move to a new registration system: IREC recommends that as soon as possible the issuance of the national ID card be integrated with the registration of voters, so that when a person requests an ID card, s/he will automatically be entered in the voter register and informed of the location of the polling station where s/he should vote (a cheap voter card containing such information can be provided to the voter). The ECK should immediately begin the necessary studies to implement this solution (resorting, if so desired, to external technical support) and a significant part of the human and budgetary resources today devoted to the registration of voters should be transferred to the new system. The availability of additional resources should allow a much faster implementation of the IPRS, which should be the final goal.*

- *Simplify qualifications for entitlement: IREC recommends that entitlement to vote be based on residency, unless there are strong arguments for maintaining some of the other categories presently included.*

- *Requirement of voter's card for voting: This is a redundant requirement. IREC recommends that voters be allowed to vote with the simple presentation of the national ID or passport if their name is in the voter register.*

Concerning nomination of candidates

- *IREC recommends that consideration be given to establishing a special election court to expeditiously receive and deal with disputes arising from party primaries. Such a court will deal with these matters, but only after the aspirants have exhausted the internal dispute resolution machinery in their respective parties and failed to obtain satisfactory relief. Guided by the constitution or rules of the parties in question, the special election court will then make a decision on the matter, and this decision should be final.*

- *IREC recommends that the ECK establish a clear, non-adjustable, timeframe within which all parties should hold their primaries and certify their nominees. Such a timeframe should be written into the regulations and communicated to all stakeholders in the electoral process together with the notice for elections. It should take into account the time required not only to conduct primaries but also to settle disputes arising from the primaries. It may be necessary to include, as a positive incentive for good behaviour, a requirement that candidates will not be gazetted while an election dispute is pending.*

- *IREC recommends amendments to the electoral law to require political parties to not only conduct elections in accordance with their constitutions or rules but to*

also conform to established standards of fair practice. The Registrar of Political Parties should, in consultation with political parties, adopt a standard that is then enforced when the constitution and rules are submitted for the party's registration (and with every amendment later) and which the electoral court can rely on to make a finding that a party's nomination rules are not in keeping with fair practice.

Concerning electoral preparations

- *IREC recommends that the job descriptions of all relevant temporary positions be reviewed and updated to take account of additional skills essential to the competent management of a modern, IT-facilitated electoral process.*
- *IREC recommends that the training of returning officers be enhanced to match the importance of their function in the electoral process, and also that consideration be given to earlier selection and recruitment to allow a longer period of training and engagement in ECK work.*
- *IREC recommends that personnel at every level be involved in the training of personnel one level below, to permit greater familiarity with the chain of work (for instance, national tallying centre staff should be involved in training returning officers in the tallying and transmission of results).*
- *IREC recommends outsourcing the selection of key temporary personnel to third-party agencies, with a requirement for testing some essential skills (e.g. IT) and a penalty clause in the event that any poor performance by selected personnel is discovered to have been caused by employees not having the stipulated qualifications. Longer lead time for the exercise is necessary so as to allow time to evaluate and if necessary replace recruits.*
- *IREC recommends that actual participation in electoral activities be made conditional on verified participation in **all** prescribed training events.*
- *IREC recommends the review of all training and operational manuals to ensure that they actually conform to the latest operational procedures in force.*

Concerning voter information and education

- *IREC recommends long-term investments in voter/civic education/information cam-paigns. Since district officers of the ECK have little to do when there are no elections, they could be used for civic education if provided with complimentary resources, such as mobility.*

- *IREC recommends that this activity not occur only during an election period or year, but on a consistent basis every year as in some other countries (Australia, Canada etc.). CSOs should be encouraged and must be able to conduct voter registration outreach in addition to voter education.*
- *IREC recommends that voter/civic education/information campaigns pay attention to local elections too. People must know enough about the choice or how their vote can make a difference in their local government or to their lives.*
- *IREC suggests that involving young people, particularly students, might help to interest younger voters, and would also strengthen bonds between older and younger elements of communities.*
- *IREC recommends that for communication to be effective the design of voter education material should factor in the varying needs and interests of target groups.*
- *IREC recommends introducing simplified teaching of the key principles and values relating to the right to vote in schools from the elementary stage.*
- *IREC recommends programmes such as "Vijana Tugutuke", which was focused on youth – they need to cover a large area and this should not only be in urban areas.*
- *IREC stresses the importance of public forums such as round tables, candidate debates and town-hall meetings at which specific local issues can be raised for discussion (e.g. the problems of people with disabilities and the local community).*
- *IREC recommends that voter education teach the Electoral Code of Conduct and highlight the deleterious effect of fraudulent practices in elections.*
- *IREC recommends linking voting to community issues.*
- *IREC recommends that selected organisations be vetted well in advance in order to have candidates for conducting voter/civic education/information campaigns.*
- *IREC recommends that monitoring and evaluation be put in place to ensure that CSOs responsible for voter/civic education/information campaigns carry out the programmes properly and in accordance with ECK guidelines.*
- *Patience, tolerance and long-term commitment are needed to help Kenyan communities overcome the barrier that stands between them and full civic participation and leadership. This is why IREC recommends that particular attention be devoted to demonstrating how free and fair elections can change Kenyans' opportunities and help to resolve difficult problems.*

Concerning regulation of political campaigns

- *IREC recommends that the ECK immediately promulgate regulations for the Political Parties Act, not only so as to provide a clearer legal framework for the registration of political parties but also so as to achieve the political finance objectives of the Act. Such regulations should have sufficient technical detail to illuminate the ECK's powers of oversight, detection (or investigation) and enforcement (or prosecution and sentence) to ensure compliance with the Act. Should it appear, in the course of drafting regulations, that matters have been omitted that form a statutory bar to the sufficiency of the regulations, the ECK should expeditiously make use of its advisory powers to bring these to the attention of the Kenya Law Reform Commission or Parliament (through a relevant Committee) so that the Act can be amended.*

- *IREC recommends electoral law reform to give power to the ECK to enforce its orders. This should include barring errant candidates in the event of defiance of the ECK's orders. The ECK should not have to go to the High Court for the sanctions contemplated in rule 9, but should be able to apply them itself, subject only to the High Court's power of judicial review. Given that rule 12 states that the judicial review proceedings shall be dealt with in priority and the decision delivered before the date of the election concerned, this would provide additional teeth to the ECK and also safeguards against abuse.*

- *IREC recommends that the plethora of provisions against the involvement of public servants in politics be consolidated into one provision in the consolidated electoral law barring not only the participation of public servants in political activity, including elections, but also barring (in unambiguous terms) the use of any public financial and material resources.*

- *IREC also recommends that the ECK put in place, at every election, adequate monitoring mechanisms to collect information on public servants involved in partisan political activity for use in prosecution and other penalties sanctioned by law.*

- *IREC recommends a reintroduction of realistic (given the economic times) and functional (with adequate monitoring and enforcement machinery) expenditure caps on election expenditure generally or specific election expenditure items. This will beef up the other regulatory functions in the Political Parties Act and reduce the undue influence of money in Kenyan elections.*

- *IREC recommends that the Attorney-General appoint public prosecutors for the ECK for the purposes of prosecuting election offenders; in the alternative, that amendments be made in the course of the constitutional review process as to how*

the Attorney-General's prosecutorial powers can be dispersed by Acts of Parliament to lead institutions, such as the ECK, to deal with matters under their remit (in like manner to the exemption of courts-martial under section 26 of the Constitution).

- *IREC further recommends that electoral law be amended to provide the ECK with prosecutorial powers over all election offences, and not merely those in section 34A of the National Assembly and Presidential Elections Act, and that the ECK thereafter proceed to expand its legal department to include public prosecutors for this purpose.*

Concerning regulation of freedom of expression and equitable access to media

- *IREC recommends that the constitutional guarantee of the right be enhanced by a provision restricting hate speech.*
- *IREC recommends that media, especially State-owned media such as KBC, should strive to offer balanced coverage to all the players in an election as is required by KBC's establishing statute and enhanced by the IPPG agreement.*
- *The ECK should ensure that the media receives correct and timely information so as to mitigate the possibility of misinformation such as was witnessed in the 2007 election period.*
- *IREC recommends that media houses ensure that they recruit professional reporters and editors and, in case of talk-shows and call-in programmes, avoid using staff who are ignorant of conflict reporting or moderation.*
- *IREC recommends that media houses ensure that they liaise with the ECK before publishing results so as to ensure the reliability and correctness of the information they pass on to their readership/audience.*
- *IREC recommends that the ECK or its successor, in consultation with suitably qualified advisors, as a matter of urgency devise and implement a sound media relations policy and strategy in order to establish and maintain a proper relationship with the media.*

Concerning technical assistance received by the ECK

- *The assistance provided by the international community to the electoral process includes highly successful elements as well as components that did not perform very well. IREC recommends that the assistance provided be thoroughly evaluated and the lessons learned applied in the future.*

- *IREC recommends that the assistance to be provided be carefully coordinated and defined well in advance of the electoral process. External evaluation of the proposed overall assistance programme before commitments is also recommended.*

Concerning management of polling day operations

- *Given the extent of bribery, IREC recommends that the ECK take steps to eliminate the practice, including stronger sanctions – such as disqualification - for candidates involved in the practice. The complementary practice of allowing assistance on the basis of illiteracy should be discontinued, and the voter education programmes adjusted accordingly.*

- *IREC recommends that the use of black books be discontinued (their destruction should be seriously considered) and that the ECK consider the use of tendered ballots in the case of persons who cannot find their names in the voters' lists.*

- *IREC recommends that party agents' access to polling stations and tallying centres be assured, and the only restrictions possibly placed on such access be related to the number of people the polling stations or tallying centres can reasonably accommodate. Agents should be adequately identified and, in the case of tallying centres, provided with special tags.*

- *IREC recommends that all three ballots be handed to the voter at the same time: this should be stressed both in training and in voter education.*

- *IREC recommends that every effort be made to ensure polling stations are accessible to all voters, especially people with disabilities and the elderly. A checklist for electoral officials surveying polling stations should be developed to help them assess whether the polling stations are accessible to all categories of voters – doorways too narrow, ramps too steep or door handles too difficult to manipulate. If possible, at each polling centre a committee including representatives of voters with disabilities should be formed to contribute to the design of polling stations.*

- *IREC points out that the polling station needs to be well designed to allow for easy entry and exit. Further, there must be a safety corridor where only ECK personnel, party agents and those voting are permitted. Clear open space must be left between the polling station door and the security rope. Only a few voters should be allowed inside the polling station at a time.*

- *Currently the training of party agents is optional. Yet they are vital to the smooth running of a successful election. Most agents do not know their formal role at the*

polling station since the parties are now left to train their agents according to their own curricula (which might well include how to rig on election day and how to prevent your opponents from voting). IREC recommends that party agents undergo ECK-supervised training. They should be given the same training as poll workers. Agents should not be allowed into the polling station unless they have undergone the training.

- *After training, all poll workers and party agents need to be sworn. IREC recommends that training identify the penalties for perjury, fraud and rigging. No poll worker or party agent should be allowed to work at a polling station without being sworn.*
- *IREC recommends that one poll worker be trained as a "greeter" for each polling station. Their responsibility is to ensure that voters are directed to the correct polling place. The greeter may be stationed outside the polling centre to assist voters before they waste time standing in the wrong queue.*
- *On election day, the ECK should make plans to provide polling station staff with food and water (or provide them with an allowance to that effect). Party agents should not be allowed to provide food to polling station workers.*

CHAPTER 6

COUNTING AND TALLYING THE 2007 ELECTION RESULTS

6.1 Introduction

The acceptability of an election depends very considerably on the extent to which the public feel the officially announced election results accurately reflect the votes cast for candidates and parties. It depends, too, on factors such as the character of the electoral campaign and the quality of the voter register, but reliable counting and tallying is a *sine qua non* if an election is to be considered legitimate by its key assessors – the voters.

Counting and tallying during the period 27-30 December 2007 (and even thereafter) and the announcement of individual results were so confused – and so confusing – that many Kenyans lost whatever confidence they might have had in the results as announced. Rumours of rigging and fraud during the counting and tallying process spread like wildfire, and the consequences were tragic.

It was therefore of paramount importance that IREC scrutinise these processes closely in order to enable it to assess whether or not the ECK administered these key elements in such a way that the voters – and others – could have full confidence in them.

6.2 The integrity of the counting, tallying and result announcement system

Integrity in systems or processes such as electoral management refers to systemic safeguards, which aim at reducing the need for personal integrity. It might even be argued that systemic integrity is what separates acceptable management, and therefore safety, from disaster.

While integrity is necessary at all stages of the electoral process, nowhere is it more important than in counting and tallying. To maintain integrity, vote counting must produce results that are and are seen to be valid and accurate, and therefore acceptable to all stakeholders. Some examples of safeguards used to ensure the integrity of counting and tallying are:

- Ballot papers may be given difficult-to-counterfeit security features or require stamping/ signing by the presiding officer (PO)/party agents.
- In some cases, ballots are numbered on the counterfoil and on a detachable section of the ballot itself. When the voter returns with the completed ballot, the presiding officer checks that the counterfoil and ballot-paper numbers are identical, detaches the number from the ballot (to eliminate the possibility of later identification of the vote) and posts the ballot in the ballot box.

- Rules for rejecting ballots should be unambiguous while aiming to retain the voter's intention. The decision to reject or not should be taken at the polling station level, although procedures for appeal should exist.
- If votes are counted at the polling station, the EMB must ensure there is no possibility of collusion among those present. This is normally done by ensuring the presence of agents of rival political parties. In some cases, however, the EMB ensures that the polling station staff is politically balanced (for instance, by asking political parties to submit names for such positions).
- In most cases, the number of names crossed out on the voter register is compared with the number of ballots in the ballot box. If party agents have copies of the voter register, they can verify the correspondence between these numbers independently.
- After the count, sensitive material is usually placed in tamper-proof bags for secure safe-keeping.
- Tallying is frequently conducted in duplicate to avoid arithmetical errors. For instance, the results at a polling station may be entered twice. If the computer identifies differences between the two entries, it rejects the results, which will then be scrutinised and re-entered.
- While it is always necessary – and unproblematic – for the EMB to announce preliminary (or provisional) results (that is, results which have not yet been formally approved as final by the relevant authority), adequate time must be allowed for the processing of complaints and appeals before the final results can be announced.

The above are only examples of how adequate rules and procedures can help ascertain and sustain the integrity of an electoral system. The following section examines this topic in relation to the 2007 general elections in Kenya.

6.3 Vote counting and tallying in the 2007 elections

After the close of voting, party agents at the polling station may check that the ballot-box serial numbers are identical to those registered at the opening of the poll. Once the physical space has been cleared, counting starts in the presence of these party agents.

Ballots are unfolded by the counting clerks (assistants) and sorted according to candidates' names, the counting clerk/presiding officer showing each ballot to the party agents before placing it in the correct pile for the candidate in question. Valid votes are bundles in fifties and counted. Rejected and disputed ballots are kept separate and stamped, but disputed ballots are treated as valid until the returning officer (RO) has decided what they are: disputed ballots are bundled separately according to candidate.

The counting clerks count the valid votes for each candidate, and the presiding officer announces the result for each presidential candidate in relation to the presidential election, each parliamentary candidate in relation to the parliamentary election, and each civic election candidate in relation to the civic election. The counting clerks then complete two forms 16A, one for the presidential and one for the parliamentary election, and one form 8 for the civic election, and invite party agents to check the correctness of the figures and confirm that by signing the forms. The Presiding Officer is also required to sign the forms. Copies of the forms are then provided to the party agents.

If agents decline to sign these forms (which they may), the presiding officer must try to establish a reason for their refusal; and if they decline to sign, he must state accurately what occurred. Agents should then (in any case) be given a copy of the relevant form. Copies of the forms are to be affixed where they are easily accessible to the public.

All sensitive material is then packed, sealed and transported to the constituency tallying centre, accompanied by party agents who so wish (and can find transport).

In Kenya, neither the electoral regulations nor the various checklists and training materials are as clear and unambiguous as one would have hoped. The regulations are not precise about the order in which the three counts (presidential, parliamentary and civic) should be carried out, and they do not indicate how to deal with situations where 100% or more of the registered voters have voted (in itself a rather fluid concept, given the acceptance late in the day by the ECK of voting by double-registered voters and the use of "the black book"). However, in some – but far from all – constituencies, presiding officers were instructed to indicate on form 16A how many voters came from these categories; this information is helpful for the assessment of actual turnout.

To what degree party agents were present or were turned away is difficult to document, since relevant material for such documentation has not been available to IREC. Information gathered during the IREC meetings and hearings indicates that there were problems at a number of polling stations.

In 2007, counting and tallying was a straightforward process, at least in principle. At the constituency tallying centre, the returning officer received the material from the polling stations, checked that all the material was there, and then assumed control – almost took ownership – of it. The returning officer then announced the results from each of the polling stations, as the presiding officers submitted them, and these results were then entered in the relevant cells in the huge form 17A.

Once this was done for all polling stations in the constituency (typically between 100 and 200), the results were added up (column-wise), and the resulting figures for presidential candidates entered on form 16, for parliamentary candidates on the last page of form 17A and for civic candidates on the last page of form 9. When this had been done, the results were announced orally, and Certificates of Results were issued for parliamentary winners (form 17) and civic election winners (form 18C). The entire process is shown in the process-chart below.

The complexity of the process is evident, and it can be no surprise that many errors were detected when IREC analysed a sample of constituencies in some detail.

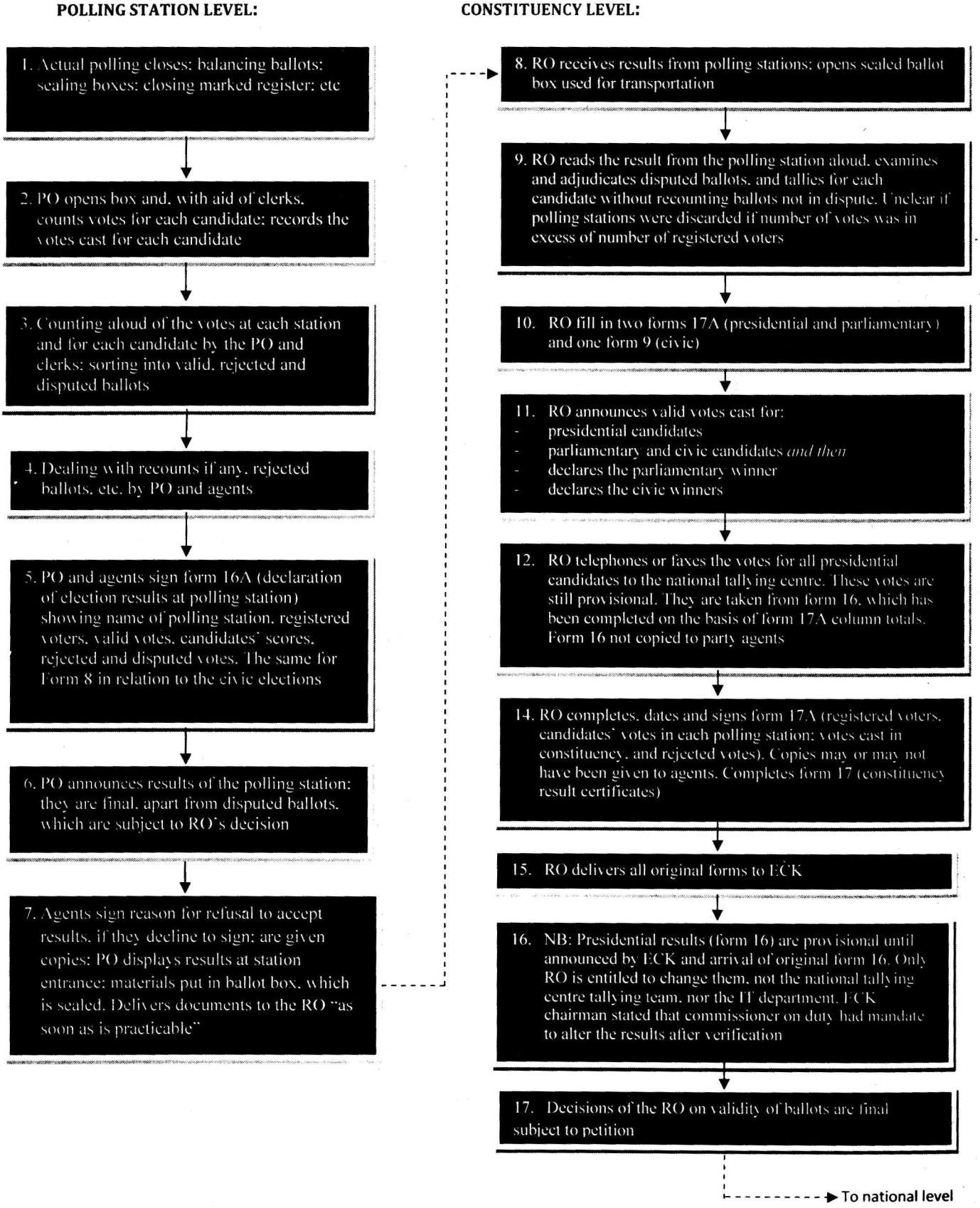
The returning officer was then required to telephone or fax the information in form 16 (that is, the votes obtained by each of the candidates and the number of rejected votes) to the national tallying centre at the Kenyatta International Conference Centre (KICC) in Nairobi, to a specifically assigned "verification" table. The information was captured on a special, preprinted constituency-specific form and subsequently checked by calling back and verifying the returning officer's identity and by rechecking the information. The hand-written form was then handed over to the IT department, where the key data were entered into the computer, and a printed version of the form was brought back to the table in question.

The returning officer was then to make his way to KICC immediately, even though some of the training material used the phrase, "within two days". He had to bring with him all results and relevant tallying forms from the constituency, and in particular the original, statutory form 16. Upon arrival, he was to certify that the content of the printed form produced by the IT department was identical to what he had on the original, statutory form 16 for the constituency.

In the meantime, an ECK commissioner would normally have announced the results from the constituency once the fax/telephone message had been received and been data-captured. If there were no differences when these were checked against the original form 16, the results changed from "provisional" to "final" (that is, the official, ECK-approved presidential results from that particular constituency) because the original form 16 was now with the ECK. What was not foreseen was that the returning officer might have realised that there were inaccuracies – or even more serious mistakes – in his form 16. As the content of form 16 would already have been communicated to KICC (and also been announced), there was a serious problem and the announced result ought to be changed. The ECK had not prepared clear procedures or rules for this eventuality. IREC has learnt that commissioners disagree on whether or not changes to announced results were possible. The same is and was the case even for senior staff, including the Deputy Secretary, the IT manager and table team leaders.

This was extremely unfortunate, as it meant that such necessary – probably unavoidable – changes were not dealt with identically. Some were accepted and changed in the database more or less immediately, others were not, and others again were changed or changed back between the announcement of the presidential winner and 8 or 9 January 2008. This means that some of the results announced on 30 December 2007 or published on 9 January 2008 do not correspond with those on the original forms 16.

GENERAL ELECTIONS RESULTS PROCESS



NATIONAL LEVEL:

From constituency level

18. Provisional presidential results are received by phone or fax by one of ten tallying teams (each handling 21 constituencies). The team fills in a constituency-specific preprinted form and verifies authenticity of results by calling back to the RO (did this always happen?)

19. • The team leader delivers the completed form to the IT department, which enters the data into the computer and prints a form with the presidential results as received from the RO and passed on by the verification table. An ECK commissioner announces the presidential results for that constituency based on the provisional results.

• When the RO arrives with the original form 16 (and accompanying documents), he is shown the form with the printed (in some cases also announced) results: he compares this with his original results and signs if they are identical. They thereby become final. If they are not identical, he the team staff manually corrects the figures on the form. The form is then taken to the IT department, which enters the corrected data into the computer and prints a new result sheet, which is then authenticated by the RO.

• Unclear if corrected results were announced as such. The IT department in some cases declined to change corrected results, claiming that results could not be changed after having been announced.

• Evident disagreement between ECK senior staff and commissioners on the correct procedures in such cases: this might explain some of the problems identified.

• The tallying teams in some cases checked the correspondence between form 16 and other forms (17A). This was, however, the exception rather than the norm.

• Final presidential results when all 210 forms 16 have been entered and tallied – or when remaining constituencies could no longer change the outcome.

• ECK chairman fills in form 18 and delivers it to the winner of the presidential election "at the time and place where the new president shall take the oath of office"

20. Gazetting of the names of those elected. ECK notifies Speaker of the National Assembly of tied elections if any

21. Disputes over counting or tallying to be lodged with ECK within 24 hours: to order a recount provided an ECK decision shall be made within 48 hours of that request. Where a further dispute arises, this has to be taken to an election petition court within 28 days.

6.4 Points and issues raised

Numerous complaints in relation to counting and tallying were made by political parties, individual voters, civil society organisations (CSOs), domestic and international observers, the media and even ECK commissioners and staff. Most of the complaints fall neatly into one of the categories listed below. We look first at problems brought up in relation to the polling station level, then at those at constituency level and last at those at national level.

Polling station level:

Polling station complaints can all be connected to problems caused by ethnic (and therefore also often party-political) dominance in a particular area. This issue was brought to IREC's attention in one or other form in many parts of the country:

- "Zoning", that is, a conscious policy of keeping political opponents away from one's territory, for instance by not allowing them to campaign. Where zoning is practised, free and fair elections cannot take place.
- Agents of rival political parties were expelled from polling stations, in some cases at the time of counting. This complaint was made by interlocutors from all major political parties and IREC heard it so often and so vigorously that there is no reason to doubt its correctness. Such behaviour – whether initiated by presiding officers, supporters of the dominant party or others – is unacceptable: it is a denial of the access to information and transparency which are preconditions for free and fair elections.
- Results from polling stations in areas dominated by one political party were not always reliable. The reason given to IREC is that ECK polling personnel and party agents from the dominant party in the area would obviously agree on the desirability of a good result for that party. And agents for other parties – if present at all – might not necessarily be reliable witnesses of what went on as they might have been bought or threatened. The party affiliation of party agents is in any case impossible to check, as form 16A does not ask that very important piece of information.
- Agents of rival parties were not allowed to accompany ballot boxes to the constituency tally centre. This is most likely true, but it has not been revealed whether this was to provide an unchallenged opportunity for ballot-box tampering – as the suspicion goes – or because of lack of transport for a considerable number of party agents. Prudent behaviour by presiding officers would of course be to provide transportation for as many agents as possible, and primarily with an eye to securing transport for as many rival parties as possible.
- In some polling stations, supporters of the main party were allowed to enter without being properly identified as party agents (as stated by a returning officer at the IREC hearings).
- High turnout in polling stations in areas dominated by one party is extremely suspicious and in the eyes of IREC is in itself a clear indication of likely fraud, most probably conducted through ballot stuffing, utilising local knowledge of who on the poorly kept voter register is absent, deceased or for another reason unlikely to appear to vote. It is

unconvincing to ascribe high turnout to the quality of voter education and motivation in this election or to the gratifying results of the voter registration drives in 2007, even in cases where there were organised efforts to get out the entire vote. IREC generally holds a 100% turnout where the voter register is of poor quality to be a clear sign of fraudulent presiding officer behaviour. Even in countries with compulsory voting, a 100% turnout is never achieved! The identification of a particular level of voter turnout to distinguish "suspicious" from "non-suspicious" turnout levels will always be arbitrary, and IREC does not find it useful for its purposes to engage in such an exercise.

Constituency level

- It was claimed in some cases that returning officers did not include all the 16A forms when the constituency tallying form (17A) was being completed. This element of the entire electoral process should have been conducted transparently, but IREC has found cases where a few forms 16A are missing and/or a few rows in form 17A have not been completed. Whether that was intentional or not and why party agents did not react to figures which were lower than their own tallies has not been investigated. It should be remembered that the omission from the constituency totals of the results from one or more polling stations will hurt an area's dominant party more than its weaker rivals, so why should this be in the dominant party's interest? In a constituency where party predominance varies from polling station to polling station, this reasoning obviously cannot be used. *Nevertheless, some members of IREC were of the view that a conclusion such as this should be taken with caution because in areas where dominance exists but is not overwhelming, especially if support also follows locales, omission of particular polling station results could yield a significant advantage over a rival.*
- Inflating the number of votes when completing form 17A. This has been claimed but not substantiated, and IREC has found no such evidence in the sample of constituencies scrutinised. *Some members of IREC were of the view that this conclusion should also be taken with care, given the limitations of its chosen methodology, which did not include a review of the veracity of Form 16As. Additionally, where some ROs gave two Form 16s, and could not successfully explain the differences between the two, even under oath.*
- Proper scrutiny of polling station results (forms 16A) at the constituency tallying centre might not always be relied on in areas where one party is dominant, e.g. questions should have been asked or investigations carried out in cases where polling stations had 100% turnout.
- Under no circumstances were returning officers allowed to announce partial results from the constituency tallying processes since that could slow tallying down and create confusion and misunderstanding. For various reasons, including calls from the national tallying centre requesting results, some returning officers nevertheless did announce partial results, which unavoidably – because this was not anticipated – caused considerable, and tragic, confusion and misunderstanding. Some of these cases – Molo, Juja, Kieni, Limuru, Lari, among others – received considerable attention, and it is clear that the returning officers in question themselves contributed to the misunderstanding and

confusion around such results and their announcement. IREC has not been able to discover information demonstrating that the official presidential election results from these constituencies are not correct. It is, however, equally clear that the handling of these cases – in the constituencies as well as at the national tallying centre at KICC – contributed to the confusion, misunderstanding and eventual denial of the correctness of the outcome of the presidential election. It is difficult not to attribute this to a combination (not necessarily the same in each of these cases) of problems emanating from recruitment of temporary staff (including returning officers), their inadequate training, conflicting information from ECK headquarters and, finally, inadequate preparation for results handling and announcement at KICC (including insufficient briefing of temporary personnel and party agents and observers). One can also ask whether the *system* as such was not primarily to at fault (that is, those who designed the system, or allowed it to be used). The system provided for the manual completion of reams of badly designed sheets of paper with thousands of entries to be made and tallied and very little technical assistance, if any.

- Some returning officers did transfer constituency results (presidential as well as parliamentary) to the national tallying centre before they were entirely certain that they had established their correct results. Therefore, in some cases, different results from those previously transmitted were brought to KICC by returning officers. This created confusion (since this had not really been foreseen) as well as a need for correction. In some cases, necessary changes were not allowed, resulting in the ECK insisting on results it knew were wrong! At the same time, attempts to correct erroneous results (no matter how well it had been established that the figures in question were not correct) also aroused serious suspicion, when altered/corrected data forms were spotted at a verification table or on their way to the IT department.
- There were allegations that delays in transferring constituency results from PNU strongholds to KICC were to allow for controlling how the score for President Kibaki stood compared with the score for his primary challenger, Mr Odinga. IREC was presented with various arguments from the two sides (PNU primarily explaining the delays by adverse weather conditions and the complexity of the constituency tallying [large constituencies, many candidates at all three levels], ODM primarily arguing that the apparent unreachability of many returning officers in these areas and the general delay was so suspicious that there could only be one explanation – that "somebody" was up to "something"). The ECK denied that there were any delays, saying the time taken in the circumstances was normal and explicable on the basis of a variety of known factors. Ultimately, IREC could establish neither the cause(s) of the delays nor that they formed part of a comprehensive plot, in which the components and collaborators remain unidentified. Nor could any numerical consequences be ascertained. In some cases, the explanation may have been that returning officers decided to deal with results from parliamentary and civic elections first, because that was what the many candidates in those elections – who happened to be present and vocal – obviously wanted. *A section of the members were of the opinion that, taken in their totality, the foregoing explanations still leave many questions unanswered, and do not sufficiently explain what were then*

perceived as delays in full. By way of illustration, they argued that the time indicated for receipt of the Kieni results, for example, differed materially from the RO's testimony of when he received them, in addition to other inconsistencies such as his reasons for not speedily alerting ECK that he had sent the wrong results in the first instance, taken with the curious time-consuming effort at saving costs by travelling with five other ROs in the same vehicle to Nairobi.

National level

- Official ECK results in a number of constituencies showed considerable discrepancies between presidential and parliamentary election turnout. Since this phenomenon was observed primarily in Kibaki strongholds, it was seen by many – political parties, domestic and international observers, ordinary voters – as convincing evidence of inflation of the Kibaki vote by ECK personnel and commissioners at KICC. However, the documentation provided is unconvincing, and no cogent evidence has been produced by any of those who claimed that these discrepancies demonstrated ECK rigging in favour of the President and PNU. Furthermore, such discrepancies were also identified outside Kibaki strongholds. However, simple reason and solid evidence from all countries with simultaneous elections make such discrepancies – in some conspicuous cases of more than 15 percentage points – most unlikely. IREC therefore decided to conduct an in-depth analysis of a sample of such cases, the clarifying result of which is presented in the subsequent section. *Though the sample is statistically valid, a number of the IREC members were of the view that the inferences drawn from it should be taken with care since, on their own, the statistics can only be relied on to illustrate errors in computation and transmission of results and no more.*
- The verification exercise by the ten teams at KICC was conducted badly, if at all. The ECK chairman admitted in his evidence to IREC that the presidential results in the computer database for no fewer than 32 constituencies currently differ from what is recorded on those constituencies' forms 16. This is 32 out of 210, i.e. 15%!
- Furthermore, the IT department did not provide an adequate checking procedure for the accuracy of the sum of valid votes; it is also not difficult to spot errors in the summation of presidential and/or parliamentary candidates' votes. This has contributed to the use of incorrect results by political parties, CSOs and observer missions in their attempts at analysing the election, leading to a number of erroneous conclusions. The ECK IT manager must take considerable responsibility for providing at least some of these incorrect figures to users of the ECK's official information.
- It was alleged that figures in forms 16A and 16 were being changed/corrected at KICC, which was in itself seen by some as proof of results-tampering. However, IREC has not been provided with any instance where this appears to be the case. The unmistakably corrected forms, primarily the handwritten data-capture forms used at the tallying centre when receiving telephone calls or faxes – the existence of which is not in doubt – reflect many other problems, such as later realisation by a returning officer (stated under oath) that he had made mistakes in tallying, or the eventually provided total results for

constituencies instead of previously provided partial results. These are convincing signs of the various inadequacies in the planning and management of the tallying and results transmission process, but that is something different from what has been the accusation made by – in particular – ODM, civil society, and domestic as well as some international observer missions. Whatever the conclusion on this particular issue, it is clear that ECK procedures and problems at KICC were never fully understood by most of those who aired an opinion, including vocal commentators. *Evidently, these interlocutors would have been much more useful to IREC's investigation if they did not have the material inaccuracies alluded to above in their assertions. Some members are nevertheless of the view that such inaccuracy should only be taken to mean ignorance of the procedures. Any aspects of their information that is unaffected by these material inaccuracies has been valuable in adding up to the final conclusions of IREC on specific issues, such as suspiciously high turnouts.*

- Access to the national tallying centre by presidential agents and by observers was handled extremely unprofessionally. It therefore became an awkward issue, causing all sorts of suspicion and justified accusations of lack of transparency. But it appears primarily to have been a sign of unprofessional process-management and inept public relations, not circumstantial evidence of fraudulent ECK misconduct. *A number of the commissioners also pointed out that, given the difficulty of proving fraud, the unanswered questions around who prevented the observers (in the first instance) and agents (throughout the process) from accessing the tallying centre until the night of the 29th of December 2007 still cast a shadow of doubt on the reasons for either implementing transparency measures that the parties had been notified by letter about nonchalantly or the possible reversal of that transparency requirement.*
- The strange circumstances surrounding the final announcement of the result of the presidential election, the handing over of form 18 and the low-key swearing-in ceremony at State House all contributed to the flow of rumours of ECK malfeasance before, during and after election day. Mr Kivuitu, the ECK chairman, has himself stated that he was not too happy about the situation and there can be no doubt that the very last part of the electoral process contributed significantly to the eruption of post-election violence. But while Mr Kivuitu was not happy, he did not intervene and request the necessary time to investigate the various claims in sufficient detail so that a proper solution could be found. The overnight "audit" exercise carried out by some party stalwarts and a couple of national observers was not conducted in such a way that it put the issues to rest.

In the final argument, ODM persisted in contending that, inasmuch as there has been no adequate refutation of such a plot, given the alterations and inconsistencies in the results and the documentation, a finding of fraud is indicated. PNU and the ECK submit that there has been no evidence that any of the alterations and inconsistencies were intended fraudulently to benefit any candidate or in fact had such result. Therefore they contend for a finding that the explanation must be human error.

It was not possible to attain consensus as between the members of IREC on this issue. Nor was it necessary. There is indeed consensus in respect to item (e) of the Terms of Reference, relative to the integrity of results, especially in relation to the presidential election: The conduct of the 2007 elections in Kenya was so materially defective that it has been, and will remain, impossible for IREC to establish true and reliable results for the presidential and parliamentary elections.

Therefore, although there is room for honest disagreement as to whether there was rigging of the presidential results announced by the ECK on 30 December 2007, the answer is irrelevant.

6.5 Analysis of the 2007 counting and tallying process

IREC soon realised that it was necessary to study in considerable detail how polling station counting results were documented (form 16A) and how such results were transmitted to the constituency tallying centre, where they were recorded and tallied (on form 17A) before the constituency results were announced. Subsequently, the constituency presidential results were transmitted to the national tallying centre, first by telephone or fax for fast announcement in the national media, and then the original form 16 was brought to KICC by the returning officer in person, whereupon that constituency's presidential results, until then provisional, became final.

IREC's intention to analyse in considerable detail how results floated upwards from polling stations via constituency tallying centres to KICC was also due to (1) claims by various stakeholders that they had identified potential problems, which needed to be investigated using basic source data, and (2) IREC's own observation that in a number of official ECK constituency results (both presidential and parliamentary) the sum of votes for all the various candidates did not tally with the number of valid votes, as it obviously should, no matter what.

At IREC's request the ECK promptly supplied photocopies of the material requested, which for this purpose was primarily the files containing forms 16A and 17A from a number of sample constituencies which evidenced various types of problems and suspicions. The ECK also made it clear that IREC, if it so wished, might have full access to the original files, but that was not considered necessary (apart from a few very specific checks). The reasons for that decision are presented below.

IREC requested the relevant material from nineteen constituencies in several tranches for these analyses, described in more detail in annex 6.A. The analytical approach was extremely simple, as an Excel spreadsheet was constructed for each of the two different elections in each of the nineteen constituencies (in one case, only the presidential election was included). The entire content of the forms16A was then transferred to the relevant spreadsheet, with candidates in the columns and polling stations in the rows, which resulted in the spreadsheets for all practical purposes being a replication of what the forms 17A for those constituencies should have looked like.

A comparison between the forms 17A and the IREC spreadsheets then allowed a closer scrutiny of discrepancies and the drawing of conclusions. In this latter part of the analysis, ECK in-house data transmission forms, forms 16 and other ECK material were also used.

The main result of this analysis is that the transfer of data from forms 16A to form 17A – especially when one considers the simplicity of the exercise – in many cases suffers from a very low level of precision and reliability. The tallying in forms 17A is also erroneous in many instances ("many" here meaning in relation to what one would expect, once again considering the simplicity of the arithmetic involved).

In some instances it was also discovered that results announced in the constituencies, which were more or less identical with the results of IREC's exercise, had not been accepted for announcement at the national tallying centre at KICC, while the less accurate aggregated result had been.

Here are the three main observations:

(1) This kind of audit is cumbersome, especially because some forms 16A apparently never made it to the constituency tallying centre (which can explain why they are not included in the forms 17A), while for unknown reasons others are not currently available in the constituency files. *Though some of the members placed a premium on the story told by statistics, a number of others felt that (time and other resources permitting) a deeper investigation of some of the reasons why statutory forms were missing, for example, would have shed more light on the issues.*

(2) Almost *all* parliamentary and presidential election results for the constituencies sampled are erroneous, which means that very few of the officially published figures are actually accurate. In one constituency (090 Kirinyaga Central) IREC even discovered that the parliamentary candidate with most votes (when properly transferred and aggregated) had not been declared the winner, as that honour was enjoyed by the candidate with the second highest number of votes (and the returning officer from the constituency in question has in his evidence accepted the correctness of IREC's analysis). *Some IREC commissioners were of the view that this was one of the cases where a scrutiny and recount would have reinforced the statistical finding, especially given the narrow margin. This was, however, not done by IREC.*

(3) In all ten constituencies displaying large discrepancies between presidential and parliamentary election turnout which were selected for analysis, the discrepancies are reduced to the low level one would expect on the basis of simple reason or from comparison with other countries conducting simultaneous elections. The table below demonstrates how the turnout discrepancy apparent from the official ECK election results virtually disappears when the far more reliable IREC data are used.

There is no reason to doubt that the picture is the same in the constituencies not included in this analysis. The overall conclusion is, therefore, that conduct of the results transfer from polling stations to constituencies, the tallying in constituencies, the transfer of constituency-level presidential election results and the tallying at national level is – generally speaking – of incredibly low quality: it is actually not acceptable.

	Constituency	Presidential / parliamentary turnout as % of total registered voters *(based on ECK data)*	Presidential / parliamentary turnout as % of total registered voters *(based on IREC data)*
090	Kirinyaga Central	15.9	0.7
017	Kaloleni	14.7	0.9
144	Kajiado North	12.8	0.1
104	Limuru	11.5	0.6
203	Bomachoge	10.3	1.1
		Average: 13.1	Average: 0.7
138	Molo	3.2	NA**
100	Juja	3.2	0.3
095	Maragwa	1.7	1.3
182	Bondo	1.0	-2.9
051	North Imenti	0.0	1.2
043	Saku	0.0	4.0
034	Wajir North	-0.2	0.0
082	Kieni	-1.0	0.3
105	Lari	-1.6	1.5
		Average: |1.3|	Average: |1.4|
155	Malava	-11.0	-0.2
009	Changamwe	-11.3	NA*
070	Machakos Town	-15.0	2.5
052	Central Imenti	-19.9	-0.8
066	Masinga	-22.4	-2.3
		Average: -15.9	Average: |1.5|

*Forms 16A for the parliamentary election for Changamwe have not been re-entered, so this constituency is not available for this analysis.

** Form 17A for the parliamentary election in Molo has not yet been identified so this analysis cannot be performed for this constituency.

This scrutiny of the handling of results-transfer and tallying has not indicated any particular or discernible party bias in the demonstration of incompetence by constituency tallying centre staff, by national tallying centre contract staff at KICC, or by ECK permanent staff and commissioners.

6.5.1 The random nature of the errors affecting the presidential election in the eighteen constituencies analysed

The analysis of the results in the eighteen selected constituencies clearly indicates the poor quality of the tallying process conducted by the ECK, and the ubiquity and magnitude of the errors in the translation of results from polling stations to form 17A, in the addition in that form, and even in the relatively simple task of transcribing the results calculated on the forms 17A to the statutory forms 16.

It is not within IREC's mandate to conduct a new tally of the vote for all the 27,555 polling stations. This would not only be beyond our capacity, but the results of the exercise could be doubted on account of the unreliability of the basic data. Even though the sample used was designed with other purposes in mind, it might, however, be of interest to conduct a brief analysis of the impact of the errors on the numbers of votes obtained by the main candidates. This has been done in the table below.

CANDIDATE	MWAI KIBAKI			RAILA ODINGA			KALONZO MUSYOKA		
CONSTITUENCY	VOTES ACCORDING TO		DIFF	VOTES ACCORDING TO		DIFF	VOTES ACCORDING TO		DIFF
	IREC	ECK		IREC	ECK		IREC	ECK	
KALOLENI	16,816	16,879	63	21,748	21,716	-32	1537	1,535	-2
BONDO	156	148	-8	56,022	53,202	-2,820	9	7	-2
MALAVA	18,152	14,712	-3,440	26,355	19,891	-6,464	346	340	-6
CHANGAMWE	15,151	9,366	-5,785	29,648	17,706	-11,942	8,368	5,347	-3,021
MASINGA	2,341	1,038	-1,303	387	238	-149	33,659	21,225	-12,434
MACHAKOS TOWN	4,954	3,187	-1,767	1,515	812	-703	55,785	41,295	-14,490
KIRINYAGA CENTRAL	55,097	52,866	-2,231	601	580	-21	59	53	-6
LIMURU	48,302	48,389	87	2,988	2,934	-54	443	436	-7
JUJA	101,003	100,390	-613	13,948	13,752	-196	4,986	4,409	-577
MOLO	75,314	75,261	-53	22,510	23,268	758	263	222	-41
MARAGWA	56,429	56,439	10	471	460	-11	577	564	-13
NORTH IMENTI	90,572	78,684	-11,888	3,677	3,370	-307	862	802	-60
KIENI	72,354	72,054	-300	612	580	-32	62	58	-4
LARI	49,280	49,276	-4	458	457	-1	70	32	-38

CENTRAL IMENTI	58,811	43,410	-15,401	1,585	1,108	-477	185	130	-55
KAJIANDO NORTH	49,055	49,038	-17	28,921	25,330	-3,591	3,260	3,664	404
BAMACHOGE	26,176	26,967	791	20,043	18,070	-1,973	224	177	-47
WAJIR NORTH	5,084	52,44	160	5,166	4,988	-178	30	29	-1
TOTAL	745,047	703,348	-41,699	236,655	208,462	-28,193	110,725	80,325	-30,400

What the table clearly shows is the random nature of the errors in these constituencies: no candidate can be said to have benefited. Table 1 shows that *all* three main candidates lost a significant number of votes on account of the errors, and those errors that negatively affect the candidates most were even concentrated in their strongholds. Kibaki lost 15,401 votes in Central Imenti and 11,888 in North Imenti, two of his main strongholds. Raila Odinga lost 11,942 in Changamwe and 6,464 in Malava, two of the constituencies where his support was stronger. Kalonzo Musyoka lost 14,490 votes in Machakos Town and 12,434 in Masinga Constituency, two of his main strongholds. *Some of the commissioners did point out that, in sum, these random "mistakes" did result in significant gains or losses by certain candidates. This is a conclusion that they admit means little working with a small sample but insist would possibly have significant effects if all the results were analysed in similar fashion and with greater rigour, which IREC did not have the wherewithal to do.*

6.6 Assessments by observer groups of the counting, tallying and result announcement processes

The various domestic and international observer groups experienced problems in general with understanding the counting, tallying and transmission processes and the possibilities for them not being conducted strictly according to the various sets of instructions and guidelines issued. This might have led to assessments based on insufficient understanding of these processes, their regulatory foundation and the actual impact of problematic recruitment procedures, unclear rules and insufficient training.

The main consequence of this incomplete comprehension of the entire counting, tallying, reporting and announcement process has been a tendency to deliver verdicts on the process which do not give a fully reliable picture of what actually happened after the original counting of votes at the polling station level.

Three problems in particular have been difficult for observers and observer missions to comprehend:

- The announcement of *partial* presidential results in some constituencies. Such announcement was not foreseen in the general regulations, in the guidelines for returning officers or in their training, but nevertheless it happened. The returning officers in question were actually announcing might well have been more or less difficult to

understand, but that does not necessarily make the subsequent announcement at the national tallying centre at KICC of the *final* result (that is, including all polling stations in the constituency, which by necessity must have produced more votes for at least some of the candidates) a proof of rigging or fraudulent behaviour as some observer groups (domestic as well as international) have claimed in their reports. Some political parties and individual commentators have also been keen to see this as an indication of ECK malfeasance, generally accusing some unnamed person or persons at the ECK of allotting a substantial number of votes to one of the presidential candidates. IREC has not been able to substantiate such accusations. Counsel acting for ODM did not suggest to any of the ECK witnesses, from the chairman to the returning officers, that they were party to or witnessed any such malfeasance. *Some of the commissioners are of a materially different view. In their opinion, the fact that partial results were expressly forbidden taken together with the lack of data on, for example which 111 polling stations the Juja RO referred to in his exculpatory letter, still leave reasonable doubt as to whether the results were not only partial as alleged, but also the percentage of the overall total from those polling stations at that stage.*

- The very noticeable discrepancy between turnout in presidential and parliamentary elections was interpreted by observer groups as well as one major political party in particular as clear evidence of rigging in favour of the incumbent president. However, IREC's analysis of counting and tallying in ten constituencies with huge turnout discrepancies demonstrates convincingly that the discrepancies are probably due to human error and general incompetence, difficult working conditions at constituency tallying centres, pressure from KICC-based ECK staff on returning officers to provide fast results, pressure from candidates and incumbents eager to know their own electoral fate, lack of training and unclear messages as to when and how erroneous constituency results might be corrected. The direction of the changes also indicates that other explanations which have been suggested are less likely to be true. The conclusions here are based on a study of forms 16A and 17A in presidential as well as parliamentary elections in a sample of constituencies. They *fully* explain the discrepancies, which disappear completely. What these constituencies' ballot boxes may contain is not relevant for this analysis. *The dissenting view of some of the commissioners is that, while some of the discrepancies can be attributed to human error, the available evidence cannot be taken to have fully explained the discrepancies (given lingering doubts about Form 16As) both in the sample as well as the universe of constituencies overall.*
- Poor understanding of the procedures at KICC (even among staff members, temporary as well as permanent) unavoidably contributed to confusion and misunderstanding of procedural issues. These concerns, such as what the proper procedures were for the correct transmission of constituency-level election results, if and where party agent signatures were required, the requirements for valid data entry (and – in particular – correction to results already entered), the inadequately designed data entry forms with no space for corrections and for proper authentication of such corrections and the time of such corrections – and inadequate and misunderstood instructions on how to correct already announced results.

These problems and the lack of proper understanding of the process reduce the usefulness of the observer reports The problems at KICC and in the transmission of election results from constituency tallying centres to the national tallying centre must, however, be seen within the context of the other key factors in the entire electoral process: only this will allow a reliable and comprehensive assessment of the quality of the entire electoral process. Also see section 4.4.

6.7 Advice received by the ECK in relation to the counting, tallying and result announcement process

Concerns about the counting, tallying, transmission and announcement of results are not new in Kenya. In 1992, on the occasion of the first multiparty elections, an International Republican Institute (IRI) pre-election report noted that:

> "... the electoral law does not stipulate the mechanism for transmittal of constituency results to the ECK in Nairobi [and] urges that this information be transmitted in ... a timely way" (p. 23).

The Report of the Commonwealth Observer Group was more drastic in its evaluation:

> "given ... the poor communication between the ECK and the returning officers and between returning officers and presiding officers, the lack of co-ordination and inconsistencies in dealing with clear-cut problems, we can only conclude that neither the polling day arrangements nor ... the counting processes were adequately designed or carried out to meet the specific situations and needs which the Kenyan electoral environment required" (p. 38).

The situation had not much improved by the 1997 general elections. A joint report of the Institute for Education in Democracy (IED), Catholic Justice and Peace Commission and the National Council of Churches in Kenya recommended that:

> "... it is vital to have a speedy counting exercise, with results verified by all parties and announced immediately after the count is completed. This is the only way in which public confidence in the result can be ensured. Unfortunately, this was not the case in 1997" (p. 82).

What happened then in 2002? Charter Hall in downtown Nairobi was to serve as a centralised ECK results centre but this did not eventuate, since events overtook the results process. The media tracked results as they were tabulated at the constituency tally centres and reported them to the public. By the afternoon of 28 December 2002 it was clear that Mwai Kibaki was heading for victory and the KANU presidential candidate, Uhuru Kenyatta, conceded defeat in the early afternoon the next day, publicly taking up the role of leader of the official opposition.

However, when the ECK called a press conference that afternoon, 29 December 2002, to announce that it did not yet have sufficient official results, the commission was pressured by the large crowd of NaRC supporters to declare Mr Kibaki president. Apparently glass was smashed,

flower-beds trashed and the ECK chairman punched in the back. Bowing to public pressure, several hours later the ECK announced – on the basis of unofficial results – that Mr Kibaki was indeed the winner and president-elect.

Official results were announced only on 3 January 2003. At that point:

> "... [the ECK chairman stated that t]here was a great deal of pressure from NaRC leaders and their supporters that the declaration of the results be made nevertheless. Between the demands of the law and those of the people, the ECK chose to obey the latter. It declared Hon Mwai Kibaki the new president. It was a political rather than a legal decision. ... ECK was convinced that just like in 1997, there was a possibility of insecurity, and further delay in the announcement of results would have resulted in chaos (only 10 forms 17 had been received when the ECK chairman announced the results)" (ECK *Report on the 2002 elections*, p. 86).

An external consultant, Michael Yard, evaluated the 2002 elections, noting that there were many problems that did not receive public attention because of the huge margin of Mr Kibaki's victory. He pointed to several deficiencies and made a number of recommendations, among which the following:

- lack of a communication protocol, weakness and slowness of communication system
- lack of quality controls
- need for the ECK to provide a steady stream of information to the press
- need for the development of an election database that would allow for communications, logistical planning, material delivery tracking, production of master ballots, production of vote count forms for polling stations and constituencies

When the ECK itself evaluated the 2005 referendum:

> "It was noted that initial results to the public were first released through other sources, e.g. the media. ECK was not fast enough to release the results. The reason for this was noted as poor network as some polling stations were not networked" (ECK *Evaluation of the 2005 Referendum*, p. 30).

The recommendations made to solve the problem:

> "The law should be reviewed to allow preliminary results by SMS, email, fax, etc. ECK to install ICT equipments to hasten the process" (ECK *Evaluation of the 2005 Referendum*, p. 30).

Nevertheless, the delivery of provisional results to the ECK command centre was seen as very effective owing to the provision of mobile and satellite phones. It was recommended that this be extended to presiding officers to ensure smoother and faster delivery of results to the returning officers and subsequent delivery to the ECK HQ (ECK *Evaluation of the 2005 Referendum*, p. 32). It is also worth quoting again from the ECK's *Report on the National Referendum Evaluation Workshop*, because some of the recommendations are closely related to the problems experienced in 2007:

> "To speed up the tallying process, the Commission should consider procuring computers for this purpose. Those to do the tallying must be computer literate ... There should be a mechanism for verification during counting and tallying of votes ... [A]dvance planning for communication protocol to be utilized in the 2007 general elections [should] commence immediately" (p. 26). "The plenary stressed that the plans to decentralize the computerization process ... should be aggressively pursued. In addition, the plan to procure/hire 210 computers for the constituency level should commence immediately in readiness for the 2007 general elections. ... It was suggested that there is need to brief the commissioners on ICT activities regularly to enable them [to] understand the technological advancements and make informed decisions" (p. 36).

In early 2007, the ECK received the advice of two competent external advisors: Michael Yard, through the International Foundation for Electoral Systems (IFES) project; and Paul Anderson, through the United Nations Development Fund (UNDP) basket funding programme. In March 2007 IFES offered to design a computer program for results at the national and constituency levels and proposed methods for improving the transmission of results from polling station to constituency. It was assumed that results would be tallied at constituency level using UNDP-provided laptops and a WAN (wide area network) to be set up by the ECK. However, as was pointed out in Yard's report of August 2007:

> "... there is still no plan for timely transmission of results from Polling Station to Constituency, with some ECK staff still favoring physical transfer of result forms as the only viable method. It is strongly recommended that ECK make plans for use of more efficient transmission methods for provisional results, including mobile phones (voice) and SMS messaging. Without such a plan it is easy to envision a repeat of a 2002 scenario in which the political parties, the media, and even the public know the results of the elections (before the ECK announces them). In 2002 this led to widespread threats of violence and even some cases of violence with growing mistrust of ECK."

In the case of Anderson and the UNDP, the effort was concentrated on providing a Media Elections Result Centre (MERC), building on the 2005 experience. It seems that most of the advice was not accepted and/or was poorly implemented. On the tallying and transmission of results, the commission plenary endorsed a simplified plan proposed by Ayub Imbira, the ECK IT

manager. The ECK failures in the implementation of Mr. Imbira's plan have been presented in some detail in section 3.8 and need not be repeated here.

Both consultants had suggested the use of progressive (partial) result announcement on a systematic basis, assuming that adequate methods for transmitting the information would be adopted. This is the procedure used in almost all countries to fill the information void in the time lapse between the closing of the poll and the availability of final results. According to the proposals, constituencies could have begun transmitting progressive (partial) results when they had received results from at least ten polling stations and suspended the transmission once 90 per cent of the polling stations' results had been received at KICC. This would have meant that the MERC could have begun issuing progressive (or partial) results during the morning of 28 December 2007, with results arriving from all constituencies.

However, the advice was rejected, the laptops were not used for tallying at constituency level, no WAN was set up and the ECK opted for the method that had been used – and proved slow – in 2002. The distinction the ECK introduced between "provisional" and final results was legally sound but conceptually fuzzy. If returning officers had proceeded as expected, they would have completed their forms 17A and 16 at the constituency. Then they would have faxed or telephoned the results as entered on form 16 to KICC, which then would have proceeded to announce these results, terming them "provisional" because legally they were not valid. If everything had gone according to plan, the provisional results would have been exactly the same as the final – after all, the only thing the returning officers had to do after telephoning or faxing was to deliver the physical form 16 to the KICC. In most cases, the time saved was only a few hours.

The plan had, however, several conceptual and practical flaws. First, the announcement of "provisional" results had to wait until form 17A was completed at the constituency level and form 16 derived from it, and this took several additional hours. This, even in the smallest of constituencies, would add several hours of delay before form 16 could be completed and in the meanwhile the media would be announcing results collected at the polling stations. Second, if for some reason just one single polling station was delayed, this would delay the sending of "provisional" results until the problem causing the delay had been solved. Third, the provisional results would arrive from small constituencies first and only later from bigger ones, which would create some bias in the sequence of results, as argued in Professor David Throup's analysis (even though this argument is not unchallenged). Last, and most importantly, if the returning officers did not perform well, because they were either inadequately recruited or poorly trained – or for any other reason – any difference between "provisional" and "final" results might be interpreted as manipulation, as actually happened in a number of cases. What happened between 27 and 30 December 27 is largely the consequence of the ignoring of adequate advice and reversion to the inadequate 2002 procedures. As to the MERC, and according to Margie Cook of the UNDP:

> "... we got to the KICC to find that the ECK had not arranged for internet access even though this was one of their responsibilities and I went beyond the bounds of my responsibilities as a UNDP project manager and promptly authorized the expenditure of some hundred dollars to buy internet access for the ECK and have it installed immediately, otherwise the journalists would

not have been able to access the website at all. But we also found that the ECK failed to facilitate the links from the ECK results database to the graphic interface at any stage. Therefore no results were displayed on the screens in the KICC and the equipment was not used for the purpose for which it was brought" (Hansard record of IREC's interview with Margie Cook).

Many of the problems were due to the ECK conviction that:

> "Margie, this election will not be a competitive election ... the public (will) not believe the press and Kenyans all know that the only authority with results is the ECK" (Hansard record of IREC's interview with Margie Cook).

The ECK was wrong on both counts.

6.8 Statistical evaluation of results

For two reasons it is not advisable to conduct any form of statistical evaluation of results from the December 2007 elections in Kenya or to draw any conclusions on that basis, nor to conduct some kind of more advanced psephological analysis.

The first reason is that the IREC analysis of tallying etc. in nineteen sample constituencies demonstrates convincingly that there are so many more or less erroneous constituency results (refer annex 6.A as well as section 6.5 above) that one cannot rely on any figures from the ECK. It should also be understood that the IREC figures – though very much better – are also not all completely reliable in cases where there were noticeable problems with the availability of all relevant data sources (forms 16A, supplementary information from 17A, etc.).

The second reason one should not conduct any statistical analysis of results from these elections is that the official ECK election results (published on the website and elsewhere) have not been cleaned of mistakes of a purely arithmetical nature, for example, checked to establish whether the sum of votes for candidates equals the number of valid votes cast in a constituency. The consequence of this separate blunder is that the turnout percentages provided by the ECK are not necessarily correct.

For these two reasons, IREC decided that it was not worthwhile to conduct any more profound statistical analysis of the available turnout data etc. The results would be almost useless for IREC's purposes as they could not form a basis for useful conclusions.

Furthermore, the 2002 general elections also displayed discrepancies in a number of constituencies between presidential and parliamentary turnouts. It cannot be ruled out that some of the same problems would have been found in 2002 as in 2007 if a proper analysis of the transfer of data from polling stations to constituencies and subsequent tallying at the constituency level had been conducted while the original source material was still available.

The deplorable conclusion is thus that ECK turnout data and election results for individual candidates are so error-infected that they should not be used for any kind of statistical analysis.

This observation is valid not only in relation to the 2007 elections but probably also in relation to the 2002 elections – in any case nothing could be done without a repetition of the exercise of reproducing form 17A for all constituencies to be included in such analysis.

An example: The very high turnout in some constituencies – e.g. more than 90% in the presidential contest in five constituencies – has aroused suspicion (and for good reason) of ballot stuffing, in particular because of the miserable state of the voter register in Kenya. However, other constituencies, such as Bondo, cross the 90% line if all votes are entered and added correctly, so the problem is not restricted to the constituencies identified as high-turnout constituencies on the basis of current official ECK results.

IREC has felt it necessary to abstain in its conclusions from relying on the results of the two exit polls which were conducted on election day at sampled polling stations. Exit polls should always be used with the utmost care, if the purpose is to forecast accurately the result of an election. A whole array of methodological concerns and sampling issues must be considered, and even then exit polls are in general more useful as a means of assessing the impact of the various explanatory factors which individually and in their interaction produce the eventual election result.

IREC also had the opportunity to familiarise itself with Professor Throup's analysis and interpretation of the December 2007 election. Interesting as it was, IREC does not find it possible to rely on that analysis, *inter alia* because it too relies on ECK data, which have not been properly scrutinised (see above). It is doubtful whether a data set of the quality necessary for a study of the December 2007 elections will ever be available. Professor Throup's analysis did, however, influence IREC's thinking and made it ask some very pertinent questions – as did the exit poll results. *Some of the commissioners nevertheless doubted the value, overall, of either interlocutor.*

6.9 The integrity of the counting, tallying and announcement of results

IREC's analysis of nineteen sample constituencies – which we have no hesitation in using for drawing conclusions about the entire operation – has led it to the irrefutable conclusion that the ECK was not able to manage the counting, tallying and results announcement processes in such a way that it secured the integrity of the electoral process at either the presidential or the parliamentary level. IREC has only sporadically concerned itself with the civic elections, but we believe that the situation is not much different at that level. If one – be it a voter, a candidate, a media representative, a party leader, an election observer – cannot trust the accuracy of the election results published by an EMB, then nothing is left and the political system loses credibility as well as legitimacy.

It is not IREC's mandate to attempt to establish who won the presidential election, and it would in any case be extremely difficult, even if all ballot boxes were to be opened for that purpose. It would, *inter alia*, also require one to ascertain if some of the ballot papers did not belong there and also if some of them had been marked contrary to assisted voters' intentions.

During its analysis conducted for another purpose, IREC established that a parliamentary candidate did not obtain the seat in the National Assembly that he had won by securing more votes than any other candidate in his constituency. If that can happen – and if the ECK can also

get away with allocating a Nominated Seat to a party without using a recognised and documentable seat allocation method – then the conclusion can only be that the election management system as it functioned in the 2007 elections is unacceptable. It did not live up to the basic international standards of transparent, free and fair elections which the ECK Chairman had forcefully stated was what the ECK aimed for. It may also be worth noting that the ECK itself has stated that they "worked harder" in 2007 than in previous elections.

Recommendations

- *IREC recommends that the ECK integrate the various descriptions of the entire counting and tallying procedure into one document – and one document only – which will then be the principal description and must be adhered to. The need for such descriptive regulations does not depend on possible changes in the counting and tallying system.*
- *IREC recommends that without delay ECK start having developed an integrated and secure tallying and data transmission system, which will allow computerised data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.*
- *IREC recommends that the media must have full access to this new system, which will not be a problem if it is properly constructed. This will assist the media in obtaining fully reliable results at high speed from all over the country and will also place the ECK in the driver's seat in relation to providing the media with fast and reliable data.*
- *IREC recommends that ample time be allowed for verifying provisional results, so that they are declared final/official only once there is no risk that errors may still be found or non-frivolous objections raised. Most countries allow one to two weeks for this – there must be sufficient time to check the provisional results, which are given status as final results only when all objections have been considered, all checks and rechecks conducted and the final verdict issued by the proper authorities. Given a clear explanation of what a provisional result is, there is no problem in making voters understand that election results are so important that they can be declared final only once they have been properly scrutinised and checked.*

CHAPTER 7

POST-ELECTION PROCEDURES

7.1 Introduction

Disputes arise in every election. An effective electoral dispute resolution (EDR) mechanism is required if an electoral system is to function properly. The election management body (EMB) needs to have in place certain principles and procedures to enable it to deal with disputes as they occur. The procedures should be known, rule-based and predictable. They should be designed and maintained to anticipate, manage and resolve election disputes. EDR should operate before, during, after and also between elections and become an essential element of good electoral management practice.

This chapter deals with various post-election procedures crucial to the integrity of any electoral process. It addresses post-election audits of the electoral process, post-election dispute management and the allocation of nominated seats. It also touches on the assumption of office by those elected, internal evaluation of the EMB and the custody of election materials.

7.2 Post-election audits and evaluations

Audits are standard practice in both the public and private sectors. They provide government departments and private businesses with an opportunity to identify mistakes and set benchmarks for future performance. There is no reason elections should be exempt from this standard accounting practice. Post-election audits provide election management bodies (EMBs) with the opportunity to improve on their performance and voters with a justified sense of confidence in election results. They make elections as transparent as possible by identifying shortcomings in the process and verifying the accuracy of vote counting. They can also point to areas of election fraud or rigging. Audits are an effective tool for building public confidence in election outcomes because they can detect human errors and help correct them.

While the ECK has not conducted proper post-election audits in the past, it has for some time now maintained a practice of holding an evaluation meeting after every election to assess how it was conducted and learn lessons to apply in the future. This is in keeping with good organisational practice generally, and for EMBs in particular, but does raise certain issues. Partly because these meetings are attended only by ECK commissioners and staff, any objective review of performance is hardly possible. These meetings produce evaluation reports that tend to gloss over major lacunae and in some cases are nothing more than self-congratulatory exercises. Given that EMBs guard their space and their independence jealously, rigorous self-examination could persuade the ECK to inject good practice into post-election evaluation exercises.

No EMB is perfect, but an EMB that learns from past mistakes and changes in response avoids their repetition and constantly improves the quality of its work. For instance, objective discussions of public expectations at County Hall in the 2002 general elections and at the KICC Media Centre in the 2005 referendum made it clear that, for the ECK to slake the public thirst for

rapid and accurate results, it would have to put in place the required technology to improve results transmission. However, in the face of this, a seemingly inward-looking institution continued asserting that "only the ECK had authority to announce results" – forgetting that results, once announced at a polling station and in the public domain, will be seized upon by media more than eager to publicise them without waiting for the ECK.

In order to be useful, an evaluation has to be as objective as possible. Internal reviews are not necessarily frowned upon. In circumstances where the institution has as sensitive a mandate as the ECK's, internal reviews may well be advisable. However, even in this case, there is merit in bringing in objective external actors (such as election management experts or representatives of other EMBs) who can facilitate open discussion of the issues under review.

A practice that may be useful is a post-election audit of the process of conducting elections, including a review of results in a specific number of constituencies such as has been carried out by IREC (discussed in detail in chapter 6). In some countries (for instance, the United States) these audits are conducted before results are made public. They may even provide reasons for recounts.

In Kenya, it would be important to have post-election audit mechanisms that enable the detection of anomalies at polling station level. As has been mentioned in other sections, voter turnout in the 2007 general elections was suspiciously high in a number of constituencies and it is necessary to use methods that allow audits at that level. This means that the electoral process should take into account security features and strategies designed to assist in detecting anomalies. For instance, it has been suggested that one possible stratagem would be to supply voter lists to polling stations without including the voters' national ID numbers. When a voter presents his/her document, a clerk would enter the ID number both in a space left for such purpose in the voter list and on the ballot counterfoil. If a polling station is audited, the ID numbers on the list/counterfoil will be checked against those in the ECK's possession, and irregularly added voters could thus be detected.

The issue of auditing, however, involves complex IT and other technical considerations, including sample design. While IREC could not undertake the full technical analysis required for such an exercise, it would recommend strongly that the ECK explore this and alternative approaches to audit.

Generally, internal audit mechanisms can provide valuable insights into how the process ran; the degree of compliance with the policies of the EMB and election law and the integrity of the results overall. Audits could be conducted either by the ECK itself or by a contractor, analysed for presentation at a retreat convened for the purpose and made public afterwards. Discussions would aim at identifying areas of weakness, recognising strengths, learning lessons and agreeing on internal reforms of election procedures as well as external reforms on which the ECK could advise, say, Parliament, with a view to improving future elections.

Findings

While the ECK has not conducted proper post-election audits in the past, it has for some time now held post-election evaluation meetings to assess performance and to learn lessons to be

applied in future elections. A post-election audit of the election process could *inter alia* review results in a number of constituencies, remembering that it is important to use audit mechanisms that will permit the detection of anomalies right down to polling station level.

7.3 Post-election dispute settlement

During the 2007general election period in Kenya, a material contributor to the tension at KICC, broadcast live to the country, was the absence of an effective electoral dispute resolution (EDR) mechanism to resolve the mounting challenges to the integrity of the results from Kibaki strongholds. The response by ECK Chairman Kivuitu and Minister Martha Karua, directing challengers to the courts, merely served to exacerbate matters. ODM representatives, adverting to the appointment of five new judges a few days earlier, made plain their distrust of the judiciary and insisted on their challenges being resolved there and then, if necessary delaying the announcement of the final result.

There is indeed no satisfactory mechanism to deal with such disputes. Sections 10 and 44 of the Constitution, read with sections 19 to 23 and 28 to 30 of the National Assembly and Presidential Elections Act, dealing with challenges to presidential and parliamentary results, make provision for determination of challenges only *after* the result has been announced. Although there is provision (in the practice rules contemplated by section 23 of the Act) for expediting the judicial process in the case of election petitions, resolution of a dispute may eventuate only months or even years later, especially if there is an appeal. Challenges to civic election results are also possible only after the event (see section 16 of the Local Government Act).

Flexibility and expedition: It is unwise in principle to oblige disgruntled candidates and their supporters, convinced as they are that they have been wronged, to wait until after the prize has been awarded to their opponents and only then to start litigation – which could drag on indefinitely. If a quick and appropriate remedy is unattainable it predisposes to the kind of political crisis that occurred here. The blanket referral of such disputes to litigation makes it impossible to find and implement quick, sensible and fair solutions. Thus, for instance, if the mistake in Kirinyaga Central had been discovered on, say, 30 December 2007, after the form 16 had been delivered at the national tally centre and the result had become technically final, the matter could have been resolved there and then instead of taking its course through the courts. For this to be possible, there has to be a tribunal qualified and legally empowered to resolve such disputes quickly, fairly and practically, rather than on the basis of strict legality.

Competence: Many Commonwealth countries, such as Kenya, adhere to the quaint fiction that judges are generalists who can grasp and deal with any matter, however esoteric, provided it is competently argued. In the case of electoral disputes this attitude needs to be re-examined. The principles and practice of electoral administration have developed

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exponentially over the last two decades and a substantial body of international learning has been produced. All of this bears on dispute resolution and ideally requires specialised judicial attention. Because electoral disputes usually demand rapid resolution and do not allow time for extensive legal research by the adjudicating tribunal, familiarity with electoral law and practice is therefore a highly desirable attribute of such a tribunal.

A special electoral dispute resolution court: EMBs are a unique feature of modern democracies. They function, uniquely, at the interface between politics and law. The essence of an election is political, not legal. It is a political process driven by political forces for a political purpose: the allocation of political power within a given polity. Therefore, although an election must always be governed by law, the law should never be allowed to entangle an election in the inevitable niceties and rules, the procedures and precedents, the predilection for detailed analysis, for thorough debate and mature reflection that are the proud hallmarks of the judicial process. Electoral dispute adjudication requires flexibility and pragmatism, an eye to the political exigencies, sometimes even at the cost of strict legalism. Furthermore, and most importantly, in a highly politicised society such as Kenya, where judicial impartiality has already been doubted, the judiciary should not be unnecessarily exposed to the risk of being politicised, or being seen to be politicised, by its involvement in political disputes.

The type of electoral dispute resolution court: There is no universally accepted mechanism. Some states, especially older democracies in Europe, have left the task in the hands of administrative agencies within the government. Others, including Kenya, have consigned electoral adjudication in general to the ordinary judiciary, sometimes under adapted procedural rules. Countries such as Mexico, where there has been radical electoral reform comparatively recently, have established a special electoral tribunal with extensive power and exclusive jurisdiction in relation to elections. This may be costly but has the great benefit of speed and special expertise. Then again, South Africa opted for a special electoral court with exclusive and final jurisdiction consisting of three senior members of the judiciary who ordinarily continue with their routine work but are on standby to deal with electoral matters on an urgent and prioritised basis. Expedition has thus been ensured with the prospect of some degree of specialist knowledge.

The lowest level of competence rule: It is often not easy to decide who is to perform a particular adjudicatory task in terms of an EDR system, nor is there necessarily a one-solution-fits-all answer. An adaptation of a well-known principle of good management dictates that electoral disputes should be determined at the lowest appropriate point in the chain of authority, there, then and finally.

Adequate enforcement remedies: A crucially important feature of effective EDR is to ensure that every dispute is resolved in a manner that affords adequate redress and/or imposes appropriate penalties. Obviously a dispute is to be resolved in time for a remedy

to be of value. One of the reasons for opting for extra-judicial EDR is because it is in the very nature of an election that, in order for relief to be effective, a decision often has to be given there and then. One of the most problematic aspects of current Kenyan EDR (which may have contributed to the eruption of violence) is that issues that could and should be addressed and possibly resolved by the ECK are consigned to the judiciary for determination in the fullness of time. The remedy must not only be timely, it must be fitting in other respects. The ordinary remedies at the disposal of the judiciary are limited. An EDR tribunal should have many more – and more varied – remedial powers than a court ordinarily has. It should also be armed with a much wider and more severe array of penalties than those contained in paragraph 8 of the Electoral Code of Conduct (Fourth Schedule to the National Assembly and Presidential Elections Act).

Consequences of failed remedies: Failure on the part of an EMB to afford an individual effective relief not only does an injustice to the individual, it also devalues the EDR system as a whole, eroding confidence in the EMB itself. Loss of legitimacy by any adjudicator is extremely serious, striking at the viability of the very adjudication process. In the case of an EMB, such loss of confidence in its EDR system is particularly grave. It functions in an arena where power is at stake, state power and control over national resources. Its loss of credibility has implications ranging much wider than the particular dispute or disputes the resolution of which (or, worse, the non-resolution of which) initiated the conflict.

Government's role in establishing electoral integrity: It is trite that the force of a set of rules and the integrity of the system they aim to enforce depend in large measure on the certainty in the eyes of the public at large that transgressions will be investigated, prosecuted and appropriately penalised. In the case of EDR rules, this general principle applies with particular force, for it is usually public figures who are the transgressors or the beneficiaries of such wrongful conduct.

7.4 Swearing-in and assumption of office

It is standard practice to lay down in electoral legislation a period of some length between elections and winners' assumption of office. In the well known case of the United States, the presidential election takes place on the Tuesday following the first Monday in November and the new president is inaugurated on 20 January the following year. Mexico has an even longer period: the 2006 elections took place on the first Sunday in July and President Calderón sworn on only on 1 December.

There are two reasons for this practice:

1) The first, which has been extensively discussed in the previous chapters, is to allow sufficient time for the solution of all pending electoral disputes and for the verification of election results. The period was used for such purpose in both countries mentioned above.

2) The second reason is that there should be a peaceful and orderly transition of power. For instance, a new president may have to select a cabinet, and the new members of the cabinet should be adequately briefed by their predecessors.

7.5 Custody of election materials

A successful post-election audit and analysis requires that all used election materials be safely stored after the elections until any analysis is concluded. In the Kenyan case this would include all materials in ballot boxes (including ballots, counting sheets, voter lists used during the election and all election result forms [16A, 17A, 16, 8 and 9]), the ECK master voter register with all voters' information and checklists of all materials sent to polling stations, giving the serial numbers. To the list of materials should be added details of ECK election-day staff with information as to where they worked and of party agents with information about the parties they represented and where they were deployed.

Following the post-election analysis, certain documentation should be archived, where possible in electronic format.

7.6 Allocation of nominated seats (MPs and Councillors)

Nominated MPs: Nominated seats have existed in Kenya since before Independence in 1963. According to section 33 of the Constitution, the National Assembly includes twelve members "nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly" (section 33(3)). Section 33(4) stipulates that the proportions "shall be determined by the Electoral Commission after every general election". Furthermore, section 33(1) indicates that these nominated members are "to represent special interests" and following section 33(5) the Electoral Commission ensures "observance of the principle of gender equality in the nominations".

The constitutional disposition should have been complemented with a regulatory framework at a lower level. However, the Act on Presidential and Parliamentary elections is silent on the subject, and the ECK has never issued any regulation or statement concerning the process for the allocation of the nominated seats. The ambiguity is twofold. First, it is not clear whether the "nominated" seats are the equivalent of what is usually known as "reserved" seats which some legislatures establish to ensure representation of minority groups. Second, the formula for allocating the seats is not indicated either in the Constitution or in subsidiary legislation.

Even in the absence of specific regulations, the ECK has proceeded to allocate the seats. The subject is extensively discussed in annex 7.A, which shows that the ECK has not been consistent in the allocation of seats in the last three general elections, and that the allocation made in 2007 does not correspond to any of the usual formulas employed for the allocation of seats under proportional representation (Largest Remainders/Quota: Hare, Hagenbach-Bischoff, Droop or Imperiali; or Highest Averages/Divisor: D'Hondt, Sainte-Laguë, Imperiali or Danish). The ECK informed IREC of the formula used, based on the "best decimal rates" but, as shown in the above mentioned annex, even when that formula is used, the resulting allocation of seats does not coincide with the allocation decided by the ECK. The fact that different formulas allocate

nominated seats differently makes it essential that the ECK specify the formula in advance of the elections, after consultation with all relevant stakeholders.

Although the Constitution does not define "special interests" as contemplated by section 33(1), the High Court, in the Il Chamus case, decided that they include those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all in a democracy. The ECK was presented with two choices. First, it should take into account the claim by the Il Chamus for representation when redrawing boundaries, in what the High Court considered would be a "reasonable" departure from population equality. Second, the court stated that "minority groups and all the other minority interests including the Il Chamus do constitute a special interest for the purpose of nomination". According to the court, the ECK is constitutionally empowered to vet party nominations to ensure compliance with the special interest criterion and gender equality before transmitting names for appointment to the President.

The court's decision placed the ECK in an impossible situation. Where should the line be drawn in terms of what constitutes a "minority interest"? Do the Dahalo who live along the Kenyan coast constitute such? Do the Suba, a community of 30,000, many of whom live on the islands of Rusinga and Mfangano on Lake Victoria, qualify? Even in the case of Il Chamus, identified by the court as a clearly defined minority group deserving representation, which party is obliged to include a member of that group in their list of nominated candidates? Do disabled people constitute a minority interest as a whole, or should blind people be considered a separate group? Do people with AIDS constitute an identifiable group with special minority interests? How can the ECK decide on the distribution of the twelve nominated seats to minority interests and then vet the lists? As a matter of fact, the ECK did not introduce into the vetting process any consideration of "special interests" with the exception of ensuring gender balance.

Bomas and Wako/Kilifi Constitutional drafts take different approaches, each with its own problems. The Bomas draft maintains the "first-past-the-post" (FPTP) or Westminster system for an undefined number of constituencies (their number to be defined by law), defines a different set of constituencies reserved for women (districts shall become special single-member constituencies for this purpose) and introduces fourteen members elected by marginalised groups (the seven groups mentioned include women, persons with disabilities, the youth, ethnic and other minorities, older members of society, trade unions and geographically marginalised communities). The elections for these groups "shall be by electoral colleges of the respective marginalised groups as provided by legislation". The electoral management, if such proposal had been adopted, would have been particularly complex. Most voters would have had three votes in parliamentary elections: one for the normal constituency, one for the special women district constituencies and one as a member of a particular electoral college. Only middle-aged men without disabilities, not belonging to trade unions, ethnic or other minorities or to a geographically marginalised community would vote twice. It seems that these practical considerations were not taken into account at the time the Bomas draft was discussed and approved.

The Wako/Kilifi draft also maintains FPTP for an undefined number of constituencies (their number to be defined by law). Women would be elected from specially designed constituencies.

The nominated members would be divided into two categories: people with disabilities (one-third of them women) and special interests, of which only the youth and workers are mentioned. The number of positions for each group would be equivalent to 5% of the total membership of Parliament. There would be two additional groups. First, there would be additional members, "as may be required to ensure that no more than two-thirds of all the members of the Parliament are of the same gender". However, these would be nominated by political parties in proportion to the votes received in each election. Furthermore, the President may appoint not more than 20% of his ministers from persons who are not members of Parliament (but with similar qualifications) and they will automatically become *ex officio* members of Parliament. As can be seen, the Wako/Kilifi draft is as complicated in terms of electoral management as the Bomas draft.

The case of the Bomas and the Wako/Kilifi drafts has been analysed in detail, in spite of the fact that neither of them is presently relevant, to point out the problems and the extremes that may be reached in the attempts to ensure the representation of special interests.

Before discussing the main issues and alternatives, it is important to clarify a few issues. First, the distinction between appointment and nomination: the non-elected members of Parliament might be appointed by the President or by Parliament, but the important issue is who nominates them. Second, the issue of non-elected members is closely related to the requirement that ministers and assistant ministers should be members of Parliament. This should not necessarily be the case, particularly in the case of a mixed system that combines features of a parliamentary system with a strong Presidency. Third, representation can be achieved without necessarily having the right to vote. The District of Columbia in the United States has representatives in Congress who do not have the right to vote, but can bring to the attention of the House issues that are relevant to the District.

The system as it existed before the Inter-Parties Parliamentary Group (IPPG) accord was of direct nomination by the President, at his pleasure. This approach, similar to that of Zimbabwe, is designed to reinforce the presidential majority in Parliament, or to compensate for losses at elections. It is one component of the approach taken by the Wako/Kilifi draft, which provides for making non-elected ministers (up to 20% of cabinet) members of Parliament. This approach flies in the face of elementary tenets of democracy and should be rejected, except where a non-elected minister has a voice but no vote.

The IPPG introduced a significant modification: the nominated seats would have to be distributed in proportion to the number of seats held in Parliament, and should represent "special interests". This left two questions open: the formula to be used in the allocation (fully discussed in an annexed document) and the identification of the "special interests" to be considered in the nominations by political parties. The High Court has intimated that the ECK should vet candidates proposed for the nominated seats using the "special interest" criterion but, as has been pointed out above, this amounts to an impossible task. The High Court approach presents some significant problems. For instance, the fact that a party, perhaps under pressure from the ECK, appoints a person with some disability does not make that person a representative of the interests of disabled people generally. The same is true for the High Court judgment: if a party selects as a nominated member one of its own members who happens to belong to the Il Chamus ethnic

group, that alone will not make that person a legitimate representative of the Il Chamus community.

The concept of reserved seats is introduced by the Bomas and Wako/Kilifi drafts in different ways. The concept is more clearly defined in the Bomas draft which would reserve fourteen seats for persons elected by marginalised groups: women, persons with disabilities, the youth, ethnic and other minorities, older members of society, trade unions and geographically marginalised communities. But the problems seem to be greater than those presented by the traditional nominated seats. First, the list in Bomas includes groups that cannot be considered marginalised. Women are under-represented in Parliament at present, but the Bomas draft contemplates the election of one woman per district – a total of some 150. Where is then the need for an elected two additional women as representatives of a "marginalised group"? The argument raised by the Il Chamus people was "that the likelihood (of having one of them elected) is so infinitesimal as to amount to an effective denial of the right of representation." This is certainly not the case with older people – President Kibaki, a septuagenarian, is still in his prime. The idea that trade unions, usually powerful political players, are a "marginalised group" is simply risible.

Reserved seats for groups of people elected by their own pose a serious danger to democracy in its wider sense. In the case of a hung parliament, special interest representatives can cast the decisive votes, giving those groups a power similar to that held by the ultra-religious parties in Israel during certain periods – not an advisable example. One possibility that might be considered is to provide some "marginalised groups" (selected according to better criteria than those employed in the Bomas discussions) with non-voting seats in Parliament. This would ensure representation without introducing distortions in the democratic process.

Nomination of councillors: Section 26 of the Local Government Act (Cap. 265) provides that a municipal council shall include councillors elected for each electoral area by the electorate thereof, councillors nominated by the Minister to represent the Government or any special interests as the Minister may by order determine, and in certain circumstances a councillor appointed by a contiguous county council. There is a further provision that generally the number of non-elected councillors shall not exceed one-third of the number of elected councillors.

Section 29(7) provides that the Minister may, in respect of any county or town council, nominate the chairman from among the members of the council or persons qualified to be members of the council. Section 39 provides for the number of councillors for a county or town council and section 46 for an urban council.

The Act states that "the criteria and principles for the appointment of nominated members of the National Assembly under section 33 of the Constitution shall *mutatis mutandis* apply to the nomination of councillors" (section 26(2)). Section 33 of the Constitution specifies that those to be appointed shall be persons qualified to be elected as members of the National Assembly [section 33(2)] and shall be "nominated by the parliamentary parties according to the proportion of every party in the National Assembly, taking into account the principle of gender equality" [section 33(3)].)

Following every general election the proportion is determined by the ECK which then informs the political parties concerned of the numbers they are entitled to nominate: in response each party

supplies the ECK with its list of nominees and the relevant information on each. The ECK then checks:

- the proportionate number of councillor(s) for nomination
- whether the person proposed qualifies to be elected as a councillor (e.g. is a registered voter of that local authority)
- observance of gender balance and special interest
- that the nominee is able to read and write

If the ECK is satisfied with the information provided, it forwards the names to the Minister for Local Government for gazetting.

Sections 27(2), 40(1) and 47(3) provide that the term of office of a councillor shall be five years. The sections give the Minister the power to terminate the nomination of a councillor by notice in writing delivered to the councillor.

The role of the Minister in the nomination of councillors is limited to publishing the names of those proposed by the political parties. The Minister has no power under the Act to substitute others for party nominees or to nominate councillors of his own choice. Because the law empowers the Minister to terminate the nomination of a councillor, it seems that he may do this but has to revert to the ECK and eventually to the parties for the nomination of replacement councillors.

Following the 2007 election, the ECK obtained names for nomination from the political parties of the relevant local authorities and forwarded them to the former Minister for Local Government. He substituted his own nominees for some of the names he had received. Under section 29(7), the Minister is allowed to nominate the chairman of a county or town council from among the members of the council or persons qualified to be members of the council. This has been misinterpreted to mean that he may nominate another set of councillors whom he can then make chairmen of county or town council.

The Chairman of the Electoral Commission thus wrote to the Minister after he had gazetted the names of the nominated councillors, advising him that the law requires him to gazette only the names of the party nominees and does not permit him to remove the names submitted to him by the ECK or substitute other names. The Chairman requested the Minister to correct the error.

The councillors whose nominations had been gazetted in breach of the law subsequently had their nominations revoked by the new Minister who took over after the coalition agreement. The revocation was effected with due regard to the law in an attempt to correct the error. (It should be noted that the nominations that had caused the hullaballoo were not the nominations that the Minister is permitted to make of persons to represent the Government or special interests.)

The new Minister purportedly invoked his powers under sections 27(2), 40(1) and 47(1) to revoke the nominations of the councillors who had been nominated without due regard to the law. He did not, however, revoke the nomination of persons appointed as mayors or chairmen of town and county councils because, under section 29(7), the Minister can nominate persons qualified to be members of the council. The previous Minister's nominations in this respect were not interfered

with. The law as it now stands does not specify the circumstances under which the nomination of a councillor can be terminated.

The new Minister's attitude was that, since the nomination of the councillors was illegal and void *ab initio*, he could revoke the nominations. The Court of Appeal of Kenya held, however, in *Taib A. Taib versus the Minister for Local Government* (Civil Appeal 107 of 2006 (2007) eKLR) that the Minister has no power to revoke the nomination of a councillor once so nominated.

The Local Government Act vests the power of nomination or appointment in the Minister for Local Government but subject to the provisions of the Constitution. These provisions are confusing. The law allows the Minister to appoint persons to represent the Government in the local government and also empowers the local authorities to nominate some members. These, however, have to come from the list presented by political parties with representation in the relevant local authority. How one can select appointees of the parties to represent the Government is hard to know. Neither is it clear how the local authority itself, e.g. a county council, would appoint members to the municipal council.

The other grey area is the number of appointees and the interests they have to represent. The one-third of local government councillors who are nominated ought to represent special interests and also promote gender equality. As in the case of nominated members of Parliament, the ECK has not been very strict on this aspect. The political parties have continued to defy the law and the Constitution with impunity and the ECK has not made efforts to enforce these provisions.

7.7 Analysis of post-election procedures

A recurring feature of IREC's public meetings around the country, and a topic touched on by more than one expert, was the perception of unseemly haste that pervaded the swearing-in of President Kibaki the evening of 30 December 2007. Such perceptions are extremely important. Elections are inherently divisive and the inauguration of the head of state offers a golden opportunity for a public display of united patriotism, unity in diversity at the commencement of the new term of office of the president and Parliament. It is therefore imperative that adequate time be allowed for the resolution of legal challenges and for political transitions to be harmonious. The current situation, where there seems to be doubt about the effect of the interaction between the provisions of sections 7 and 9 of the Constitution when a president is re-elected, can and should be resolved in conjunction with related aspects of the post-election period and procedures. Of these the most important, substantively, is that Kenya combines two inherently inconsistent constitutional courses: retaining the British parliamentary prerogative of the President as the political head of the executive to dissolve Parliament, on the one hand, with a programmed handover of office by the President in his capacity as head of state. The constitutional review process might well wish to consider whether the time has not come to have a fixed term of office for both President and Parliament, allowing for a predetermined electoral calendar, from notice of dissolution of Parliament through to inauguration, with adequate periods of time for all the requisite formal and administrative steps to be routinely scheduled and dealt with. These could then be fixed in the Constitution, allowing, for instance, at least a month between the elections and the formal assumption of office for all disputes to be resolved. But

whether or not so radical a change is adopted, the constitutional uncertainty needs urgent attention.

Recommendations

Recommendation on post-election audits and evaluations:

- *IREC recommends that the ECK institutionalise the practice of post-election audits and evaluations, not only by continuing to hold them but also by improving the quality of objective data and other information (as well as actors) that feed into the evaluation exercise. This will enable the ECK to be a continuously learning EMB, whose processes are objectively reviewed and improved upon after every major electoral exercise, and at other instances as the EMB deems fit.*
- *IREC records a recommendation by a member that post-election audits be conducted by an independent auditor and made public.*
- *In order to facilitate the conduct of such audits, IREC recommends that the ECK publish on its website the results for all polling stations (forms 16A).*

Recommendation on post-election dispute settlement:

- *IREC recommends that in the course of the constitutional reform debate and in reviewing the legal framework for elections, provision should be made for the establishment of an appropriately composed and empowered special electoral dispute resolution court.*

Recommendations on swearing-in and assumption of office:

- *IREC recommends a transition period between a successful candidate's election and his swearing-in.*
- *IREC recommends that the period provide sufficient time to resolve most electoral disputes and to verify election results.*

Recommendations on custody of election materials:

- *IREC recommends that the ECK develop procedures for safe storage of election materials until any post-election analysis has been completed.*
- *IREC recommends that the ECK store certain relevant election materials (such as the election results) in electronic format.*

Recommendations on allocation of nominated seats:

- *If it is decided to maintain the nominated seats, IREC recommends that an electoral formula (D'Hondt or Largest Remainders with a Hare quota offer two alternative*

options) be specified. In terms of the use of the nominated seats to support underrepresented groups or special interests, it would be preferable to devote all of them to improve the representation of women in Parliament. The number of nominated seats might be the same as at present, or Parliament might decide on an increase. Kenya might also explore alternative approaches (such as those adopted in Uganda and Rwanda) to increase the representation of women in Parliament.

- *In the case of persons with disabilities and ethnic minorities, IREC recommends the introduction of reserved seats. Rather than preparing special rolls it might be better to ask organisations representing those groups to submit candidacies, with the final selection to be conducted by Parliament. Reserved seats should have a voice but no vote in the deliberations of Parliament.*
- *IREC recommends that, since there is no necessity for allocating reserved seats to women (who would be better covered by nominated seats and selection by political parties), to young people (some MPs are reasonably young), to other minorities (the concept might be somewhat difficult to operationalise), to trade unions (certainly not a marginalised group) or to geographically marginalised communities (another concept difficult to operationalise), this not be done*
- *IREC recommends that consideration be given to leaving the President a margin for appointing ministers who are not MPs. This would eliminate pressures on the use of nominated seats. Ministers who are not MPs might participate in Parliament with voice but without vote.*
- *IREC recommends the proper regulation of the matter of nominated councilors. It should be left to the ECK, applying a predetermined formula, to make the nominations from a list presented by the political parties. A minister who is a politician (and will always belong on a particular side of the political divide) is not expected always to act fairly/equitably in the allocation/nominations, as was demonstrated after the 2007 elections.*
- *IREC recommends that the Constitution or legislation clearly define what special interests or groups should benefit from nominations.*

Recommendation on post-election procedures

- *IREC recommends an amendment to sections 7 and 9 of the Constitution to eliminate all doubt as to the expiry of the President's term of office.*
- *IREC recommends that consideration be given to amending the Constitution to provide for fixed terms of office for the President and Parliament together with concomitant provisions for an electoral timetable.*

CHAPTER 8

RECOMMENDATIONS

Recommendations in relation to chapter 2

Concerning the constitutional and legal framework

- The right to citizenship, to vote and to be elected at genuine periodic elections should be included in the Constitution.
- Voting by universal and equal suffrage and by secret ballot should be guaranteed for all without discrimination.
- Section 34(c) of the Constitution should be amended so as not to discriminate against persons with disabilities.
- All laws relating to the operational management of elections should be consolidated under one statute.
- A separate law should be enacted to cater for electoral dispute resolution starting with the ECK. The law should, in addition:
  - establish an Electoral Dispute Resolution Court with the final jurisdiction to handle electoral disputes
  - entrench a statutory limit to ensure that election petitions are finalised in good time. A limit of not more than six months should be adequate.
- The current rules and regulations on the procedures of election petitions should be repealed and replaced with new rules that ensure that petitions are heard in a just and timely manner.

Recommendations in relation to chapter 3

Concerning the ECK's legal framework

- There should be enacted a dedicated law with more detailed provisions on the ECK's institutional aspects which takes into account the relative complexity of the organisation and its responsibilities.

Concerning the composition of the ECK and the appointment of commissioners

- Legislate a broad consultative process prior to the appointment of ordinary members and the chairman of the ECK.
- Reduce the maximum number of commissioners.
- Reorganise the expiry of the terms of office of ECK members to ensure that their retirement does not coincide with election years and that all commissioners have at least two years' experience before every election.
- Make the ECK accountable to Parliament, without prejudice to its status as an independent body, by reviewing the channels by which it establishes and seeks approval for its budgetary requests.

Concerning the ECK's operational procedures

- Review the ECK's administrative procedures, with a view to introducing as much certainty as possible in key operational areas so as to ensure uniformity of performance throughout the electoral process, from polling station level up to the various teams at the national tallying centre.
- Review ECK's overall training/briefing procedures in order to improve on their utility for adult learners.
- In the recruitment of temporary election officers, commissioners should vet the recruitment of returning officers only: they should establish clear procedures for the recruitment of other staff and ensure these are strictly implemented.

Concerning the structure of the ECK Secretariat

- Urgently reexamine the roles of commissioners vis-à-vis those of staff, with a view to establishing a clearer commission-management separation of roles.
- Establish clear lines of individual responsibility for service delivery among both commissioners and staff.
- Rationalise the ECK operating structure to reduce time devoted to committees.
- Rationalise the devolved structure of ECK offices with a view to making it functionally efficient between elections and in election years, possibly down to eight provincial offices to provide a limited coordination role between elections.

- Revise ECK Secretariat structure with a view to introducing performance management across the board.
- Ensure that the Commission Secretary, among other qualifications, is an experienced election manager, competitively recruited from the open job market, and has the status of Permanent Secretary.

Concerning ECK funding modalities

- Carefully consider the issue of the ECK's expenses being a charge on the Consolidated Fund.

Concerning the ECK's advisory role

- Enumerate ECK's roles to include advising the government, Parliament and other stakeholders on electoral law reform.
- Take ECK's advice henceforth more seriously than has been the case in the past and deliberate such proposals expeditiously with the ECK and with other stakeholders, with a view to incorporating them into electoral law.

Concerning the ECK's functional efficiency

- Undertake a thorough management systems review of a new or transformed ECK as a matter of urgency.

Recommendations in relation to chapter 4

Concerning nominations

- A standing liaison committee should be set up comprising the ECK and political parties as a first step towards the enactment of nomination rules which must be strictly adhered to.
- Once Parliament has been dissolved no more political parties should be registered and application for party symbols should also be suspended.
- The campaign period should be specifically defined and ECK must ensure that all parties comply with the Electoral Code of Conduct.

- The election date should be pre-set, taking into account all the required timelines for efficient conduct of the election.
- Where a party violates its constitution and regulations on nominations, the ECK should invoke and enforce its powers to deny it the opportunity to nominate candidates to compete in elective politics.

Concerning the media

- The Media Council of Kenya should oversee the conduct of media and properly enforce its Code of Conduct.
- Develop a media and elections policy to encourage accurate and responsible reporting on electoral matters.
- There should be full disclosure on a regular basis of the actual owners of media.
- The KBC Act should be amended to give the ECK the power to compel KBC to act in accordance with the law.
- Mechanisms should be set up to ensure the independence and public accountability of KBC.
- The access to KBC by the Presidential Press Service, particularly in an election year, should be reviewed.
- Key provisions in the KBC Act pertaining to free access slots for party political broadcasts should be clarified and precisely defined as to the rights of the parties and candidates.
- A substantive Act prohibiting hate speech should be considered.

Concerning CSOs and election observers

- The ECK and CSOs should be encouraged to work together, and particularly in voter education as this eases tensions and improves delivery.
- The ECK should select trainers and facilitators should be done through a transparent process and the criteria for a neutrality test determined in advance and published.
- Bodies (including FBOs) which have relationships with either the ECK or political parties or are established to have acted in a partisan manner in an immediately preceding election should be excluded from domestic observation.

- A permanent domestic observer group should be constituted comprising diverse civil society interests.
- Co-operation and co-ordination of local, regional and international election observer groups should be encouraged.
- Election regulations should be amended to allow observation of the tallying process at all levels and provide copies of all authentic statutory forms to observers.

Recommendations in relation to chapter 5

Concerning constituency delimitation

- The basic principle for the delimitation of constituencies should be the equality of the vote, and the maximum departure from that principle should be clearly defined in the law (equality of voting strength should be aimed at in all cases although in special circumstances a 5-20% deviation range could be accepted).
- The process of delimitation should be transparent and conducted in consultation with the public.
- Establish a Boundary Review Commission (BRC) and remove constituency delimitation from the ECK.
- The first delimitation should take place as soon as possible and thereafter should follow the population census.
- Delimitation should be completed at least 18 months before a general election.

Concerning registration of voters

- Move to a new registration system: As soon as possible integrate the issuance of the national ID card with voter registration, so that when someone requests an ID card, s/he will automatically be entered in the voter register and informed of the location of the polling station where s/he should vote (a cheap voter card containing such information can be provided).
- Simplify qualifications for entitlement: Entitlement to vote should be based on residency, unless there are strong arguments for maintaining some of the other categories presently included.
- Requirement of voter's card for voting: This is a redundant requirement. If their

name is in the register, voters should be allowed to vote with the simple presentation of the national ID or passport.

Concerning candidate nomination

- Consider establishing a special electoral court to deal expeditiously with disputes arising from party primaries.
- The ECK should establish a clear, non-adjustable timeframe within which all parties should hold their primaries and certify their nominees.
- Electoral law should be amended to require political parties not only to conduct elections in accordance with their constitutions or rules but also to conform to established standards of fair practice.

Concerning electoral preparations

- Review and update the job descriptions of all relevant temporary positions to take account of additional skills essential to the competent management of a modern, IT-facilitated electoral process.
- Enhance the training of returning officers to match the importance of their function in the electoral process, as well as consider earlier selection and recruitment to allow a longer period of training and engagement in ECK work.
- Involve personnel at each level should be involved in the training of personnel one level below, to permit greater familiarity with the chain of work (for instance, national tallying centre should be involved in training returning officers for the tallying and transmission of results).
- Outsource the selection of key temporary personnel to third-party agencies, with a requirement for testing of some essential skills (e.g. IT).
- Actual participation in electoral activities should be made conditional on verified participation in **all** prescribed training events.
- Review all training and operational manuals to ensure that they actually conform to the latest operational procedures in force.

Concerning voter information and education

- Long-term investments in voter/civic education/information campaigns are advisable.

- This activity should not only occur during an election period or year, but on a consistent basis every year.
- Voter/civic education/information campaigns should focus on local elections too.
- Involving young people, particularly students, might help to interest younger voters and would also strengthen bonds between older and younger elements of communities.
- For effective communication the design of voter education material should factor in the various needs and interests of target groups.
- Introduce simplified teaching of the key principles and values relating to the right to vote in schools from the elementary stage.
- Programmes such as "Vijana Tugutuke", which was focused on youth, need to cover a large area and this should not be only in urban areas.
- Encourage public forums such as round tables at which specific local issues can be discussed.
- Voter education should teach the Electoral Code of Conduct and highlight the ill effect of fraudulent election practices.
- Linking voting to community issues is very important.
- Vet organisations well in advance so as to have candidates for conducting voter/civic education/information campaigns
- Put monitoring and evaluation in place to ensure that CSOs responsible for voter/civic education/information campaigns conduct the programmes properly and in accordance with ECK guidelines.
- Patience, tolerance and long-term commitment are needed to help Kenyan communities overcome the barrier between them and full civic participation and leadership.

Concerning regulation of political campaigns

- The ECK should immediately promulgate regulations for the Political Parties Act not only to provide a clearer legal framework for the registration of political parties but also to achieve the political finance objectives of the Act.
- Electoral law reform should give powers to the ECK to enforce its orders. This should include barring errant candidates if they defy the ECK's orders.

- The plethora of provisions against the involvement of public servants in elections should be consolidated into one provision in the consolidated electoral law and also bar the use of any public financial and material resources.
- Adequate monitoring mechanisms to collect information on public servants involved in partisan political activity must be in place for use in prosecution and other penalties sanctioned by law.
- Reintroduce realistic and functional expenditure caps on election expenditure.
- The Attorney-General should appoint public prosecutors for the ECK to prosecute election offenders.
- Additional consideration should be given to all relevant electoral laws to provide the ECK with prosecutorial powers over all election offences.

Concerning regulation of freedom of expression and equitable access to media

- Enhance the constitutional guarantee of the right by a provision restricting hate speech.
- Media, especially State-owned media such as KBC, should strive to offer balanced coverage to all the players in the election as is required by KBC's establishing statute and enhanced by the IPPG agreement.
- The ECK should ensure that the media receives correct and timely information so as to mitigate the possibility of misinformation such as was witnessed in the 2007 election period.
- Media houses should ensure that they recruit professional reporters and editors and, in the case of talk-shows and call-in programmes, avoid using staff who are ignorant of conflict reporting or moderation.
- Media houses should ensure that they liaise with the ECK before publishing results to ensure the reliability and accuracy of the information they pass on to their readers/audience.
- The ECK or its successor should urgently devise and implement a sound media relations policy and strategy.

Concerning technical assistance received by the ECK

- Thoroughly evaluate the assistance provided by the international community to the electoral process and apply the lessons learned.

- The assistance to be provided by the international community should be carefully co-ordinated and defined well in advance of the electoral process.

Concerning management of polling day operations

- Take steps to eliminate bribery, including stronger sanctions – like disqualification - for candidates involved in it.
- Discontinue the complementary practice of allowing assistance on the basis of illiteracy and adjust voter education programmes accordingly.
- Stop using black books(consider destroying them) and consider using tendered ballots instead.
- Assure party agents' access to polling stations and tallying centres: and the only restriction should be the maximum number of persons that the polling station or the tallying centre can reasonably accommodate.
- Party agents should be adequately identified and, in the case of tallying centres, be issued with special tags.
- In joint elections, hand all three ballots to the voter at the same time, and stress this point in training and in voter education.
- Make every effort to make polling stations accessible to all voters, especially people with disabilities and the elderly.
- Issue a checklist to electoral officials surveying polling stations to assess whether the polling stations are accessible to all categories of voters.
- Polling stations need to be well designed to allow for easy entry and exit. Further, the safety corridor needs to be restricted to ECK personnel, party agents and those voting.
- Party agents need to undergo ECK-supervised training (the same training as poll workers) and should not be allowed into the polling station unless they have undergone the training.
- After training all poll workers and party agents need to be sworn. Training should identify the penalties for perjury, fraud and rigging.
- Train one poll worker as a "greeter" for each polling station to ensure that voters are directed to the correct polling place.
- On election day, the ECK should provide polling station staff with food and

water. Party agents should not be allowed to provide food.

Recommendations in relation to chapter 6

Concerning counting, tallying, and announcement of results

- Integrate the various descriptions of the entire counting and tallying procedure into one document only, which will then be the principal description and must be adhered to.
- Without delay have developed an integrated and secure tallying and data transmission system.
- Media must have full access to this new system.
- Ample time must be given for verifying provisional results, so that they are only declared final/official, when there is no risk that errors can still be found or non-frivolous objections raised.

Recommendations in relation to chapter 7

Concerning post-election audits and evaluations

- Institutionalise the practice of post-election audits and evaluations and improve the quality of the objective data involved.
- Publish all polling station results (form 16A) on the ECK website to ensure transparency.
- Post-election audits should be conducted by external auditors and made public.

Concerning post-election dispute resolution

- Establish an appropriately composed and empowered special electoral dispute resolution court.

Concerning swearing-in and assumption of office

- Introduce a transition period between a successful candidate's election and his swearing-in.

Concerning custody of election materials

- Develop procedures for safe storage of election materials until any post-election analysis is complete.
- Store certain relevant election materials (such as the election results) in electronic format.

Concerning allocation of nominated seats

- If it is decided to retain nominated seats, specify an electoral formula.
- In terms of the use of the nominated seats to support underrepresented groups or special interests, rather devote all of them to improve the representation of women in Parliament.
- The Constitution or the law should clearly define what special interests or groups should benefit from reserved seats.
- Use reserved seats with voice but no vote rather than nominated seats for persons with disabilities and ethnic minorities.
- Do not allocate reserved seats to women, youth, trade unions, geographically marginalized communities or other minorities.
- Consider leaving the President a margin for appointing ministers who are not MPs.
- The ECK should fill nominated council seats from a list presented by the political parties.

Concerning analysis of post-election procedures

- Amend the Constitution to eliminate all doubt as to the expiry of the President's term of office.
- Consider amending the Constitution to provide for fixed terms of office for the President and Parliament together with concomitant provisions for an electoral timetable.

ANNEXES

SPECIAL ISSUE

ANNEX 1A

THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

(Registered as a Newspaper at the G.P.O.)

Vol. CX—No. 23 **NAIROBI, 14th March, 2008** **Price Sh. 50**

GAZETTE NOTICE NO. 1982

THE COMMISSIONS OF INQUIRY ACT

(*Cap.* 102)

APPOINTMENT OF COMMISSION OF INQUIRY

IN EXERCISE of the powers conferred by section 3 of the Commissions of Inquiry Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, being of the opinion that it is in the public interest to do so, appoint a commission of inquiry to inquire into all the aspects of the General Election held on 27th December, 2007, in Kenya, with particular emphasis on the Presidential Election, to be headed by Johann Kriegler (Judge) as the Chairman and—

Imani Daudi Aboud (Lady Justice),
Marangu M'Marete (Prof.),
Francis Angila Aywa,
Catherine Muyeka Mumma,
Horacio Boneo,

as commissioners.

Dated the 13th March, 2008.

MWAI KIBAKI,
President.

GAZETTE NOTICE NO. 1983

THE COMMISSIONS OF INQUIRY ACT

(*Cap.* 102)

Citation

A COMMISSION to inquire into all the aspects of the General Election held on 27th December, 2007, in Kenya with particular emphasis on the Presidential Election.

IN EXERCISE of the powers conferred on me by section 3 of the Commissions of Inquiry Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, direct the commissioners to hold an inquiry with immediate effect.

1. The terms of reference shall be to—

(*a*) analyze the constitutional and legal framework to establish the basis for the conduct of the 2007 elections and to identify any weaknesses or inconsistencies in the electoral legislation;

(*b*) examine the organizational structure, composition, and management systems of the Electoral Commission of Kenya to assess its independence, capacity and functioning during the preparation and conduct of the 2007 elections;

(*c*) examine the public participation in the 2007 electoral process and the electoral environment, including the roles and conduct of the political parties, media, civil society and observers;

(*d*) investigate the organization and conduct of the 2007 electoral operations including: civic and voter education; training; voter registration; logistics and security; polling and counting; vote tabulation and results processing and dispute resolution;

(*e*) investigate the vote counting and tallying for the entire election with special attention to the presidential elections in order to assess the integrity of the results and make recommendations for improvements, adjustments or overhaul of the system;

(*f*) assess the functional efficiency of the Electoral Commission of Kenya and its capacity to discharge its mandate;

(*g*) perform any other tasks that the Commission may deem necessary in fulfilling the foregoing Terms of Reference;

(*h*) recommend—

(i) electoral reform including constitutional, legislative, operational and institutional aspects, as well as on accountability mechanisms for Electoral Commission of Kenya Commissioners and staff pertaining to electoral malpractices, in order to improve future electoral processes;

(ii) such other legal or administrative measures as the Commission may deem necessary;

and to report this findings and any recommendations within six months.

2. The members of the Commission shall be—

Johann Kriegler (Judge)—(*Chairman*),
Imani Daudi Aboud (Lady Justice)
Marangu M'Marete (Prof),
Francis Angila Aywa,
Catherine Muyeka Mumma,
Horacio Boneo.

3. In the discharge of its mandate, the Commission shall—

(*a*) receive views from members of the public and receive oral and/or written statements from any person with relevant information, and may—

(i) use official reports of any previous investigations;

(ii) use any investigation report by any institution or organization;

(iii) carry out or cause to be carried out such studies or research in any relevant areas.

(*b*) determine its own rules of procedure and develop its own work plan;

(*c*) appoint a vice-chairman from among its members;

(*d*) publish its rules of procedure in the *Kenya Gazette*;

(*e*) summon any person or persons concerned to testify on oath and to produce any records, books, plans and documents that the commissioners may require;

(*f*) hold such meetings in Nairobi or other places as it may determine;

(*g*) hold meetings in public but may hold private hearings whenever it becomes necessary to instill confidence in the people appearing before it or to allay their fears of adversity or reprisal.

(*h*) execute the said inquiry with all diligence and speed and make its report without undue delay.

4. The Commission shall have all the powers necessary or expedient to effectively discharge its mandate, including the power to require co-operation from public officers and relevant institutions.

5. The Commission shall produce and submit to the President and the Panel of Eminent African Personalities a final report on its findings and recommendations, which shall be made public, in English and Swahili, within 14 days of submission.

6. The Commission shall be funded by the Government of Kenya and from the Trust Fund for the National Dialogue and Reconciliation.

Dated the 13th March, 2008.

MWAI KIBAKI,
President.

GAZETTE NOTICE NO. 1984

THE PUBLIC COMPLAINTS STANDING COMMITTEE

APPOINTMENT OF EXECUTIVE DIRECTOR

IN EXERCISE of the powers conferred by paragraph 4 (*a*) (i) of Gazette Notice No. 5826 of 2007, the Minister for Justice and Constitutional Affairs appoints—

KENNETH NYAGA MWIGE

to be the Executive Director of the Public Complaints Standing Committee Secretariat, for a period of three (3) years, with effect from 13th March, 2008.

Gazette Notice No. 6327 of 2007, is revoked.

Dated the 13th March, 2008.

MARTHA KARUA,
Minister for Justice and Constitutional Affairs.

CORRIGENDA

IN Gazette Notice No. 2229 of 2008, *amend* the proprietor's name printed as "Josephine Wamboi Ikere" to *read* "Josephine Wamboi Kere".

GAZETTE NOTICE. NO. 2437

THE COMMISSIONS OF INQUIRY ACT
(*Cap.* 102)

COMMISSION OF INQUIRY INTO THE DECEMBER, 2007 GENERAL ELECTIONS

APPOINTMENT

IN EXERCISE of the powers conferred by section 6 of the Commissions of Inquiry Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya appoint—

JORGEN ELKLIT

to be secretary to the Commission appointed by me through Gazette Notices Nos. 1982 and 1983 of 2008.

Dated the 2nd April, 2008.

MWAI KIBAKI,
President.

GAZETTE NOTICE. NO. 2438

THE COMMISSIONS OF INQUIRY ACT
(*Cap.* 102)

COMMISSION OF INQUIRY INTO THE DECEMBER, 2007 GENERAL ELECTIONS

APPOINTMENT

IN EXERCISE of the powers conferred by section 4 of the Commissions of Inquiry Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya appoint—

LUCY KAMBUNI

to serve as a Commissioner on the Commission appointed by me through Gazette Notices Nos. 1982 and 1983 of 2008.

Dated the 2nd April, 2008.

MWAI KIBAKI,
President.

GAZETTE NOTICE. NO. 2439

THE RETIREMENT BENEFITS ACT
(*No.* 3 *of* 1997)

THE RETIREMENT BENEFITS AUTHORITY

REVOCATION OF APPOINTMENT

IN EXERCISE of the powers conferred by section 6(f) of the Retirement Benefits Act, the Minister for Finance revokes the appointment of—

BARNABAS G. KARIUKI

as a member of the Retirement Benefits Authority.

Dated the 19th March, 2008.

AMOS KIMUNYA,
Minister for Finance.

*G.N. NO. 657/2008

GAZETTE NOTICE. NO. 2440

THE RETIREMENT BENEFITS ACT
(*No.* 3 *of* 1997)

THE RETIREMENT BENEFITS APPEAL TRIBUNAL

APPOINTMENT

IN EXERCISE of the powers conferred by section 47(2) of the Retirement Benefits Act, the Minister for Finance appoints—

BARNABAS G. KARIUKI

to be a member of the Retirement Benefits Appeals Tribunal, for a period of three years, with effect from 11th December, 2007.

Dated the 19th March, 2008.

AMOS KIMUNYA,
Minister for Finance.

GAZETTE NOTICE. NO. 2441

THE CERTIFIED PUBLIC SECRETARIES OF KENYA ACT
(*Cap.* 534)

APPOINTMENT

IN EXERCISE of the powers conferred by paragraph 2 (1) of the Third Schedule to the Certified Puplic Secretaries of Kenya Act, the Minister for Finance appoints—

Gilbert Oduor Otieno,
Jackson K. Maingi,

to be the Chairman and Vice-Chairman, respectively, of the Registration of Certified Public Secretaries Board, with effect from 1st January, 2008.

Dated the 27th March, 2008.

AMOS KIMUNYA,
Minister for Finance.

GAZETTE NOTICE. NO. 2442

THE CERTIFIED PUBLIC SECRETARIES OF KENYA ACT
(*Cap.* 534)

APPOINTMENT

IN EXERCISE of the powers conferred by section 12 of the Certified Public Secretaries of Kenya Act, the Minister for Finance appoints—

Gilbert O. Otieno,
Jackson K. Maingi,
Charles K. Wachira,
Hosea K. Kili,
Pius Mungai Nduatih,
George S. Mwosa,
Jane Wambui Chege,
Elizabeth Ng'ang'a,
Mary Adhiambo Oyolla,

to be members of the Registration of Certified Pulbic Secretaries Board, with effect from 1st January, 2008.

Dated the 27th March, 2008.

AMOS KIMUNYA,
Minister for Finance.

GAZETTE NOTICE. NO. 2443

THE ACCOUNTANTS ACT
(*Cap.* 531)

APPOINTMENT

IN EXERCISE of the powers conferred by section 15 (1) of the Accountants Act, the Minister for Finance appoints—

George Godia (Prof.),
Enos O. Oyaya,
Njoki Kahiga,
Fredrick Fanuel Odhiambo,
Kariithi M. Murimi,
Wanyama Kulundu-Bitonye (Prof.),
Sam G. Ogutha
Rosemary Njogu,
Stephen Lubalia,

to be members of the Kenya Accountants and Secretaries National Examinations Board for a period of three years, with effect from 1st January, 2008.

Dated the 27th March, 2008.

AMOS KIMUNYA,
Minister for Finance.

GAZETTE NOTICE. NO. 2444

THE ACCOUNTANTS ACT
(*Cap.* 531)

APPOINTMENT OF MEMBERS

IN EXERCISE of the powers conferred by section 12 of the Accountants Act, the Minister for Finance appoints—

SPECIAL ISSUE

ANNEX 1B

THE KENYA GAZETTE

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Vol. CX—No. 30 **NAIROBI, 11th April, 2008** **Price Sh. 50**

GAZETTE NOTICE No. 2941

THE COMMISSIONS OF INQUIRY ACT

(*Cap.* 102)

COMMISSION OF INQUIRY

RULES AND PROCEDURES

This Commission of Inquiry has been convened pursuant to its appointment to inquire into all the aspects of the General Election held on the 27th December, 2007 in Kenya, with particular emphasis on the Presidential Election, as stated in *Kenya Gazette* Notice Nos.1982 and 1983 of March 14, 2008.

The Commissioners make the following rules for the conduct and management of the proceedings of the inquiry under section 9 of the Commissions of Inquiry Act (Cap. 102).

General

(a) The Commission shall be known as the Independent Review Commission (hereinafter "IREC" or "the Commission").

(b) Subject to section 9 of the said Act, the Commission of Inquiry shall conduct its business through –

(i) meetings of the Commission;

(ii) review of documents;

(iii) receipt and consideration of oral and written submissions by individuals, political parties, public and private organizations, media, civil society, observers and any other parties or persons in public meetings or otherwise;

(iv) investigations;

(v) hearings in Nairobi and in such other places as the Commission shall determine;

(vi) hearings *in camera*;

(vii) research and analysis into relevant aspects of elections, electoral systems and the law;

(viii) any other means of gathering information; and

(ix) compilation of a report with recommendations for action.

(c) The Commission shall recommend the person to be appointed the Secretary to the Commission.

(d) The Commission shall appoint an advocate or advocates to assist the Commission in the inquiry by investigating and reporting information to the Commission and by formally presenting evidence and/or argument to the Commission at hearings by leading the evidence of or cross-examining witnesses before the Commission.

(e) The Commission shall appoint such other staff as it shall deem fit for the discharge of its mandate.

(f) The Commission shall meet as often as may be necessary for the dispatch of its business within a period not exceeding six months.

(g) Meetings of the Commission shall be held on such date and at such time and place as the Commission shall decide.

(h) The Commission may carry out its work either in plenary or through such committees as it shall determine provided that such committees shall be responsible to the Commission.

(i) The quorum for the conduct of business at a meeting of the Commission shall be the majority of all the members of the Commission or, in the case of a Committee of the Commission, a majority of the members of the Committee.

(j) Notwithstanding these rules, no proceedings of the Commission shall be invalid by reason only of a vacancy among the members thereof, or the absence of any member at any meeting or hearing.

(k) The Chairman shall preside at every meeting of the Commission at which he is present and in the absence of the Chairman at a meeting, the Vice-Chairman shall preside and in the absence of both the Chairman and the Vice-Chairman the members present shall elect one of their number who shall with respect to that meeting and the business transacted thereat, have all the powers of the Chairman.

(l) Subject to section 8 of the Act, unless a unanimous decision is reached, a decision on any matter before the Commission shall be by concurrence of a majority of all the members.

(m) Unless otherwise provided by or under any law, all instruments made by and decisions of the Commission shall be signified under the hand of the Chairman and/or the Secretary.

(n) The Commission may direct that the public shall not be admitted to all or to any specified part of the proceedings of the inquiry.

(o) The Commission shall cause minutes of all proceedings of meetings of the Commission to be kept in a book for that purpose.

(p) Except as provided by the Act, the Commission shall regulate its own proceedings.

Hearings

(q) Save as may otherwise be determined by the Commission, meetings of the Commission for the purposes of conducting hearings shall take place between 9.00 a.m. and 3.00 p.m. from Monday to Friday.

(r) Subject to the Commissions of Inquiry Act, the conduct of and procedure to be followed on the hearing is under the control and discretion of the Commission.

(s) Hearings shall be held in public, but the Commission may exclude any person or class of persons from all or any part of the proceedings of the inquiry if satisfied that it is desirable so to do:

(i) for the preservation of order;

(ii) for the due conduct of the inquiry;

(iii) for the protection of the person, property or reputation of any witness in the inquiry or any person referred to in the course of the proceedings thereof; or

(iv) for the protection of the Security of the State.

(t) The Commission may, if satisfied that it is desirable for any of the purposes mentioned above, order that no person shall publish the name, address or photograph of any such witness of person or any evidence or photograph identifying such witness or person or any evidence or information.

(u) Any person who is in any way implicated or concerned in any matter under inquiry shall be entitled –

(i) before being called as a witness to be informed of any allegations which are made against him/her and the substance of the evidence in support of such allegations;

(ii) to an adequate opportunity to prepare his/her response and to obtain legal representation;

(iii) to be legally represented at the inquiry at his/her own expense;

(iv) to have his/her evidence led by his/her legal representative;

(v) to cross-examine or have his/her legal representative test by cross-examination the evidence of any witness who implicates him/her.

(v) The Commission may call for any further evidence on any point relating to any matter before them and may recall any witness for further examination.

(w) The Commission may summon any person or persons to testify on oath and may call for the production of books, plans, materials and documents that the Commissioners may require.

(x) All government entities, agencies and officials and all witnesses shall cooperate fully with the Commission and shall make available all documents and witnesses relevant to the mandate of the Commission.

(y) Witnesses who testify will give their evidence at a hearing under oath or upon affirmation unless otherwise ordered by the Commission in its discretion.

(z) The Commission may issue or serve a hearing notice or summons upon each witness before he/she testifies and witnesses may be called more than once.

(aa) A person may be granted full or partial standing as a party by the Commission if the Commission is satisfied that the person is directly and substantially affected by the subject matter of the hearing at the earliest possible opportunity.

(bb) A person may be granted standing as an intervenor by the Commission if the Commission is satisfied that the person represents clearly ascertainable interests and perspectives essential to the Commission's mandate, which the Commission considers ought to be separately represented before the hearing, in which event the intervenor may participate in a manner to be determined by the Commission.

(cc) Any person wishing to be granted standing must apply in writing and include the following information –

(i) name, address, telephone and fax numbers, and e-mail addresses (if any) of the person;

(ii) whether the person seeks standing as a party or as an intervenor for all or a portion of the mandate of the hearing;

(iii) the areas and issues whether the person is directly and substantially affected or where the person has a clearly ascertainable interest or perspective which would enhance the work of the Commission and the reason in support thereof;

(iv) the names of the lawyers, if any representing the person, together with the lawyer's address, telephone number, e-mail address (if any) and fax number.

(dd) The Commission will determine any special conditions under which a person may participate and those parts of the hearing in which a person granted standing may participate.

(ee) The Commission may direct that a number of applications share in a single grant of standing.

(ff) Parties and intervenors shall advise the Commission of the names, addresses and telephone numbers of all witnesses they wish to have called and to provide summaries of the information the witnesses have.

(gg) The Commission may receive any evidence or information which it considers to be helpful in fulfilling its mandate whether or not such evidence or information would be admissible in court.

(hh) In the ordinary course of its proceedings, the Commission will call and cause to be questioned witnesses who testify at the hearing. Counsel for a party may apply to the Commission to lead a particular witness' evidence in chief. If counsel is granted the right to do so, examination shall be confined to the normal rules governing the examination of one's own witness in court proceedings, unless otherwise directed by the Commission.

(ii) Parties may be afforded an opportunity to cross-examine the witness to the extent of their interests. The order of cross-examination will be determined by the Commission.

(jj) After cross-examination, counsel for a witness may then re-examine the witness.

(kk) The Commission may refuse to call any witness if it is satisfied that the evidence of such a witness will be of insufficient relevance to the Commission's mandate.

(ll) The Commission shall deal with a breach of these rules as it deems fit including, but not restricted to, revoking the standing of a party, and imposing restrictions on the further participation in or attendance at (including exclusion from) the hearings by any party, intervenor, counsel, individual or member of the media.

(mm) Any person who contravenes an order given in accordance with these rules shall without prejudice to section 121 of the Penal Code, be guilty of an offence and liable to a fine not exceeding fifty thousand shillings.

(nn) Upon completion of the report of the Commission it shall be transmitted under the hand of the Chairman of the Commission to the President of the Republic of Kenya and the Panel of Eminent African Personalities without undue delay and at any rate not more than 2 days after such completion and cause to be published a notice of such transmission without undue delay.

(oo) The Commission will on transmittal of its report seek the mandate of the President of the Republic of Kenya and the Chairman of the Panel of Eminent African Personalities to deposit all its preparatory materials with the Kenya National Archives.

(pp) The Commission may, at any time, amend these rules.

Dated the 11th day of April, 2008.

JOHANN KRIEGLER,
Judge/Chairman,
Independent Review Commission.

INDEPENDENT REVIEW COMMISSION: COMMISSIONERS & STAFF

Commissioners

Name	Title
Judge Johann C. Kriegler	Chairman
Lady Justice Imani Daudi Aboud	Vice Chair
Prof. Marangu M'Marete	Commissioner
Francis Ang'ila Aywa	Commissioner
Lucy Kambuni	Commissioner
Horacio Boneo	Commissioner
Catherine Muyeka Mumma	Commissioner
Staff	
Prof. Jørgen Elklit	Secretary to the Commission
Akinyemi Adegbola	Deputy Secretary
Yohane Masara	Assisting Counsel
Jacqueline Kabari	Administrative Assistant
Winnie Muthui	Secretary
Peris Odhiambo	Secretary

Name	Title
Leonard Obonyo	IT Specialist
Mary Mwangi	Receptionist
Eunice Ajwang	Hansard Reporter
Susan Njeri Kimiti	Hansard Reporter
Hellen Kimari-Kanyora	Hansard Reporter
Brown Otuya	Logistics Officer
Silvia Nyaga	Electoral Researcher
Njeri Onyango	Legal Counsel
Cecil Miller	Legal Counsel
Linda Murila	Legal Researcher
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Akaki Opakwa	Investigator
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Amos Olendo Esikokho	Short-term Research Assistant
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Aggrey E. Onyango	Short-term Research Assistant
Francis Juma Odhiambo	Short-term Research Assistant

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Name	Title
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Sgt. Cosma R. Mungania	Uniformed Security Officer
Apc. George Osero	Uniformed Security Officer
Sgt. Elijah Mutuku Nzioka	Uniformed Security Officer
Apc. Alias Mosop Kosgei	Uniformed Security Officer
Apc. Kandagor Cheptumo	Uniformed Security Officer
Apc. Yerrow Ali	Uniformed Security Officer
Sgt. Abdikadir Ali	Close Protection Coordinator
Sgt. Jackson Ole Kisira	Close Protection Officer
Sgt. Richard Odongo	Close Protection Officer
Sgt. Nicholas Ndusya	Close Protection Officer
Sgt. Noah M. Musungu	Close Protection Officer
Cpl. Henry Wawire	Close Protection Officer
Cpl. Peter Mwaura	Close Protection Officer
Cpl. Tom Morara	Close Protection Officer
Cpl. Joshua Karani	Close Protection Officer

Name	Title
Cpl. Masila Kula	Close Protection Officer
Cpl. Abraham Kemboi	Close Protection Officer
Cpl. Vincent Mwandiko	Close Protection Officer
Apc. Josephat Rukwaro	Close Protection Officer
Apc. John Nyaga Njeru	Close Protection Officer
Apc. Geofrey Cheboi	Close Protection Officer
Apc. Willis O. Asiyo	Close Protection Officer

Government Personnel: Drivers

Peter Mainga	Driver
Allan K. Kibera	Driver
Geoffrey Ngare	Driver
Bernard Onga'nga	Driver
Joseph Gakuha	Driver
P. O. Mogaka	Driver
Japhet Mumba	Driver

PUBLIC MEETINGS ACROSS KENYA **ANNEX 1 D**

NYANZA PROVINCE

Date	Locality	Venue	Chairing
11 June 2008	Kisumu	Kisumu East Municipal Council Hall	Judge JC Kriegler
12 June 2008	Homa Bay	County Council Hall	Lady Justice ID Aboud
12 June 2008	Kisii	Gusii County Council Hall	Judge JC Kriegler
13 June 2008	Bondo	Bondo Teachers' Training College	Judge JC Kriegler

NORTH EASTERN PROVINCE

Date	Locality	Venue	Chairing
16 June 2008	Garissa	Garissa Town Hall	Judge JC Kriegler
17 June 2008	Wajir	Red Cross Hall	Lady Justice ID Aboud
17 June 2008	Mandera	Mandera Town Hall	Judge JC Kriegler

COAST PROVINCE

Date	Locality	Venue	Chairing
18 June 2008	Mombasa	Tononoka Social Hall	Judge JC Kriegler
19 June 2008	Lamu	Lamu Fort	Lady Justice ID Aboud
19 June 2008	Hola	Hola Town Hall	Judge JC Kriegler
20 June 2008	Kwale	Kwale Council Chambers	Judge JC Kriegler
20 June 2008	Voi	Voi County Hall	Lady Justice ID Aboud
21 June 2008	Malindi	Malindi County Council Hall	Judge JC Kriegler

WESTERN PROVINCE

Date	Locality	Venue	Chairing
23 June 2008	Kakamega	Kakamega Social Hall	Judge JC Kriegler
23 June 2008	Bungoma	DIDC Hall	Lady Justice ID Aboud
24 June 2008	Busia	Busia Municipal Hall	Judge JC Kriegler
24 June 2008	Mumias	St Mary's School of Medicine	Lady Justice ID Aboud

PUBLIC MEETINGS ACROSS KENYA

NAIROBI PROVINCE

Date	Locality	Venue	Chairing
25 June 2008	Nairobi	KICC, Aberdares Hall	Judge JC Kriegler
26 June 2008	Nairobi	KICC, Aberdares Hall	Judge JC Kriegler
27 June 2008	Nairobi	KICC, Aberdares Hall	Judge JC Kriegler

CENTRAL PROVINCE

Date	Locality	Venue	Chairing
30 June 2008	Limuru	Kirathimo Red Cross Hall	Judge JC Kriegler
30 June 2008	Kikuyu	Wangige ACK Church Hall	Lady Justice ID Aboud
1 July 2008	Thika	Thika Municipal Hall	Judge JC Kriegler
1 July 2008	Murang'a	Murang'a County Council Hall	Lady Justice ID Aboud
2 July 2008	Kerugoya	Kerugoya County Council Hall	Lady Justice ID Aboud
2 July 2008	Nyeri	PC's Information Hall	Judge JC Kriegler

EASTERN PROVINCE

Date	Locality	Venue	Chairing
3 July 2008	Embu	Embu County Council Hall	Lady Justice ID Aboud
3 July 2008	Chuka	Tharaka Nithi Teachers' Sacco Hall	Judge JC Kriegler
4 July 2008	Machakos	Municipal Council Hall	Lady Justice ID Aboud
4 July 2008	Kitui	Kitui PC's Information Hall	Judge JC Kriegler
5 July 2008	Meru	Meru County Council Hall	Lady Justice ID Aboud
5 July 2008	Isiolo	Isiolo Agricultural Centre	Judge JC Kriegler

PUBLIC MEETINGS ACROSS KENYA

RIFT VALLEY PROVINCE

Date	Locality	Venue	Chairing
7 July 2008	Eldoret	Eldoret Municipal Council	Judge JC Kriegler
7 July 2008	Kericho	County Council Hall	Lady Justice ID Aboud
8 July 2008	Kitale	Trans Nzoia Council Chambers	Judge JC Kriegler
8 July 2008	Molo	Town Council Hall	Lady Justice ID Aboud
9 July 2008	Lodwar	Medical Training Centre Hall	Judge JC Kriegler
9 July 2008	Nakuru	Nakuru Municipal County Hall	Lady Justice ID Aboud
10 July 2008	Narok	Narok County Council Chambers	Judge JC Kriegler
10 July 2008	Naivasha	Municipal Council Hall	Lady Justice ID Aboud
11 July 2008	Kajiado	Kajiado Resort Hotel	Lady Justice ID Aboud
11 July 2008	Kilgoris	Kilgoris Social Hall	Judge JC Kriegler

TECHNICAL WORKSHOPS CONDUCTED

Theme: Electoral Systems - Friday, 1 August 2008

Workshop Chair & List of Presenters	Presenters' Institutional Affiliations	Title of Paper
Chairman Judge Johann Kriegler		
Jørgen Elklit	Independent Review Commission	What Can Kenya Learn from Lesotho? Or: Something on Electoral Systems
Horacio Boneo	Independent Review Commission	Electoral Systems: On the Allocation of Nominated Seats under PR
Nancy Baraza	Kenya Law Reform Commission,	Electoral Systems
Catherine Wanjiku	Foundation for Women Rights in Kenya,	Women and the Electoral System
Mike Abala Wanga	Pan African Movement,	Towards a Credible Electoral System
Samuel M Kivuitu	Electoral Commission of Kenya	Electoral Systems

Theme: Registration of Voters - Monday, 4 August 2008

Workshop Chair & List of Presenters	Presenters' Institutional Affiliations	Title of Paper
Commissioner Francis Ang'ila Aywa		
Horacio Boneo	Independent Review Commission	Briefing Note on Registration of Voters
Peter Aling'o	Institute for Education in Democracy	The Challenges that Continue to Undermine the Registration of Voters Processes in Kenya
Edah W Maina	Kenya Society for the Mentally Handicapped	Hindrances for Participation of Persons with Mental Disabilities in the Electoral Process
Reginald Oduor	Society of Professionals with Visual Disability	Removal of Obstacles to Full Inclusion of Persons with Disabilities in the Electoral Process
Jeremiah Matagaro	Electoral Commission of Kenya	Registration of Voters

Theme: Political Parties - Wednesday, 6 August 2008

Workshop Chair & List of Presenters	Presenters' Institutional Affiliations	Title of Paper
Commissioner Lucy Kambuni		
Angima Omweri	Centre for Multi-Party Democracy	The Role of Political Parties in Democratic Governance
Emmanuel Manyasa	Centre for Ethnic Mainstreaming	Ethno-political Parties and the Democratization Challenge in Kenya
Thomas Maosa	No affiliation	Inefficacy of Political Parties, Registrar of Societies & the Electoral Commission of Kenya: A Perspective
Elisha A Aduke	No affiliation	Political Parties & their Role in Enhancing Democracy in Kenya
Samuel arap Ngeny	Electoral Commission of Kenya	Political Parties

TECHNICAL WORKSHOPS CONDUCTED

Theme: ECK Organization and Structure - Friday, 8 August 2008

Workshop Chair & List of Presenters	Presenters' Institutional Affiliations	Title of Paper
Vice-chair Lady Justice Imani Aboud		
Job Ogonda	Transparency International	Governance, Electoral Management and Transparency
James Gondi	Kenyan Section of ICJ	ECK – Organization and Structure
Steve Lugalia	Institute of Certified Public Accountants of Kenya	Proposal to the Kenya National Dialogue & Reconciliation – Independent Review Commission
Okong'o Omogeni	Law Society of Kenya	ECK – Organization and Structure
Elizabeth Marete	Institute for Education in Democracy	Gaps in the Organization & Structure of the ECK that Undermine Effective Management and Administration of Elections in Kenya
George Mirie	No affiliation	ECK Organizations, Structures, Strengths and Weaknesses
Amb Jack Tumwa	Electoral Commission of Kenya	ECK Organization Structure

Theme: Regulation of Electoral Campaign and Dispute Resolution - Monday, 11 August 2008

Workshop Chair & List of Presenters	Presenters' Institutional Affiliations	Title of Paper
Commissioner Catherine Mumma		
Johann Kriegler	Independent Review Commission	Effective Electoral Dispute Resolution
Wilfred Nderitu	Kenyan Section of ICJ	Regulation of Electoral Disputes Resolution
Immaculate Njenge-Kassait	Institute for Education in Democracy	Do we have Adequate Regulations for Campaigns and Electoral Dispute Resolutions or is it that Our Institutions of Government have Simply Failed Us?
Marangu M'Marete	Independent Review Commission	Long Walk to Election Transparency in Kenya
Lawrence Mute	No affiliation	Legislating Against Hate Speech for Kenya Without Impeaching the Right to Freedom of Expression
Kihara Muttu	Electoral Commission of Kenya	Regulation of Electoral Campaign & Dispute Resolution

Theme: Role of the Media - Wednesday, 13 August 2008

Workshop Chair & List of Presenters	Presenters' Institutional Affiliations	Title of Paper
Commissioner Marangu M'Marete		
Dennis Itumbi	No affiliation	Thy Kingdom is on Gunfire
Kioko wa Kivandi	Sauti ya Mwananchi F.M. Nakuru	Will Journalists Go to Heaven?
Vitalis Musebe	Independent Review Commission	Kenyan Media: Walking the Tight Rope
Mildred Owuor	Electoral Commission of Kenya	Role of the Media

WITNESSES WHO TESTIFIED UNDER OATH

1. Samuel Kivuitu - Chairman, ECK
2. Koki Muli
3. Jack Tumwa – Commissioner, ECK
4. Agnes Kisero
5. Ayub Imbira
6. Abdul Karim A Sheikh – RO, Changamwe
7. Nicholaus Ombasa Okemwa – RO, Mbita
8. Laban Arupe Korellach – RO, Molo
9. James Gitahi – RO, Kirinyaga Central
10. Kahindi John Njuguna – RO, Kieni
11. Suleiman Chege
12. Samweli Mwangi
13. Stephen Kiao – RO, Masinga

ANNEX 2.A

Independent Review Commission (IREC)

An Analysis of the Constitutional and Legal Framework for the Conduct of Elections in Kenya

September 2008
N A I R O B I

Okech-Owiti
Consultant

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We would like to acknowledge the contributions of Paul Ogendi, a student at the School of Law, University of Nairobi, in assisting in background research, and compilation of the materials for this report. His assistance is appreciated.

CKRC	-	Constitution of Kenya Review Commission
COG	-	Commonwealth Observer Group
DP	-	Democratic Party
EAC	-	East African Community
ECK	-	Electoral Commission of Kenya
EMB	-	Electoral Management Bodies (EMBs)
EOA	-	Election Offences Act
EU EOM	-	European Union Election Observation Mission
FORD	-	Forum for the Restoration of Democracy
FORD-K,	-	FORD-Kenya
IDEA	-	Institute for Democracy and Electoral Assistance
IPPG	-	Inter-Parties Parliamentary Group
IREC	-	Independent Review Commission
KACC	-	Kenya Anti-Corruption Commission
KADU	-	Kenya African Democratic Union
KANU	-	Kenya African National Union
KHCR	-	Kenya Human Rights Commission
KNCHR	-	Kenya national Commission of Human Rights
KPU	-	Kenya People's Union
LDP	-	Liberal Democratic Party
LGA	-	Local Government Act
MP(s)	-	Memebr(s) of Parliament
NAPEA	-	National Assembly and Presidential Elections Act
NARC	-	National Rainbow Coalition
NARC-K	-	NARC Kenya
NCCK	-	National Christian Council of Kenya
NDP	-	National Development Party
ODM	-	in the 2005 Referendum, the
ODM-K	-	ODM Kenya
PNU	-	Party of National Unity
PPA	-	Political Parties Act
SDP	-	Social Democratic Party

This report is a summary of the constitutional and legislative framework of elections in Kenya. It was commissioned by the Independent Review Commission (IREC), which was mandated to inquire into the 2007 General Elections. The summary is intended to provide a background to IREC's work and eventual recommendations. The broad Term of Reference required the Consultant to 'analyze the constitutional and legal framework and establish the basis for the conduct of the 2007 elections and to identify any weaknesses or inconsistencies in the electoral legislation'.[1]

The Report is divided into three main parts apart from this introduction. The first part provides a historical survey of Kenya's experiences with elections since independence. It, therefore, gives a brief summary of the experiences between 1963 and 1991 and thereafter discusses each of the elections that Kenyans have gone through since 1992. The discussions on the 2007 General Elections include a summary of formal comments made by election observers and their recommendations.

The second part discusses the constitutional and legislative framework for elections, mainly the Constitution of Kenya, the National Assembly and Presidential Elections Act, the Local Government Act the Political Parties Act and the Election Offences.

The third and last part analyses this framework in light of Kenyan and other experiences.

[1] See Annex

Historical Background

Kenya's electoral history dates to the colonial days. It began in 1905, when an order in council established the first Legislative Council. Subsequent Orders in Council saw subsequent elections held from 1909 through to 1961.

The constitutional foundations of democratic governance in Kenya were first put in place during the Lancaster House Constitutional Conferences of 1960-63. These conferences debated political transition in Kenya and succeeded in substituting British colonial rule with elected African leaders.

In pre-colonial times, there were no centralized political systems resembling states in the modern sense. Communities comprised small units bound together by kinship and other forms of affinity. They planned and pursued common activities guided by well-established norms and customs. The clan was the central unit in most of these societies and was repository of community management and of conflict management and of conflict prevention and resolution. Leadership was based either on age and gender, with male elders forming local councils, or on heredity, such as the *laibon* system of the Maasai community. [2]

From the time the ban on African political parties was lifted in 1960, Kenya has sea-sawed between single-partyism and multi-partyism until the triumph – so far – of *de jure* multi-partyism in 1991:

- 1960-1964: Domination of the political scene by two political parties - the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU)

[2] Kenya Election 1997: Free and Fair? International Commission of Jurists (Kenya Section), November 1997, p. 6

- 1964: voluntary dissolution of KADU and merger with KANU, creating a *de facto* one party system
- 1966: Re-emergence of multipartyism when the then Vice-President, Jaramogi Oginga Odinga, resigned from KANU and launched a new party, the Kenya People's Union (KPU) in which he was joined by 28 other legislators from KANU[3]
- 1969: On the eve of the 1969 General Elections, KPU was proscribed leaving KANU as the only political party and making Kenya – again – a *de facto* one-party state
- 1982: The Constitution was amended[4] to make KANU the sole legal political party and Kenya finally became a *de jure* one-party state[5]
- 1991: After popular campaigns against the *de jure* single-party system, an amendment to the Constitution[6] repealed Section 2A which had made KANU the only legal political party.

It is this last amendment which paved the way for the first multi-party elections since 1966.

The 1992 General Elections

Despite the clamour for the expansion of the democratic space, no other serious amendments were made to the Constitution after the removal of section 2A. Thus, the 1992 General Elections were held under the same Constitution which had been considered as undemocratic, especially its concentration of power in the executive, and under the cloud of the one-party system. During these elections, KANU won 100 out of the 188 seats[7] largely as a consequence of the fact that the original Forum for the Restoration of Democracy (FORD) had disintegrated into FORD-Kenya and FORD-Asili on the eve of the Elections. There were allegations that the elections had been rigged in favour of Moi and KANU,

[3] A constitutional amendment pushed through by KANU required that a person who defects from a party through which he or she entered into Parliament loses his/her seat. This necessitated the 'Little General Elections of 1966 during which KPU put into Parliament only seven MPs, making it a very small opposition party

[4] Constitution of Kenya (Amendment) Act, 1982 (Act No. 7 of 1982); this was after an attempted *coup d'etat* against President Moi's government

[5] Two general elections - 1983 and 1988 - were held under this system

[6] Constitution of Kenya (Amendment) Act, 1991 (Act No. 12 of 1991)

[7] These included 18 seats that were captured without any opposition. Moi won the elections with less than 35% of the votes cast, making his government a 'minority' one

but the petitions filed in the High Court against Moi were dismissed - largely on technicalities.[8]

Following upon the experiences of the 1992 elections, it dawned on opposition parties and civil society organisations and activists that the removal of section 2A did not provide a wide-enough democratic space; particularly, it was demonstrated that there was no level playing field in the electoral arena. It became clear that further reforms were necessary in the political, constitutional, judicial and administrative spheres. These experiences were compounded by the fact that many activities organized to champion reforms were denied licenses and, very often, violently dispersed. Thus, as Kenyans approached the 1997 elections, the clamour for constitutional (including electoral) reform heightened. This gave impetus to an MP-led reform initiative called the Inter-Parties Parliamentary Group.

IPPG, which met outside Parliament, negotiated and recommended a raft of proposals which resulted in the introduction and passage of two bills – a Constitution of Kenya (Amendment) Bill and a Statute Law (Repeals and Miscellaneous Amendments) Bill – which, to some extent, responded to the demands for minimum reforms before elections. A third bill, the Constitution of Kenya Review Commission Bill, 1997, proposed the establishment of a commission to collect, analyse, and collate the views of Kenyans on constitutional change after the elections.[9]

[8] See, for example, Civil Appeal No. 178 of 1993 (unreported), where Mr. Kenneth Nyindo Matiba had appealed against a decision by the High Court to dismiss his petition against Mr. Moi

[9] Altogether, the reform package came to be called the 'IPPG Package'. Once passed by Parliament, the Bills were given prompt Presidential Assent. As an example of the liberalization introduced by the IPP package, the Registrar of Societies was required to register all the political parties whose applications were pending or give an explanation for non-registration. Consequently, e record 16 political parties were registered in the run-up to the 1997 elections

The 1997 General Elections

Of the 27 registered parties, 22 participated in the 1997 general elections and 15 of these fielded presidential candidates[10]. The elections were scheduled for December 29 but officially extended to December 30 as a result of technical problems that occurred at a number of polling stations. In some constituencies in North Eastern and Coast Provinces that were affected by floods, polling went on beyond the official two days.[11]

Compared to past elections, the ECK conducted its affairs more openly during the preparatory stages, giving press briefings and fielding questions. However, it was bedevilled by numerous logistical and administrative problems during the actual elections, giving rise to widespread criticism across the party divide.

The counting of votes continued into the first week of January 1998 in more than 50% of constituencies. It was not until January 6 that all results for parliamentary and civic elections were finally announced.

In the presidential elections, Moi, the incumbent, won with slightly over 40% of the vote.[12]This win was to provide the lesson in the need for 'coalition-building' in the run-up to the 2002 elections.

The 2002 General Elections

A number of developments that had taken place earlier or took place in 2002 made some difference in these elections. Consequent upon the limitation of presidential tenure to two terms of five years, Moi was disqualified from contesting in the 2002 elections. The Statute Law (Miscellaneous Amendments) Act of June 2002:

---

[10] Out of these, only five were in serious contention: Moi of KANU, Mwai Kibaki of the Democratic Party (DP), Raila Odinga of National Development Party (NDP), Michael Wamalwa of FORD-K and Charity Ngilu of Social Democratic Party (SDP)

[11] Okech-Owiti (ed) (1998): Report on the 1997 General Elections in Kenya, 29 – 30 December. Nairobi, Institute for Education in Democracy, p. 67

[12] In the parliamentary elections, KANU won 107 seats against DP's 39, NDP's 21, FORD-K's 17 and SDP's 15. Though it won about 51% of the seats, it received only about 38% of the total votes (about 2.24 million), compared to the opposition's 62% (about 3.6 million)

- Provided for continuous voter registration
- Allowed a blind, 'physically disabled' or illiterate voter to freely choose a companion or an assistant (under oath of secrecy) to assist in marking the ballot paper
- Enabled the voter to make any mark to indicate his/her choice of candidate on the ballot paper (except any mark that identifies the voter)
- Provided for the counting of ballot papers at the polling station immediately after the closing of voting, and in the presence of the candidates or their agents.

It is noteworthy too, that a lot of civic education had been conducted through outreach programmes of civil society organisations, and that there was relative peace compared to the politically-motivated violence of the previous elections.

Perhaps one of the most significant political developments was the formation of the umbrella National Rainbow Coalition (NARC). Drawing lessons from the failure of the opposition to dislodge KANU in 1997, fourteen political parties formed NARC to contest the elections against KANU, whose 'Moi-annointed' flag-bearer was Uhuru Kenyatta. NARC fronted Mwai Kibaki as its presidential candidate. During the elections, Kibaki was able to garner 25% in all eight provinces, the highest being in Nairobi (76% of the votes) and the least in N. Eastern (28% of the votes). The KANU presidential candidate, Uhuru Kenyatta managed 25% of the votes in three provinces only – N. Eastern, Eastern and Central provinces. Uhuru had the highest proportion of votes in North Eastern where he garnered 67.1% of the votes. The remaining presidential candidates, FORD People's Simeon Nyachae, SDP's James Orengo and UMA's Ngethe Waweru, did not achieve the required 25% of the votes in any of the provinces.

NARC formed a government in January 2003. However, it was not long before disagreements began to emerge over cabinet and other appointments, corruption and constitutional review, among others. From a political point of view, the most important arena in which these differences were played out was the constitutional review process, especially the 2005 referendum.

The 2005 Referendum

NARC, under the stewardship of Mwai Kibaki, had promised during the campaigns that it would deliver a new Constitution in 'a hundred days' if put into power. A lengthy public consultation process produced the Bomas Draft Constitution in March 2004. But its provisions, notably those reducing the executive powers of the presidency, proved unacceptable to the Government. After a protracted legal wrangle, and amid violent protests in Nairobi, the government secured parliamentary approval for certain key amendments to the Draft Constitution, and a new Constitution Bill was published. This new Draft Constitution came to be known as the 'Wako draft', which was put to a referendum.

The legal framework was provided under the Constitution of Kenya Review (Referendum) Regulations 2005 attached to the Constitution of Kenya Review Commission (CKRC) Act (Chapter 3A of the Laws of Kenya).

The 'Wako Draft', was put to a Referendum in November 2005. It was rejected by 58% of voters. This result was also widely viewed as a vote of no confidence in President Kibaki's government. This prompted President Kibaki to dismiss his entire government and start with a new team which excluded all those Ministers (mainly from the LDP faction of the NARC Coalition) who campaigned and voted against the Wako Draft. Some ministerial nominees rejected their appointments. This effectively marked the end of the NARC Coalition.

The 2007 General Elections

The 2007 General Elections are memorable for the violence that followed the announcement of PNU's Mwai Kibaki as the winner of the presidential race and his hurried swearing in as the President for a second term. Let us first look at the alignment of political parties in the run-up to these elections.

Following the victory of the anti-Wako Draft ODM in the 2005 Referendum, the movement transformed itself into a political party. Matters, however, came to a

head as the party was trying to consolidate itself and choose a presidential candidate. First, Kenyatta withdrew KANU from ODM on the argument that certain guarantees, including KANU's independence and equal partnership within the 'coalition', had not been given. He then aligned himself with President Kibaki, but maintained KANU as an independent party. Then Kalonzo Musyoka 'left' the new party but insisted him and Julia Ojiambo were the rightful custodians of ODM Kenya (ODM-K). Raila Odinga and his 'Pentagon' colleagues[13] 'acquired' the ODM Party of Kenya and transformed it into ODM, which, together with ODM-K, represented the main opposition parties in the 2007 general elections. In the meantime, several of Kibaki's ministers attempted to revive the 'NARC dream' but without NARC. Since the chair, Charity Ngilu, refused to surrender the party, they established NARC Kenya (NARC-K) to galvanise support for Kibaki.

118 political parties[14] fielded candidates for the general elections and a number of these parties formed the Party of National Unity (PNU) coalition group lead by Kibaki seeking a second term in office. PNU was founded in August 2007 and selected as the party for Kibaki's re-election campaign over NARC-K despite resistance from some cabinet members. PNU consisted of a hybrid of coalition partners, with varying degrees of autonomy after a number of these partners decided to contest the parliamentary elections individually whilst maintaining support for Kibaki's candidature for the presidency. PNU was therefore both an informal coalition and a political party in its own right. Many of the political parties comprising the PNU coalition have strong regional bases[15] and collectively formed a broadly national coalition.

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[13] Musalia Mudavadi, William Ruto, Najib Balala and Joseph Nyaga

[14] 9 parties registered for presidential, 117 for parliamentary and 118 for civic elections [Source]

[15] FORD-People in the Kisii region of Nyanza Province, led by Cabinet Minister Simeon Nyachae; FORD-Kenya, led by Cabinet Minister Musikari Kombo, in parts of Western Province and the Trans Nzoia District of the Rift Valley; New FORD-Kenya, the breakaway party from FORD-Kenya, rooted in the same regions and led by Cabinet Ministers Mukhisa Kituyi and Soita Shitanda; and KANU under Uhuru Kenyatta in parts of the Rift Valley, North Eastern and Central Provinces, while PNU would primarily focus on the Kikuyu, Embu and Meru regions in Nairobi, Central, Eastern and Rift Valley Provinces.

In early September 2007, ODM elected Raila Odinga as its presidential candidate. In October 2007 the Pentagon was expanded to incorporate the NARC leader Charity Ngilu. Thus, the three main parties PNU, ODM and ODM-K, had Kibaki, Raila and Musyoka as their presidential candidates, respectively. There were six other presidential candidates, among them one woman candidate, Naslin Umar from Nairobi, and Kenneth Matiba, from Central Province, the runner-up in the 1992 elections. However, none of these candidates were able to launch a viable campaign for office.

The elections were held on December 27, 2007. On December 30, Kibaki was sworn in as the president after the ECK announced him the winner. Violence erupted immediately in several parts of the country, notably, Nairobi and Coast, Nyanza, Rift Valley and Western provinces. The violence, which took on an apparently ethnic character, lasted the whole of January 2008 and only abated once the National Accord for power-sharing was been signed by Kibaki and Raila following mediation by Dr. Koffi Annan.

There were allegations of irregularities in the conduct of these elections. These revolved around results being received and announced without the requisite, authenticated documentation, doctoring of results and improper tallying. What happened during the elections and tallying of votes, including the presidential ones, are the subject-matter of the Independent Review Commission (IREC). The violence that followed the announcement of the final results of the presidential election and the swearing in of Mwai Kibaki as the President are the subject of another commission, the Waki Commission. However, a number of observation groups produced reports on the elections, expressing opinions and giving recommendations on various aspects of the elections. We summarise some of the reports below. The intention is to present part of what there is in terms of formal impressions on the December 27, 2007 elections, rather than analyse and present positions. It is for IREC to decide what to make of the reports, taking into account its other sources of information.

European Union Election Observation Mission, Kenya, 27 December 2007: Final Report on the General Elections, 3rd April 2008

The European Union Election Observation Mission (EU EOM) undertook observation in all eight provinces of Kenya. The report observed that within the resources at its disposal, the ECK was able to prepare adequately for the elections both technically and logistically. It enhanced accessibility to voter registration centres, ensured gender balance in the selection of polling staff and generally provided appropriate training for election officials.

However, the appointment of new ECK Commissioners by the President without consultation with opposition parties undermined the confidence in the electoral authority. This mistrust was further fuelled by the failure of the ECK to meet international standards of transparency. Observers and party agents were denied full access to the tabulation of results at national and partly at constituency level.

The ECK announced the final presidential result in the absence of certified constituency results. A full breakdown of presidential results down to polling station level, as commonly and speedily executed in elections following best international practice, has not been published so far.

The observer team recommended that in advance of future elections, the election framework needs reforms to be fully in line with international standards for democratic elections. Other key recommendations include:

- One Kenya Elections Act that consolidates the various and disparate elements of the current election legislation
- A results process that guarantees full transparency at every stage and which enables publishing of results at constituency level upon the completion of tallying and posting of polling station results on the ECK website
- Prioritising the prevention and handling of election disputes, with an independent judicial body being established to deal with complaints and appeals in a timely, effective and transparent manner
- Implementation of polling procedures in a consistent manner

- Selection and appointment of the ECK Commissioners in a manner that ensures confidence by all election stakeholders
- A national voter registration database and computerized constituency registration offices
- A regulatory framework for the audiovisual media and restoration of the independence and public accountability of the Kenya Broadcasting Corporation (KBC).

The Report of the Commonwealth Observer Group on the Kenya General Election: 27 December 2007

According to the report of the Commonwealth Observer Group (COG), the election was significant considering the scale of logistical and operational challenges that the ECK had to put in place for the polls. The COG had, in its Interim Statement commended the professionalism and commitment of the ECK. It formed the view that, up until the conclusion of election day, the process was credible. The COG observed, however, that since polling day it had become obvious that there is a need to have in place improved measures to ensure the timely release of election results and to considerably improve the system of communication between the ECK headquarters and the field. Other key recommendations include:

- Subjecting the process for appointing ECK Commissioners to screening and confirmation by Parliament in order to strengthen the independence of the ECK and further insulate the institution from possible political interference.
- Review of the processes for the transmission and announcement of results
- Review of the polling day procedures and operational arrangements to incorporate a number of features, including transparent and clearly marked, strengthen ECK's capacity to manage polling stations, better layout and clearer directions in polling centres, greater care with the authentication of ballot papers, strict adherence to the procedure for the calling out of voters' names as they are marked off the register, conspicuous identification of all ECK officials at polling stations, adequate lighting for all polling centres and clearer guidelines to presiding officers to determine a valid vote when the intention of the voter is clear

- Implementation of a better system for updating the register of voters and the provision of voters' identification cards
- Implementation of the Political Parties Act of 2007
- A limit on the amount of expenditure that can be incurred during the campaign
- Requiring advertisements to carry some form of identification
- Clear guidelines on advertising with inappropriate content
- Increased training for all media on political reporting
- More effective and consistent training for all domestic observers
- Rulings on election petitions within a specified time period and reduction of the period for lodging legal challenges
- Conclusion of any legal challenge to the election results against a set deadline before the inauguration of newly-elected officials
- Separate funding for female candidates
- Enforcement of laws to protect candidates, particularly women, from violent attacks
- Fostering an environment that is conducive to women's active participation in politics
- Providing adequate funding to ensure that young people are able to genuinely compete in elections.

The East African Community Observer Mission Report Kenya General Elections December 2007

According to the report, the objectives of the East African Community (EAC) Observer Mission were:

- To ascertain whether the elections were free and fair and conform to principles of good governance and democracy in the region
- To look out for best electoral practices that could be emulated in the region
- To widen and deepen cooperation between Partner States in socioeconomic and political affairs.

The report strongly commended the people of Kenya for the high voter turnout, their enthusiasm and commitment to the process, and respect, hospitality and cooperation accorded to the Observer Mission. In the same vein, the Mission

condemned the resultant violence and deeply regretted the senseless loss of life and property. The Mission recommended, among others, that:

- The EAC should establish a regional mechanism to prevent, manage, resolve disputes and conflicts and common mechanisms for the management of refugees in the Region as per Chapter 23 of the Treaty
- The fundamental principle in the Treaty which requires adherence to principles of good governance should be underpinned by enactment of a uniform electoral law and establishment of an East African Electoral Commission
- The EAC should develop a civic education programme that addresses potential challenges of ethnic and tribal tensions within the region.
- Excessive use of force in dealing with protestors should be discouraged
- Those involved in perpetration of political crime and killings should be prosecuted
- The anomalies cited in the tallying process should be investigated and the ECK officials and any other persons found to be responsible should be held accountable
- Electoral legal reforms in Kenya should encompass provision of a time limit within election results should be announced, provision of a specific time-frame within which electoral petitions are disposed of, use of transparent ballot boxes, clarity on qualifications for presidential victory, appointment of the Judiciary, appointment of ECK Officials, use of public resources during campaigns and clarity on powers, authority and autonomy of the ECK
- Political Party leaders should prevail over their supporters to stop violence and engage in collective dialogue for the resolution of the crisis.

The Kenya Human Rights Commission: *Violating the Vote: A Report on the 2007 General Election*[16]

The report of the Kenya Human Rights Commission (KHRC) offers a human rights approach to analysing the 2007 electoral process. The KHRC monitored human rights violations during the 2007 electoral process, including the pre-elections period (and political party nominations), polling day and the post-election period, and concluded that these processes were marked by violations of

[16] February 27, 2008

the rights to life, food and water, security, housing and property ownership, among others.

KHRC's analysis is done around the following themes:

- The Right to Vote
- The Right to Integrity and Security of the Person
- The Right to Freedom of Expression
- The Right to Access Information
- The Right to Freedom of Assembly
- The Right to Freedom of Association
- The Right to Equality and Non-Discrimination
- The Right to Campaign
- The Right to Freedom of Movement
- The Right to Judicial Petition
- Regulation of Political Financing
- Executive Discretion over the Timing of Elections
- Impunity and Prosecution.

Overall, the report concludes that there were violations and makes various recommendations with timelines, in respect of each of these themes. Among these are:

- That the ECK should be disbanded or Commissioners and staff who took part in the irregularities, malpractices and illegalities, resulting in electoral fraud be identified, investigated and prosecuted, and that constitutional, legal, policy and administrative changes be made to replace the current electoral system with mixed member proportional representation
- That the Kenya Police Force should investigate and prosecute those who committed violence, the Commissioner of Police be relieved of his duties and replaced, those among the Kenya Police Force who gave orders to shoot to kill be relieved of their duties and prosecuted, a Police Service Commission be established, within the framework of the Bomas Draft Constitution, and that a Civilian Oversight Body, based on international frameworks for checking excesses of the police, be established
- That the Kenya Police Force and the KNCHR investigate sources of the leaflets, emails, blogs and SMS propounding hate speech and prosecute those responsible, the Kenya Police Force investigates audio and video footage of politicians in campaign rallies to prosecute those

responsible for inciting violence and that Parliament enacts hate speech legislation

- That the Freedom of Information Bill be enacted and related policy formulated and implemented, and that the management of the KBC be de-linked from the state and it be transformed into a genuine national public broadcaster through appropriate legislation and internal policies
- That the state Government restore calm and address underlying issues preventing peace in conflict areas
- That the state, through the relevant Minister, gazette and operationalise the Political Parties Act
- That Parliament amends the Constitution of Kenya to provide for district seats where women contest parliamentary seats, relative to the Bomas Draft Constitution, Local Authorities specify wards where only women contest and that Parliament and the reconstituted ECK work out a formula, through MMPR to provide space for women and other marginalised groups
- That the Kenya Police Force establish a unit to provide security for candidates, especially females, during campaigns and investigate and prosecute all cases of violence against female and other candidates
- That the Chief Justice should institute mechanisms, such as a special court, to hear all petitions before the end of 2009 and that the complicity of the Chief Justice and the judiciary in the electoral failures be examined and addressed
- That the Kenya Police Force, the Attorney General and the KACC should investigate all campaign financing between September and December 2007 and prosecute all those guilty of corruption
- That Parliament alters the Constitution to reduce the powers of the presidency, the, the state undertakes comprehensive judicial and electoral reforms and that the Provincial Administration be abolished
- That the current Attorney General be relieved of his duties, the state establishes Transitional Justice mechanisms.

Kenya is in the process of reviewing its Constitution and other Laws. The legal reform content is likely to have a significant impact on the election process.

Currently, the main legal provisions relating to elections are:

- The Constitution of Kenya
- The National Assembly and Presidential Elections Act (Chapter 7, Laws of Kenya)
- The Local Government Act (Chapter 265)
- The Societies Act (Chapter 108)[17]
- The Political Parties Act, 2007
- The Election Offences Act (Chapter 66).[18]

Others which have relevance but which are not discussed here in detail are the Registration of Persons Act, the Penal Code, the Kenya Broadcasting Corporation Act, the Public Order Act.

In summary, the Constitution of Kenya establishes the Electoral Commission of Kenya (ECK) and stipulates its functions. It also provides for the election of the President and members of the National Assembly, and citizenship, which provides the basis for recognition as an elector.

The National Assembly and Presidential Elections Act provides for registration of electors, declaration of vacant seats, elections and election petitions and expenses.

The Local Government Act provides for the establishment of Local Authorities, defines their functions and provides for matters connected and related to those functions. It gives power to the ECK to divide local authorities into various

[17] Now repealed by the Political Parties Act, 2007

[18] The Elections Bill, 2007, is also dealt with, but only to the extent that it introduces new substantive provisions, and only by way of footnote comments

electoral areas and prescribe their boundaries and names. It also provides for procedures for local government elections.

The Registration of Persons Act provides for the registration of and provision of a national identity card to, Kenyans who have attained the age of eighteen years. The cards are used during registration of voters as evidence of age and nationality.

The Societies Act provides for the registration and control of societies[19] and is the legislation under which political parties were registered.

The Political Parties Act, 2007 provides for the registration, regulation and financing of political parties. It replaces the Societies Act under which these parties were registered previously.

The Election Offences Act creates a variety of offences relating to registration of voters and elections, and provides penalties for offenders. Also important in this regard is the Penal Code, the main penal statute in Kenya, under which most illegal acts committed during elections are also prohibited. The offenders could be prosecuted under either of the Acts.

The Kenya Broadcasting Corporation Act is important in the electoral process because it establishes and regulates the public electronic media. It requires that the media treat political parties equally during elections. It forbids discriminatory broadcasting. If political parties so request, it, in consultation with the ECK, prepares a schedule for use of the facility free of charge by the political parties. During campaign periods, the public media are expected to maintain a fair balance in the allocation of broadcasting hours as between different political viewpoints.

The Public Order Act originally required any person intending to hold a political rally to obtain a licence. However, in 1997, arising from the Inter-Parties Parliamentary Group's reform package, this requirement was removed. It was

[19] See long title of the Act

replaced by a provision which requires only that the person intending to hold a rally notify the Officer Commanding a Police Station nearest to the place of the rally. The period of notice required is not less than three and not more than fourteen days prior to the meeting.

The Elections Bill, 2007 is, largely, a consolidation of the provisions of the National Assembly and Presidential Elections Act, the Local Government's Act and the Election Offences Act and addresses elections to the office of the President, to the National Assembly and to local authorities, provides for the procedure and conduct of referenda, and contains provisions to prevent election malpractices.[20]

The Constitution and Human Rights

The Constitution of Kenya makes provision for minimum standards of human rights to be enjoyed by every citizen. Although these standards contain exceptions, they form the constitutional benchmarks for the recognition and implementation of human rights in Kenya.

The main constitutional articles on human rights are in Part V of the Constitution, particularly sections 70-82. A general derogation is provided for under section 83. Enforcement is provided for under section 84.

In summary, they provide for the right:

- To *life*, except when convicted and sentenced to be hanged in respect of a capital offence
- To *liberty*, except under a court order or for other lawful purposes
- To *security and the protection of the law*
- To freedom of *conscience*, of *expression* and of *assembly and association*
- To protection of the *privacy* of the home and other property and from deprivation of property without compensation
- To protection against *slavery or servitude*
- To protection against *forced labour* except one ordered under a court sentence and labour reasonably required as part of normal communal or other civic obligations

[20] See long title

- To protection against *torture* or inhuman or degrading punishment except where it is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit
- To protection against *illegal search* of one's person or property or entry by others
- To a *fair hearing* within a reasonable time by an independent and impartial court established by law
- To every person charged with a criminal offence to be *presumed innocent* until proved or pleads guilty
- To every person accused of an offence to be given *adequate time and facilities to defend* himself or herself
- To every person accused of an offence to *attend the hearing* of the case
- Not to be held guilty of a criminal offence on account of an act or omission that did not constitute a crime at the time it took place
- Not to be *tried again* for an offence on the same facts where one has been convicted or acquitted or pardoned
- Not to be *compelled* to give evidence at his or her trial
- Not to be *convicted* of a crime that is *not provided* by written law and punishment given
- Not to be discriminated against on grounds of race, tribe, place of origin or residence or other local connection, political opinion, colour or creed
- Where detained, to be provided with a statement in writing, in a language he or she understands, specifying in detail the grounds of such detention.

It is, however, notable that, overall, the Kenyan constitutional human rights regime focuses on 'first generation' rather than the 'second generation' and 'third generation' human rights

'First-Generation Human Rights' mainly deal with civil and political rights. They serve to protect the individual from excesses of the state. They were first recognised at the global level by the Universal Declaration of Human Rights (1948) and expanded by the International Covenant on Civil and Political Rights (1976).

'Second-Generation Human Rights' deal with social, economic and cultural rights. In social terms, they ensure different members of the citizenry equal

opportunities, conditions and treatment. They also grant people the right to work and to be employed. They represent things that the State is required to provide to the people under its jurisdiction. At the international level, these rights are covered mainly by the International Covenant on Economic, Social and Cultural Rights.

'Third-Generation Human Rights' focus on communal rights and solidarity. They cover group and collective rights, the right to self-determination, to economic and social development, to sovereignty over natural resources, to communicate, and to participate in the common heritage of mankind.

The constitutional rights, though limited only to the civil and political arena, are important for the present purposes. This is because elections fall within this very arena. The right to participate in political activity, including elections, is guaranteed generally under sections 78 (freedom of conscience), 79 (freedom of expression), 80 (freedom of association and assembly), 81 (freedom of movement) and 82 (protection from discrimination). The other sections may also have relevance depending on the circumstances and consequences of the elections. For example, the right to life[21], to protection from inhuman treatment[22] and to protection from deprivation of property[23] may not be directly relevant to elections in ordinary circumstances, but may be in circumstances of violence prior to, during or after elections, as happened in the 2007 elections.

The Constitution and State Structures

The Constitution establishes a three-arm state structure composed of 'the legislature'[24], 'the executive'[25] and 'the judiciary'[26]. In general, the Legislature is composed of elected and nominated members of parliament, and ex-officio

[21] Section 71
[22] Section 74
[23] Section 75
[24] Chapter III, Constitution of Kenya
[25] Chapter II
[26] Chapter IV

members (Attorney General and the Speaker of the National Assembly)[27]. Its primary function is to make law[28]. It also makes policy and exercises supervisory authority over the Executive through a 'vote of no confidence', a 'vote of censure', and investment and financial controls (budgeting and appropriation, taxation and auditing).

The Executive is composed of the President, the Prime Minister, the Vice-President, members of the cabinet, assistant ministers and the civil service[29]. The main function of the Executive, as the name suggests, is to carry out the policies and laws passed by the Legislature, although it may also propose policies and laws for adoption by the Legislature and play some other roles[30].

The judiciary – or 'Judicature' – is composed of both 'ordinary'[31] and 'special'[32] courts. Its main function is to listen to and decide disputes arising among citizens at various levels.

These three 'arms' of the state are important in elections. This is because they either:

- Provide the basis for elections (the Legislature and the Executive)
- Propose, pass or execute policies and laws related to elections (the Legislature and the Executive)
- Assist in conducting elections (the Executive), or
- Address disputes which arise during elections (the Judiciary).

[27] Sections 30-45
[28] Sections 46-57
[29] Sections 4-22, 26, Constitution
[30] Sections 23-24, 27-45
[31] The Court of Appeal, the High Court and the Magistrates Courts (sections 60-63 and 65),
[32] Parliament has constitutional authority to establish other judicial bodies under section 65 of the Constitution and has done so and created such courts as the Industrial Court (Labour Institutions Act, 2007), the Courts Martial (the Armed Forces Act, Chapter 99), and the Children's Courts (the Children's Act)

The Constitution and the Electoral Commission of Kenya

Establishment, composition and status

Section 41 of the Constitution of Kenya provides for the establishment of the Electoral Commission of Kenya (ECK), qualifications, appointment, removal and tenure of the members (or Commissioners). The ECK must be composed of between 4 and 21 members and a chairman, all appointed by the President. The Chairman of the Commission is appointed by the president while the Vice Chairman is elected by the ECK. It is important to note, parenthetically, that although the President has the Constitutional power to appoint all the Commissioners, the 'IPPG package' discussed above empowered political parties to nominate potential Commissioners for appointment by the President on the basis of their parliamentary strength and as determined by the ECK. This 'deal' was, however, not put into any law and, to this day, remains a 'gentlemen's' or 'ladies' agreement which requires the President's goodwill to implement.

There are no special qualifications for appointment except that the Commissioners must be Kenya citizens and that the Chairman and the Vice Chairman must have been or are qualified to be appointed Judges of the High Court of Kenya. Members of the armed forces, civil servants and members of the National Assembly are expressly barred from becoming Commissioners.

With regard to security of tenure, a Commissioner may be removed only for inability to perform the functions of her/his office or for misbehaviour. Even then, the question of such inability or misbehaviour must have been referred to a tribunal appointed by the President and the tribunal has recommended such removal to the President. Besides, the office of a Commissioner becomes vacant only at the expiration of five years from the date of appointment, or if circumstances arise which disqualifies her/him from such appointment.

As regards independence, the ECK, in the exercise of its functions, shall not be subject to the direction of any person or authority, shall employ its own staff in line with any existing law and shall make its own rules of procedure. Its decisions

are made by a majority of all its members. It is notable, however, that the Commissioners' salaries are determined by Parliament and allowances determined by the President. None of these can be taken away or reduced to the detriment of a member. These expenses are charged to the Consolidated Fund.

Functions

Sections 42 and 42A set out the functions of the Commission. These are:

- To determine and review constituencies' boundaries and names after a period of 8 to 10 years
- To register voters, and maintain and revise the voters' registers
- To conduct presidential, parliamentary and local government elections
- To promote voter education
- To promote free and fair elections
- To carry out any other functions as may be prescribed by Parliament.

The Constitution confers power on Parliament to provide for an orderly and effective conduct of the ECK's operations and business.

The National Assembly and Presidential Elections Act

The National Assembly and Presidential Elections Act (NAPEA) is the main law dealing with the process of presidential and parliamentary elections. The Act elaborates the functions of the ECK as provided under section 42A of the Constitution.

The NAPEA defines an elector as a person whose name is included in the register of electors, that is, a person registered as a voter.

ECK Staff, Immunity and Code of Conduct

Section 3 empowers the ECK to appoint its staff. It also declares that where police officers have been assigned election duties, they, by that appointment, become election officials subject to the direction and instruction of the ECK.

Section 3A provides for the immunity of the ECK members and officers from personal liability for actions they may take in the course of their duties.

Section 3B establishes a Code of Conduct[33] for ECK members and its staff which re-emphasizes that they must be impartial and not engage in activities which are detrimental to the status of the ECK.

Registration of Voters

Section 4 (as amended[34]), mandates the Commission to prepare or cause to be prepared two types of registers:

- A constituency register in which is maintained the names of those who register in a constituency
- The principal register, which is a combination of constituency registers and any other register that the ECK may direct.

A copy of the part of the principal register that relates to the constituency for which a registration officer is responsible must be given to her/him. A notice should also be given to the public in general, through the official Gazette, that compilation of the principal register has been completed. With exceptions, section 4A (as amended[35]), empowers the ECK to carry our registration of voters at all times, subject to the following exceptions:

- The period between the commencement of the ninety-day period following the office of the president becoming vacant and the time of election of the President
- The period between the dissolution of Parliament and the Parliamentary elections
- The period between the dissolution of a local authority and the date of election of councillors
- The period between the declaration of a vacancy in respect of a by-election and the date of such election.

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[33] Second Schedule of NAPEA. See Appendix One for the provisions of the Code
[34] By Act No. 2 of 2002
[35] *Ibid.*

The section also provides for the use of either a national identification card or passport to support an application for registration. Section 5 criminalizes the act of making multiple applications in order to be registered as voters. It is an offence punishable with a fine or penal confinement.

Section 6 disqualifies from registration as a voter any person who was convicted or reported guilty of an election offence within the preceding 5 years.

Sections 8, 9, 10 and 11 state who may challenge and where he/she can challenge, any decision to disqualify him/her from registration. However, it leaves the procedures for doing so to be provided for in subsidiary legislation.[36]

Elections

Sections 12, 13 and 14 provide for the notices which the ECK must send out calling for parliamentary and presidential elections. These are provisions which relate to the initial stages and steps that must be taken to commence the elections. They provide a timetable and the processes to be undertaken. They start with the writ from the Speaker of the National Assembly and end with the returning officer being directed on what he/she has to do to hold the election. Section 15 recognizes the right to vote as set out in section 32(2) of the Constitution but adds that this is subject to the production of an elector's card.

Section 16 creates an additional disqualification to those in sections 34 and 35 of the Constitution in respect of persons convicted or reported to be guilty of an election offence or who hold certain public offices.[37].

Section 17A grants ECK authority in the overall conduct of the elections, with the power to give general directions and exercise supervision and control and to take the necessary measures to ensure that elections are transparent, free and fair.

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[36] See the National Assembly and Presidential Elections (Registration of Electors) Regulations

[37] The First Schedule to the Act includes a full-time member of a board, council or governing body, or employee, of a body corporate established by an Act of Parliament other than the Companies Act, the Building Societies Act, the Co-operative Societies Act or the Local Government Act, and an officer other than a Director not employed full-time, or employee of a company incorporated under the Companies Act in which the Government holds fifty percent or more of the shares

Political Party Nominations

Section 17 vests in registered political parties the power to nominate candidates for elections and provides certain legal procedures they must follow or observe in this regard, including:

- Nomination in the manner provided for in the political party's constitution or rules
- Only qualified persons being nominated by the political parties
- The political party bearing expenses of its internal nominations
- Every party notifying the ECK of the persons it has nominated.

Public Officers during Elections

Section 17B forbids public officers[38] from engaging in partisan politics during election time. The Police Act has a similar provision but specifically applicable to police officers only.

Election Petitions

Sections 19-23, 25-26 and 28-31 make provisions for procedures for applications to the High Court for nullification of a President's or an MP's election up to the final determination of the Court. Section 23 specifically provides for the promulgation of practice rules for the Courts to govern the hearing of petitions.[39]

Section 33 provides for moneys to run elections to be voted for by parliament.

Section 34 empowers the ECK to make regulations on matters listed in the section. Section 34A provides for an Electoral Code of Conduct. This Code appears as the Fourth Schedule to the Act.[40] Its object is 'to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear of coercion, intimidation or reprisals. .

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[38] A public officer is defined under the Public Officers Ethics Act, 2003
[39] National Assembly Elections (Election Petitions) Rules
[40] See Appendix Two for the Electoral Code of Conduct

The Local Government Act[41]

The Local Government Act (LGA) (Chapter 265) provides for the establishment of local authorities, defines their functions and provides for matters connected to those functions. Reference is made to Sections 10, 53-54 and 72, and the Fifth Schedule of the LGA. The Act, together with the Local Government Elections Rules, provides for detailed procedures for elections in electoral areas (referred to as 'civic wards').

Local authorities in Kenya consist of:

- City councils (Nairobi only)
- Municipal councils (for large and developed urban areas)
- Town councils (for small normally undeveloped semi-urban and semi-rural areas)
- County councils (for rural areas).

Creation of Electoral Areas

Section 10 of the Act gives power to the ECK to divide local authorities into various electoral areas and prescribe their boundaries and names.[42] The provisions of the Constitution relating to the division of Kenya into constituencies apply to the creation of wards *mutatis mutandis*. As it is with constituencies, there are both elected as well as nominated councilors. The latter are nominated by the Minister in-charge of local authorities. They may not, however, be more than one-third of the elected councillors. The term of office for both elected and nominated councillors is five years, except that in respect of nominated councillors, the Minister may prescribe a shorter period.

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[41] The Elections Bill presents a major departure from the current position as far as election and terms of mayors, chairs of councils and councilors are concerned. Under sections 26-30, they are to be elected by the electorate/voters at the same time as the Presidential and National Assembly elections take place. Secondly, under section 34, the term of office of the mayors, chairs and councilors run along-side parliamentary tenure

[42] A local authority may make representation for the alteration of boundaries of an electoral area (section 54)

Elections

Section 58 of the LGA states that the provisions of the NAPEA relating to powers, responsibilities and duties of the ECK apply *mutatis mutandis* to elections under the LGA.

Societies Act

The Societies Act[43] has been repealed by the Political Parties Act.[44] It should be noted, however, that the political parties which took part in the 2007 General Elections were registered under this Act. This section gives a summary of the provisions of the Act. An evaluatory overview is presented in part 4 of this report.

Definition of 'Society'

The Act, under section 2, defines a society to include:

- Any club, company, partnership or other association of ten or more persons, whatever its nature or objects
- Established in Kenya or having its headquarters or chief place of business in Kenya, and
- Any branch of a society,

but does not include building societies (Building Societies Act, Chapter 489, Laws of Kenya), a school registered under the Education Act (Chapter 211), a company incorporated or registered under the Companies Act (Chapter 486), a corporation under any other law, a co-operative society, a trade union (formerly under Chapter 233 but now under the Labour Relations Act, 2007), an association formed by not more than twenty persons for business for profit, a bank registered under the Banking Act (Chapter 488), an international organization of which Kenya is a member, and any association the Minister declares is not a society.

[43] Chapter 108, Laws of Kenya
[44] Discussed in the next session

Registrar

The Act requires the Minister to, by notice in the Gazette, appoint a Registrar of societies to perform the duties and exercise the powers imposed and conferred by the Act. The Minister may also appoint a Deputy Registrar and any number of Assistant Registrars. The Deputy and Assistant Registrars are subject to the directions of the Registrar.[45]

Registration, Cancellation and Suspension[46]

A society can be registered or exempted from registration. Under section 9, every society is required to apply to the Registrar for registration or for exemption from registration. This must be done within twenty-eight days after its formation, and in the manner prescribed by the Act. If the Registrar is satisfied that an application satisfies the requirements of the Act he must register the society or, in case of exemption, do so with the approval of the Minister. Every society which is not a registered or an exempted society becomes an 'unlawful society'.[47] Any person who manages or assists in the management, is a member or attends or facilitates meetings of such a society, is guilty of an offence and is liable to imprisonment for a term of between one and three years or to a fine of between five to ten thousand shillings, or to both.

Where a society is a branch of, is affiliated to or connected with, an association outside Kenya of a political nature, or a proposed officer has been an officer of a society which has been refused registration or has had its registration cancelled, the Registrar *may* refuse registration. However, the Registrar *must* refuse registration where:

- Has objects which are unlawful or prejudicial to Kenya
- The society has been declared dangerous by the Minister
- The society's constitution or rules are inconsistent with any law
- The application does not comply with the Act

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[45] Section 5
[46] Sections 9-15
[47] Section 4(1)

- The society does not exist
- The name:
  - is identical to that of an existing society or one whose registration has been refused
  - resembles that of another society as to deceive the public as to its nature or identity
  - is repugnant or inconsistent with any law or is undesirable.

The Registrar may cancel or suspend the registration of a society where it has, since registration:

- Ceased to satisfy any of the conditions for registration
- Engaged in activities that would otherwise have disentitled it to registration
- Contravened the law or its constitution
- Ceased to be a society
- Failed to comply with any requirements of the law or orders of the Registrar.

Prior to cancellation of suspension of registration, the Registrar is required to give notice to the society, where appropriate, to show cause why its registration should not be cancelled or suspended, or put a notice in the Gazette requiring a society to furnish information that it still exists. The Registrar may then cancel or suspend the registration if the society fails to show cause or to prove its existence. An applicant or society may appeal to the Minister within 21 days if it is dissatisfied with the Registrar's refusal, cancellation or suspension of registration. A second appeal lies with the High Court. A political party which is similarly aggrieved by the Registrar's decision may appeal to the High Court within thirty days of such decision.

A Society's Constitution

Under section 19, the constitution or rules of every registered society or exempted society which is formed after the commencement of the Act must provide for all the matters specified in the Schedule to the Act. These are:

- The name of the society

- The whole of the objects for which the society is to be established.
- The persons to whom membership is open
- The rates of entrance and subscription fees (if any) for membership.
- The method of suspension or expulsion of members
- The titles of officers, trustees and auditors and their terms of office, and the method of their election, appointment, dismissal and suspension
- The composition of committees (if any) of the society, the terms of office of members of such committees and the method of their election, appointment, dismissal and suspension
- The authority for and the method of filling vacancies on committees
- The frequency of, quorums for and dates of the general meetings referred to in section 29 of this Act
- The custody and investment of the funds and property of the society, and the designation of the persons responsible therefore
- The purposes for which the funds may be used, and in particular the prohibition of the distribution of funds among members
- The inspection of books and list of members of a society, by any member or officer, under section 28 (1) of this Act
- The annual or periodical audit of accounts
- The formation of branches, if branches may be formed
- The manner of amending the name, constitution or rules of the society
- The manner of the dissolution of the society and the disposal of its property on dissolution.

Change of Officers and Offices, Amendments, Affiliations and Dissolution

A registered society which changes any of its officers or the title of any of its offices, must give to the Registrar notice of such within 14 days of the change. The notice must be signed by three of the officers of the society. The Registrar may cancel the registration of the society if it fails to comply, after giving the society notice to show cause why it should not be deregistered.

Any society which wishes to amend its name or constitution or rules , or to dissolve itself must apply to the Registrar for authorization before such

amendment or dissolution is effected. The application must be signed by three of the officers of the society and must be made within fourteen days of the resolution. A similar application must be made by a society if it wishes to become a branch of, affiliated to or connected with, any organization or group of a political nature established outside Kenya. In all cases, the application must be accompanied by a certified copy of the minutes of the meeting at which the resolution to make such change, affiliate or dissolve was passed.

Restriction of Appointments

A person:

- Who has been convicted of a crime of fraud or dishonesty must not be appointed or elected:
  - as a treasurer, deputy treasurer or treasurer of a society
  - to any office responsible for collection, disbursement, custody or control of funds
  - to be a trustee
- Who is an officer of the society must not be appointed or elected as an auditor
- Who has not been appointed as, or has ceased to be, an officer of a society must not act as such.

Registers, Books and Accounts[48]

A society is required to:

- Keep an accurate and up-to-date register of members
- Keep books of account in which must be entered all moneys received and payments made
- Through the treasurer or any other person responsible, render to members a true and full account of all moneys received and payments made
- Make its books and documents available for inspection by any officer and members, and the Registrar.

[48] Sections 25-28

General Meeting[49]

Every registered society must, at least once in every year, hold a General meeting to which all its members shall be invited, which meeting will be carried out in line with its constitution.

Returns, Information and Documents[50]

Every registered society is required to furnish the Registrar with the returns, accounts and other documents as prescribed. Failure to file the said returns is an offence on the basis of which the Registrar may deregister the society.[51] The Registrar may also call for a copy of its constitution and rules, list of its officers and members, minutes of meetings of any of its organs, list of number of meetings, audited accounts and any other information and documents. The Registrar has discretion to publish any information furnished in the Gazette.

Winding-up[52]

The Minister has power appoint a receiver and to vest in him/her all the property of a society which is unlawful, whose registration has been cancelled or exemption rescinded, or which has ceased to exist. The receiver may proceed to wind-up the society and:

- Where the society is solvent, pay all its debts and propose to the Minister a scheme for distribution of the surplus and implement the same where the Minister approves
- Where the society is insolvent, set aside the funds which are sufficient to meet the costs of winding-up and then divide the balance among proven creditors on a pro rata basis.

Investigation[53]

The Act gives power to a 'requiring officer' (the Registrar, any administrative officer and police officer of or above the rank of an Assistant Inspector) to investigate any aspect of an unlawful, registered or exempted society and to

[49] Section 29
[50] Sections 30-32
[51] Section 30
[52] Sections 33-37
[53] Sections 38, 39

require the attendance of any person she or he believes to have information relevant to the investigation. Besides, the officer has powers of entry, arrest and search.

General Penalty[54]

The general penalty for offences for which no specific penalty id provided for is five thousand shillings for the society and a similar fine and imprisonment for not more than six months or both for the like offence committed by an officer.

The Political Parties Act

The Political Parties Act (PPA), 2007 was enacted with the objective of providing for the registration and regulation of the operations of political parties. The PAA establishes an institutional framework for this purpose, and a fund.

The Registrar and Tribunal

The PPA establishes an office and a tribunal for purposes of the registration and regulation of political parties, and determination of disputes. The office of the Registrar of Political Parties[55] is an office within the ECK. It is charged with the responsibilities of registering political parties and dealing, in the first instance, with disputes arising among members of a political party. For purposes of the first responsibility, the Registrar is required to establish and maintain a register of political parties which contains the names of all registered parties and any other particulars that may be prescribed.[56]

The Political Parties Disputes Tribunal[57] consists of the following members:

- A chairman, who must be a person qualified to be appointed a judge of the High Court
- Two other members of high moral standing and integrity, one of whom must be an advocate of the High Court of Kenya of five years standing.

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[54] Section 42
[55] Section 3, PAA
[56] Section 4, PAA
[57] Section 5, PAA

The members are appointed by the Chief Justice for a term of five years and are eligible for appointment for a further term of five years. The appointments are, however, subject to approval by Parliament. Any person who is a member of the public service or takes an active part in the activities of a political party is disqualified from membership of the Tribunal. The Attorney General is authorized to designate a secretary to the Tribunal.[58]

The Chief Justice may remove a member if he or she:

- Becomes an undischarged bankrupt
- Is convicted of a criminal offence
- Is incapacitated by reason of prolonged physical or mental illness from performing his duties, or
- Is otherwise unable or unfit to discharge the functions of the office.[59]

The main function of the Tribunal is to determine:

- Disputes between the members of a political party
- Disputes between political parties forming a coalition
- Appeals from decisions of the Registrar of Political Parties.

All disputes before the Tribunal are expected to be determined expeditiously, but in any case, within a period of three months from the date the dispute is lodged. The decisions of the Tribunal shall be final.[60]

Formation, Registration and Cancellation of Registration of Political Parties

The PAA allows for the formation of political parties in Kenya by a citizen who has attained the age of eighteen years. Political parties may also form a coalition before or after an election, provided that the instruments of the coalition agreement are deposited with the Registrar for the purposes of arbitration in case disputes arise between the parties. The Registrar is, however, prohibited from registering a political party which:

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[58] Section 10, PAA
[59] Section 9, PAA
[60] Sections 6, 7, PAA

- Is founded, or seeks to engage in propaganda, on an ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious basis
- Uses words, slogans, emblems or symbols which could arouse ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious division
- Has a constitution or operational ethic that provides for discriminatory practices contrary to the provisions of the Constitution or of any written law
- Accepts or advocates the use of force or violence as a means of attaining its political objectives
- Advocates or aims to carry on its political activities exclusively in one part of Kenya
- Does not allow regular, periodic and open election of its office bearers.

Besides, a person who is a member of the Armed Forces, the Kenya Police Force, the Administration Police Force, the Prisons Service, the Kenya Wildlife Service, the Judicial Service, or any other person who is a public officer:

- Is not eligible to be a founding member of a political party or to hold office in a political party
- Cannot engage in political activity that may compromise or be seen to compromise the political neutrality of his office
- Is not permitted to publicly indicate support for or opposition to any political party or candidate in an election.[61]

A political party is not allowed to have as its founder, leader or a member of its executive any person who is not qualified to be elected as a member of Parliament or councillor, or to hold a public office.

A person is not permitted to be a member of more than one political party at the same time.[62]

An association of persons or an organization must first be registered as a political party before it can operate as such. An application for registration of a political party must satisfy the following conditions:

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[61] Sections 12-15, PAA
[62] Sections 16, 17, PAA

- Must be in writing, signed by the applicant or applicants
- Must indicate the name of the party and any abbreviation of its name
- Must be accompanied by a copy of the constitution[63], the prescribed fee and a request for the registration of the emblem it intends to use on ballot papers.

The Registrar may refuse an application for the registration of a political party if the name, or the abbreviation of the name, of the party is, in his/her opinion, unacceptable for a number of reasons listed under section 20. Where the Registrar accepts to register the party, it will first be issued with a certificate of provisional registration within thirty days. This entitles it to operate as a party pending application for full registration, except for purposes of national elections. The party is expected to apply for full registration within one hundred and eighty days from the date of provisional registration; otherwise, its provisional registration lapses. On application, a party will be qualified for full registration and be issued with a certificate if it has:

- Been provisionally registered
- Obtained not less than two hundred members who are registered as voters for the purposes of parliamentary elections from each Province
- On its governing body, a member from each province ordinarily resident or registered to vote in such Province
- Submitted a list of the names, addresses and identification particulars of at least one founding member of the political party ordinarily resident in each District
- Submitted to the Registrar the location of its head office, a postal address and the locations and addresses of any district offices it has.

By virtue of full registration, the party becomes a body corporate with a common seal, perpetual succession and the capacity to sue and be sued in its corporate name.

The Registrar has power to cancel the registration of a political party if he or she is satisfied that the political party:

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[63] The matters which must be contained in such constitution are listed in a schedule under section 19, PAA. The constitutions of existing political parties are also required to conform to the schedule

- Is in breach of the provisions of sections 14, 30 and 31, PAA, or a provision of its own constitution
- Has not complied with the provisions of sections 14 and 30, PAA
- Obtained its registration by fraudulent means
- Instigated or participated in the commission of an election offence
- Has not, for each of the two previous general elections, secured at least five percent of the national vote
- Has used moneys allocated to it for prohibited purposes.

The party is, however, entitled to be informed by the Registrar, in writing, of the intention to cancel the registration and be given ninety days to remedy the breach or comply with the provisions of the Act.[64]

The Political Parties Fund

The PAA establishes the Political Parties Fund, to be administered by the Registrar, from any funds provided by the Minister of Finance and contributions and donations from any other source. The moneys from the Fund are allocated to political parties for their use for purposes compatible with democracy. The funds must not be used:

- For paying remuneration, fees, rewards, or any other benefit to a member or supporter of the party
- To finance any matter, cause, event or occasion in contravention of any code of ethics binding on public officers
- For the purposes of establishing any business or acquiring or maintaining any right or financial interest in any business or in any immovable property, unless it is to be used for ordinary political purposes
- For any purpose incompatible with the promotion of a multiparty democracy and the electoral processes.

It is notable that a party is not entitled to benefit from the Fund if its registered national office bearers do not reflect at least a third of either gender.

Parties may source other funds from:

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[64] Sections 20-24, 26, PAA

- Membership fees
- Voluntary contributions
- Donations, bequests and grants from any other source, not being a foreign government, inter-governmental or non-governmental organization
- The proceeds of any investment, project or undertaking in which the political party has an interest.

Voluntary contributions and donations from an individual must not exceed five million shillings.[65]

Other Provisions

The PAA also provides for declaration by parties of assets, liabilities and expenditure in relation to elections (section 32), publishing of sources of funds by parties (section 33), audit of political parties' accounts (section 34), keeping and availability of records of a political party (section 35), a duty of a political party to provide the Registrar with any information required (section 36), immunity of the ECK and the Registrar fro things done honestly and in good faith (section 37), public meetings of political parties (section 38), penalties for breach of its provisions (section 41) and winding up of a political party (section 42).

The Election Offences Act

The Election Offences Act (EOA) (Chapter 66, Laws of Kenya) provides for offences which specifically relate to electoral activities. The offences are loosely categorized as 'Election Offences' (Part II, sections 3A-6), 'Corrupt Practices' (Part III, sections 7-11) and 'Illegal Practices' (Part IV, sections 12-14).

General Offences

Section 3 provides for a raft of offences which relate to:

- False statements with regard to registers
- Forging, fraudulently defacing or destroying, or delivering to a returning officer a forged, nomination paper

[65] Sections 28-31, PAA

- Forging, fraudulently defacing or destroying a ballot paper, official perforation, stamp or mark on a ballot paper
- Unlawfully supplying, selling or purchasing, or printing, a ballot paper, or being in possession of a ballot paper with official perforation, stamp or mark, or printing
- Putting into the ballot box anything other than the official ballot paper
- Unlawfully taking out of a polling station or being found, outside the polling station, in possession, a ballot paper
- Unlawfully destroying, taking, opening or interfering with a ballot box or ballot papers
- Unlawfully manufacturing, constructing, importing, having in possession, supplying, using any appliance, device or mechanism for manipulating a ballot paper after deposit in the ballot box
- Unlawfully making any mark on a ballot paper issued to another person
- Voting at any election where one is not entitled to.[66]

Election Offences

This part creates offences which relate to unlawfully dealing with a voter register and elector's cards, unlawful action or conduct by election officers and maintenance of secrecy and unlawful communication at elections by officers, candidates or agents. The penalty for these offences is imprisonment for a period not exceeding five years. The offences under this Part are cognizable and prosecution therefor cannot be instituted without the prior consent of the Attorney General.[67]

Corrupt Practices

Under this Part, offences regarded as 'corrupt practices' are:

- Personation, that is, applying for a ballot paper in another or a fictitious person's name, or in one's name in an election where one has already voted[68]

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[66] Those found guilty of these offences are liable to imprisonment for a period not exceeding five years

[67] Section 6, EOA

[68] Section 7, OEA: the offence is cognizable, and a person who applies for a ballot paper is deemed to have voted for purposes of this section

- Undue influence, that is, using or threatening to use force, violence or temporal or spiritual injury, damage or loss, fraudulent device, trick or deception to influence a voter or candidate or nomination of a candidate[69]
- Bribery, that is, giving, procuring, offering, promising, receiving money, office, place or employment, gift, loan or some other valuable consideration in order to influence a voter, an officer or a candidate[70]
- Printing, publishing, distributing, putting up an advertisement, handbill, placard or poster without indicating on its face the name and address of printer or publisher[71]
- Making or publishing any false statement of fact about a candidate's personal character or conduct or regarding the withdrawal of a candidate.[72] [73]

Illegal Practices

Illegal practices are:

- Making or receiving payment or entering into a contract for payment - for the purpose of promoting or procuring the election of a candidate – on account of ferrying voters to or from the poll, or the use of any house, land, building or premises for the exhibition of any bill or notice[74]
- Refusal by an employer to allow an employee to vote or any attempt to interfere with the exercise this right, deduction of an employee's dues or imposition of any penalty on account of going to vote on polling day[75]
- Facilitation of use or use of musical instruments or loud speaker for purposes of political propaganda during polling day.[76]

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[69] Section 9, OEA
[70] Section 10, OEA
[71] Section 11(1)(b), EOA
[72] Section 11(1)(c), (d)
[73] The penalty for offences of personation, undue influence or bribery (all of which are cognizable and the prosecution of which requires the Attorney General's consent) is imprisonment for a period of not more than five years (section 11(1), OEA) and for the others and secondary offenders a period not exceeding four years
[74] Section 12, OEA
[75] Section 13, OEA; the penalty is a fine not exceeding fifty thousand shillings or imprisonment for a term not exceeding three years or both
[76] Section 14 OEA; the offence is cognizable and the penalty is a fine not exceeding twenty thousand shillings or imprisonment for a term not exceeding twelve months or both

This section summarises the international and regional standards for electoral regulation and practice and then discusses a number of issues by way of a critique of the existing constitutional and legislative framework for elections.

International and Regional Frameworks

A number of international and regional instruments[77] provide for certain standards which national regulatory frameworks for elections are expected to measure up to. We summarise these below.

The Universal Declaration of Human Rights (UDHR) (1948)[78] summarises the requirements of the Declaration with regard to elections. These include:

- Participation in the government of one's country, which could be through elections or referenda, with further emphasis that the will of the people shall be the basis of the authority of government; this also provides a basis for observation of electoral processes
- Holding of periodic genuine elections, which also implies independent and fair election administration
- Universal suffrage and equal suffrage, which outlaws 'gerrymandering' but does not expressly exclude limitations based on age considerations
- Secrecy of the vote, which does not exclude special procedures for persons with disabilities or illiterate voters.

The International Covenant on Civil and Political Rights (ICCPR) (1966)[79] reproduces, in general terms, the provisions and spirit of the UDHR. It states that every citizen must, without prohibited distinctions or unreasonable restrictions, have the right and the opportunity:

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[77] For a summary of the content of these instruments, see European Commission (2007): Compendium of International Standards for Elections. European Commission. Brussels; International Institute for Democracy and Electoral Assistance (IDEA) (2002): International Electoral Standards: Guidelines for Reviewing the Legal Framework for Elections. IDEA, Stockholm: IDEA (1997): Code of Conduct for Ethical and Professional Administration of Elections. IDEA, Stockholm

[78] Article 21

[79] Article 25

- To take part in the conduct of public affairs, directly or through freely chosen representatives
- 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
- To have access, on general terms of equality, to public service in his country.

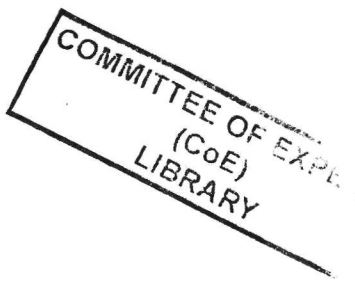
Under Article 5 of the United Nations (UN) Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965), States Parties undertake *to prohibit and to eliminate racial discrimination* in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of political rights. These rights include:

- To participate in elections – which includes to vote and to stand for election – on the basis of universal and equal suffrage
- To take part in the Government as well as in the conduct of public affairs at any level
- To have equal access to public service.

Article 7 of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) requires States Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, to ensure to women, on equal terms with men, the right:

- To vote in all elections and public referenda
- To be eligible for election to all publicly elected bodies.

At the regional level, important provisions are to be found in the OSCE Copenhagen Document (CD) (1991), the American Convention on Human Rights (ACHR) (1969) and African Charter on Human and People's Rights (ACHPR) (1981).



The CD underlines the will of the people as the basis of the authority of government. The participating States are expected to:

- Hold free elections at reasonable intervals
- Permit eats to be freely contested in a popular vote
- Guarantee universal and equal suffrage to adult citizens
- Ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly and the results made public
- Respect the right of citizens, as such or as representatives, to seek political or public office without discrimination
- Respect the right of individuals and groups to establish their own political parties or other political organizations and have the opportunity to compete with each other on an equal basis
- Ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere
- Provide that no legal or administrative obstacle stands in the way of access to the media
- Ensure that candidates who obtain the necessary number of votes required by law are duly installed and remain in office.

The ACHR[80] largely reproduces the provisions and spirit of Article 25 of the ICCPR, except that it allows national laws to regulate participation in government on the basis of language and education, over and above age, nationality, residence, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

The ACHPR provides for participation in government.[81] However, the details on participation in elections are elaborated in the OAU/AU Declaration on the Principles Governing Democratic Elections in Africa (2002).[82]

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[80] Article 23
[81] Article 13
[82] Adopted at the 38th Session of the OAU on July 8, 2002, Durban, South Africa. The provisions are similar to those of the CD, except that the OAU Declaration also imposes obligations on stakeholders, for example, to refrain from violence, corruption and discriminatory practices

The Electoral System and Political Parties

The FPTP System[83]

The electoral system of Kenya is, by definition rather than by declaration, a First-Past-the-Post (FPTP) system.[84]

We note in passing that the system provides for the nomination of twelve members of Parliament by the President. This process was introduced during the colonial times and was intended initially to cater for social groups or interests who/which may not be adequately represented through the electoral process. However:

- The provision for nomination does not change the essential character of the electoral system, seeing that the percentage of the membership of Parliament arising from nomination is barely 5.5
- No criteria have been established for determining the social groups or interests to be represented, either generally or in respect of specific nominations
- The practice has not established a *tabula rasa* of social groups or interests that one can state are clearly the beneficiaries of the nominations, or generated, over time, criteria which can be used to determine the groups or interests likely to benefit from nomination
- Anecdotal evidence suggests that nomination is based largely on loyalty and the desire to reward those who staunchly support the party, or the top party officials.

The FPTP is one of the plurality/majoritarian electoral systems. These systems are distinguished largely by the fact that they are based on single-member geographical areas, often referred to as 'districts'. The essential characteristic of FPTP – also referred to as 'winner-takes-all' in common parlance, or 'plurality-

[83] The Elections Bill, 2007, though coming at a point when debates have been held and polemics exchanged over a period on the Kenyan electoral system, takes the FPTP system as a given and makes no attempt to change it

[84] For a discussion on electoral systems, see Reynolds, Andrew, Reilly, Ben and Ellis Andrew (2005): Electoral System Design: The New International IDEA Handbook. International IDEA, Stockholm, Matlosa, Khabele (2003): Survey of Electoral Systems and Reform in the SADC Region. Electoral Institute of Southern Africa (EISA) Occasional Paper No. 12, September

single-member-district' system more technically – is that in an electoral contest, it is the candidate who gets the highest number of votes who wins. This does not necessarily mean that the candidate has received the absolute majority of the votes.

FPTP system is one of the three most common electoral systems, the others being the proportional representation system (PR), and the mixed (FPTP and PR) system. It has been lauded and criticised in almost equal measure. On the positive side, it is considered to be the simplest and easiest to implement, especially in situations where voters may be illiterate.[85] It connects voters to the legislature more directly in the sense that the MP is their constituency ('district') representative. It facilitates a clear choice between political parties, particularly in situations where there are no independent candidates and clarifies the distinction between the ruling party and the opposition party(ies).

On the downside, however, this system is amenable to manipulation through gerrymandering, may give rise to a minority government (and consequently, the majority votes supporting a group of 'opposition' political parties are, in that sense, wasted) and devalues the participation of women and 'minority' groups.

In the context of Kenya, it is clear that we have had experiences where the ruling party and its presidential candidate got less votes than the opposition parties and their presidential candidates put together, respectively.[86] Second, constituency boundaries have been a perennial object of complaint. Indeed, right now as we are gearing for constitutional review and preparing early for the 2012 elections, redrawing of electoral boundaries is one of the issues at the centre of debate. Third, women and minority groups have found it very difficult to increase their representation in parliament and the councils, apart from the problem of sustaining a presidential candidate. Fourth, it is possible to argue – from anecdotal evidence, since inquiries, reviews and analyses are still going on - that

[85] It is also arguable that in the context of Kenya, it is the system people are most used to and is, to that extent familiar to a majority

[86] The 1992 and 1997 General elections are good examples as shown above

the 'winner-takes-all' attribute of the FPTP system, coupled with partisanship arising from either political party, ethnic or class affiliations may have contributed to the tensions which eventually erupted into the violence that Kenya experienced in January and February, 2008. It is noteworthy, in this context, that the 'Accord' which eventually contributed to the cessation of violence represented, at least in its consequences, a system somewhat removed from a 'winner-takes-all' framework.

Political Parties as the Focal Point: Independent Candidature

The constitutional and legislative system on elections focuses entirely on political parties. There is no provision for independent candidates[87], although this is not necessarily excluded by the FPTP electoral system. In a context where political parties may not:

- Necessarily have clear ideological leanings and attendant programmes,
- Be properly organised institutionally,
- Have developed a stable democratic culture,

individuals who may want to participate as candidates within a specific ideological framework and attendant programmes are denied the opportunity. So are voters who may wish to associate with that kind of candidate.

It is possible to argue that this gives political parties an opportunity to grow and organise and sell themselves. This, of course, is a good thing for democracy. However, the Kenyan experience since independence does not bear this out. Indeed, it could be argued that allowing for independent candidates would avoid party-shopping, especially during nominations – a thing that is quite common. It may even put parties on notice that if they do not offer ideologically clear, stable

[87] Germany, the United Kingdom (UK) and Zimbabwe are examples of electoral systems which provide for independent candidates

and democratic leadership, they stand to lose to an alternative route to parliament or council.[88]

Referenda[89]

Neither the Constitution of Kenya, nor the general electoral laws provide for a referendum. It will be recalled that prior to the 2005 Referendum on the 'Wako Draft Constitution', the ECK used regulations attached to the CKRC Act. The Chairman of the ECK was at pains to explain that the referendum should be treated as an election. This may well be true, since the electorate was required to 'elect' between two positions: 'YES' or 'NO' to the Draft. However, the nature of a referendum as we have come to experience it in Kenya, though only over a short historical period, is different from that which the Tanzanians did during the period they were required to say 'YES' or 'NO' to Julius Nyerere as *Chama Cha Mapinduzi* (*CCM*s) sole presidential candidate. We envisage referenda as a process that will be used to make some weighty politico-legal and economic decision, like the adoption of a draft constitution, or different system of

[88] The Elections Bill, 2007 assumes the existing political party-focussed electoral system. It does not provide for independent candidature

[89] It is noteworthy that the Elections Bill, 2007 devotes a lot of space to the issue of a referendum. Unlike the Constitution and the existing principal legislation, the Bill provides for holding of a Referendum in Part V. The Bill provides for the power to hold a referendum (section 39), the mode of voting in referendum (section 40), the right to vote in a referendum (section 41), notice of holding a referendum (section 42), Referendum Committees and their registration (sections 43 and 44), appointment of a chief agent and other agents (sections 45 and 46) and procedures for the conduct of a referendum, which are the same as those for holding elections (section 47). With regard to offences, section 61(2) provides that 'An offence under this Act relating to an election shall be an offence during a referendum.' In Part VII, there are provisions on petitions in a referendum: the fact that election petition procedures should apply to a referendum petition and referendum petitions (sections 77 and 78), composition of a referendum court (section 79), operation of a declared result submitted to a referendum (section 80), persons who may present and respondents to a referendum petition (sections 81 and 82), filing of a referendum petition (section 83), the duty of the Registrar to make a list of referendum petitions (section 84), the practice, procedure and security for costs (section 85), death of or delay by a petitioner (section 86), hearing of a referendum petition (section 87), provisions as to witnesses (section 88), prohibition of disclosure of vote (section 89), invalid votes (section 90), powers of the court (section 91), petition expenses (section 92) and certification of a referendum (section 93)

government, or economic system. This removes it slightly from ordinary elections[90] [91]

The Constitution, Human Rights and State Structures

Collective Rights and Derogations

We have noted that the human rights provided for in the Bill of Rights in the Kenyan Constitution are only 'First Generation' human rights. This means that such rights as the right to work and to decent living, and collective or group rights are not recognised. These can, therefore, not be reproduced or reflected in electoral laws. We have also noted that section 83 provides certain derogations from the rights contained in the Bill of Rights. It is on the basis of such derogations that laws like the Public Order Act require politicians and political parties who/which wish to hold political rallies must inform the officer in-charge of a police station prior to the meeting. The original intention was to enable security to be provided for the meeting where necessary. However, this has given such officers the discretion and opportunity to 'outlaw' – and even disperse - political rallies even where they have not given adequate proof that security may be compromised.

State Structures and Appointments

The appointment of the judiciary largely by the Executive branch of government, in fact by the president, has become a contentious issue aside from the general concentration of power. The president appoints the Chief Justice solely and the other judges in accordance with the advice of the Judicial service Commission

[90] The UK's Electoral Administration Act, 2006 (Chapter 22) provides for referenda side by side with ordinary elections

[91] The procedure in the Elections Bill for determining whether or not there should be a referendum at any point in Kenya is both dependent on the President and rather convoluted (see sections 39). First, the President determines whether there is an issue to be decided by a referendum. Thereafter she/he refers the issue to the ECK. The ECK is then expected to frame the issue in the form of a question or set of questions that can be answered through a 'YES' or 'NO' vote. The ECK then transmits the question(s) to the Attorney General (AG) who lays it/them before the National Assembly for approval by resolution in its discretion. The AG then publishes the question(s) as approved by the national Assembly whereafter the ECK takes over to conduct the referendum in the manner it would conduct elections. The ECK may assign a specific symbol to the 'Yes' or 'No' answer as it may deem fit.

(JSC), the members of which he also appoints. To the extent that perceptions are important, this situation is deemed to favour the incumbent and to influence the manner in which the judiciary makes its decisions, apart from being seen simply as a concentration of too much power in one member of the Executive. Indeed, after the announcement of the disputed results of the presidential vote, the Orange Democratic Party leaders and supporters vowed not to pursue the dispute through the courts for precisely this reason. Whether the position was right or wrong, the political process gave it legitimacy and pursued alternative avenues for resolving the dispute.

The Constitution and the Appointment of the ECK

As explained earlier, the appointment of the Commissioners of the ECK was considered a contentious issue prior to the 1997 elections, after bitter experiences by the opposition during the 1992 elections. The IPPG recognised this and recommended a process where the president would appoint Commissioners in consultation with the opposition political parties. Though this part of the 'IPPG Package' was not written into the Constitution, Moi abided by it in 1997 and 2002. Come 2007, however, Kibaki ignored this on the basis that he had – which was true - the constitutional authority to appoint the Commissioners. The issue is still contentious and will be during debates on the review of the Constitution and, if not resolved, in the run-up to the 2012 elections.

Another issue which is peripheral but has been canvassed – especially since the December 30, 2007 announcement of the presidential results and the aftermath - is that of security of tenure. Does security of tenure have to be in the form of *difficulty* in removal of officers, or should it be in the *justice* in the process of removal? Does security of tenure guarantee independence, impartiality and good performance? Ultimately, is security of tenure necessary generally, or in respect of the ECK in particular? If so, how should it be assured and for what purpose? These are questions that cannot be ignored, especially taking into account the

performance and demeanour of the ECK during the tallying of the votes and thereafter.

The Societies Act and the Regulation of Political Parties

A number of aspects of the Societies Act are notable, especially as regards political parties. Two, which encompass many issues, stand out. The first of these is that there is no, or any attempt to make any, real distinction between political parties and other types of societies in terms of definition, registration, regulation of operations, offences and penalties, finances and winding-up. Indeed, the only place where any distinction is made is in respect of which institution a society aggrieved by a decision of the Registrar on refusal, cancellation or suspension of registration can appeal to: the High Court for political parties and the Minister – and then the High Court - for other societies. The only other mention of political 'party' is in the Regulations made under section 53. Here, Form A (Application for Registration or Exemption from Registration of a Society) and Form I (Annual Returns) require the society to state 'the name of each organization or group of a political nature established outside Kenya, if any, of which the society is a branch, is affiliated to or connected with'. In our view, the distinction is necessary and essential for various reasons, a few of which are mentioned below.

- The objects of a political party are the pursuit of political power, control of state power and regulation of the activities of the population as a whole, both internally and externally, as opposed to the welfare-oriented objectives of most of the other societies. These objects are radically different. Indeed, the state has found it necessary to exclude 'economic societies' from the Societies Act because of the difference in their activities. That difference is, in our view, even less radical than that between 'ordinary societies' and 'political societies'.
- The structural organization of political parties is likely to be, and is, in practice, more complex than that of the other societies, with layers that are far beyond the simple 'chair'-'secretary'-'treasurer'-'etc' phenomenon, and with mandates that go far beyond 'chairing', 'recording and correspondence' and 'receiving, keeping, paying and recording funds'. Even the leadership of the more prominent political

parties is likely to be made up of people with alot of economic, political and social clout which may be difficult to handle in the context of the Act.

- The day-to-day internal activities of political parties, and activities related to campaigns, elections and governing (once the party/ies is/are in power) are so broad, complex and involving that a Registrar of societies, Deputy and Assistants would need to muster more expertise, power and courage to tackle the issues that arise therefrom. Besides, the kind of moneys handled by these entities are likely to be far more than those handled by most of the 'welfare' societies.
- Some of the offences that political parties may engage in (for example, false promises, hate speech, tribalism/ethnicity and nepotism, bribery and other forms of corruption and violence), especially during their political operations, are characteristically different from those that are ordinarily engaged in by the other societies.

Indeed, these factors underline the inadequacy of the Act as a regulatory framework for political parties. It is probably for this reason that we have a different legislative and structural regime (the Constitution, the National Assembly and Presidential Elections Act, and the Local Government Act, to mention but three) dealing with the political activities of the 'political societies'.

Secondly, the level of discretionary powers given to the Minister and Registrar are overwhelming. Indeed, these discretionary powers are only subject to the appellate jurisdiction of the High Court. It is true that the discretionary powers are fettered by certain conditions; but within these parameters, they are still too wide for the political arena, especially in the era of widening of the democratic space. This is particularly so with respect to registration, cancellation and suspension of registration, 'unlawful societies', and regulation of the day-to-day activities of societies. It is interesting to note that these discretionary powers were used to restrict the registration of other political parties during Kenyatta's regime (particularly 1966-1979) and Moi's regime (1979-1982) when Kenya was a *de facto* one-party state. Yet, more or less the same discretionary powers were used to increase registration of political parties between 1991 and 1997 and, with only slight regulation by the Inter-Parties Parliamentary Group (IPPG)

'Package' in 1997, to progressively enlarge the number of parties registered after 1997, especially since 2002.

It is our humble general opinion that (almost) silently including political parties in the ambit of the Societies Act as it exists was either inadvertent, an unconsidered afterthought, or simply an act borne of ignorance (of the nature of political parties).

Registration of Voters

It is a big improvement that the law was amended to provide for continuous voter registration. However, Kenya still does not have on-line voter registration systems[92] and a system for registration of persons who are resident outside the country. Physical attendance at a registration centre is still the norm, despite developments in technology. It is possible that many Kenyans are disenfranchised as a consequence of this state of affairs.

Campaigns and Expenditure

The Political Parties Act discussed above provides for funding for political parties from the Consolidated Fund (through the Political Parties Fund) and other authorised sources of funding. It also provides for categories of acceptable and prohibited expenditure. The Election Offences Act provides for offences committed in relation to elections with regard to undue influence. We, however, do not have provisions on ceilings of expenditure during campaigns and polling, or the electoral period generally. There are also no requirements for candidates to compile and give reports on their authenticated expenditure to the Registrar.[93]

Voting

Again, as happens with registration, there are no provisions for on-line voting. There are also no provisions for postal voting and voting by proxy. It is obvious

[92] The UK's 2006 Act mentioned above provides for on-line registration
[93] This, sadly, is also the position in the Elections Bill, 2007

that these processes are difficult to implement and may require quite some financial outlay. However, the main advantage is that they make voting more convenient and, consequently, increase the *potential* number of those who may

Offences and Enforcement

As things stand, the ECK has power and authority to act on offences – and breaches of Codes of Conduct - in relation to elections. Many times, the ECK has argued that it does not have teeth, without explaining what teeth it requires beyond the power. This may be partly because there is no actionable responsibility on the part of ECK to act in respect of breaches of both the legislation and Codes of Conduct. Power should come with responsibility to act diligently.[94]

Petitions

There are currently no time-limes in either the Constitution or the electoral laws regarding determination of election petitions. This means that hearing of petitions may continue even upto the next elections, which does not make sense in terms of democratic representation.[95]

[94] Section 62 of the Elections Bill, 2007 explicitly states that 'A member of the Commission or a returning officer may order the arrest of a person who commits an offence under this Act'

[95] The Elections Bill, 2007 is more advanced in this respect since it provides for a time-limit. All election petitions must be heard and determined within a period of one (1) year (section 74)

Jørgen Elklit **August 23, 2008**

What Can Kenya Learn from Lesotho?

Or: Something about Electoral Systems[1]

Electoral systems are those procedural rules, which govern the transformation of votes to seats in the National Assembly (or any other elected body), so one cannot conduct elections without having some sort of electoral system. This note will concentrate on electoral systems as such and not venture into a detailed discussion of the functions of elections in democracies or other elements of electoral systems in the broadest sense.[2]

Criteria for Choosing an Electoral System

The choice of an electoral system should always be based on a careful consideration of a relevant set of criteria. A useful set of such criteria has been supplied in the International IDEA Handbook on electoral system design (Reynolds et al., 2005):

1. Provide (equitable? How equitable?) representation (geographical?, social?, sectional/tribal?, ideological/attitudinal?)
2. Make elections accessible and meaningful
3. Provide incentives for (re-)conciliation
4. Facilitate stable and efficient government
5. Hold government accountable
6. Hold individual representatives to account
7. Encourage the formation and development of political parties
8. Promote legislative opposition and oversight
9. Make the electoral process sustainable
10. Take international standards into account

Other lists of criteria may be suggested, but this is as good as any. It should from the very beginning be realized that no electoral system will allow the simultaneous fulfillment of all those criteria, so (hard) choices must be made and trade-offs accepted.

The Nine Electoral Systems Families

The main distinction in relation to electoral systems is between majoritarian systems and proportional representation (PR) systems. Almost all electoral systems of any practical relevance can be categorized as belonging to either of these two broad categories.

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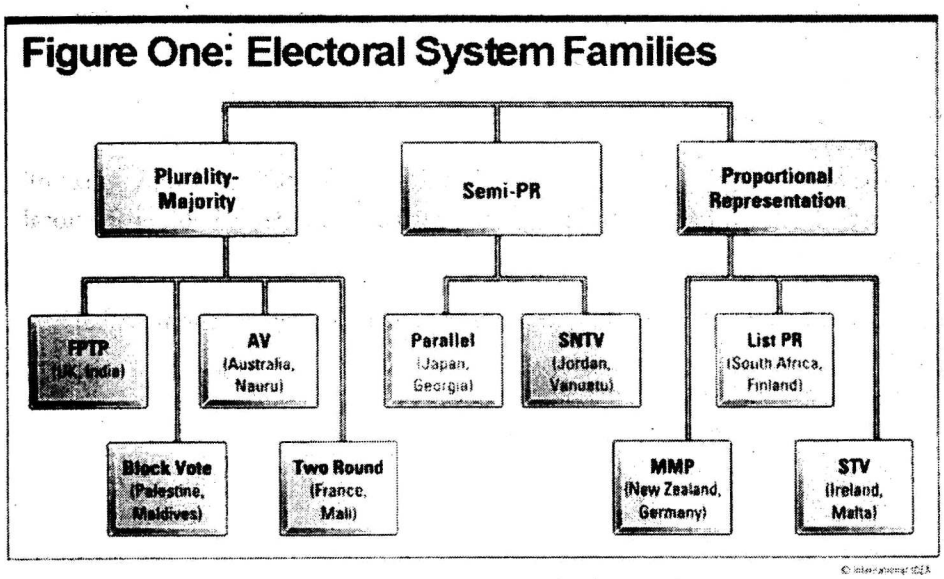
[1] This is a slightly revised version of the paper, which was prepared for presentation at the IREC technical workshop on electoral systems, KICC, Nairobi, 1 August, 2008

[2] Such as securing representativeness, providing legitimacy etc.

The basic idea behind majoritarian systems is to allocate seat(s) to the party/candidate with more votes than any other (plurality systems) or to the party/candidate with at least 50 per cent + 1 vote (majority systems). The figure below (borrowed from the 1997 edition of the International IDEA Handbook on Electoral Systems by Reynolds et al.) shows in the left hand side the four members of the majoritarian systems family:

- The ordinary First-Past-The-Post (i.e., plurality in single member districts, SMDs),
- the Block Vote (i.e., plurality in multimember districts),
- the Alternative Vote (i.e., an immediate run-off system using rankordering of) and
- Two Round systems.

The last two are different ways of obtaining majorities behind the winning candidate, if that does not come by itself.



Two-round systems is a way of securing that there is always a majority of constituents behind the selected candidate. This is achieved by conducting a second round of elections in cases, where the first round winner does not get at least 50 per cent + 1 of the votes. This second round (usually) only has participation by the two top contenders, which means that the winner will have the support of a majority of those voting, which also gives him/her a strong position in parliament (and in the constituency).

Two-round electoral system – which in a considerable number of countries are used for **presidential elections** – are often seen as contributing to further strengthening the bigger parties, as they will usually be among the contenders in the second round (and they will also normally be those who win seats in the first round). This might in itself contribute to a reduction in the number of political parties, so it should be considered a viable option at both the presidential and the parliamentary level. As many MPs in Kenya

are elected with impressive majorities already now, the cost component of introducing a second round of elections should not be considered prohibitive.

The basic idea behind proportional representation (PR) systems is to have a seat allocation system in place, which *consciously* attempts to achieve that the allocation of seats to parties to a considerable degree – and not only accidentally – reflects the vote distribution among parties proportionally. The three PR electoral system families in the right hand side of the figure, i.e., List PR, MMP (Mixed Member Proportional), and STV (Single Transferable Vote), will be explained below.

Two electoral systems in between the two major categories complete the picture. In the figure, one system (SNTV, Single Non-Transferable Vote) is placed here, even though it is a plurality system, which means that it belongs in the left hand side of the figure. The other system in the figure's semi-PR category, the Parallel System, mixes elements from both of the two larger categories without aiming at achieving a reasonable degree of proportionality, so it is more clearly a kind of mid-way house between majoritarian and PR systems.

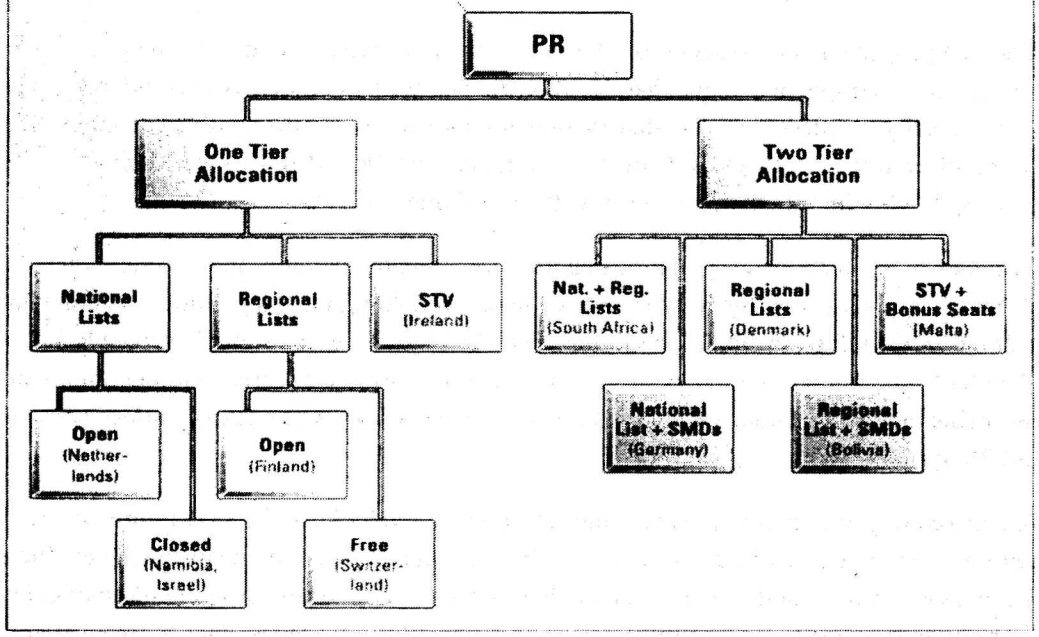
PR systems are a mixed bag of systems. This becomes clear when one looks at the next figure, where the main categorization is according to whether or not seat allocation takes place on one or two levels (tiers). One tier allocation means that all seats are allocated either on the national or the provincial/regional level (as in Namibia or Finland), while two-tier allocation – where seat allocation takes place at two different political-administrative levels – is found, e.g., in South Africa and Lesotho.

PR systems are further categorized according to

- the magnitude of the constituencies (national, provincial, or smaller), which must be multi-member to allow for proportional allocation,
- the allocation formula (quota or divisor methods; no need to dig deeper into those methods, which are therefore not indicated in the figure. They will be covered in the paper by Commissioner Borneo)
- the list forms (open, closed, semi-closed)
- in the case of two-tier systems:
    - PR systems used on both tiers (if so: do they differ, e.g., by the formulae employed?)
    - Are single member districts (SMDs) used on the lower tier?

STV is a special type of PR system based on the voters' rank ordering of candidates in multi-member constituencies according to the order in which they want them elected. The system has some advantages, but cannot be used in settings with a high level of illiteracy.

Figure Four: PR Variations



MMP, the two-tier combination of FPTP and PR at a higher level – as the overarching feature – is in the figure exemplified by Germany, which also reflects that this system is oftentimes referred to as "the German system". The basic features of this system are that voters have two ballots, where one (the national – or PR – ballot, as it is sometimes called) is used to determine the overall, proportional composition of parliament as such. These are the main feature of this system: Two ballots and the more important of these determines that parties get seats in proportion to their strength in the electorate. The other ballot is used to elect a parliamentarian from the single-member constituency, where the voter is registered, usually by traditional FPTP. So all voters are given two ballots, which they can – if they so wish – use to support different parties. They can also decide only to use one of the two ballots.

Seat allocation under MMP is done in several steps. One is to allocate seats to candidates in the constituencies on the lower level (tier). Seats won in the constituencies cannot be lost in later calculations, i.e. they are final. Another step is to calculate each party's *overall* seat entitlement based on the distribution of the PR ballot. If a party is entitled to 36 seats overall, but has only won 19 constituency seats, it is entitled to 17 compensatory seats from the pool of compensatory seats. All parties vying for compensatory seats must have submitted a (closed) list of candidates, and in this case the first 17 names on that list get a (compensatory) seat in parliament. Some of these 17 candidates may also have won a constituency seat, in which case one just moves down to the next name(s) on the party list. If a vacancy occurs among those parliamentarians occupying a compensatory seat, one again goes to the next available person on the list, i.e., by-elections are not needed in case of compensatory seat vacancies.

If a party happens to win more constituency seats than its overall seat entitlement, it keeps the constituency seats, i.e. that allocation is final. But the consequence is that there are fewer seats available

for the achievement of full proportionality among the other parties. In this case two options are available: (1) to allocate seats as proportionally as possible with the number of seats available, or (2) to increase the size of parliament for that parliamentary term. This latter option is used in Germany, where one talks of "surplus" seats, but that system might be misused and is not really recommendable.

The MMP system has previously been discussed in Kenya as part of the constitution review process (primarily advocated by academics like Reynolds and Hartman). It was, however, dropped from the debate already in the Bomas draft and It was also absent from the Wako proposal, which was rejected in the 2005 referendum.

Instead of MMP, these two documents both proposed a combination of

- Single-member constituencies (as now),
- Single-member constituencies (the districts), each to elect one woman (the Bomas-proposal as well as the 2005 Wako constitutional proposal are both silent on whether all voters should be allowed to vote in these elections or only women, which some might say would make more sense).
- Representatives of marginalized groups (the Bomas draft proposes 14 such members, to be indirectly elected by electoral colleges of the respective marginalised groups; Wako a more complicated proposal aiming at the same, but also aiming at securing a better gender balance, to be based on lists submitted by political parties and allocated in proportion to votes obtained).

Neither of these proposals has anything to do with MMP. The reason is that there is no attempt to ensure overall proportionality in the allocation of seats (based on a separate calculation on the basis of the vote distribution of the national/PR ballot) and there is – in particular – no attempt to ensure that such seats go to parties underrepresented in the allocation of constituency seats. On the contrary, the current distribution of the nominated seats reflects party strength in parliament.[3]

There appears to be some confusion about how to categorise Kenya's current electoral system. Some seems to believe that it is MMP (because it combines ordinary FPTP with some seats allocated proportionally), but that is not the case. Others, including a universally used standard text, classifies it as FPTP (Reynolds *et al.*, 2005, p. 185), disregarding the 12 nominated seats, which is to skip the key categorisation problem.

The solution is, to understand that Kenya's current electoral system is a *variant* of a parallel system, i.e. one part being the system with 210 seats allocated by FPTP in single-member constituencies, the other part the system with subsequent, separate, and – in particular – non-compensatory allocation of 12 seats to represented parties on the basis of their number of seats obtained in the constituency elections.

A standard parallel system would allocate the PR seats on the basis of the number of votes cast for parties on a separate ballot, with or without an electoral threshold. However, that the current allocation of the 12 nominated seats based on the number of seats already obtained by the parties does not change the basic

[3] Cf Art. 33 in the Constitution of Kenya.

character of the system. One can also say that the one and only ballot is – firstly – used for the constituency seat allocation and then – secondly – for the allocation of the 12 nominated seats, via the number of seats obtained in parliament by the political parties.[4]

Similarly, neither the Bomas draft, nor the Wako proposal did in any way attempt to *compensate* parties for disproportionality experienced at the level of constituency seat allocation, so they cannot be MMP proposals. The Wako proposal was a little closer to being a parallel system,[5] than the actual electoral system in Kenya, while the Bomas draft is of a different category.

Special seats for specifically identified marginalized groups is in itself a complicated thing to have. The establishment of a proper and acceptable (i.e., legitimate) group of electors is complicated and easily becomes discriminatory; furthermore, such representatives will almost by their very nature become – and be seen as – defendants of special interests, unable or unwilling to prioritise broader, national interests; they *might* therefore contribute to the increase of the level of political tension. And why should – e.g. – members of trade unions be more entitled to special representation than farmers? This compartmentalization of representation is not a good way of integrating marginalized groups in the political life and providing them with the access to participation and representation, they might need. Such commendable objectives are much more easily achieved by implementing a closed list PR system, where parties can demonstrate their social profile through placing representatives of various groups in need ogf special attention in winnable positions.

Special seats for women is an equally complicated and much debated issue. More equal representation of the two genders is important, and it is well documented that a reasonable level of representation of women does not go well with FPTP (in Kenya or elsewhere). However, special seats often entail the perception that MPs holding such seats are only second order MPs. The most solid and sustainable female representation is seen in countries with forms of list PR, where women are included since they – in their own right – can attract additional votes to their parties, because these parties by nominating women candidates show that they evidently value the presence of these women on their lists and in their parliamentary caucuses.

Discussion of the difference between MMP and Parallel systems:

Consider a system with 100 constituency seats and 100 seats available as compensatory seats.[6] There are four parties, A, B, C, D, and one independent candidate, E, winning the number of constituencies indicated in the table below. Their general strength in the electorate (measured on the basis of the votes on the second, national or PR ballot) is as indicated.

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[4] The allocation of the 12 nominated seats by the ECK in early 2008 remains a contentious issue. In 1997 and 2002 these seats were allocated to parties on the basis of a standard Hare + largest remainders formula. In 2008, the allocation was done differently and not by any known seat allocation formula.

[5] Because the PR seats were to be allocated on the basis of the sum of votes obtained by parties, not their number of seats in the National Assembly. But still the system would build on voters having one ballot only, not two.

[6] The sizes of these two groups are chosen for ease of calculation and comparison. In real life, they are only rarely of the same size (as in Germany). The constituency part normally has more seats than the other part (as in Lesotho (80 + 40) or Kenya (210 +12)).

MMP	Constituencies won (1)	Strength (per cent of PR ballots won) (2)	Overall seat entitlement based on PR ballots won (N=200 – 1 = 199) (3)	Compensatory seats (3) – (1) (4)	Sum of constituency and compensatory seats (1) + (4)
Party A	60	45 %	89	29	89 (= 45.5 %)
Party B	30	25 %	50	20	50 (=25.0 %)
Party C	9	20 %	40	30	40 (=20.0 %)
Party D	0	10 %	20	20	20 (=10.0 %)
Independent E	1	Not applicable	Not applicable	Not applicable	1 (= 0.5 %)
Total	100	100 %	200	100	200 (= 100.0%)

Parallel system	Constituencies won (1)	Strength (per cent of PR ballots won) (2)	Overall seat entitlement based on PR ballots won (N=100) (3)	PR seats = (3) (4)	Sum of constituency and PR seats (1) + (4)
Party A	60	45 %	45	45	105 (=52.5 %)
Party B	30	25 %	25	25	55 (=27.5 %)
Party C	9	20 %	20	20	29 (=14.5 %)
Party D	0	10 %	10	10	10 (= 5.0 %)
Independent E	1	Not applicable	Not applicable	Not applicable	1 (= 0.5 %)
Total	100	100 %	100	100	200 (=100.0%)

The Case against MMP

There has since the early 1990s been a trend in electoral system reform in the direction of MMP (and the other main category of two-tier combinations of SMDs and PR, i.e., the parallel system).

One important reason for this trend has been that retaining the FPTP/SMDs has been attractive to many incumbent parliamentarians (and many voters), while many reformers – and parties and groups suffering from the well-known disproportionalsing effects of FPTP – have been attracted by, in particular, the idea of approaching overall PR (at the national level).

Usually, this has been attempted by using two different ballots as indicated above. It is, however, also a possibility to use the constituency ballot as the sole basis for allocation of compensatory seats, even though that creates a harder (more difficult) decision situation for voters, as it decreases the number of options they have. The flip side of the argument is that it makes voting simpler and it also takes away the possibilities for manipulating the system which are discussed below. However, almost all known cases of MMP operate with two ballots, even though it has been argued by some commentators (and critics) that many illiterate and politically less experienced voters might not understand the different considerations behind having two ballots. Recent experience (such as Lesotho) demonstrates that good voter education and information from political parties can easily address at least some of that concern.

Many see MMP as an attractive electoral system because:

- Parties which are underrepresented in the constituencies (normally all but the two biggest[7]) can to some degree be compensated for their underrepresentation, which by many is seen as a good thing.
- Small, geographically concentrated parties can meaningfully stand for election in a limited number of constituencies
- Independent candidates with sufficient local support can compete for constituency seats
- Small and geographically dispersed parties, which can never win a constituency seat, can campaign for national (PR) ballots which will subsequently allow them to obtain a corresponding number of compensatory seats
- Restrictions on the formation of the (closed) party lists can be used to further the representation of otherwise underrepresented groups, e.g. by requiring that parties submit lists with both male and female candidates, often ordered according to the so-called zipping principle: a woman, a man, a woman, a man, etc. (or: a man, a woman, a man, a woman, etc.)
- Party leaders – who might risk losing in their constituencies – can be given a political life belt, if they are also put on top of the party list (which is only natural).

[7] This problem is less pronounced in Kenya than in many other FPTP countries because of the strong geographical/tribal structuring of the vote.

However, a traditional MMP system can relatively easily be circumvented by unscrupulous political parties, either by arranging for a more or less informal agreement between two parties, where the expectedly bigger party (A) only presents candidates at the constituency level, while the expectedly smaller party (B) only presents a party list. If supporters and followers of the two parties now vote for Party A in the constituency election and for Party B in the national election (because they are being told to do so), then whatever number of constituency seats Party A gets over and above its proportional share of the total number of seats cannot be deducted from whatever number of compensatory seats Party B is allocated on the basis of its share of the PR votes. So it's a win-win situation for both A and B – at the expense of other parties entitled to compensatory seats on the basis of *their* share of the national PR votes.

This is exactly what happened in Lesotho in the February 2007 elections to the National Assembly, even after two of the involved parties (Lesotho Congress for Democracy, LCD, and National Independent Party, NIP) had their MoU scrutinized by the Independent Electoral Commission, which, however, could not establish any legal reason not to accept the arrangement. The problems following from this circumvention of the ideas behind the 2001 political and constitutional settlement are dealt with elsewhere (Elklit 2008), but the parliamentary impasse has created a huge number of problems in Lesotho since early 2007. A July 2008 High Court judgment only postponed the finding of a proper solution to the complicated political and legal problems, which are now (again) waiting for SADC mediation.

Similar problems arose in the 2005 National Assembly Elections in Albania, even without a formal MoU between the two participating parties, one big, one small, because voters were easily educated to do as their political leaders suggested: Trick the MMP system!

These two illustrations are obviously from countries where there is no firm and well-established party structure and culture. In countries with more well-established parties, it is difficult to imagine that parties would engage in purposively circumventing the constitution or even breaking the relevant legislation. Two such countries using MMP are Germany and New Zealand.

New Zealand represents another problem in relation to introducing MMP, which was only gradually realized after 1993-94, when New Zealand introduced MMP. New Zealand was previously considered the archetypical Westminster-country, where parliamentary rules, procedures, and traditions were applied even more strictly and consequently according to traditional Westminster thinking than in the UK! After the change to MMP, there was no clear winning majority in parliament (as is often the case under PR, whether MMP or list PR systems) and no well-defined opposition, only a handful of parties vying for power and influence according to their relative strength in parliament. Even small parties were doing very well in the House because they held the seats which were key to the formation of majority government coalitions as well as to legislative winning coalitions, i.e., they had considerable political blackmail potential. Parliamentary life in New Zealand changed considerably over some years (a couple of parliamentary terms and some snap elections), probably to the better, but certainly to the surprise of most political actors.

The key point is that the introduction of MMP is not necessarily a good thing. For it to function reasonably well there must be

- a strong political party system, with well-established norms and traditions, which political parties and leaders adhere to;
- the legal drafting of constitutional amendments and electoral law changes must foresee all eventualities, but also maintain the basic principles of the system, and
- a period of adjustment to the new system – a parliamentary system, which will not go well together with a traditionally strong presidential system, like in Kenya – must be allowed, as a different system might not work well from Day 1. Such period might easily last at least ten years and there is no need to deny that a new balance between the Presidency and the National Assembly would also have to be defined.

A supplementary issue is the relative share of constituency and compensatory seats. The rule of thumb is that for an MMP system to be able to obtain a reasonable level of proportionality, the balance between the two kinds of seats should be *at least* 3:1 and probably more (in Lesotho it's 2:1, in Germany even 1:1). In a system with 210 single member constituencies, this means that there should be at least 70 compensatory seats, and probably more (maybe around the +/- 100 discussed at Bomas).

Conclusion

There is no easy solution to the issue of the future electoral system in Kenya (cf. the criteria on p. 1).

The main options appear to be these:

(1) continue with FPTP, but carry out some redistribution of constituencies (delimitation in the traditional way, by using the GPS-based system developed by Joel Barkan and his collaborators, or by employing combination of principles[8])

(2) change to a two-round system at the parliamentary (and presidential) level. Will be understandable for voters and contribute to a further reduction of parties.

(3) introduce changes along the lines suggested by Bomas/Wako. Changes in the constituency structure are also necessary in this case.

(4) MMP (which will also require changes to the constituency structure)

(5) PR (closed list, some kind of gender zipping) at the provincial level. The district level can also be considered for this, as that will allow for smaller distances between voters and representatives.

(6) PR (with closed list and some kind of gender zipping) at the national level

[8] The use of multiple criteria – and not only, e.g., the number of registered voters – is recommendable to balance various considerations. One possibility is to do the delimitation on the basis of a figure, which itself is the sum of the number of registered voters, the overall population figure, and the physical areal of the constituency in km^2, maybe even multiplied by a factor 2.

All six options have advantages and disadvantages, including that the constituency boundary delimitation will be an important element in the first four options.[9]The views of the author are that (1) and probably (5) are the most promising system for Kenya at this point in time, but the scoring of all six systems against the criteria on page 1 is not easy!

The MMP system is in any case not an obvious choice because of the in-built risks for misuse. The MMP system should – if nevertheless chosen – only be used with one ballot – even though that is against a key principle behind MMP thinking!

[9] ECK points of view on this were presented in a paper by ECK Chairman Samuel M. Kivuitu: *Matters to consider with Regard to the Review of Electoral System for Kenya*, which was presented to the Independent Review Commission (IREC) at KICC, August 1, 2008.

TECHNICAL NOTE ON VOTER REGISTRATION

1) The role of registration in the electoral process

Although the registration of voters has Constitutional status in Kenya (Section 43 of the Constitution) it is; in strict sense, an administrative process which only aims to facilitate voting - the essence of an electoral process. Before a person can vote, it is necessary to perform the following controls:

1. Verification of entitlement: To ensure that the person that appears at the polling station is entitled to vote in the election that is being held there;
2. Verification of identity: To ensure that the person that appears at the polling station is the person who s/he purports to be,
3. Verification that the person has not previously exercised his/her right to vote: to ensure that voters do not exercise their right to vote more than once,

It is possible to conduct an election in which all three aspects above are taken care at the time of voting. Such was the case, for instance, of the 1994 elections in South Africa. However, the verification of entitlement is a time consuming exercise, as it is necessary to verify citizenship, age, the non applicability of some of the restrictions that are placed on the right to vote (e.g. being of sound mind, not having being condemned of certain types of crime, etc.), as well as the entitlement to vote in the specific constituency/ward where her/his vote will have effect. In the case of Kenya, the qualifications specified for entitlement are somewhat complex, particularly so in the case of local elections.

It is for this reason that the verification of entitlement is usually done in advance. The Register of Voters is essentially a list of persons whose entitlement has already been verified. If such a list exists, entitlement will be quickly verified at the polling station by checking if the name of the prospective voter is included in the list.

It should also be mentioned that the registration of voters usually contributes to all three activities mentioned in the initial paragraph. In some cases, the electoral management body (EMB) issues a document that can be used both for the verification of entitlement

and identity (voters' card becoming, in many of those cases, a document of identity that might be used in other aspects of daily life). In some cases, the EMB does not deliver a document but includes in the list of entitled voters sent to the polling station information that enable the polling officers to verify the identity of the voter (e.g. the inclusion of photographs or signatures in such list). The registration process is also frequently used in relation to the third type of verification (avoidance of multiple voting). This is done by crossing the name of a person who has voted in the list of voters sent to the polling station, or by placing a mark in the voters' card, or both. If the EMB and other relevant stakeholders are reasonably convinced that the name of a voter appears only once in the register (for instance, if the EMB has established effective ways to prevent double registration, like the use of Automated Fingerprint Verification Systems - AFIS), such markings would suffice. If not, a customary practice is marking the cuticle of one finger with indelible ink.

Previous registration of voters has another important administrative function: it makes possible adequate logistic planning by the EMB. In the absence of registration, the EMB could only make rough estimates of the number of voters that would appear to vote in a polling station and would be forced to send a significant quantity of extra material in order to cover unexpected large turn-outs. Previous registration, if it links voters to specific polling stations, substantially helps the EMB in planning the distribution of electoral materials and the allocation of polling staff.

It is important to emphasize that the systems and procedures established by the electoral authority concerning registration should not introduce bias affecting specific groups, or place excessive burdens on the citizens willing to exercise their right to vote. The verification of the absence of bias in registration procedures is not strictly an administrative issue, but it is related to the free and fair character of the electoral process. It means that the procedures chosen will not favour certain regions (by making it easier to register there) or affect differentially certain groups. For instance, in a predominantly Muslim area the registration of women will be jeopardized if women officers are not included in the polling team. Similarly, if the registration process has a significant direct or indirect cost for the applicant, it will introduce a significant bias against poor persons, who may not be able to afford such a cost.

2) Voters' registration in Kenya: Historical Evolution

Registration process for the 1992 elections: For the first multi-party elections in 1992, registration of voters was undertaken for a period of 31 days starting June 8, 1992 and was later extended through July 29 on account of a boycott by the opposition. There were at the time 188 constituencies and 5631 registration centres. The procedure was simple enough: voters would present themselves at a registration centre, fill a form and present the National ID card as a proof of identity. The Registration Officer would then enter the information on the voter in a "black book" (a lined exercise book divided into alphabetical sections). The name, sex and address of the registrant were then entered into the appropriate place according to the first letter of the applicant's surname. The number assigned to the elector was composed of four blocks: the first two or three letters denoted the district, the second block designated the registration unit, the third was the initial of the voter's surname, and the fourth was a serial consecutive number (1,2, ..., n). Voters were issued on the spot an elector's card, which included the voter's name, the number assigned to him by the ECK and the National ID card number. At the time it was made of pink card stock, and not laminated or otherwise protected. The "black book" information was then transcribed into stencils and mimeographed and the mimeographed lists were used in the polling stations. In 1992, 7,956,354 Kenyans (an estimated 76% of the VAP) registered. The average productivity of the registration teams was 27.7 registered voters per day per registration team. It should be mentioned that since procedures were manual, it was impossible at the time to eliminate multiple registration. Therefore, numbers above probably include some multiple registered voters.

Registration for the 1997 elections: For the 1997 election, the ECK decided to computerize the Register, using OMR forms to compile the information. The UNDP had made an assessment on computerization, but it was discarded as the Government did not provide the required counterpart funds. Another study was then commissioned by the ECK to a local firm. In 1997, there were 12,500 Registration Centres, twice as many as in 1992. Registration was to be conducted for 35 days starting on May 19, 1997 but later was extended for an additional eight days. The total number of registered voters was 8,967,569 (of which 8,013,814 during the initial 35 days –an

average productivity of 18.3 registered voters per day per registration team). Of them, 47.9% were women and 52.1% men. Shortly before the elections, the government had decided to replace the national ID cards with a new version and, after some debate, the ECK allowed the use of either old or new National ID cards for registration. The computerization of the registration process allowed the ECK to check double registration, and 61,696 double and multiple registrations were detected and eliminated. The registration was a full exercise, involving the whole population.

The old electoral card was replaced with a new version, still in use. It is a document with limited security elements, laminated in cold at the issuing station. It cannot be used for identification purposes, as it does not include a photograph. It includes a thumb print, but this is not very useful for verification of identity on polling day. The information contained in the document are the elector's full name, her/his number of ID card, the elector's number, the constituency at which s/he is entitled to vote, the name of the place of registration (which coincided with a polling centre) and a control number.

In order to provide back-up systems, the ECK continued to use the black books with its manual entries. Apparently, in most cases the registration officer would fill the form B as well as the OMR form at the registration centre, and add the information to the black book later at her/his office.

Registration process for the 2002 elections: In June 2002, changes were introduced to the National Assembly and Presidential Elections Act to provide, among others, for the continuous registration of voters. This meant the introduction of two important changes. First, it was not anymore necessary to discard the old register and built a new one for each election. The register used for one election could be kept for the next, and only modifications resulting from the incorporation of new citizens, the elimination of deceased voters, changes in address, etc. should be incorporated. Therefore, the Register used in 2002 was based in the 1997 register, updated through registration drives conducted in 2000 and 2001. The register was further updated through a registration drive conducted between 4th February and 19th March 2002 and a supplementary effort conducted for 14 days following 26th August. There were 1,3 million new entries: 1,040,155 new names were added to the register and 195,716

transfers were made. 53,476 cases of deceased persons (approximately 0.5% of the total number in the Register of Voters) were detected and moved to the register of deceased persons. They were later reinstated in the voter register due to complaints from the political parties on the accuracy of those cases and thus became a part of the 2002 National Register. At that time, ECK found 266,000 cases of double and multiple registrations countrywide, which were excluded from the voters' lists.

In the Register used in the 2002 elections there were 4,985,905 female (47.7%) and 5,827,111 male (52.3%) voters. The percentage of registered women was particularly low in Nairobi province: only 307,851 registered voters (34.8%) were female.

The age distribution of registered in 2002 was as follows:

Age	18-25	26-30	31-35	36-40	41-45	46-50	51-55	56-60	60 +	???
Percent	13%	17%	13%	11%	11%	8%	7%	5%	12%	3%

As it can be seen, the percentage in the range 60+ is somewhat high for a country of the characteristics of Kenya. This might indicate that a number of deceased voters were still included in the Voter Register. According to the EU 2002 Election Observation Report: "...the ECK does not systematically expunge the details of deceased persons from the Voter register and the Registrar of Persons does not have a structured method for removing deceased persons from the register and relies solely on the records from the Registrar of Births and Deaths."

In the 2002 elections, in the event that a voters' name did not appear in the computerized register, the polling officers could not refer to the "black books" (the original record of the registration), and could not allow the voter to vote even if his or her name appeared there, but not in the list provided to the station. This procedure, which was later allowed in 2007, was specifically forbidden in 2002 because the political parties refused to accept it.

Registration for the 2005 referendum: The Register of Voters used for the 2005 referendum was the result of the successive annual updates that took place in 2003, 2004 and 2005. The total number of voters registered for the referendum was

11,608,891. No special registration drives were conducted, other than the annual update corresponding to 2005.

Registration for the 2007 elections: The 2006 annual Registration Drive was conducted between August 15th and September 14th 2006 (with a period for inspections between October 16th and November 17th). A total of 920,197 voters were added to the Register. The first registration drive during 2007 took place between March 1st and March 30th 2007 reinforced by a second drive that took place between June 11th and July 31st 2007 (with 30 days inspection periods following each drive). The increase in the number of registered voters was of 1,767,212 voters in both drives, resulting in a total number of voters for the 2007 election of 14,296,180, representing 71% of the 19.8 million persons over 18 years of age who were issued national ID cards.

Overall, the variations in the number of registered voters between 1997 and 2007 were as follows:

Year	1997	2000	2001	2002	2003	2004	2005	2006	5/2007	11/2007
Number ('000s)	8,968	9,080	9,411	10,451	10,777	11,222	11,609	12,529	13,044	14,296
Percent	100	101.2	104.9	116.5	120.2	125.1	129.4	139.7	145.5	159.4

As it can be seen, the massive registration efforts of 2006 and 2007, which took place in an increased number of registration centres (a total of 20,655 centres) and for an unusually long period (67 days), produced good results. In 2006/7, the number of registered voters increased by 23.1%, to be compared with the 29.1% increase of the previous eight years or with the 15.1% increase verified in 2001/2. It should be added that the Government had for the first time acquired equipment which enabled it to produce National ID cards in large numbers, which facilitated the access to the National ID cards by many young Kenyans. However, the average productivity of the registration teams was exceptionally low, only 1.1 registered voters per day per registration team (and just 0.8 in the first of the two periods).

By-elections: Although by-elections were held in April 2003 (Wajir West, Naivasha); July 2003 (Yatta); November 2003 (Saboti, Kajiado South); April 2004 (Kisumu Town West); December 2004 (Kisauni); March 2006 (Kasipul, Kabondo); July 2006 (Moyale, North

Horr, Saku, Laisamis, Nakuru Town) and May 2007 (Magarini), no specific registration efforts took place before the by-elections, as the law forbids registration to take place from the moment in which a parliamentary seat is declared vacant. The ECK, however, would replace lost or deteriorated voters' card during that period.

Evolution of the regional structure of ECK: Up to 1998 the ECK had not a formal regional structure. It used "casual" part-time workers in the Districts, which were paid with what little ECK could save from other parts of the budget. They were lodged at other government offices, and perform mostly logistical duties.

Since then, the ECK has obtained approval and funding for setting up the District Electoral Offices (DEO). In 1998 funding was available for the District Electoral Coordinators as well as three very junior officers (Copy typist, Clerk and Support Staff). In 2002 funds were obtained for another officer at higher level – denominated Electoral Officer II – which allowed them to recruit university graduates. The District Electoral Coordinator (DEC) is usually someone with previous experience as Returning Officer or equivalent. The functions of the DEC are essentially logistical. During registration drives the District offices would recruit personnel, receive materials, distribute them, pay bills and salaries, etc. At present they function in offices that belong to the ECK or have been rented. In order to build their offices the ECK received the land from the Government and use whatever funds are left from the allocation received for the holding of general elections for that purpose. Not many of these offices have vehicles. In between annual registration drives the DEC is nominated as Registration Officer and the Electoral Officer II as Assistant Registration Officer for the constituencies within the district.

The initial expectations of the ECK, when continuous registration was approved, were to have at least one office per constituency. Alternatively, they could have managed with the 71 offices they have now, if provided with vehicles, which would have allowed the officers to travel throughout their district registering voters. Another alternative would have been to use Government Officers, who are everywhere, on a part-time basis. The ECK would have accepted such a solution, but political parties did not, as there is a deep mistrust in the government administration.

The number of ECK electoral districts corresponds to the number of Administrative districts of a few years ago. As of today, there are 137 Administrative districts that do not coincide with the Electoral Districts. The ECK has decided not to expand the number of electoral offices until the institution is provided with funding as well as adequate maps of the new districts, which seem to be still missing.

3) Voters' registration in Kenya: legal framework

The Constitution of Kenya defines the entitlement to vote in a rather unusual way. According to Section 32 of the Constitution, a person is entitled to vote in a constituency if s/he registered in such constituency as a voter (with a few standard disqualifications). In Section 43, the constitution specifies in detail the qualifications for being registered as a voter as:

(a) (being) a citizen of Kenya who has attained the age of eighteen years; and

(b) (having been) ordinarily resident in Kenya either:-

  (i) for a period of not less than one year immediately preceding that date, or

  (ii) for a period of, or periods amounting in the aggregate to, not less than four years in the eight years immediately preceding that date; and

(c) (having), for a period of, or periods amounting in the aggregate to, not less than five months in the twelve months immediately preceding that date, been ordinarily resident in the constituency in which he applies to be registered, or has for such a period of periods carried on business there, or has for such a period or periods been employed there or has for such a period or periods lawfully possessed land or residential buildings there.

Subsection (2) of Section 43 specifies a number of disqualifications frequently found in other legislations: (a) if, under any law in force in Kenya, he is adjudged or otherwise declared to be of unsound mind; (b) if he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under a law in force in Kenya; (c) if he is

detained in lawful custody; or (d) if he is convicted of specified election offences. Subsection (5) establishes the appeal procedures.

According to Subsection (3) the determination of questions regarding qualifications will be prescribed by Parliament. Subsection (4) prescribes that where a person "is qualified to be registered in more than one place as a voter in elections to which this section applies, he shall be so registered only in the first of those places in which he applies to be so registered, and Parliament may provide for the punishment of a person who, being already registered in one place as a voter in the elections or having applied to be so registered there and not having had that application finally rejected, applies to be registered in another place as a voter."

The National Assembly and Presidential Elections Act (as revised in 1998 and 2002) establishes that the Electoral Commission should prepare or cause to be prepared "constituency registers in respect of all constituencies" and a "principal register, which shall be a combination of the constituency register, and such other registers, for the time being in existence, as the Electoral Commission may direct." Subsection 2 mandates the ECK to open the Registers for public scrutiny.

Section 4A enshrines the principle of continuous registration, by establishing that the registration of voters can be carried out at all times (with the exception of defined time periods before the date of the election). Multiple registration is forbidden and penalized in Section 5. Last, Sections 8 through 11 define the basic procedures for claims and objections. Section 34 of the Act empowers ECK to make regulations governing other matters such as appointment of Registration Officials.

The Local Government Act (Cap 256) at Section 53 empowers ECK to make rules on the requirement for registration of electors and for election as an elected councilor. Under this section, candidates for local government elections are required to be registered voters within the local authorities in which they wish to contest as councilors. Section 55 of the Act provide for the preparation of the register of electors by ECK for each local authority. According to Section 56, only those persons appearing in the register are entitled to vote at a particular civic election. The Fifth Schedule of the Act describes the circumstances under which one may qualify or be disqualified for

registering as a voter during Local Government Elections. To qualify as a voter in Local Authority (civic) elections one must meet the following conditions:

(a) Be a Kenyan citizen at least 18 years and over;

(b) Possesses any of the following qualifications:

(i) Be in the current valuation roll, assessment roll and area roll or the local authority for the area applied to be registered; or

(ii) Have paid for each of the last three years a rate or tax levied by the local authority for general purposes;

(iii) have resided in an area within the local authority for periods aggregating to not less than five years in the past seven years; or

(iv) be a spouse of any person falling within paragraphs (b), subparagraphs (i) through (iii).

It should be noted that the ECK does not apply these qualifications, as they are almost impossible to verify. Last, the Elections Offences Act (Cap 66) defines offences that might be committed during the registration of voter exercise include the following:

- Knowingly making false statement in connection with any application to be placed on any register of electors;
- Making, preparing or printing without due authority, a document or paper resembling or purporting to be a register of voter;
- Printing a document resembling an elector's card;
- Being in possession, without due authority of an elector's card bearing another person's name or where no name has been written on the card;
- Supplying an elector's card without authority to any person;
- Destroying, damaging, defacing or making alteration without authority an elector's card;
- Selling an elector's card to any person or purchasing any elector's card from any person;

- Abetting, aiding, counseling or procuring the commission of or attempting to commit any of the offences contained in the Elections Offences Act;
- Registering twice or more times as a voter in one constituency(s) and local authorities or applying to register as an elector simultaneously in different registration centers; etc

The National Assembly and Presidential Elections (Registration of Electors) Regulations, 2002, describes a registration process decentralized at the constituency level. The ECK shall appoint a registration officer for each constituency (although a registration officer can be appointed for more than one constituency). They will be supported by one or more assistant registration officers. Each registration officer shall prepare and maintain a register of electors for his constituency "in such form as the Electoral Commission may direct".

The role of the registration officers in between registration drives is essentially passive, as the initiative for additions or changes lies on the individual electors. New electors who express their desire to be included or existing electors who want to transfer to other constituency or to make changes in their particulars should present themselves in person at the Registration offices.

Registration Officers have a more active role in the elimination of deceased people from the Register. During registration drives there are District Registration Committees made up of the District Officers, Chiefs, Assistant Chiefs and the village elder headmens. DECs would get information about deceased voters from burial permits (issued and compiled by Chiefs/Assistant Chiefs and mortuaries) in the District Register of Births and Deaths. During the annual registration drive, an elder per sub-location is appointed by the ECK to identified deceased persons. Chief/Assistant chiefs certify this list of deceased voters which is then forwarded to ECK HQs for deletion of deceased voters. It should be mentioned that this depuration is fraught with difficulties and it is far from being considered adequate. In some areas there is some underreporting of deaths; in the past death certificates did not include ID numbers which created difficulties for ECK in deciding deletion, as errors could easily happen; the capture of data by the

mortuaries frequently records particulars of next of kin collecting the body instead of those of the deceased, etc.

Part VI of the Regulations provides the legal foundation for what are usually known as "registration drives" where the Electoral Commission expands significantly during a short period the number of places where voters can register, as described in the section on the historical evolution of the Register. According to Section 29 of the Regulations, the Electoral Commission may direct that (a) the register of electors for every constituency be revised; or (b) the register of electors for one or more specified constituencies be revised. This is the procedure applied in the months previous to a general election, to facilitate access to registration by voters.

4) Voters Registration in Kenya: a criticism of present practices

Before 1997, Kenya used to have what is called a "periodic" Register of Voters which is a voters list established for a specific electoral event. It was developed for one-time use and was not an ongoing list, to be updated or otherwise adjusted between elections. It was produced in the period immediately preceding the election, normally within a relatively short time frame. It was discarded after the election, as a new one will be compiled before the next electoral event.

The old system had several positive aspects: (1) There was no need for a large administrative apparatus throughout the country to maintain an ongoing list between elections; (2) there was no need to track changes in voters' personal information (including changes of address) between elections - the currency of a periodic list being one of its main advantages; (3) the voter registration period was limited, with clearly identifiable beginning and end; and (4) the periodic list could be developed without using hi-tech computer hardware and software. However, it was a rather costly exercise, and it involved a significant cost spike. In order to register the entire population, it was necessary to open a very large number of registration places (coinciding with the polling stations to be used later), and required a very large number of temporary staff.

When the ECK introduced computerization of the Register in 1997, it became possible to introduce the so-called "continuous" lists. This involved two significant changes. First, the lists used for a given election were not discarded, but were used as a building block for the lists to be used in future elections. Second, it was only necessary to incorporate new voters, eliminate those deceased or who had lost their right to vote, and introduce the changes in particulars of already registered voters, particularly changes of address. The concentrated cost of opening and operating a large number of registration centers during a short period of time was to be replaced by the more diffused cost of setting up a network of ECK offices and procedures that would capture and register the additions and changes. Therefore, there was (in theory) no need for making any special efforts before elections, as the lists were constantly updated. It should be noted, though, in most countries where continuous lists are being used (e.g. Canada) the EMBs do not open an extensive network of offices to do the adjustments, as the system draws data gathered by other civil agencies, such as motor vehicle and driver's registration bureaus, tax departments, and housing authorities.

In Kenya, the ECK opted for opening and/or reinforcing a network of local offices. Although the Commission did not have enough funds to open an office in each constituency, it did open 71 offices at district level, each of them taking care of 2 to 4 constituencies. In each of these District Offices, there is a District Electoral Officer and an Electoral Officer II who, in between registration drives, would act as Registration and Assistant Registration Officer respectively, for the purpose of the continuous registration. However, the use of data from other agencies, which is an essential feature of a continuous Register, did never happened, with the exception of data drawn from the Register of Births and Deaths for the purpose of eliminating deceased form the Register.

Therefore, continuous registration, as implemented in Kenya, depended entirely on the voluntary appearance of applicants, whether for new inscriptions, or for changes of addresses or particulars. It seems that the absence of effective incentives for people to register in-between elections was never taken into account. From the point of view of a prospective voter, registration is a time-consuming procedure with no intrinsic value.

The voters' card, as it has no use as an identity document, becomes useful only in election time. Even if a citizen is highly motivated to vote, that motivation is not automatically transferred to the act of registration - very few voters fully understand the relation between registration and voting. Having 210 Constituency offices rather than 71 would have resulted in a marginal decrease in the time spent for registration and in the distance to be travelled but, in the absence of effective motivation, the improvement in the "continuous" registration of voters would probably have been entirely marginal. That the lack of motivation is the main problem rather than the number of registration places is suggested by other facts. All the ECK offices are located in urban centres, and there is a large number of people living within short distance of them. Even so, registration is very low. In Narok, there are 40,000 inhabitants in the city itself. That means that a little over 1,000 persons reach the age of eighteen each year. However, only 10 persons registered in the first seven months of the year.

It is only when voting approaches that the interest re-emerges, as it becomes clear the registration is a pre-condition for voting. It is then when most people will opt for registering. International experience strongly points in this direction. Pakistan used to have a network of local offices where people could go and register at any time – just like in Kenya. During periods in which there were no elections, an average of 400 persons registered, mostly for non-electoral reasons (the voters' card was requested for a limited number of activities). When elections were called, the number of people seeking registration jumped to around 200,000 a month. In Guatemala, which has an Electoral Office in each municipality, 72% of these offices received one registration request or less per week in non-electoral years.

There are stronger incentives for obtaining other documents. National ID cards, Drivers' licenses, inscriptions with the tax authorities, etc., are important for many reasons, and most people would obtain them as soon as required. The principle on which continuous registration is based is that when a citizen makes contact with one of these other agencies the occasion is used to either incorporate that person to the Voter Registers or to update her/his particulars. Given the demand for these other documents, the coverage and currency of the Register will improve as a consequence of the sharing of

information. In 2007, only 14.3 million people registered to vote, but 19.8 million had the national ID card, even if obtaining the ID card takes more time and effort than registering as a voter.

In a different category there are those countries where there is no national ID and the voters' card includes a photograph and incorporates integrity features. In those cases the voters' card is widely used for identification purposes. It is this second use of the voters' card, rather than civic fervor, what creates a strong motivation for registering. In Mexico, for instance, where there was no national ID document, the voters' card was demanded by the public on account of its use as an "identity" document rather than because of its being an "electoral" document.

In the case of Kenya, the introduction of continuous registration, perceived as a step forward in 2002, it has in practice created a system that combines the costs of both the periodic and the continuous systems of registration. It has resulted in a extended network of District offices whose main purpose, in non-election years, is registering voluntary applicants. But the ECK still conducts yearly registration drives that in magnitude and cost are similar to those conducted in the case of a periodic register. Registration numbers under the two systems clearly support this argument.

REGISTRATION ACCORDING TO DIFFERENT APPROACHES

Type and period of registration	Number registered	Percent
Continuous during 2006	28,854	2.5 %
Drive Aug-Sep 2006	1,141,523	97.5%
Total registered voters 2006	1,170,377	100.0 %

Continuous during 2007	40,367	2.0%
Drive Aug-Sep 2007	1,972,455	98.0%
Total registered voters 2007	2,012,822	100.0%

Although there might be some overlapping in the data, the numbers clearly suggest that the impact of continuous registration (understood here as voluntary registration by voters at District Offices) is almost insignificant. The data is consistent with that included in the IED study: "Registration of Voters in 2007 – An Audit" which indicates that 2222 out of 2,318 respondents (95.6%) had registered during the registration drives at the polling stations. The argument is also confirmed by the continuous registration data for the period January - April 2008. During these four months, the ECK network captured 553 transactions: 129 new registrations, 110 transfers, 23 cases of persons missing in the registers, 275 deceased and 16 changes in particulars. It can be estimated that the number of "registration events" (persons reaching 18 years of age, transfers, deceased, etc.) in a four-month period should be around 300,000. This means that continuous registration capture 0.18 % of the "registration events" that probably took place during that period. The average productivity of the ECK network of offices was 0.1 transactions per office per day – in other words, one customer every two week per office. Of course, the already low motivation is even lower immediately after a general election, but the quoted figures are quite indicative of the overall inefficiency of the system.

The drives conducted in 2007 had a similar low productivity. During 2007 there were two registration drives: one throughout March 2007, and a second from June 11th to July 31th. The total number of registration centers was 20,655 and those centers were open to the public for a total of 79 days. Since the number of registered voters was 1,667,000, the average number of voters registered per registration center was one per day.

It should also be emphasized that the extensive deployment may have allowed registering ex-novo the entire population without any problem. The average number of voters to be registered per registration centre per day - if all the 14,296,000 persons who were registered to vote for the 2007 elections attempted to do so during the 2007 registration drives - would have been 8.8 registered voters per registration centre per day. This is a modest productivity if compared with that of the full population registration undertaken in 1992 (27.7 registered voters per day per registration team) or

that of 1997 (18.3 registered voters per day per registration team). In some other international experiences, the number of voters processed per day per center had been around 50.

It should also be pointed out that the cost of this duplicate system is staggering. The cost of the field offices, mostly devoted to Voter Registration in non-election years, was of 309 M KSh in 2006 and it is expected to reach 377.4 M KSh in 2008. The cost of the 2006 registration drive was 412.2 M KSh, the two registration drives that took place in 2007 required 2,179 M KSh and the allocation for voter registration for 2007/2008 is 596.6 M KSh.

We should now turn the attention to the degree in which the actual ECK practices in the conduct of registration ensure an adequate verification of entitlement that, after all, is the time consuming aspect of registration. As it was mentioned there, the verification of entitlement is a time consuming exercise, as it is necessary to verify citizenship, age, the non applicability of some of the restrictions that are placed on the right to vote (e.g. being of sound mind, not having being condemned of certain types of crime, etc.), as well as residence in constituency/ward where her/his vote will have effect.

But none of this is done by the ECK. The only documents requested for registration are the national ID card or a Kenyan passport. They only contain entitlement information concerning citizenship and age. There is no information concerning residence (or the other conditions that would allow incorporation to or exclusion from, the register) in the national ID, with the exception of the sub location. The "residence" aspects of entitlement are entirely bona fide. Both Form B (Application to Register as an Elector) and the OMR form include a declaration: "I, solemnly and sincerely declare that ... I am qualified to be, and not disqualified from being, registered as a voter under the law in respect of the class or classes of election for which I now apply for registration". The ECK does not require any additional proof, nor are the registration officers required to make any specific questions regarding these aspects of the entitlement. It does not conduct ex-post-facto investigation, or any other form of verification. The number of objections concerning other people's registration made by individual voters or political parties is very low. The ECK Chairman, with his detailed and extended experience,

could not recall more than five cases of prosecution for offences in this category in the more than 15 years he has been involved in electoral matters.

Another specific problem is that the requirement to present a national ID card for registering as a voter excludes from the right to vote to a non insignificant proportion of 18/19 years old persons. Although the Registrar of Persons has a limit of 90 days for delivering the National ID, the waiting period is frequently significantly longer.

It should be noted that neither the Constitution nor the Elections Act specify any required means by which a person proves his or her eligibility to register to vote. The only reference to the use of the National ID card appears in the Registration Regulations, which are appended as a supplement to the Elections Act. It is entirely reasonable to require some form of confirmation of citizenship in order to register to vote. Not to do so would leave any system open to challenge on the grounds of inaccuracy and potential fraud. Such a requirement, however, should be structured so as not to be overly restrictive and thereby disenfranchise large numbers of otherwise qualified persons. It would be therefore equally reasonable to allow the use of a number of forms of documentation to prove citizenship, like birth certificates or other legal documents, if they contain the pertinent information on citizenship. Although it can be argued that birth certificates are easily forged, they are, in most cases, the only document required to obtain a National ID card, with the exception of the case of border areas, where procedures are significantly more difficult for certain ethnic groups who live on both sides of the borders.

5) Information collected during the country visits

Problems related to registration were mentioned in practically all meetings and, in most cases, revolved around the same basic issues. The problems seem to fold in a few basic categories:

1. Electoral malpractices: The most frequent complaints involved tampering with the Register, including cases of persons illegitimately expunged from the rolls on account of supposed double registration, missing names, and accusations of illegal addition of foreign nationals (Ethiopians, Somalis and Ugandans) to the

Register of Voters. At least in one case, it was argued that there was discrimination against Muslims, who were asked for documents not required from persons of other religions. The elimination of persons whose family name began with O was similarly mentioned in several occasions.

2. The subsistence of dead voters and migrants in the Register was mentioned in several meetings.
3. In practically all meetings the plight of the youth in obtaining the national ID card was emphasized. In a few cases, the existence of bias in the processing of IDs was suggested.
4. In some parts of the country, nomadic populations have limited access to both the national ID card and voter registration, and the ECK was asked to adopt adequate practices to service these populations.

A number of suggestions to solve these problems were proposed:

1. That the national ID cards should be sufficient for voting.
2. That the ECK should implement a continuous process of registration. Since the ECK already has a system of continuous registration, even if rather inefficient, the frequency of this proposal indicates that there is a problem in informing the population on the fact that they can register in between registration drives if they so want.
3. That the ECK should be tougher in controlling the effective implementation of the registration rules and the behaviour of its employees.

6) Completeness, accuracy and currency of the Register of Voters;

Three criteria are used to evaluate the performance of a Register of Voters: coverage, currency and accuracy. They will be used below to evaluate the present situation of the Register of Voters in Kenya.

Coverage – sometimes referred to as comprehensiveness or inclusiveness - concerns the extent to which the voters list contains information on all eligible voters at the time of the election. Currency refers to the extent to which the information on a voters list is up-

to-date on Election Day. In other words, have those who died been deleted from the list? Does the list contain the latest residential address, particularly for anyone who moved since the last election? Accuracy concerns the extent to which the information listed for registered voters is correct and free from error. Errors may happen, as information is initially gathered and recorded by Registration officers, and transferred to a voter registration database used for the extraction and printing of a voters list.

There are two usual ways to compile information concerning the coverage, currency and accuracy of a Register of Voters. A frequent approach (used by IED in their audits of the 2002 and 2007 electoral lists) is to use two types of samples. Through the so-called "list-to-people", a sample of registered voters is chosen, and localized through the addresses normally included in most Registers of Voters. The individuals in the sample are then interviewed, to verify whether they are still alive, have not changed address, and whether the information on them included in the register is free from error. This analysis provides adequate information on the currency and accuracy of the Register of Voters. The complementary analysis is called "people-to-list" and it attempts to measure the coverage of the Register. Usually, a sample of Census segments is chosen, and all the households within them are visited to verify if all citizens of voting age in each household are registered to vote. IED, rather than using census segments, selected 30 homesteads around the sample of polling stations included in their sample. Usually, a number of questions concerning the reasons for non-registration are made, to be used in designing approaches that would result in future improvements of the registration process. This kind of analysis is conducted in some cases by the EMBs themselves or by observation groups.

Unfortunately, there are factors in Kenya that conspire against the full use of this approach. The main problem is that the ECK does have few useful records of the residence of most persons included in the Register. In the case of rural constituencies, IED was able to locate a significant number of the people in their sample using local guides. However, the lack of information on residence makes it impossible to locate persons in the selected samples in urban areas. Therefore, IED studies were limited to rural constituencies, which introduce a bias in the analysis.

However, the information collected by IED, even if derived from a non-representative sample, provides indications concerning the accuracy of the Register. In a sample of slightly over 1900 cases, the study found that when comparing the information in the national ID with that in the voter's card and the Register of Voters, there were differences relating to the ID card number in 2.6% of the cases, in the voter's name in 7.2%; in the date of birth in 2.5% of the cases; and in the gender of the voter in 0.9% of the cases. When comparing information in the voter's cards with that in the Register of Voters, differences were found concerning the number of the voter's card in 2.1% of the cases, and concerning the Constituency name in 0.1% of the cases.

The other standard approach is to use demographic information, which provides rough but adequate measures of coverage and - partially - of currency (it is not possible to determine the currency of addresses using demographic tools). For instance, according to the Census of 1999, the proportion of women in the population was 51.4% while the proportion of women in the 2007 Register of Voters was only 47.1%. If women had registered at the same rate than men, the total number of registered voters would have been of 15,384,572, rather than the actual 14,296,180. In the hypothesis of identical levels of registration, the number of registered women would have been 7,907,670, rather than the 6,819,278 that effectively registered. This suggests that the magnitude of women under representation is well over a million (1,088,392) - a significant 7.6% of the total number of registered voters. Furthermore, the participation of women has been decreasing throughout the years. In 1997 the percentage of women in the Register was 47.9%; in 2002 it decreased to 47.7% and in 2007 was only 47.1%. Since there are no external factors explaining this trend, the only answer lies in the inability of the ECK to conduct focused efforts to redress the gender balance in the Register.

Another interesting analysis is the comparison of the demographically estimated number of deceased persons of over 18 years of age, corrected by the percentage of registered voters to total population for a given year, and the number of deceased persons that were deleted from the Register of voters. The difference indicates the number of deceased persons that the EMB has been unable to detect and therefore remain included in the Register. According to the ECK, the number of deceased

deleted from the Register between 1997 and 2007 was 513,148 persons. Central Bureau of Statistics estimates for the same period project the number of deceased persons aged 18 years and above at 1,733,413 persons. Even if the figures are corrected to reflect the fact that only a certain percentage of the Voting Age Population (VAP) is included in the Register, the discrepancy is significant.[1].

The distribution of the deleted deceased per province, if compared with the total number of registered persons per province, gives an idea of the capacity for capturing data in the different provinces.

PROVINCE	# of registered voters as of December 2007	# of deceased deleted 1997 through 2007	Deleted as a % of RV
Nairobi	1,275,445	2,758	0.29
Coast	1,178,537	34,755	2.95
North Eastern	315,756	3,307	1.05
Eastern	2,374,763	92,744	3.91
Central	2,186,936	73,447	3.36
Rift Valley	3,358,381	83,832	2.50
Western	1,564,682	80,334	5.13
Nyanza	2.041680	141,971	6.95
National total	14,296,180	513,148	3.95

Another type of analysis frequently conducted is shown in the figure below, which compares the age structure of the population at large with that of the Register of Voters. As it may be expected; the number of older persons in the Register exceeds that in the population at large, since it includes a number of deceased people. The excess is represented in the graph by zone A. On the other hand, young people are under registered, and the numbers of people in the 18-19 years range in the Register is

[1] The information used in the paragraph originates in two submissions from the ECK.

usually below their proportion in the population at large, which is represented in the graph by zone B.

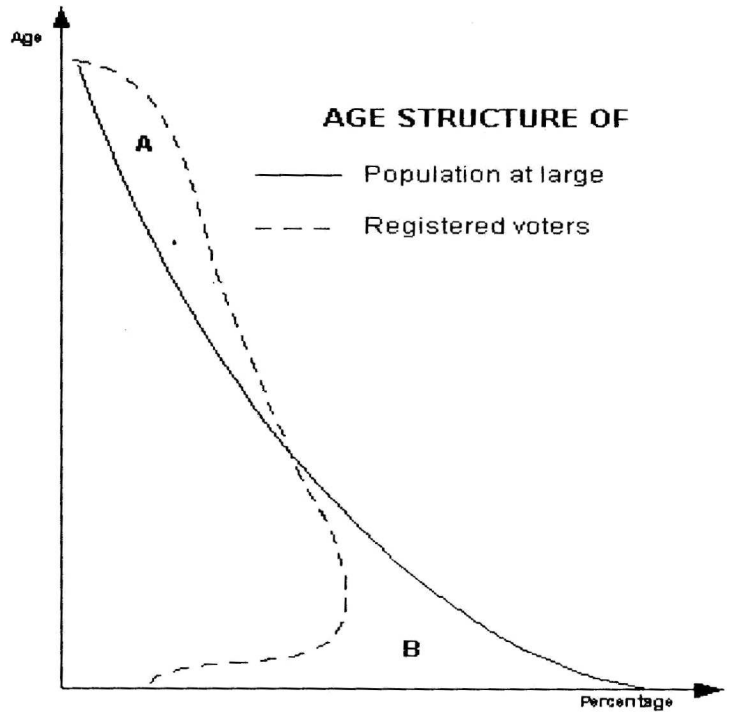


Figure 1 – Comparison of age structure of Register and Population at large

In the case of Kenya, the comparison of the age structure of the population at large and the age structure of the Registered of voters produces the results indicated in the table below:

Age Cohort	18	19	20-24	25-29	30-34	35-39	40-44	45-49	50-54	55-59	60+
Population	5.1	4.0	20.3	16.8	12.2	10.2	7.5	6.0	4.9	3.3	9.7
Register	0.4	1.9	15.6	14.2	15.4	11.9	7.9	9.3	6.0	5.7	11.6
Under Registration	4.7	2.1	4.9	2.6	-	-	-	-	-	-	-
Over Registration	-	-	-	-	3.2	1.7	0.4	3.3	1.1	2.4	2.0

Note: The number of registered voters by age group has been provided by ECK. It includes a 1.04% of voters with unspecified age. They have been distributed proportional in each of the age cohorts.

The table clearly shows that, although the largest incidence of under registration corresponds to persons of 18 years of age, it is not limited to that group. There is a very significant under registration of persons between 20 and 29 years, which cannot be explained by problems in delays in receiving the ID card. The under registration for these age cohorts is compensated by a similarly over registration of persons of over 30 years of age, partially related to failures in depurating deceased voters.

There are other aspects related to the currency of the Register of Voters that might be the subject of estimates if the relevant statistics were available, which unfortunately is not the case in Kenya. For instance, Registers include a significant number of persons who, although still alive, might experience significant difficulties in exercising their right to vote. All registers include a number of people that have migrated to foreign countries or to far away regions of the country. Although some of them may return to the places of registration to vote, the proportion is not usually very high. But as usable statistics on external and integral migration are not available, it is difficult to make estimates for the case of Kenya.

In other words, the number of people in the Register is not always an adequate standard to measure participation, as it includes a significant number of deceased and permanent migrants. Since these errors are accumulative, registers "age". After a number of years, they include so many inaccuracies that the only solution is to re-register the whole population. Although it is impossible to obtain precise data for Kenya, some estimates made for other countries can provide an idea of the magnitude of the gap. In Guatemala, for instance, where the Register of Voters was built afresh for the Constituent elections of 1984, a very detailed study conducted in 2002 estimated the total number of deceased and migrants still in the Register at a level as high as 25%.

The relevance of the discussion above is not limited to the eventual "aging" of the Kenya's Register of Voters and the eventual need to build a new one from scratch. In order to conduct proper evaluations of voter turnout, it would be inadequate to use the total number of registered voters for each polling station or constituency. The "real" turnout should be related to the number of registered voters remaining after perfectly

purging it from deceased people that the ECK has not been able to identify; plus permanent migrants still included in the register. The adequate methodological approach for precise information would be, of course, the "list-to-people" analysis which, in the absence of adequate information on residence, could not be used in Kenya. However, the rough demographic analysis conducted above provides a reasonable approximation to the "state" of the register.

The main purpose of the adjustment is to provide a better approximation to the detection of potential anomalies in the turnout in certain polling stations, which would then lead to more detailed analysis of specific cases. At present, the approach used by ECK is to "suspect" of polling stations where turnout exceeds 100%, that is, where there are more cast ballots than people in the voters' list. A more effective approach would be a comparison as follows:

Number of persons in voters' list

+

Persons not in the list but identified through black books (presiding officer should note these cases in log book)

-

Estimates of deceased voters still in list

-

Estimates of permanent migrants

= **Corrected estimate total of registered voters**

It is this corrected estimate that should be compared with the number of cast ballots. If this procedure is applied in the case of Kenya, possibly voters' turnouts greater than 85% (calculated in relation to the traditional measure – number of registered voters), should be considered as highly suspect. The corrected totals will not be the same for each province. In those provinces with a poor record of capture of deceased voters (like Nairobi), the corrected total is lower than in the case of other provinces with better record (like Nyanza).

There is another aspect in which the approach used by ECK does not allow to use the Voter Register as an instrument of control. In a large majority of countries, once the

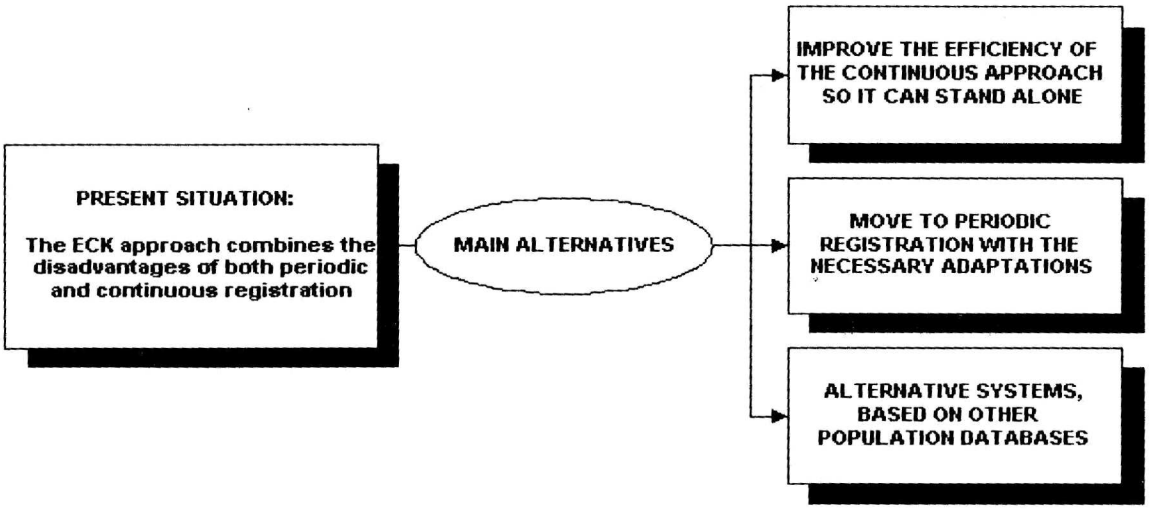
documentation of a voter is verified and s/he is delivered the ballots, the name is crossed in the voters list by one of the polling station officers. When the ballots are counted, one of the main ways of reconciliating the numbers at the polling station is to compare the number of ballots cast with the number of names crossed in the voters' list. It is a very effective control, particularly if the party agents have a copy of the voters' list and they also cross the names of voters when they are announced by the Presiding Officer.

In the context of Kenya, this reconciliation cannot be conducted at general elections, when Presidential; Parliamentary and Civic elections take place simultaneously. While the numbers of names crossed in the voters' list gives the number of registered voters that showed up to vote, it cannot be related to the number of ballots cast in any of the three elections. The crossing of a name in the voters' list only indicates that that person casted a vote in at least one of the elections, but nothing else. If voters were given the three ballots at the same time (as is done in countries much less developed than Kenya without significant problems), then the numbers would very approximately coincide. In Kenya, the process of voting follows an unusual choreography, as ballots are given one at a time. After her/his documents are verified, the voter receives a ballot for one of the elections (the order in which they are delivered is nowhere defined, but is generally assumed that voters receive first the Presidential ballot). The voter then marks the ballot, deposits it into the adequate ballot box, and returns to the polling officers to receive a second ballot (presumably for the Parliamentary election). After repeating once again the procedure for the Parliamentarian and the Civic elections, the voter has the finger inked, retrieves the document, and leaves. This awkward approach resulted in an unusual outcome: if a voter did not favour any candidate in a given election, the voter has two options: (a) the voter can opt for issuing a blank vote, or (b) the voter can opt for simply leaving the polling station without voting in one or more of the elections of the elections. Therefore, the differences between Presidential and Parliamentary turnout may be, in certain cases, very large. In Msambweni Constituency, the presidential turnout exceeded that of the parliamentary election by 34.15%, while in Makadara Constituency the parliamentary exceeded the presidential by 49.17%. In

these condition, the possibility of using the voting lists as a control tool is inexistent in Kenya.

7) Main alternatives for the compilation of the Register of Voters.

The present situation is not particularly adequate, and it might be necessary to consider alternatives. The graph below attempts to depict the three main strategies that can be adopted.



FIRST ALTERNATIVE- Improve the efficiency of the continuous approach so it can stand alone (without need for additional drives): As it was mentioned above, the approach chosen by the ECK was to open a registration office in each of the constituencies. Because of funding problems, the number was reduced to 71, and the ECK has established a permanent presence at District level. No significant measures were taken to obtain information from other sources that would allow ECK to update the Register of Voters, as the possibilities in this regard do not seem to exist in Kenya. As argued above, only a very small percent of the population has chosen to register at the District office. The argument that this is the consequence of not being able to open an office in each constituency, as originally envisioned by the ECK, does not seem to be valid. The increase of the number of registration sites from 71 to 210 would probably have a limited impact in the number of people registering there. The IED study makes a

more extreme suggestion: "We recommend that the ECK considers conducting continuous voter registration at the polling stations since they are easily accessible to the people (IED, 2007, p.vii)". Was this recommendation meant to suggest keeping open the 20,655 polling centres on a continuous basis, just for the purpose of registering voters? That approach might diminish the problems, but the cost would be staggering.

The basic problem with the ECK approach, which is based in voluntary appearances by the citizens to get register, is that there is no real incentive (or need) for individuals to register unless there is an election, since the only use of the voters' card is for voting. In Kenya, as in all other countries in similar situation, citizens will wait until the elections come close to take the initiative in registering, and small increases of registration points will not change the essentials of the situation. Therefore, the only available alternative left to the ECK is to maintain their expensive annual drives, where most of the work is done, while maintaining a costly network of offices throughout the country with a very low productivity.

One potential alternative that was considered at the time continuous registration was proposed might be reconsidered. It was suggested building a large network of registration points through specific arrangements with certain categories of public servants that may undertake the task of interfacing with the citizens, and receive a small fee in compensation. Just to give an example, the ECK could establish a focal point in each primary school and appoint a teacher/administrator as an ad-hoc registration officer, collecting the information from the citizens and delivering the voters' card. The selected person would then submit the collected information to the ECK for incorporation in the central database, and verification of double/multiple registrations, similarly as it is done presently. One of the advantages is that whoever is in charge of registration would have some interest in increasing the number of registered persons, and it should be easier for her/him to transmit information to potential voters in the neighborhood. The additional workload for those who receive such commissions would be small. If the overall yearly work load is assumed to be 1,000,000 "registration events" per year and there are 20,000 registration points (in 2007, the number of

primary schools throughout the country was 26,104), the average yearly workload for each agent would be 50 transactions, each of them probably involving less than 15 minutes. Primary schools had been used as a practical example to illustrate the possibility of a much larger network of agents, working on a very part-time basis, but other arrangements are possible. The administration of such a system would not require maintaining 71 field offices, and a much smaller number should be sufficient. Potential problems related to the collection of forms, transmission to ECK HQs, and the handling of multiple registrations might exist, but they could be easily solved with a well-designed system.

This alternative seems attractive, as it would expand the number of registration points to levels equivalent to those established during a registration drive. Since the registration in Kenya is a one-step process, there would be no particular urgency in transmitting the information to the ECK HQs, which would make it easier the operation of the system. The agents could transmit the collected forms to the provincial offices every two/three months, and the provincial offices would transmit it to HQs with a similar frequency. The IT department would then verify multiple inscriptions, and send information back to agents when a duplicate is detected or, as discussed below, eliminate previous inscriptions. The setting up of the system would involve a significant amount of initial work, but once in place, it should run smoothly.

However, in order to be an efficient alternative to the present system, the creation of a large scale of agents should result in substantive downsizing of the regional ECK structure (the part-time agents could be managed with a smaller number of offices, probably one per province) and in the elimination of the special registration drives. In order to be an effective alternative, it would be necessary that Kenyan citizens take advantage of the larger network and register in numbers that make it unnecessary to undertake special registration drives. It is quite possible – and even probable – that the ECK would maintain the regional network in its present size, and argue for the need of special registration drives before general elections, possibly with significant support from the political parties. It is quite possible – and again probable – that Kenyan citizens would not care much about registering in the absence of the real motivation

force – an election. Should that happen, the practical result would be a significant increase in the inefficiency of the system.

There are other practical issues concerning this alternative. For instance, the part-time agents will not be available at all times and applicants may come when agents are not available. On the other hand, if specific days and hours are set up, the applicant's turnout might be affected. It might not be easy to define the right level of payment for part-time agents. The amount that agents may expect might be excessive or, at the other extreme, inadequate to motivate them to perform adequately their work. However, these problems can be easily overcome. If the ECK is willing to undertake the significant changes involved in the alternative, and if it is expected that the answer of the population will be adequate, then the alternative has significant merits.

There are two other arguments usually raised against this type of approaches. First, Electoral Management Bodies tend to dislike it: these "agents" will not be "real" employees of the EMB, and cannot be trusted in the same degree that the officers that have been recruited by the EMB. However, there is more prejudice in this argument than factual data. The second argument is that political parties mistrust government officials and believe that such a system would be abused. However, the possibility of using a network of existing officers through ad-hoc arrangements is quite promising, and arguments can be brought to the open and defended in a public discussion. No system could stand in place if all arguments are essentially subjective opinions.

However, the strongest argument against the improvement of continuous registration through the increase in the number of permanent registration points is that people would still not register, even in those improved accesibility conditions. The comparison between the number of people who live in places within reasonable distance of one of the existing ECK offices and become 18 years of age and those who effectively register is appaling – only a small percentage does so.

SECOND ALTERNATIVE: Move to periodic registration with the necessary adaptations: Since the amount of registration conducted by the registration officers during the year is almost negligible, another – rather extreme - alternative would be simply to close down or substantially diminish the size and/or number of the ECK decentralized offices, and

update the Register of Voters through annual drives as presently done. Given the poor record of ECK District offices, not much would change, and ECK would have substantial savings.

It would not be strictly necessary to conduct annual registration drives. The reason for having these drives is to keep the Register of voters updated, in case of by-elections. As mentioned above, the law does not permit registration to take place once a seat (parliamentary or civic) has been declared vacant. There is an obvious reason for this measure: if the registration of voters is kept open when a by-election takes place, it would be easy to "import" voters to the constituency, as it is so difficult to verify residential entitlement. However, if registration of new voters is limited to those that had reached 18 years of age since the time of the last registration drive, and the possibility of transfers is excluded or tightly controlled (which might require a simplification of the conditions for entitlement), the possibilities of illegally transferring voters would be significantly diminished.

The alternative described above creates a different mix of continuous and periodic registrations. It involves doing a full-scale national registration exercise before each general election, which ensures a high level of currency of the Registers. The effort necessary for these national drives need not be larger than that of 2007, as argued above. However, the Register of Voters built for a general election will not be discarded, and it will still be used for the by-elections in between general elections after a restricted constituency-level update, as described above.

A system based on a full registration exercise before every election, complemented with special registration drives limited to those voters who have reached voting age in case of by-elections, will be simple to administer, and it should be sufficient to maintain a small network of strong provincial ECK delegations. However, such a system would have a limited flexibility and would need adequate time for conducting partial registration in case of by-elections. It might be necessary to extend the period between the moment in which a seat is declared vacant and the date of the by-election. Furthermore, it will complicate the organization of a new parliamentary election in case of dissolution of the Parliament according to Section 59 of the Constitution.

It should be mentioned that such a change would have significant perception issues. It would involve moving from a modern (in theory) but inefficient (in practice) system to an efficient, although somewhat primitive, system. Therefore, it would be perceived as a step backward, rather than a possible move in the right direction.

THIRD ALTERNATIVE: Alternative systems, based on other population databases: In most countries there are several public organizations that maintain large population databases, from which it is possible to derive a voters' register, thus avoiding the costs that Electoral Management Bodies (EMBs) must sustain for the maintenance of a network of offices, in the case of continuous registration; or the costs of conducting periodic registration drives; or the cost of both, as it is the case of Kenya. In some cases, like Denmark, the population data base used as a basis for the voters' list is the national civil registration system maintained by the Ministry of Interior. In other cases, the population data base used is that backing a national identification document that may be issued by other public organization. Although these two cases are the most common, there are examples of the use of other data bases. In Sweden, for instance, the basic lists are provided by the Tax Office. In Iraq, given the absence and limitations of most available data bases, the lists used for food distribution (established due to the scarcity caused by sanctions) were the basis for the Register of Voters used for the 2005 elections.

The use of another population database as the initial source of information does not mean that the EMB will relinquish its control over the decisions of who should and who should not be in the voters' list. The EMB would define the criteria that will be used to extract the sub-set of citizens who are relevant for the purpose of registration. The EMB would also eliminate persons who have been deprived of the right to vote and make all other necessary adjustments.

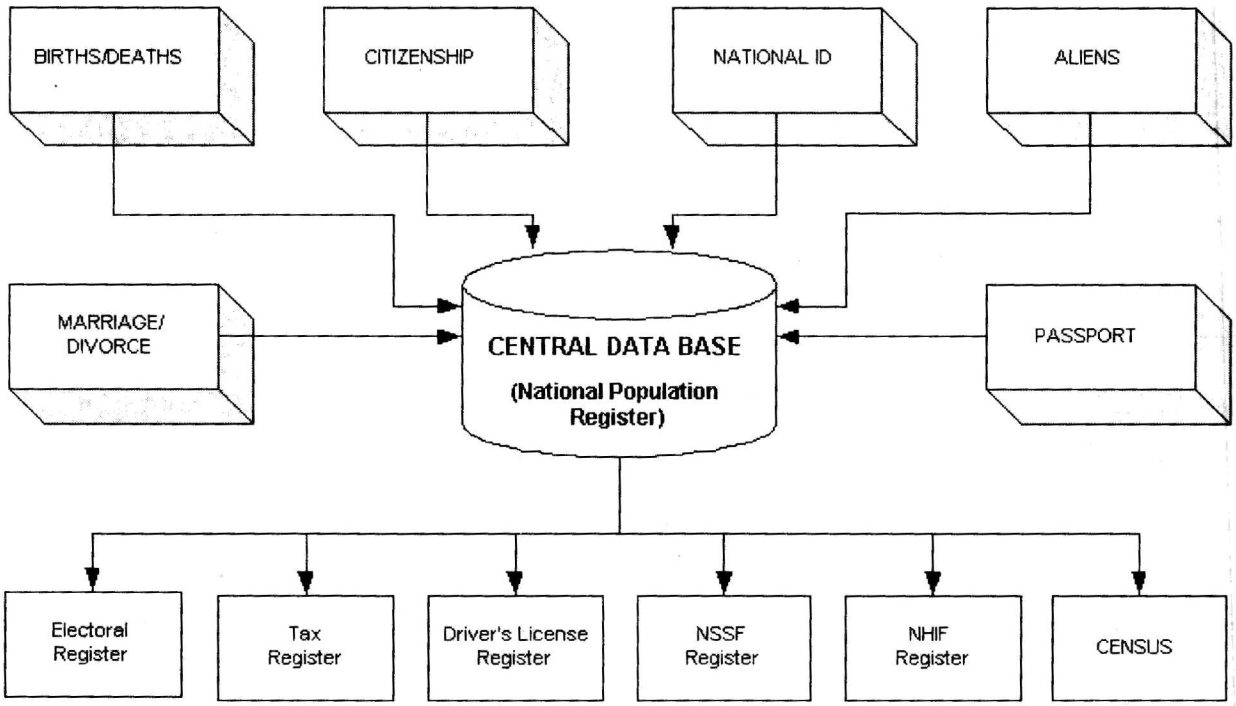
Under these systems, there will be little cost for the EMB related to the collection of data for voter registration because the key information would have already been collected and compiled for the specific purposes for which the other database was established. Efficiency considerations are quite different. While a Register of Voters is only used for elections, other population databases are used for a variety of administrative purposes,

which justifies sustaining their higher compilation cost. While the motivation for registering in a Register of Voters is only the acquired capacity to vote, a citizen not included in a civil registry or in the database behind a national ID document may not have access to a wide variety of social services, such as employment or unemployment benefits, health care support, and education. This is a very strong incentive, and the coverage of other population data bases like the Civil Register or a national ID card is much higher than that of the Register of voters. It might be recalled that, in the case of Kenya, the number of people included in the voters' lists used in the 2007 general elections was 14,3 million, against the 19.8 million of persons over 18 years of age who had been issued national ID cards at the time the Register of Voters was compiled.

Not all population data bases can be used to extract a Register of Voters. For instance, Civil Registers exists in practically all countries. However, not all of them can be used as a basis for a Register of Voters. Quite frequently Civil Registers have a decentralized structure, where municipalities maintain the registers for their area of influence, usually as a collection of documents. This kind of civil register cannot be used as the basis of a Register of Voters. It is only when the Register is fully computerized and updated, that it can be used as the basis for a voters' list, as it is the case of Denmark.

In most cases, the Register of Voters is more easily derived from the database that sustains a national ID card. In the case of Kenya, there has been a proposal for the integration of Population Registration Systems (IPRS). The initiative is based on the fact that population services are carried out by various Government Agencies operating under different legal mandates, such as the Civil Registration Department, National Registration Bureau, Immigration Bureau, Registrar General, National Social Security Fund, National Hospital Insurance Fund and, of course, the Electoral Commission of Kenya. The strategy of the system is based on the introduction of a unique Personal Identification Number (PIN) to be assigned at birth for all Kenyans. Residents will also be assigned a PIN, with a number that will allow differentiating Kenyans from non-Kenyans. The PIN will serve as a common identifier in all subsequent registrations. For

example, upon reaching the age of majority, the PIN will be the basis of ID and voters registration. The graphic below describes the logic of the system:



The information in the database will include the following: Personal Identification Number (PIN); Names; Date of Birth; Place of Birth; Gender; nationality; Marital Status; Residence/Physical address; Occupation; Biometrics; Date of Death; Ethnicity/Race. As all the information will be in electronic form it will be possible to derive the Register of Voters from the National Population Registration Database.

While the linking of national population databases is a significant step ahead, not all the problems are automatically solved. For instance, the performance of the national ID database in eliminating deceased might not be significantly better than that of the Register of Voters. Similarly, the currency of the new database in relation to addresses may present some problems. Important documents, like the national ID card, do not lose validity if a person changes residence and does not inform the authorities of the fact. As a consequence, there might be problems with the currency of addresses in the database. These problems might introduce difficulties in linking voters with specific

polling stations, which might be further compounded if the definitions of residence used by the various users are different. Typically, the rather flexible definition of residence for voting would be inadequate for a national ID document. While there are adequate technical solutions for these problems, they are not always easy to implement. In case of adopting such approach, the ECK would probably need to conduct a thorough study of these problems.

The alternative of moving to a system based on a National Population Register that would feed other population databases, is consistent with modern practices and tendencies. However, it is not exempt of problems. First, the ECK would be forced to rethink the role of its regional network. Without being involved in registration, the main leiv motif for the network of regional offices would be lost, and the work load of these offices in-between elections would be insignificant, unless re-defined. Therefore, unless it is the ECK who is in charge of the new Register, a large proportion of their field personnle should be transferred to the new institution, who would benefit from an influx of experienced personnel. The second problem has already been mentioned: the difficulties of linking voters to polling stations under this system. The third problem relates to implementation. Experience from other cases suggests that the full implementation of a system like the IPRS takes not less than two years, and frequently more. Therefore, unless its implementation begins in 2009, the system will not be fully in place for the 2012 general elections. The ECK should be aware of this possibility, and have alternative plans at hand.

However, this is the way forward for ECK – most other EMBs are moving in similar direction. At least, even if the IPRS is not implemented, it would be quite feasible to integrate the issuance of the National ID card with the registration of voters, so that when a person requests the ID card, s/he will automatically be inscribed in the Register of Voters and informed of the location of the polling station where s/he should vote (a cheap voter card containing such information can be provided to the voter). ECK should begin immediately the necessary studies to implement this solution (resorting, if so desired, to external technical support). The total budgetary resources devoted to the maintenance of the field offices and the conduct of yearly registration drives can be

estimated at around 5,000 million Ksh[2]. 350 persons work at the ECK network of field offices. If a significant part of the human and budgetary resources today devoted to the registration of voters is transferred to the implementation of the new system, this would allow a much faster implementation of the IPRS, which should be the final goal of both ECK and the Government of Kenya.

8) Some potential adjustments in other aspects of registration.

Qualifications for entitlement: The qualifications for entitlement to vote in a specific constituency or ward are unnecessarily complicated and of extremely difficult verification, particularly in the case of the entitlement to vote in civic elections. Qualifications could be limited to residence, unless there are strong arguments for maintaining some of the other categories presently included.

Requirement of voters' cards for voting: This seems to be a redundant requirement. The presentation of the voters' card is a necessary but not sufficient requirement to exeercise the right to vote. It is necessary, because unless produced at the polling station the voter would not be allowed to exercise the right to vote even if s/he is included in the voters' list, which shold be the real proof of regsitration, as the voters' card can be easily counterfeited. It is not sufficient, as even if the voter produces a voter' card, s/he cannot vote unless her/his name is included in the register.

The entitlement to vote in a given polling station is established by the appearance of the name of the voter in the Register, and not by the possession of a voter's card. The identity is proven through the exhibition of the national ID or a passport. If the name of a voter is found in the list, and the identity can be proven by the national ID, what would be the purpose of demanding the voters' card for voting? The voters' card is useful to the voter and the electoral authorities as a reminder of the number of the voter and the polling place where voting will take place, but it is not an essential electoral document.

[2] As mentioned above, ECK spent around 2,300 million Ksh in the two registration drives in 2007. In each of the years 2003 to 2006, the ECK spent an average of 350 million in the maintenance of the field offices, and an equivalent amount in conducting the annual registration drives.

The problem of young people's registration: A Kenyan citizen who reaches the age of 18 years is entitled to vote, and should not be deprived of that right on account of administrative issues – like the excessive time it takes to obtain the national ID card. This should be considered by the electoral authorities as a matter of principle and it should be the responsibility of the ECK to ensure that this group of people is able to vote. The requirement to present the national ID card is established in the regulations, and could easily be changed, allowing people in that group age to present alternative documents. Another alternative would be to request the National Registrar of Persons to extend the national ID card at the age of 16, which would solve the problem in most of the cases.

Transfers and cases of double and/or multiple registration: The ECK has usually been adamant in eliminating double and multiple registrants from the electoral rolls. In 2007 the ECK, under pressure from the political parties, allowed to vote those persons with double registration, provided they surrendered their cards at the moment of voting. It should be noted that the responsibility for the double registration might lie on ECK itself, and not on the voter. When a person transfers from one constituency to other, the registration officer in the receiving constituency should send the information to the registration officer in the constituency of origin, so that the name of the voter can be eliminated from the Register. There are some cases in which this is not done properly, and that such a mistake would be considered as the fault of the innocent voter. Given this possibility, it might be better to let in place not the first but the last inscription. Rather than compiling a list of double registers and letting them to vote or otherwise depending on the decision of the political parties, as done presently, the ECK might simply eliminate previous inscriptions. Each polling station should receive, on occasion of an election, a list of the people who has been transferred to other constituencies/polling stations. In that way, if a person shows up to vote in her/his old polling station, s/he can be reminded of the change.

ANNEX 4.A

COMMENTS ON THE ANALYSIS OF TALLYING AT KICC PREPARED BY THE FIVE NATIONAL OBSERVERS

Countdown to deception: 30 hours that destroyed Kenya **How to steal an election: Kenyan Elections Observers' Log: Dec. 29-30, 2007** *By* Kenyans for Peace with Truth and Justice	**Analysis of the Accuracy of the Countdown**
On Sunday, December 30, 2007 at 1830, Mwai Kibaki was sworn in as President of the Republic of Kenya at State House in Nairobi. Three forms of violence immediately broke out across the country: disorganised and spontaneous protests; organised militia activity; and disproportionate use of force by the Kenyan police force and General Service Unit (GSU). As a result, over 500 people were killed, 4,000 exiled in Uganda and over 250,000 people internally displaced. Many more are in hospital nursing injuries. Domestic election observers who monitored the final hours of the presidential ballot tallying and announcements noticed transgressions at once brazen and shocking. The following log captures the critical highlights of Kenya's deviation from democracy.	*The paper duplicated in the columns to the left is the most influential document written by electoral observers in regard to the 2007 Kenyan elections. It is clearly the source of similar allegations by the EU observation mission, and was reproduced widely by the international press.* *The purpose of the comment below is to analyze the accuracy of the comments made by the KPTJ observers and whether the facts observed constitute attempts at rigging or simply incompetent practices by the ECK.* *It should be noted that the ECK willingness to open the tallying centre and room to observers is not precisely a symptom of deception.*
Saturday December 29, 2007	
1343: Results for 174 constituencies received and the gap narrows While sitting with Institute of Education in Democracy (IED)'s Executive Director, Koki Muli (observer), and journalist Kiss 100's Paul Ilado (journalist) on the second floor of Kenyatta International Conference Centre (KICC), the ECK's Chair, Samuel Kivuitu, receives results that put the gap between the Party of National Unity (PNU)'s Kibaki about 107,779 votes behind the Orange Democratic Movement (ODM)'s Raila Odinga—Kibaki has 3,697,768 and Odinga 3,805,547 votes, while ODM Kenya's Kalonzo Musyoka has 498,361 votes.	*The ECK, against the advice of experienced external advisors, had decided against the provision of "partial or progressive" results, that could have started flowing from all 210 constituencies in the morning of 28th December, providing the public with a balanced view of results.* *The ECK opted for announcing results by constituency arrived. Furthermore, results were informed to the public without placing them in proper contex: for instance indicationg that most of the missing constituencies were located in strongholds of the incumbent.* *Many of subsequent problems could be attributed to this basic imprudence of ECK.*
1500: Nail-biting wait	
Some ECK Commissioners express concerns to Muli about the long delays and remark that, since the gap between the two front-runners is narrowing, the ECK may have to await results from all the constituencies before announcing the final tally. This, it is feared, will heighten tensions and anxiety among political parties, their candidates and supporters. No one seems to understand why the delays were so long, especially as the ECK had been better prepared than in 2002, when such delays were not experienced.	*It is an obvious concern: if the gap is narrowing, there is no alternative but to count all constituencies before announcing the results. This is a standard procedure.* *Delays were greater in 2007 because of the larger number of candidates and of polling stations as well as for requests for recounts in several constituencies.*
1600: Ballots scrutiny	
Kivuitu becomes more suspicious of discrepancies and begins to contemplate a re-examination of results. Most results are not available as they have only been telephoned in. Kivuitu yields to pressure from ODM and PNU to scrutinise the tallying of presidential ballots in all the 210 constituencies after party agents point out that votes being announced by the ECK's tallying centre in	*Results are always telephoned or faxed as soon as available – they are announced as soon as received, and are what ECK calls "provisional results"* *Although those discrepancies might have looked suspicious at the time, the later analysis allows the identification of adequate reasons for discrepancies, mostly related to the lack of capacity and*

KICC do not agree with those announced at the constituency tallying centres. He agrees to have two political party agents each for every presidential candidate and five domestic election observers verify the results. Kivuitu says he wants the findings in a report to be discussed by all ECK Commissioners the following morning.	*of adequate training of the ROs.* *Again, the acceptance of the verification and the allowing of observers to be present during the process seem to be another symptom of transparency.*
1800: The night shift begins	
The atmosphere inside the ECK is tense. The day teams leave without properly handing over to the night teams. Kipkemoi Kirui, deputy leader for Team II (night), notes that although results for Lamu East, Lamu West, Wundanyi and Dujis have come in, they do not have the statutory documents, Forms 16A, 16 and 17A, accompanying them. The day team leaders responsible have therefore not signed for them. Kirui also refuses to receive them without the necessary documents because there are doubts about the verity of the data. Word goes round that his team is not accepting results without the accompanying Form 16As. For most of the night, he and his team repeatedly call the returning officers for results together with statutory documents. Statutory documents for Ijara, Galole, Wundanyi and Dujis are not received even though the results are phoned in.	*According to the regulations, the only statutory document is Form 16. The other statutory document is Form 16A, but for tallying at constituency level. Form 17A is a tally sheet from which the results of Form 16 are derived. In order to tally the results for the presidential election, only the Form 16 is necessary. As the Secretary of the ECK has testified, Forms 16A and 17A are required essentially for administrative purposes – for verification if problems arise in relation to a specific constituency.* *While normally it is –and should be – expected that ROs bring the full set of forms with them, this may have not happened in several cases, for reasons explained a posteriori. Still, the duty of the verification tables was to receive the Form 16 and compare it with the faxed/telephoned results. Mr. Kirui was not proceeding according to instructions when he refused to receive results unless all the forms were submitted.*
1900: Setting up for verification	
The tallying centre at KICC is set up for ten teams, each sitting around a table to receive, verify and forward constituency results to the internet technology (IT) team to prepare for announcement. The teams are managed by a team leader and a deputy leader. Most of the teams consist of returning officers and ECK staff. Each team is working on about 21 constituencies shared according to ECK's own plan so that, for example, Team I deals with Mombasa and Nairobi.	*This statement is incorrect. No RO is - or can be – member of a verification team. Only the Team leaders were, in all cases, ECK staff. Overall, between 90 and 95% of the staff at the verification tables were temporary staff contracted for such purpose.*
In addition to tables for the ten teams, more are reserved for use by ECK Commissioners and senior staff as well as filing clerks, spread out strategically in the room to enable any of the above mentioned people to operate from a station. There are also waiting chairs reserved for returning officers, security staff and other people allowed inside the rooms.	*No comments. Description is adequate.*
2000-2100: Initial hitches	
Observers are denied access to the tallying room at KICC. They get the ECK Chair and Secretary to intervene and are finally let in. ECK Deputy Secretary, Suleiman Chege, who receives them congenially, insists that they be accorded all the help they need. Observers are conducted on a tour of ECK's offices enthusiastically.	*While it is true that the observers were initially denied access because they were not included in the lists of the security staff, the fact that they were allowed as soon as they requested access, and were received "congenially and enthusiastically" speaks by itself. If there was something to hide, such openness would have not existed.*
2237: Verification begins	
After arguments about how and where to begin the verification, work finally begins. James Orengo for ODM insists that results for all 210 constituencies be reviewed while Martha Karua for PNU wants scrutiny to be limited to Forms 16A of only contested constituencies, which she insists they have to identify and agree on since the discrepancies and problems associated with tallying are not only in constituencies that the ODM identified in the afternoon, mostly in Central and central Eastern	*I can't see any wrong doing in this description of events, although I would certainly agree that Mr. Melli should have been received with smiles.*

Provinces, but were in Nyanza and the Rift Valley. Julius Melli, Association of Professional Societies in East Africa (APSEA) (observer) encounters a hostile reception at the verifying tables. Karua complains about there being too many observers, prompting a domestic observer to move from the table where agents of political parties are seated to another table where he is not noticeable.	*I can't see any wrong doing in this description of events, although I would certainly agree that Mr. Melli should have been received with smiles.*
2247: Extent of the problem	
All results for the presidential election are in except for 14 constituencies. Observers immediately notice discrepancies in the results transmitted from the constituencies to the ECK's headquarters at KICC. They also notice that a number of the statutory documents for the constituencies' returns have serious anomalies:	*As mentioned above, there were discrepancies between provisional results faxed/telephoned and those in the Form 16 brought by the ROs. The tallying at constituency level was characterized by multiple arithmetical and other errors, detected by IREC analysis in all cases analyzed. In some cases, the difference was identified by the ROs before travelling to KICC with the original Form 16. In a few others, ROs had announced "partial" results, even if they were not supposed to do such thing. But some ROs were not well qualified, and were subjected to pressures to deliver results.*
a) they are not signed by the returning officers;	*All Forms 16 we have seen were signed by the ROs. Why wouldn' they sign it?*
b) they are not countersigned by agents;	*Forms 16 are not supposed to be countersigned by agents. There is no place in the form for it.*
c) in some cases, only photocopies of these forms are available even though the law requires that the originals be filed;	*As far as we know, all Forms 16 brought in by the ROs were originals. Even if there might have been a few photocopies, all Forms 16 are signed by the ROs.*
d) although all these forms (Form 16A, 16 and 17A) require an ECK stamp to stamp to validate them, those that have a stamp are the exception rather than the rule;	*The reverse is true. Almost all have the stamp, although there might be a few exceptions. It should be also pointed out that the ECK stamps are extremely easy to counterfeit, if need be.*
e) ECK Commissioners have thus announced constituency results without verifying their authenticity with the necessary statutory documentation. For example, provisional results were telephoned in and even though the ECK called back the returning officers to ensure the results indeed came from them, most returning officers phoned in different results from what they delivered in person to KICC. Yet the ECK Commissioners accepted and included these results in the final tally;	*These two paragraphs indicate the limited knowledge of the observers concerning the procedures to be followed at KICC. ECK commissioners announced provisional results on the basis of the faxes/telephone calls from the constituencies. In most cases, final legal results as contained in the Form 16 brought in by the ROs were identical to those faxes. If that was not the case, the changed results should have been announced, and this was done in practically all cases (IREC has identified only one exception). The final legal results as in Form 16 were those incorporated in the final tally.*
f) Although the ECK Regulations (Parliamentary and Presidential Elections Act, Cap 7 of 2007) clearly states that the ECK shall not accept for results that showed voter turnout of 100 per cent and above, the ECK Commissioners allowed returning officers who had returns over 100 per cent to "correct them." They subsequently accepted and included such results for tallying without any explanation, for example, Maragwa constituency had given results amounting to a 115 per cent voter turnout but the returning officer was allowed to reduce them to 85.24 per cent at KICC and these results were accepted for the final tally!	*Maragwa was the only case in which this happened, apparently because one or more polling stations have been added twice. IREC is paying particular attention to this case and has retallied the forms 16A and reconstructed table 17A.*

g) It is unusual for ECK senior staff and Commissioners to accept results from constituencies without proper documentation and to allow returning officers to prepare the documentation at the ECK headquarters as they did at KICC. Most returning officers did not arrive with proper documentation yet were allowed to prepare their documents at KICC. This was the case for Kipipiri, Starehe, Kinangop, Garsen, Turkana Central and Turkana North and Kajiado North.	*Effectively, this is not the normal procedure. ROs who completed their forms at KICC have provided different explanations for this, which do not seem particularly suspicious.*
Observer inquiries establish that agents were unable to sign Form 16A in areas of Central and Eastern provinces because they were not allowed to do so or they were sent out of the counting halls altogether. In some areas, the returning officers inform the observers that agents did not feel secure enough to stay through the counting. This apparently happened in the Meru districts, in Central, Nyanza and parts of the Rift Valley. The agents of PNU, ODM and ODM-K settle on 44 constituencies found to have filed results, already announced by ECK Commissioners, without any primary or original evidence for example, original signed, countersigned and stamped Forms 16A, 16 and 17A.	*The first point is correct, and party agents were denied access in certain areas, mostly by youths from the other side. We do not have information of Presiding Officers denying access to agents unless there was no place at the polling station, which might have happened in some cases.* *The second point is also correct, although the discussion and the revision was mostly an issue between PNU and ODM. However, as it was mentioned above, results were announced on the basis of faxes or telephone calls, before any form arrived to ECK.*
These constituencies include: Gatundu South, Makadara, Likoni, Kitoleni, Galole, Lamu East, Ijara, Wundanyi, Malindi, Voi, Dujis, Igembe South, South Imenti, Nithi, Kitui West, Kitui South, Mwala, Kinangop, Ol Kalou, Mukurweini, Juja, Githunguri, Kiambaa, Lari, Eldoret East, Baringo East, Baringo Central, Laikipia West, Nakuru Town, Naivasha, Kuresoi, Rongai, Kimilili, Bumula, Alego, Bondo, Kisumu Rural, Kasipul Kabondo, N Ithiwa, Migori, Kuria, Bomachoge, Bobasi, Nyaribaru Chache and Kitutu Masaba. Results for these constituencies were thus announced in contravention of the law.	*These were in effect the 47 constituencies analyzed.* *The second part of the statement is incorrect. The law only requires the Form 16 duly signed and stamped by ROs. As mentioned several times before, the Commissioners announced provisional results of the constituencies on the basis of the faxes/telephone calls made by the ROs which was the standard procedure.*
In addition, results for Dagoretti constituency were found to have been announced while vote tallying was still in progress. Documents for Kinangop, Kipipiri, Ol Kalou, Ndaragwa, Tetu, Kieni, Mathira, Othaya and Ndaragwa had no ECK stamp. Many constituency results were received and announced by Commissioners without the signatures of ECK officials and all party agents. Indeed, some of the documents conveying the results contained only the results without the presiding officers' signature, ECK stamp or any agent's signature. For example, there were no signatures and stamps in most Forms 16A, 16, and 17 A from Nithi, Kitui West, Kitui South, Mwala, Kinangop, Ol Kalou, Mukurweini, Gichugu, Lari, Mathioya, Eldoret East, Mosop, Aldai, Baringo East, Baringo Central, Laikipia West, Naivasha, Nakuru, Kuresoi, Kajiado North, and Kajiado South yet the Commissioners had already announced the results from these constituencies.	*Results were announced at KICC while tallying was going on in all constituencies that submitted by mistake partial results which were interpreted at KICC as complete provisional results. This appears to be the consequence of incompetence by ROs and ECK selection and training of ROs, but IREC have not received factual information indicating that it was due to fraud or deception.* *As mentioned so many times before, results were announced on the basis of faxes/telephone calls, and the absence of agents' signature does not convert Forms 16A or 17A in invalid.* *Form 16 is not to be signed by agents, and there is no space in the form for it. However, it would be quite unusual for a Form 16 not to be signed by the RO. We are not aware of such cases.*
Some constituencies had only a few statutory forms, but their total votes were still announced. These included Ndaragwa, which had 25 Forms 16A not signed by party agents. There were 34 Forms 16A not signed for Mathira. There was one Form 16A that had a double entry, and two returns for parliamentary results were entered in the presidential file. The total presidential tally of 16A returns was actually 77,442 votes after additions were verified by a Commissioner, ECK Deputy Secretary and observers against the 80,024 announced by the ECK.	*As mentioned before, the results were announced on the basis of faxes/telephone calls, and the Form 16 does not lose validity even if the Forms 16A and 17A are not enclosed. The signature by party agents is not a requisite for validity of forms 16A* *IREC has identified arithmetical mistakes in all the 19 consitutencies it has analyzed. However, the verification teams had not instructions to verify the additions. If discrepancies were noticed, the correct procedure would have been to inform the RO of the fact and have him correcting them.*
The ECK's legal officer, Jemimah Keli, is notified of these discrepancies by Melli, but she takes away the file and hands it to the ECK's head of research, [...] Laichena, for storage. She says rechecking numbers would slow everyone down. The focus of the scrutiny, she adds, should be limited to whether or not there are Forms 16 and 16A, and not stretch to calculations or checking for consistency in the figures. She says that she and other ECK staff had not slept for many days and	*ECK legal officer was correct, and she properly identified what should had been the focus of the verification team. The ECK procedures for tallying are quite inadequate and IREC will recommend significant changes, but they were the legally valid procedures at the time.*

wished they could do voluntary work like the observers. She asks if Melli is being paid to observe the elections. When answers in the negative, she asks why he is paying so much attention to detail. She is taking notes but seems more preoccupied with justifying every concern raised than addressing it. There are questions about the accuracy of her record of the goings-on.	*The rest of the verbal exchanges is irrelevant, unless we are judging the politeness of Ms. Keli.*
16 Forms 16A for Othaya have not been signed by party agents. Results for the following constituencies were announced without some statutory documents including Forms 16A, 16 and 17A Makadara, Starehe, Likoni, Malindi, Galole, Wundanyi, Ijara, Lamu East, Voi, Dujis and Igembe South. Some results were also faxed as provisional tallies, as in Kirinyaga Central. In other cases, results were announced when there was no documentation to support the announcement, for example, Kimilili, Bumula Alego, Kitutu Masaba, Nyaribari Chache, Bomachoge and Kuria constituencies. In some cases, the returning officers' files available at ECK's tallying centre are in duplicate and ECK senior staff claim they cannot find the original files for scrutiny. Examples include Kieni, Ol Kalou and North Imenti.	*Once again, there is no requirement for Form 16A to be signed by agents, and Form 16 is not supposed to be signed by agents.* *All the other issues did exist, and are evidence of the incompetence of ECK, but not of deception or fraud, as KPTJ alleges.*
Indeed, most photocopies of Forms 16A were neither signed by the presiding officers nor by party agents, yet the results on such forms were included in the tally of results. In some cases there were disparities between the total votes cast for parliamentary and civic elections on one part and those cast for the presidential election on the other.	*Practically all forms 16A we have seen have been signed by the POs, and the signature of agents is not a requisite for validity.* *Disparities are significant, but in the constituencies IREC has analyzed the disparities disappear once the arithmetic errors are eliminated.*
2300: Results without documents	
Work slows to a near-stop until around midnight when a sleepy-looking fellow is ushered in. He is the returning officer from Moyale. He does not have Forms 16A, 16, 17 or 17A. He slips into a doze as Kirui consults. Hours later, Kivuitu announces the Moyale results—without any documentation. After Moyale, results for Saku and Laisamis follow. They are not supported by any of the statutory documents and Kirui refuses to receive them. His Team Leader goes ahead to receive them nonetheless. The ECK Chair announces the results.	*While it might be true that the RO from Moyale did not bring Forms 16A or 17A (Form 17 has nothing to do in KICC), it can be seriously doubted that he did not bring Form 16.* *Once again, it should be remembered that the Commissioners announced the provisional results on the basis of faxes/telephone calls. It is clear that KTPJ observers have no idea that this is what was happening. Moyale results should have been announced well before the RO arrived to KICC.*
The figures are, in a number of instances, overstated. Kirui feels perturbed because there is no reason for the returning officers' failure to bring in the statutory documents three days after the vote tallying at the constituency level. Disparities between provisional results phoned in earlier and those relayed to KICC were also noted for Kipipiri, Kieni, Maragua, Juja and Dagoretti constituencies	*Kirui did not seem to understand well the rules that were followed at KICC. The disparities in results had been explained and IREC is carefully evaluating those cases.*
2300: Slippery returning officers	
Observers Melli and Muli meet the returning officer for Starehe and ask about the constituency. He says the people who had been causing trouble wanted to disrupt the electoral process. They had wanted him to announce results that favoured their candidate and had been threatening him and pushing him forward but he says he had insisted on doing what the ECK had sent him to do. He says that he first called for police reinforcements and then announced the winner because they had recounted the vote twice. There had been an anomaly in one of the stations, he says, and when it was rectified, the winner was known. He does not, however, let observers examine the file for the constituency.	*Wehave no reasons to doubt the description of events by the RO.* *It is a pity he did not show the file to the observers.*

Observers never got to examine the file. The Kipipiri results reported on the telephone give 36,470 votes to Kibaki against the 37,315 announced by the ECK. The final tally on file shows 37,279 votes.	*Discrepancies as such existed in practically all constituencies. This proves the incompetence of the ECK and the system used, but not fraud or deception.*
Sunday, December 30, 2007	
0100: Insider information	
One ECK senior staff member calls Muli outside the hall and asks her if she is aware that something terrible is happening. The ECK senior staff member points out that it is important for observers to scrutinise all returning officers' returns especially of Mombasa, Central, Eastern, North Eastern, Rift Valley and Nyanza. The senior staff member also cautions her that the discrepancies have been planned systematically and are not accidental. She says the scheme involves most Commissioners, who have organised how the tallying will be carried out. There is also the concern that Commissioners were in charge of their regions—which had not been the practice in the past—and most of the Commissioners engaged returning officers who owed them loyalty, in some cases, replacing returning officers who had experience, having worked with the ECK in the past.	*IREC had not been informed by Ms. Muli of the name of the ECK senior staff member, nor provided with further details of such conspiracy, like the naming of the involved commissioners.* *It is true that the Commissioners have been put in charge of regions, and have a last say in the appointing of RO and other staff. The ECK itself has indicated that there were anomalies, but has not identified the regions or the commissioners involved. These are one of the many anomalies that IREC has detected during the electoral process, but they do not seem to be related to the events at KICC.*
0200: Missing returns	
The only constituencies without results are Kibwezi and Emuhaya. In the case of Kibwezi, the returning officer had reportedly been threatened with dire consequences by one of the candidates if he released the results. Although he was assured of transport by helicopter and additional paramilitary police escort, he still would not come in. Emuhaya was bogged down by logistical problems. The ECK Chair announced the results the following day.	*As mentioned before, the Eck announced results on the basis of faxes/telephone calls.*
Electoral official quits	
Kirui's colleagues tell him that results are being reduced or suppressed for certain constituencies. He raises the alarm. He takes his Team Leader, [...] Njuguna, aside and starts saying: "My brother, this is an important national exercise. I am concerned that we are not following the law and we are letting down Kenyans ..." Njuguna tells him he would be recommending Kirui's removal because he was proving difficult. He goes ahead to report him to Daniel Koech, who asks Njuguna to cooperate with Kirui. Njuguna goes back to their work station. Kirui follows him and tells the team that he regards their work as an important national exercise that demands patriotism and neutrality. Kirui also demands respect and cooperation from Njuguna, who says that if he wishes to, he could leave. Kirui leaves the ECK offices for the last time.	*We are fully aware of Mr. Kirui allegations. In most cases, they are due to his erroneous interpretation of the requirements for the validity of a constituency result.*
0400: Fatigue and irritation set in	
Melli says, "I started noticing general irritation and resistance from ECK officials. I asked for the Nithi constituency file, but the returning officer grabbed it and held it close to his chest. The same was the case for the Starehe constituency file. The returning officer for Nithi went outside and carried all his documents with him wherever he went." ECK Commissioners who are asked to intervene defend their staff, saying they had not completed work on the files.	*The description might well be correct, but it does not point to fraud or deception.*

0500: Invented figures show up	
Molo constituency returning officer provides results showing that Kibaki has 50,145 votes at completion of counting but ECK prepares to announce 75,261 votes for him and provides a computer print out of the increased results. ECK Commission staff deny observers the opportunity to verify information on file, saying the result had not been announced. Observers at the ECK tallying centre at KICC who take a break from the tallying room to freshen up are denied re-entry. Those who come in to relieve their colleagues on night duty are also barred from entering. Police presence is strong and the atmosphere tense.	*The Molo case has been exhaustively analyzed, and the reasons for the difference are reasonable.* *If the ECK did not allow the re-entry of the observers, it was a big mistake.*
0930: Agents ordered out	
A message goes out on the public address system asking all agents to leave the premises. Observers are also ordered out and evicted.	*Another big mistake of ECK.*
1000: ECK goes underground	
A media briefing scheduled for 1000 to announce presidential results is put off indefinitely.	*Results were not yet ready.*
1100: Odinga press conference	
The ODM presidential candidate claims he has won the election according to results from his call centre.	*IREC has never been shown results from the ODM call centre*
1300: Trial balloon	
Word goes round that the ECK could announce the results of the presidential election at any time.	*Why would that be a trial balloon?*
1421: ODM press conference	
ODM holds a press briefing at KICC and discloses rigging by the ECK in 48 constituencies after a joint parties and ECK audit of all the 210 constituencies. William Ruto discloses that all 48 constituencies lacked supporting documents and inflated Kibaki's figures. The ECK does not provide any evidence to the contrary.	*ODM did not provide evidence either. The argument in most cases is that when there are more votes at the presidential than at the parliamentary elections, the difference between the two are votes added to Hon. Kibaki. In the 19 constituencies analyzed in detail by IREC the difference derives from massive arithmetical errors by the ROs.*
1620: Protests on the floor	
The ECK Chair attempts to announce the final results of the presidential election. He, however, begun with announcing the results of Molo which were inflated, 75,261 instead of the 50,145 votes announced at the constituency tallying centre. Kivuitu is shouted down by ODM which insists that the contested results need to be resolved, including those of Molo, and also insist the delayed results from Eastern and Central provinces had been inflated. The ECK Commissioners leave the briefing centre under police escort.	*The mistake in Molo is the beginning of the chaos.* *KPTJ does not mention the 90+ percent of turnout throughout Nyanza.*
1642: Bombshell	
An ECK staff member, Kipkemoi Kirui, tells an ODM-convened press conference that the poll results and documents are being manipulated at the KICC, and that he and many other people had deserted	*Mr. Kirui arguments derive, as those of KTPJ, from an incorrect interpretation of the regulations in*

their work stations in frustration.	*place.*
1700: Dogged determination	
A signal goes out to the diplomatic corps that the ECK is about to announce the results.	*Accurate description.*
1739: The Final announcement	
Paramilitary police clear KICC as the ECK Chair announces Kibaki winner of the presidential election in a sealed room. The news is relayed via the public Kenya Broadcasting Corporation (KBC) and picked up by other networks.	*Accurate description.*
1824: Swift swearing-in	
Kibaki is sworn in as President at State House in Nairobi as protests erupt all over Kenya. A live press conference by ODM is pulled off air as the Minister for Internal Security suspends live broadcasts.	*Accurate description.*

When properly analyzed, the description of events provided by KTPJ confirms the impression of a tallying process inadequately designed, and of a system of counting and tallying that lacks proper controls and checks. It makes quite evident the incompetence and lack of foresight of the ECK, but it does not come close to prove wrongdoings, fraud and deception – as the title of the paper suggests.

INDEPENDENT REVIEW COMMISSION (IREC)

REPORT

on the

Data analysis of the 2007 general elections results

Based on sample constituencies and case studies

F I N A L R E P O R T

September 9, 2008

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1 EXECUTIVE SUMMARY

Results are central in any given election. All preparations made before any elections, logistics and other forms systems put in place all come down to the actual voting that takes place, and how results from this voting are tallied, transmitted, recorded, announced and even reviewed or audited. The integrity of the results process is a *sine non qua* of decent, free and fair elections. This is more so in the case of Kenya, because of the electoral system—first past the post, or so-called "winner takes all"—that is presently in place.

This report summarized the results of data and statistical analysis that was undertaken for 19 selected constituency results from the 2007 general election. The analysis was undertaken as part of IREC's research process aimed at helping the Commission inquire into various aspects of the election, especially the presidential one. The report opens by outlining the approach used, criteria used to select constituencies for analysis, methodology employed, limitations, findings and concludes with a set of general observations or recommendations.

The analysis and findings in this report are based on word done on 19 constituencies selected using a robust criteria. Constituencies are selected on the basis of the following criteria: constituencies where there were claims made about the results by political parties and other bodies; constituencies selected using a structured criteria based on various electoral anomalies such alleged high-turn-out, major different in turn-out between presidential and parliamentary elections, and so on; constituencies with special features or attributes that are prone to electoral abuse, such as the constituencies that were last to submit results, areas where major complaints were raised, and so on.

The approach used for our analysis is a process of undertaking simple quantitative tests and re-checks of the results from these constituencies, from the polling station and streams level up to the constituency, and in some cases, national level. Specifically, we aimed at reconstructing form 17A—that tabulates total votes for all candidates from all polling stations—and which is the main basis of form 16—the document that by law is used to get the final election results. Finally, variance, discrepancies, and other anomalies were noted, including the implications thereof.

It must be understood that statistical analysis is limited in some respects in its ability to detect electoral malpractice or fraud. This is because some of these activities, such as stuffing of ballot boxes, may leave the statistics unchanged, hence making it hard to isolate these statistically. Additionally, the data that is generated from the level of form 16A (i.e., polling station level) would say little in terms of electoral (mal)practices that may have taken place in activities preceding form 16A level. However, checking the accuracy of results tallies, entries and transmissions has yielded incredible findings, and possible areas of reform.

Our findings from the constituency analysis fall in different categories. We have discovered a litany of errors in terms of how results for candidates were added up at the polling station level and transferred to form 17A at the constituency level. There is a fair share of errors in computation, that is, addition of results at the constituency level in form 17A. Some of these erroneous results were transmitted to the form 16 and eventually to the national level, where they were, tragically, announced. Some of these wrong results (such as the case of Kirinyaga Central) resulted in one

candidate who did not get the highest number of votes, declared winner. In others, especially for the presidential election, candidates' results were grossly under- or over-reported, as is the case of Masinga, Changamwe and so on. There are clear cases of omission, in terms of candidates' results not being filled properly, or omitted altogether, in the tally of results in form 17A. There are cases where presidential results announcements made have lower figures than those clearly stated in form 16.

Most of these errors and handicaps point to several system—and systemic—failures within the ECK and their planning, management and supervision of the results process in particular, and elections in general. While a technical solution may lie in investing in a robust, appropriate technology-based system, the problem, and solution designed to solve it, goes beyond the use of technology or automation as the magic bullets to solving these problems.

At a matter of priority, the personnel or electoral officers and clerks hired to run the election must be well trained, effectively supervised, and putting in place system of on-site auditing of results before their announcement and/or transmission. Automating a flawed system, without streamlining its procedures and personnel first, would only make fraud and electoral malpractice harder to detect. The future of flawless tallying of results lies in a right mix of appropriate technological solutions, integrity of electoral officers and robust or fool-proof procedures. Here, a trade-off might have to be made between getting wrong, or un-checked results out fast enough, or taking time to tally and announce proper results.

The ECK should cease relying on experience in past elections (implying age matters) at the expense of other competencies such as ability to used information technology, public administration and strong numeric skills. Whilst its not being recommended that returning officers should be statisticians, there would be much value added in one being able to work with large volumes of information, perhaps under pressure. The same applies for clerical staff, or in particular, proof-readers and data auditors, that this report recommends as people who should be part of the elections clerical battalion.

There are other larger issues that are a matter of law and policy. How is it that ECK cannot review or correct results where it detect errors done on, say, form 16, by the returning officer, who are hired as temporary staff? This situation is a fundamental flaw and limits the checks-and-balance system of how results are received and their accuracy and authenticity guaranteed.

In the final analysis, the integrity of results will depend as much on systems and structures, as on the goodwill and faith of electoral officers, the electoral management body and politicians.

2 INTRODUCTION AND OBJECTIVES

2.1 What is IREC

The Independent Review Commission (IREC) was set up on 14 March 2008 (Gazette notice no. 1982). IREC as a body emanates from discussions held under the Kenya National Reconciliation Dialogue, the mediated talks held under the auspices of the Africa Union Panel of African Eminent Personalities, chaired by Kofi Annan. The talks were aimed at resolving the post-election crisis and violence that followed the disputed 2007 general elections in Kenya. IREC was set up after parties agreed to form a committee that would looking into various aspects of the disputed elections. IREC comprises seven commissioners and a staff structure designed to enable it achieve its mandate. The Commission chairman was Justice Johann C. Kriegler.

2.2 Mandate and output

IREC's overall mandate is to inquire into all aspects of the 2007 general election, with particular emphasis on the presidential election. Other elements of IREC's mandate entail analyzing the legal and constitutional framework under which these elections were held, examining various aspects of the Electoral Commission of Kenya (ECK), public participation, conduct of the media, civil society, observers, and to investigate the vote counting and tallying process in order to assess the integrity of the results. In terms of its output, IREC was mandated to, firstly, recommend various reforms that would improve future elections and, secondly, suggest other legal and administrative reforms that it would deem necessary. The Commission carried out its work mainly through investigations, receiving written submissions, research, public meetings held countrywide, and conducted formal hearings in Nairobi.

2.3 Data and statistical analysis

As part of its research process IREC undertook statistical and data analysis of the 2007 general elections results. The data and statistical analysis informed IREC's term of reference (d) and (e), touching on the process of counting and tallying, in order to arrive at a conclusion on the integrity of the results. The data and statistical work had several goals, namely:-

a. Analyzing parliamentary and presidential results of the 2007 elections with a view of ascertaining its accuracy, integrity and highlighting variances thereof;

b. Analyzing results from a select number of constituencies that had been named by various bodies, for instance, in political party submissions to IREC.

c. Analyzing the results/data with a view of isolating constituencies where there were unusual features, e.g., unusually high voter turn-outs, areas with alleged voter or counting anomalies, etc.

d. Providing statistical support to the Commissions meetings and formal public hearings

e. Making recommends to other IREC committees on areas and constituencies that would require further investigative work.

3 STATISTICAL OVERVIEW OF THE 2007 GENERAL ELECTIONS

A general overview of the statistics for the 2007 general elections reveals a number of things.[1] In 2007, the number of voters registered to vote in the general election increased by over 36% compared to 2002. The over 14 million registered voters for 2007 represented about 71% of the 19.8 million Kenyans who had been issued with national ID cards (the voting age population). The election was one of the most competitive in Kenya's recent history. Compared to 2002, the number of presidential candidates increased from 5 to 9, but remained far below the 15 that contested the 1997 election. At the parliamentary level, the number of candidates increased by more than 1.5 times, from 1,035 in 2002 to 2,548 in 2007. The number of civic candidates also more than doubled; and that of political parties participating in the elections trebled. See table below.

Overview of recent Kenya general elections

	1997	2002	2007
Registered voters	8,967,569	10,451,150	14,296,180
Voters under 40 years, %	..	54.0	60.8
Presidential			
No. of candidates	15	5	9
Total valid votes	6,181,701	5,871,408	9,877,028
Winner	2,500,320	3,636,783	4,584,721
% of total ballot	40.45	61.94	46.42
1st runners up, %	30.83	31.30	44.07
2nd runners up, %	10.80	6.18	8.91
Parliamentary			
No. of candidates	883	1,035	2,548
Male	835	991	2,279
Female	48	44	269
Civic			
No. of candidates	8,468	7,012	15,334
Male	8,050	6,630	13,856
Female	418	382	1,478
National turn-out, %			
Presidential	70.74	58.75	70.71
Parliamentary	69.74	58.46	69.57
Polling centres	12,778	14,114	20,655
Polling stations	..	18,366	27,555
Participating political parties	27	39	117

Source: ECK general election reports; varoius documents

".." means data not readily available

[1] It should be noted from the outset that analysis of ECK data are revealed numerous errors of entry, aggregation and other typographical errors. The sum effect of these errors has resulted in various statistics being distorted, as is discussed and explained later on in the report. Hence, the figures presented in this section borrows figures as they appear in ECK reports and results as they submitted to IREC.

The number of parliamentary aspirants in some constituencies increased exponentially. In 1997 the highest number of parliamentary aspirants were in Starehe and Kamkunji constituencies (10 each), and Embakasi and Dagoretti (9 each). There were 81 constituencies in total that had 5 or more aspirants. In 2002 Kangundo constituency had the highest (13) followed by Makadara, Changamwe, Kigumo and Juja (with 10 each). Embakasi had 10; the number of constituencies with 5 and above aspirants rose to 103. In 2007 there were 190 constituencies with at least 5 parliamentary candidates, and for the first time in Kenya's history, there were 28 constituencies with at least 20 aspirants. Some had very high aspirants: Kitutu Masaba (33); Kasarani, Emuhaya, Bomachoge and North Mugirango Borabu (with 28 each).

The election was also very closely contested. The final outcome at the presidential level (with a victory margin of only 2.35 percentage points) was the closest ever. The top two candidates accounted for about 90% of the total presidential vote. The vote was nearly evenly split; unlike the case in 2002 and 1997where the presidential winners had large victory margins. The turn-out in 2007 was much lower than in 2002, but comparable to 1997. Average turn-out for the 2007 election was about 70%.

4 FRAMEWORK FOR ANALYSIS

4.1 Guiding principles

The work was aimed at undertaking analyses that is impartial, unbiased and objective. All due care was taken in terms of checking the integrity of the data and statistics made available by various parties and organizations. However this should not be taken to mean that the originators have used acceptable means of collecting and processing this information. Where an issue relating to the objectiveness of data or a statistical issue arose, this was pointed out. Due prudence has been taken to ensure that analysis is as correct as possible. This however, does not rule out the possibility of clerical error or typos.

4.2 Approaches

There are two types of statistical analyses that can be utilized in analyzing the 2007 elections data. The first is a purely econometric analysis of the data that would be aimed at assessing various statistical tendencies and relationships among established variables such as votes garnered by candidates, parties, etc, in relation to a number of explanatory variables. This can be carried out across time, which is, assessing time series data over 1997, 2002 and 2007 elections. The second is to undertake a simple quantitative and arithmetic/numeric tests in order to assess the results' integrity in terms of tallying and the soundness of the process that was used to produce, record, transmit, receive, store and announce the results. There are various studies that undertook analysis of the results using the first approach.[2] The findings presented here have utilized the second approach.

[2] See, for example, "*The Kenyan Election 27th December, 2007: Was it Rigged*" by David W. Throup, a presentation given during the IREC public hearings. Also the special issue of the *Journal of Eastern Africa Studies*, volume 2 issue 2 2008, that has a special focus on Kenya's 2007 elections.

4.3 Selection of constituencies for analysis

The magnitude of problem that brought about the dispute in results from the 2007 elections is enormous. The entire result and a significant part of the election was in serious dispute.[3] Therefore, the choice of what to analyze needed to be very strategic and robust, but at the same time careful enough in order not to leave out key areas that had serious disputes, or those that could be instrumental in helping the IREC achieve its mandate. In order to identify the constituencies for analysis we were guided by a number of criteria, namely:-

a. Looking at specific disputed constituencies listed by various parties/bodies. For instance, submissions sent to IREC by Orange Democratic Movement (ODM), Party of National Unity (PNU) and other bodies, listed a number of problematic constituencies:-

b. Selecting areas using a structured selection criteria based on various electoral anomalies such alleged high-turn out and so on

c. Areas with special features or attributes that are prone to electoral abuse, such as the constituencies that were last to submit results, areas where major complaints were raised, and so on.

4.4 Disclaimer and limitations: What data can reveal and what they can't

It must be pointed out that while data analysis was aimed at providing insights in the disputed results or data, this analysis on its own, much as its necessary, needs to be complemented by other forms of investigative enquiries in order to arrive at a total picture of what could have gone wrong in last year's election. A major limitation of statistics is that while they can be used to detect abnormal electoral behaviors or anomalies, such analysis can be quite limited or totally incapable of highlighting electoral malpractice of fraud.

For instance, time-series analysis of high turn-out in some constituencies in 2007 compared to past elections have been used by many as an indicator of electoral anomalies. But changes in turn-out are both a function of malpractice and real electoral or political behaviors. Also, is cases of, say, ballot boxes being stuffed with pre-marked ballot papers, analysis of these results may very well reveal little statistical issues, but the situation underneath may very well be that of series of electoral fraud or abuse. As can be seen on the results management process chart on section 9 below, data used for our analysis arises from the point of form 16A, generated at the close of counting at the polling station. Any electoral fraud taking place before this point, or outside what is featured in the statutory forms used, cannot be detected by statistical analysis employed here.

In the case of 2007, where there were vast allegations of changes in statutory forms, this again could very well pass statistical tests, but can only be faulted on account of breaching certain laws or electoral codes and practices. Data and statistical analysis therefore, should be seen in the full picture of other forms of electoral, political and legal processes. Hence, the results in this report therefore, do not necessarily explain the actual voting and other processes that might have taken place in the constituencies analyzed. The analysis relied only on official documents and results submitted to IREC by ECK.

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[3] Various groups, political parties, observer missions and even part of ECK commissioners, have attested to this fact.

5 DATA SOURCES AND METHODOLOGY

The data and information used for our analysis was obtained from the ECK, which had submitted various types of statistical information to IREC. This included:-

- Election results data (presidential, parliamentary and civic results for 2007)
- Voter turn-outs, number of registered voters (including new registrations, transfers, etc)
- Past election data was obtained from official ECK reports of the 1997 and 2002 general elections
- Number of polling stations and centers
- Other types of data, such as on demographics, death rates, were obtained from the Kenya National Bureau of Statistics and Department of Civil Registrar, respectively.

IREC requested ECK to submit constituency files that had copies of form 16As from polling stations for both parliamentary and presidential elections. These files also had form 17A, form 16s, and the administrative data capture forms that were used at the ECK national tally center at KICC to receive (provisional) results. The statistical and data analysis employed a methodology depending on the output needed. This was done for a sample of constituencies based on the criteria above, and which allowed us to arrive at conclusions about the accuracy and integrity of selected ECK results. The analysis entailed checking the system of recording results for candidates, the transferring of figures across the statutory forms (see results management process below), how the results were added and transmitted. This called for a firm understanding of how elections results are generated, the statutory forms used, while at the same time, undertaking simple tests such as re-checking accuracy and of tallying figures. The methodology was therefore entailed analysis of various types:-

a. Checking the accuracy of results and declarations based on statutory forms 16, 16A, and 17A. This entailed simple computations of adding up all votes in these forms, and even in the final national results that were released by ECK to confirm accuracy and computation of such things as valid votes and voter turn-outs.

b. Checking other systems that would ensure the integrity of the entire process. Such as areas of possible abuse or weakness in the entire process of managing results were highlighted.

c. Reconstructing the form 17A, which is the main document/instrument used to amalgamate and tally results at the constituency level. This was the most important exercise, and was built upon the first two steps.

d. Finally, a comparison was made between three total figures: IREC's own summation for totals for each candidate; totals for candidates listed in form 17A and/or form 16; ECK final published results; and then highlighting the differences and implications thereof.

6 CONSTITUENCIES ANALYSED

Using the criteria outlined above, we were able to generate a short list of about 18 constituencies where further scrutiny and analysis was carried out. Each of the five cluster areas listed below produced a list of constituencies. Some of them featured in more than one cluster. These are the ones that were identified for further analysis. Some statistics regarding the list of constituencies analyzed are presented in the table and diagrams below.

Categorisation of constituencies for analysis	
Code	Issue
A	47 constituencies disputed by ODM
B	Those with issues after 29 Dec 2007 night verification
C	Those where form 16 figures differ with ECK data base
D	30 constituencies whose results were received last
E	Others, e.g., high turn-out, strong claims made, etc

List of constituencies analysed with more scrutiny	
Constituency	Incidence in categories (code)
009 Changamwe	D,E
017 Kaloleni	A,B,D
034 Wajir North	E
043 Saku	Baseline
051 North Imenti	A,B,C
052 Central Imenti	n/a
066 Masinga	C,E
070 Machakos Town	C,E
082 Kieni	A,
090 Kirinyaga Central	A,E
095 Maragwa	E
100 Juja	A,B,E
104 Limuru	E,
105 Lari	B,
138 Molo	A,B,D,
144 Kajiado North	A,B,C,D,E
155 Malava	B,D,E
182 Bondo	B,E
203 Bomachoge	E

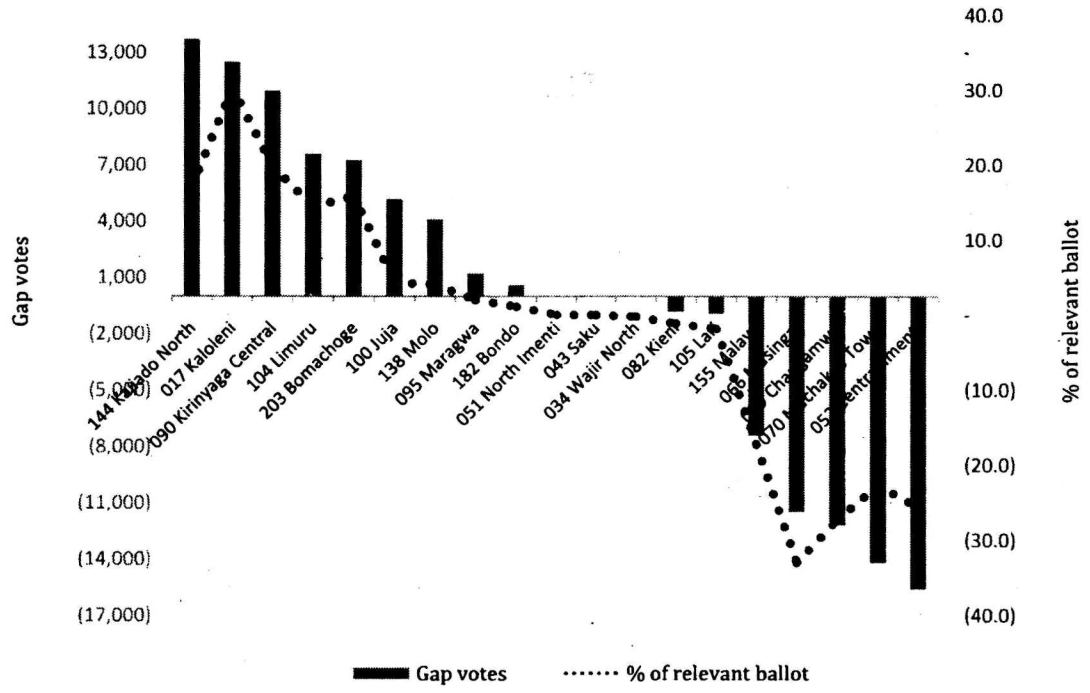
Statistics for case study constituencies											
	Constituency	Registered voters	Presidential cast total	Parliamentary cast total	Presidential valid votes	Parliamentary valid votes	Gap votes (C - D)*	% of total relevant ballot**	% of total registered voters	No. of polling centres	No. of polling stations
	A	B	C	D	E	F	G	H	I	J	G
1	017 Kaloleni	85,131	41,231	28,740	40,581	28,266	12,491	30.3	14.7	94	97
2	090 Kirinyaga Central	68,878	55,380	44,446	55,061	43,957	10,934	19.7	15.9	50	102
3	144 Kajiado North	107,390	79,901	66,190	78,351	63,273	13,711	17.2	12.8	117	188
4	203 Bomachoge	70,590	45,725	38,484	45,725	38,481	7,241	15.8	10.3	130	151
5	104 Limuru	65,771	52,343	44,769	51,940	44,078	7,574	14.5	11.5	46	97
6	100 Juja	163,657	119,964	114,808	119,050	113,646	5,156	4.3	3.2	69	231
7	138 Molo	126,361	100,066	95,967	99,143	94,725	4,099	4.1	3.2	120	204
8	095 Maragwa	70,524	60,117	58,899	59,795	58,163	1,218	2.0	1.7	72	113
9	182 Bondo	62,352	53,282	52,674	53,173	52,332	608	1.1	1.0	85	109
10	051 North Imenti	123,948	84,188	84,158	83,535	83,364	30	0.04	0.0	158	217
11	043 Saku	19,247	14,215	14,214	14,100	14,008	1	0.01	0.0	37	44
12	034 Wajir North	14,176	10,292	10,314	10,292	10,314	(22)	(0.2)	(0.2)	53	56
13	082 Kieni	84,687	73,057	73,898	72,896	72,269	(841)	(1.2)	(1.0)	109	145
14	105 Lari	59,391	50,082	51,015	49,864	50,681	(933)	(1.8)	(1.6)	62	95
15	155 Malava	67,242	35,578	42,983	35,507	41,864	(7,405)	(17.2)	(11.0)	96	124
16	070 Machakos Town	94,844	48,650	62,858	45,811	61,848	(14,208)	(22.6)	(15.0)	113	165
17	052 Central Imenti	78,243	45,209	60,807	44,907	60,205	(15,598)	(25.7)	(19.9)	120	142
18	009 Changamwe	107,545	32,614	44,812	32,614	44,812	(12,198)	(27.2)	(11.3)	53	150
19	066 Masinga	51,302	23,341	34,818	22,942	34,371	(11,477)	(33.0)	(22.4)	118	129

Source: Computed using ECK results; Figures entered as they appear on ECK results. Wrong ones have been highlighted in the constituency analysis.

** Figures in brackets means that there were more parliamentary votes (turn-out) than presidential. Vice versa is true.*

*** Relevant ballot means that for those constituencies where presidential turn-out was higher, the gap votes are taken as a percentage of total presidential votes cast. For areas where parliamentary votes were higher, % gap is taken as a percentage of total parliamentary votes cast.*

Relative differences in turn-out for select constituencies



7 ANALYSIS

The main analytical work that is undertaken is mainly to recheck the process of tallying the results right from the polling station to the constituency, and for some, up to the national level. The reconstruction of the form 17A was done by taking all the forms 16As, checking their entry in forms 17A, and adding this up in a separate spreadsheet to enhance correctness and accuracy. This gives us not only the totals for all the polling stations, but also the totals for each candidate at the constituency level. This is done for both presidential and parliamentary results. This exercise yields three totals that were compared in order to come up with our findings:

a. The total of results for each candidate according to correct addition of form 16A figures;

b. The results as given by the returning officer in form 17A or added up/declared at constituency level; or those in form 16;

c. The results as given by the final ECK announcements, and what was finally published.

These three totals are then compared to see if we arrive at different figures. Variances are explained where possible. There is a second line of analysis which entails simple arithmetic calculation of results as given by ECK at national level, especially those where major differences in presidential and parliamentary turn-outs were recorded. This also has yielded some conclusions about the accuracy and correctness of how the results/data was handled.

8 FINDINGS

8.1 Summary

This section presents the results from the analysis that was conducted on a sample of constituencies. It presents tables that show the discrepancies in results at various stages of the results processing chain, and in some instances, the repercussions arising out of these errors. In summary, the following errors were noted:-

- Errors of entry. Results for candidates in form 16A not entered correctly in form 17A. Some have results mixed up with those of other candidates, others increased or decreased, others omitted in form 17A altogether. While the misstatements involved small numbers, the sum total of these errors of entry at the constituency or national level may have produced material effects, as is the case of Kirinyaga Central, Changamwe, Masinga, and others as listed below. There are cases where the candidates (the minor candidates) had two conflicting results/figures on the same form 16A.

- Errors of computation. These were the most common, and pervasive, errors noted. They occurred at various levels, namely:-

  - ✓ On a considerable number of form 16As at polling stations, the sum of candidates' votes did not tally with the indicated number of valid votes, whilst these two are supposed to be identical figures.

  - ✓ In the form 17A, vertical additions of some candidate's total tally for all polling stations gave different figures from those obtained by returning officers, and in some cases, our own totals varied with those figures transmitted to the national tally centre at KICC.

- Noted discrepancies. For a few constituencies, there were discrepancies between the final constituency tallies (aggregate figures in form 17A) and form 16 figures that were sent or received at KICC. Some of these made their way in the final results published by ECK.

- System errors. There are visible and major discrepancies in ECK final published results, in terms of figures given as total valid votes, total votes cast, and percentage turn-out. For example, adding up votes for all candidates should give the total valid votes. If this is done manually, it differed with the figure indicated as 'valid votes' in ECK results,. This changes both votes cast and the turn-out. This was noted in a considerable number of constituencies in the ECK final results. It indicates a lack of internal- or self-check system in the application that was being used to store and print final results.

- Cases of omissions. For instance, results for given candidates in form 16A not entered in form 17A, or number of rejected votes indicated in a vast number of 16As not being captured in the final results. For instance, the final ECK results show Changamwe and Wajir North as having zero rejected votes, which is clearly an impossibility. Checking the form 16As for these constituencies reveals a fair share of entries for rejected votes in form 16A but not in the final results.

As a point of good measure, the tables below must be read together with the spreadsheets used to construct them so that one can see the comments made on each case and the few forms 16A that were missing in the files submitted to us by ECK.

8.2 Kirinyaga Central

Presidential

Presidential analysis for 090 Kirinyaga central

	Own addition of form 16A results and correct additions	ECK official, published result	Corrected ECK final result	Correct addition of figures in 17A with no change in data entries	Variances
	A	B	C	D	B - A
Presidential candidate:					
Kibaki Mwai	*55,097*	*52,866*		*54,219*	*(2,231)*
Kukubo Nixon	*8*	*8*		*8*	-
Matiba Kenneth	*10*	*9*		*9*	*(1)*
Musyoka Stephen	*59*	*53*		*57*	*(6)*
Mwangi Pius	*36*	*37*		*40*	*1*
Ngacha Joseph	*150*	*130*		*133*	*(20)*
Ngethe David	*13*	*2*		*13*	*(11)*
Odinga Raila	*601*	*580*		*595*	*(21)*
Rajput Nazlin	*4*	*3*		*3*	*(1)*
Total valid vote	55,978	55,061	**53,688**	55,077	*(2,290)*
Rejected	319	319	**319**	318	-
Total votes cast	56,297	55,380	**54,007**	55,395	*(2,290)*
Turn-out	81.73%	80.40%	**78.41%**	80.42%	*-3.32%*

Source: Copies of form 16, 16As and 17 from ECK

Note: Can't compare with form 16 figures as two form 16s with differing figures exist.

Noted issues:

- Major variances between our own addition and the final announcement.
- There are a number of forms 16A not signed by presiding officers.
- There are other cases of figures being entered wrongly in form 17A.
- Wrong addition/figure for valid votes in the final ECK results, that leads to the following:

a. The figure valid votes given by ECK is wrong. An addition of all the votes got by the 9 candidates gives a total of 53,688, not 55,061 as given by ECK. With rejected votes of 319, this makes the new total cast to be 54,007 (not 55,380 as given by ECK) and the turn-out to be 78% (not 80.4% as given by ECK).

b. This reduces and reverses the ECK gap between the two elections from 10,934 more presidential votes (or 15.87% in turn-out) to 3,579 more parliamentary votes (or 5.2% in turn-out) in favour of the parliamentary election.

Parliamentary

Parliamentary analysis for 090 Kirinyaga central

	Own addition of form 16A results	Results in form 17A & 16	ECK official final result	Corrected ECK final result	Variances
	A	B	C	D	C - A
Parliamentary candidate:					
Abubakar Hasia I.	*214*	*219*	*219*		*5*
Gatimu Pauline W.	*353*	*536*	*536*		*183*
Gichuki Evan M.	*126*	*126*	*126*		*-*
Giture Eric K.	*479*	*474*	*474*		*(5)*
Kagondu Andrew M.	*621*	*226*	*226*		*(395)*
Kaponda D.	*379*	*372*	*372*		*(7)*
Dickson Daniel Karaba	*17,270*	*17,151*	*17,151*		*(119)*
Karimi Dishon K.	*354*	*336*	*336*		*(18)*
Thomas Raymond K.	*326*	*309*	*309*		*(17)*
Kariuki John Ngata (ECK winner)	*17,268*	*17,219*	*17,219*		*(49)*
Keriri John M.	*4,537*	*7,298*	*7,298*		*2,761*
Kinyua Edwin M.	*9,597*	*9,239*	*9,239*		*(358)*
Mbui Nicholas K.	*1,078*	*948*	*948*		*(130)*
Mwangi Lawrence R.	*206*	*199*	*199*		*(7)*
Mwaniki Henry M. J.	*1,918*	*1,855*	*1,855*		*(63)*
Njeru Samuel K.	*208*	*257*	*257*		*49*
Njiru James N.	*305*	*309*	*309*		*4*
Njogu Richard M.	*31*	*24*	*24*		*(7)*
Total valid vote	55,270	54,688*	43,957	**57,097**	
Rejected	512	489	489	**489**	
Total votes cast	55,782	54,199*	44,446	**57,586**	
Turn-out, %	80.99%	..	64.53%	**83.61%**	

Source: Copies of form 16, 16As and 17 from ECK

** Figures obtained directly from form17A. Adding up total votes for all candidates gives a figure of valid votes as 57,097 and cast votes as 57,586, as done in column D.*

".." means no figure given in original document.

Noted issues:

- Major variances between our own addition and the final announcement.
- Wrong addition/figure for valid votes in the final ECK results
- There are a number of forms 16A not signed by presiding officers.

Major findings:

a. Our own tabulation and addition of votes from form 16A of all polling stations indicate that a wrong parliamentary winner was declared. According to ECK/RO the winner was Kariuki John Ngata with 17,219 against Dickson Daniel Karaba with 17,151. Our own additions indicate that Dickson Daniel Karaba's votes adding up to 17,270 and Kariuki John Ngata's adding up to 17,268. This has the implication of reversing the parliamentary declaration.

8.3 Kajiado North

Presidential

Presidential analysis for144 Kajiado North

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of 17A totals & ECK final result	Variances
	A	B	C	D	C - A
Presidential:					
Kibaki Mwai	49055	*49,038*	*49,038*		*(17)*
Kukubo Nixon	*1*	*1*	*1*		-
Matiba Kenneth	*12*	*97*	*97*		*85*
Musyoka Stephen	*3,260*	*3,644*	*3,664*		*404*
Mwangi Pius	*55*	*68*	*68*		*13*
Ngacha Joseph	*127*	*131*	*131*		*4*
Ngethe David	*11*	*10*	*10*		*(1)*
Odinga Raila	*28,921*	*25,330*	*25,330*		*(3,591)*
Rajput Nazlin	*30*	*32*	*32*		*2*
Total valid vote	81,472	81,485	78,351	78,371	
Rejected	..	758	1,550	1,550	
Total votes cast	..	82,243	79,901	79,921	
Turn-out	..	76.58%	74.40%	74.42%	

Source: Copies of form 16A's; ECK

Note: Addition in final ECK result wrong, correct addition in column D.

".." means figure not given in original document.

Noted issues:

- Variances between our own addition and the final announcement.
- Wrong addition/figure for valid votes in the final ECK results.
- One form 16A missed in file submitted by ECK; no results of the same in form 17A.

Parliamentary

Parliamentary analysis for 144 Kajiado North

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of 17A totals & ECK final result	Variances
	A	B	C	D	C - A
Parliamentary:					
Abincha Mogambi Harrison	*57*	*60*	*141*		*84*
Gitau Francis Parsimei	*320*	*331*	*528*		*208*
Gitonga Eric Maurice	*193*	*190*	*274*		*81*
Kerina Hellen Mokune	*59*	*63*	*63*		*4*
Kinyanjui Solomon	*1,145*	*1,133*	*152*		*(993)*
Mahinda Gerald Wamwangi	*177*	*156*	*14*		*(163)*
Mbuchi Wanjiru Judy	*19*	*29*	*6*		*(13)*
Murunga Mathew	*33*	*38*	*2*		*(31)*
Ngossorr Soila Florence	*87*	*87*	*8*		*(79)*
Otieno Wambui	*156*	*145*	*22*		*(134)*
Saitoti George	*46,850*	*46,591*	*40,376*		*(6,474)*
Sakuda Moses Ole Somaine	*31,942*	*31,376*	*21,642*		*(10,300)*
Sane Ole Saroni	*246*	*259*	*10*		*(236)*
Oleseki Oliver Lemachon	*116*	*132*	*26*		*(90)*
Wambui Julius	*156*	*154*	*22*		*(134)*
Total valid vote	81,556	80,744	63,273	63,286	..
Rejected	..	..	2,917	2,917	..
Total votes cast	..	..	66,190	66,203	..
Turn-out	..	..	61.64%	61.65%	..

Source: Copies of form 16A's; ECK

Note: Addition in final ECK result wrong, correct addition in column D.

".." means figure not given in original document.

Noted issues:

- Major variances between our own addition, form 17A figures, and the final announcement.
- Wrong addition/figure for valid votes in the final ECK results.

8.4 Kaloleni

Presidential

Presidential analysis for 017 Kaloleni

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Presidential:				
Kibaki Mwai	*16,816*	*16,879*	*16,879*	*63*
Kukubo Nixon	*68*	*64*	*64*	*(4)*
Matiba Kenneth	*73*	*68*	*65*	*(8)*
Musyoka Stephen	*1,537*	*1,535*	*1,535*	*(2)*
Mwangi Pius	*140*	*136*	*136*	*(4)*
Ngacha Joseph	*89*	*71*	*71*	*(18)*
Ngethe David	*65*	*62*	*62*	*(3)*
Odinga Raila	*21,748*	*21,716*	*21,716*	*(32)*
Rajput Nazlin	*50*	*50*	*50*	-
Total valid vote	40,586	40,581	40,581	*(5)*
Rejected	657	650	650	*(7)*
Total votes cast	41,243	41,231	41,231	*(12)*
Turn-out	48.45%	48.43%	48.43%	*-0.01%*

Source: Copies of form 16A's; ECK

Noted issues:

- There are form 16As with the name of the same presiding officer that seem to have different signatures.
- Some form 16As not signed by presiding officers
- Slight variances between own addition, form 17A figures and final ECK results

Parliamentary

Parliamentary analysis for 017 Kaloleni

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Parliamentary:				
James Rophus Baya	*724*		*496*	*(228)*
Bemwacbaya Japhet Kanyume	*307*		*139*	*(168)*
Kenga Emanuel Chengo	*117*		*72*	*(45)*
Chome Onesmus Habel	*429*		*342*	*(87)*
Dzoro Morris Mwachondo	*2,721*		*1,916*	*(805)*
Fondo James Kitsao	*167*		*115*	*(52)*
Chea Mwinga Gunga	*1,984*		*1,683*	*(301)*
Jangaa Simon Chagga	*407*		*350*	*(57)*
Kambi Samuel Kazungu	*13,276*		*7,441*	*(5,835)*
Katama Gideon Mwambaji	*175*		*135*	*(40)*
Kenga Michael Mure	*6,773*		*6,410*	*(363)*
Kulumba Betty Wavinya	*132*		*77*	*(55)*
Luganje Esther bahati	*164*		*1,640*	*1,476*
Malanga Alice Mbetsa	*71*		*46*	*(25)*
Maneno Betty Kabibi James	*739*		*571*	*(168)*
Mangi Raymond Furaha	*547*		*387*	*(160)*
Kamto Kenneth Mwakombo	*861*		*430*	*(431)*
Mwamkale William Kamoti	*6,844*		*3,685*	*(3,159)*
Mwamure bakari toya	*718*		*475*	*(243)*
Mwarandu Ferdinand Katana C	*530*		*322*	*(208)*
Mwaringa Beatrice Mwaka	*239*		*135*	*(104)*
Ngala Jimmy F C	*1,506*		*1,100*	*(406)*
Hassan Nuru Lula	*88*		*34*	*(54)*
Watsuma Anderson Chibule	*520*		*265*	*(255)*
Total valid vote	40,039		28,266	*(11,773)*
Rejected	474		474	..
Total votes cast	40,513		28,740	..
Turn-out, %	47.59%		33.76%	..

Source: Copies of form 16A's; ECK

Note: Form 17A not clear to allow for sound reading of its aggregate results for candidates

Noted issues:

- A number of form 16As not signed by presiding officers.
- One form 16A with names of persons not on ECK's list of contesting candidates.
- Some cases of candidates having different results or figures on the same form 16A.
- Major variances between own addition, form 17A figures and final ECK results.

8.5 Limuru

Presidential

Presidential analysis for 104 Limuru

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Presidential:				
Kibaki Mwai	*48,302*	*48,389*	*48,389*	*87*
Kukubo Nixon	*7*	*6*	*6*	*(1)*
Matiba Kenneth	*11*	*10*	*10*	*(1)*
Musyoka Stephen	*443*	*439*	*439*	*(4)*
Mwangi Pius	*14*	*15*	*15*	*1*
Ngacha Joseph	*129*	*123*	*123*	*(6)*
Ngethe David	*11*	*13*	*13*	*2*
Odinga Raila	*2,988*	*2,934*	*2,934*	*(54)*
Rajput Nazlin	*10*	*11*	*11*	*1*
Total valid vote	51,915	51,940	51,940	*25*
Rejected	411	403	403	*(8)*
Total votes cast	52,326	52,343	52,343	*17*
Turn-out	79.56%	79.58%	79.58%	*0.03%*

Source: Copies of form 16A's; ECK

Noted issues:

- One form 16A not entered in form 17A
- Form 16A not signed by the presiding officer
- Form 16A for 040 not signed by RO.
- Final form 16 results for all candidates have increased, save for Odinga Raila that have reduced from 3,144 (provisional) to 2,934 (final).
- Slight variances between own addition, form 17A figures and final ECK results

Parliamentary

Parliamentary analysis for 104 Limuru

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of ECK results	Variances
	A	B	C		C - A
Parliamentary:					
Chege John Kiragu	*7,342*	*7,028*	*6,371*		*(971)*
Kamau Keneth Chege	*1,398*	*1,317*	*1,248*		*(150)*
Kamau Mwaniki Charles	*8,957*	*8,470*	*8,325*		*(632)*
Kariuki George Njoroge	*837*	*813*	*759*		*(78)*
Kariuki Joram Gathini	*166*	*156*	*132*		*(34)*
Kimani Joseph Munyaka	*250*	*3,077*	*212*		*(38)*
Kiratu Christopher D. M	*212*	*186*	*178*		*(34)*
Kuria Simon Kanyingi	*3,337*	*3,118*	*2,810*		*(527)*
Maara George Jonathan	*5,897*	*5,671*	*4,021*		*(1,876)*
Mbugua Mercy Muthoni	*286*	*289*	*266*		*(20)*
Mburu George Mwaura	*145*	*684*	*655*		*510*
Mirie George Ndungu	*414*	*423*	*388*		*(26)*
Mwathi Peter Mungai	*14,924*	*14,543*	*13,552*		*(1,372)*
Mwaura Esther Wanjiku	*565*	*609*	*533*		*(32)*
Ngugi Job Kariu	*151*	*150*	*125*		*(26)*
Njonjo Apollo Luciano	*2,044*	*2,085*	*1,428*		*(616)*
Njoroge James Mingi	*74*	*60*	*44*		*(30)*
Nyanja George Boniface N M	*2,458*	*2,555*	*2,406*		*(52)*
Paul John Njoroge	*1,714*	*1,724*	*1,115*		*(599)*
Thuku Peter Kimani	*135*	*420*	*111*		*(24)*
Waweru Samuel Chege	*61*	*60*	*53*		*(8)*
Total valid vote	51,367	53,438	44,078	44,732	*(7,289)*
Rejected	..	571	691	691	..
Total votes cast	..	54,009	44,769	45,423	..
Turn-out, %	..	82.12%	68.07%	69.06%	..

Source: Copies of form 16A's; ECK

Noted issues:

- Multiple entries for candidates in some polling stations.
- Some forms 16A not signed by presiding officers.
- Results for Njoroge Paul John indicated as 1,724 in form 17A but entered as 7,028 in form16 then as 1,115 in final ECK results.
- Results for Kimani Joseph Munyuka entered as 3,077 in form 17A and form 16, then 212 in final ECK results.
- In a letter to ECK dated 27 December 2007 the RO notes that by the time they were compiling data for parliamentary results, no agents were around to sign the form 17A. Would it have been

possible, for even one of the 21 parliamentary candidates or agents not to be around on the day the elections were taking place?

- Final ECK results do not correspond at all with those in form 16 dated 28 December 2007. What are published as final ECK results are the provisional results received on 28 December 2007 and authenticated by the RO on 29 December 2008.

8.6 Bondo

Presidential

Presidential analysis for 182 Bondo

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of ECK final results	Variances
	A	B	C	D	C - A
Presidential:					
Kibaki Mwai	156	*148*	*148*		*(8)*
Kukubo Nixon	*1*	*1*	*1*		
Matiba Kenneth	*2*	*3*	*3*		*1*
Musyoka Stephen	*9*	*7*	*7*		*(2)*
Mwangi Pius	*4*	*5*	*5*		*1*
Ngacha Joseph	-	-			
Ngethe David	*5*	*4*	*4*		*(1)*
Odinga Raila	*56,022*	*53,202*	*53,202*		*(2,820)*
Rajput Nazlin	*15*	*16*	*16*		*1*
Total valid vote	56,214	54,026	53,173	53,386	*(3,041)*
Rejected		110	109	109	
Total votes cast	56,214	54,136	53,282	53,495	
Turn-out	90.16%	86.82%	85.45%	85.80%	

Source: Copies of form 16A's; ECK

Note: ECK addition of valid votes wrong. Correct addition in column D.

Noted issues:

- A number of form 16A polling station results entered wrongly in form 17A
- A number of forms 16A not signed by presiding officers
- There are a number of polling stations with over 98% turn-out. One of them (085 Thim primary school) has 100% turn-out.
- Under reporting/major variance between own addition and final ECK result, for Odinga Raila.

Parliamentary

Parliamentary analysis for 182 Bondo

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Parliamentary:				
Agunga Alfred Nyandimo	*740*	*320*	*321*	*(419)*
Oginga Dr. Oburu	*49,511*	*45,270*	*45,270*	*(4,241)*
Ogola Gideon Ochanda	*7,610*	*6,841*	*6,741*	*(869)*
Total valid vote	52,218	52,218	52,332	*114*
Rejected	..	225	342	..
Total votes cast	..	52,443	52,674	..
Turn-out	..	84.11%	84.48%	..

Source: Copies of form 16A's; ECK

".." means figure not available in original document

Noted issues:

- A number of missing forms 16A in the file. Results obtained from form 17A.
- Some form 16A results entered wrongly in form 17A.
- Errors in entry and calculation of results in form 17A by hence a 100.05% share of valid votes by the winning candidate.

8.7 Bomachoge

Presidential

Presidential analysis for 203 Bomachoge

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Presidential:				
Kibaki Mwai	*26,176*	*26,967*	*26,967*	*791*
Kukubo Nixon	*35*	-	-	*(35)*
Matiba Kenneth	*46*	*19*	*19*	*(27)*
Musyoka Stephen	*224*	*177*	*177*	*(47)*
Mwangi Pius	*38*	*52*	*52*	*14*
Ngacha Joseph	*348*	*312*	*312*	*(36)*
Ngethe David	*57*	*83*	*83*	*26*
Odinga Raila	*20,043*	*18,070*	*18,070*	*(1,973)*
Rajput Nazlin	*33*	*45*	*45*	*12*
Total valid vote	47,000	45,725	45,725	
Rejected	..	-	3	
Total votes cast	..	45,725	45,728	
Turn-out	..	64.78%	64.78%	

Source: Copies of form 16A's; ECK

".." means figure not given in original document.

Noted issues

- Identical results in streams for 002 Amatagaro primary schools
- Cases of forms 16A not signed by presiding officers;

Parliamentary

Parliamentary analysis for 203 Bomachoge

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of 17A totals & ECK final result	Variances
	A	B	C	D	C - A
Parliamentary:					
Atati William Moturi	*261*	*215*	*215*		*(46)*
Michoti David Mogendi	*308*	*337*	*337*		*29*
Migiro Samuel Ongori	*756*	*581*	*581*		*(175)*
Omambia Ben Mogaka	*282*	*299*	*299*		*17*
Mogeni Samuel Osoro	*497*	*539*	*539*		*42*
Peter Jim Momanyi	*326*	*316*	*316*		*(10)*
Mwema Nathan Onkundi Ogesare	*80*	*139*	*139*		*59*
Nyakora Musa Ondara	*413*	*309*	*309*		*(104)*
Nyameyio Samson Nyakweba	*470*	*262*	*262*		*(208)*
Nyamwamu Cyprian Orina	*3,397*	*1,084*	*1,084*		*(2,313)*
Oigara Cedius N. Nyachwati	*354*	*191*	*191*		*(163)*
Nyangwara Zaphaniah Moraro	*7,231*	*5,746*	*5,746*		*(1,485)*
Nyaundi Albert Mbaka	*7,159*	*7,133*	*7,133*		*(26)*
Obondi Lugard Mogusu	*464*	*442*	*442*		*(22)*
Obure Ferdinand Ondabu	*1,694*	*824*	*824*		*(870)*
Nyaundi Simon Ongari	*6,219*	*7,221*	*7,221*		*1,002*
Oirere Bororo Onyimbo Naftal	*747*	*704*	*704*		*(43)*
Omagwa Zacharius Nyangena	*89*	*93*	*93*		*4*
Omboga Johnson Ondego	*288*	*261*	*261*		*(27)*
Omwemo James Ombasa	*499*	*339*	*339*		*(160)*
Ondabu Jason	*200*	*308*	*308*		*108*
Ontiri Machana Mokua	*149*	*165*	*165*		*16*
Onukoh Paul Nyabere	*412*	*318*	*308*		*(104)*
Omagwa Joel Onyancha	*13,277*	*9,076*	*9,076*		*(4,201)*
Koina Onyancha	*581*	*242*	*242*		*(339)*
Oseko Isaac Mbaka	*776*	*621*	*621*		*(155)*
Masea Arnold Benson Ototo	*402*	*266*	*266*		*(136)*
Siagi Moses Nyandieka	*438*	*450*	*450*		*12*
Total valid vote	..	..	38,481	38,471	..
Rejected	..	..	3	3	..
Total votes cast	..	..	38,484	38,474	..
Turn-out	..	..	54.52%	54.50%	..

Source: Copies of form 16A's; ECK

Note: Addition in final ECK result for valid is wrong, correct addition in column D.

".." means figure not given in original document.

8.8 Juja

Presidential

Presidential analysis for 100 Juja

	Own addition of form 16A results and correct additions	Results in form 17A & 16	ECK final published result	Variances
	A	B	C	C - A
Presidential candidate:				
Kibaki Mwai	*101,003*	*100,390*	*100,390*	*(613)*
Kukubo Nixon	*16*	*35*	*35*	*19*
Matiba Kenneth	*47*	*67*	*67*	*20*
Musyoka Stephen	*4,986*	*4,409*	*4,409*	*(577)*
Mwangi Pius	*92*	*80*	*80*	*(12)*
Ngacha Joseph	*257*	*219*	*219*	*(38)*
Ngethe David	*21*	*61*	*61*	*40*
Odinga Raila	*13,948*	*13,752*	*13,752*	*(196)*
Rajput Nazlin	*48*	*37*	*37*	*(11)*
Total valid vote	120,418	119,050	119,050	*(1,368)*
Rejected	..	914	914	
Total votes cast	..	119,964	119,964	
Turn-out	..	73.30%	73.30%	

Source: Copies of form 16, 16As and 17 from ECK

Note: Can't compare with form 16 figures as two form 16s with differing figures exist.

".." means figure not given in original document.

Noted issues:

- A number of form 16A that are not signed by presiding officers
- A few form 16As with signatures that look different by same presiding officer name.
- Variances between own addition and final ECK results.
- A number of presiding officers indicated names and details of voters allowed to vote from black book and double/multiple register.

Parliamentary

Parliamentary analysis for 100 Juja

	Own addition of form 16A results	Results in form 17A & 16	ECK official final result	Variances
	A	B	C	C - A
Parliamentary candidate:				
Enos David Nzioka	*2,813*	*2,653*	*2,653*	*(160)*
Gathua Eunice Gathigia	*1,032*	*832*	*832*	*(200)*
Gitau William Kabogo	*34,114*	*32,987*	*32,987*	*(1,127)*
Githaiga Dick Maina	*2,649*	*2,621*	*2,621*	*(28)*
Kamamia Beatrice Wairimu	*277*	*268*	*268*	*(9)*
Kiama Peter Wangai	*287*	*272*	*272*	*(15)*
Kibugu Agness Wangui	*1,029*	*973*	*973*	*(56)*
Kihara Freddie Kirima	*430*	*472*	*472*	*42*
Kirika Mary Wanjiru Mwaniki	*661*	*661*	*661*	-
Moreka David Nyamache	*7,651*	*7,410*	*7,410*	*(241)*
Ndabi Stephen Ndichu	*2,964*	*2,924*	*2,924*	*(40)*
Ng'ang'a Alice Wambui	*9,541*	*9,252*	*9,252*	*(289)*
Thuo George	*55,728*	*52,321*	*52,321*	*(3,407)*
Total valid vote	119,176	113,646	113,646	*(5,530)*
Rejected	..	1,162	1,162	
Total votes cast	..	114,808	114,808	
Turn-out, %	..	70.15%	70.15%	

Source: Copies of form 16, 16As and 17 from ECK

".." means no figure given in original document.

Noted issues:

- A number of form 16A not in file, figures read from form 17A
- A large number of form 16As not entered in form 17A
- Form 16As with same name of presiding officers but different signatures

8.9 Molo

Presidential

Presidential analysis for 138 Molo

	Own addition of form 16A results and correct additions	Results in form 17A	ECK final published result	Correct addition of ECK final results	Variances
	A	B	C	D	C - A
Presidential candidate:					
Kibaki Mwai	*75,314*	*75,611*	*75,261*		*(53)*
Kukubo Nixon	*12*	*11*	*12*		
Matiba Kenneth	*44*	*45*	*46*		*2*
Musyoka Stephen	*263*	*264*	*222*		*(41)*
Mwangi Pius	*38*	*35*	*19*		*(19)*
Ngacha Joseph	*303*	*294*	*266*		*(37)*
Ngethe David	*43*	*42*	*34*		*(9)*
Odinga Raila	*22,510*	*22,580*	*23,268*		*758*
Rajput Nazlin	*18*	*15*	*12*		*(6)*
Total valid vote	98,545	98,897	99,143	99,140	*598*
Rejected	..	1,016	923	923	..
Total votes cast	..	99,913	100,066	100,063	..
Turn-out	..	79.07%	79.19%	79.19%	..

Source: Copies of form 16, 16As and 17 from ECK

".." means figures not given in original document.

Note: Figure for valid votes by ECK wrong; correct addition done in column D.

Parliamentary

Parliamentary analysis for 138 Molo

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Parliamentary candidate:				
Ayub Jesse Mwaniki	*243*		*302*	*59*
Gaithya Simon Ndungu	*448*		*545*	*97*
Philip Nduhiu Githambo	*164*		*191*	*27*
Karanja Kabage	*4605*		*5,436*	*831*
Joyce Njoki Karimi	*131*		*175*	*44*
Kiarie stephen Karanja	*153*		*175*	*22*
Kimani Joseph Kamau	*228*		*271*	*43*
Kinyanjui Johnson Mwamba	*551*		*868*	*317*
Manini George Githua	*161*		*247*	*86*
Mukiri Macharia	*601*		*764*	*163*
John Njenga Mungai	*6,865*		*10,340*	*3,475*
Njogu James Mwangi	*780*		*718*	*(62)*
Kiuna Joseph Nganga	*43,243*		*54,057*	*10,814*
Dickson Ngigi Ngugi	*113*		*123*	*10*
Njeri Mary Kulankash	*80*		*95*	*15*
Wambui Florence Njoroge	*99*		*118*	*19*
Karanja Njoroge Mungai	*350*		*513*	*163*
Njoroge Philip Thuo	*48*		*84*	*36*
Njunga Michael	*214*		*348*	*134*
Sang Peter Kipngetich	*17,885*		*18,603*	*718*
Maina Stephen Thuo	*59*		*84*	*25*
Tonui Samwel Kipkemoi	*171*		*666*	*495*
Total valid vote	77,192	..	94,725	*17,533*
Rejected	..	..	1,242	
Total votes cast	..	..	95,967	
Turn-out, %	..	..	75.95%	

Source: Copies of form 16As and 17 from ECK

Note: Correct figure for valid votes on column C is 94,723, making total cast 95,965.

Noted issues

- A number of form 16A missing form file; can't be read from 17A as the file contains no form 17A, which has been explained by the Returning Officer
- A number of form 16A not signed by presiding officers
- Some form 16As look incomplete as they miss names of some candidates

8.10 Maragwa

Presidential

Presidential analysis for 095 Maragwa

	Own addition of form 16A results	Results in form 17A & 16	ECK official final result	Correct addition of 17A totals & ECK final result	Variances
	A	B	C		C - A
Presidential:					
Kibaki Mwai	*56,429*	*56,439*	*56,439*		*10*
Kukubo Nixon	*15*	*15*	*15*		-
Matiba Kenneth	*26*	*25*	*25*		*(1)*
Musyoka Stephen	*577*	*564*	*564*		*(13)*
Mwangi Pius	*28*	*29*	*29*		*1*
Ngacha Joseph	*205*	*198*	*198*		*(7)*
Ngethe David	*10*	*10*	*10*		-
Odinga Raila	*471*	*460*	*460*		*(11)*
Rajput Nazlin	*13*	*14*	*14*		*1*
Total valid vote	57,774	59,795	59,795	57,754	*2,021*
Rejected	..	322	322	322	
Total votes cast	..	€0,117	60,117	58,076	
Turn-out	..	85.24%	85.24%	82.35%	

Source: Copies of form 16A's; ECK

Noted issues

- A form 16A not signed by presiding officer but by deputy presiding officer
- A form 16A with different signatures but same results

Parliamentary

Parliamentary analysis for 095 Maragwa

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Parliamentary:				
Elias Peter Mbau	*18,355*	*18,266*	*18,266*	*(89)*
Gituabiah Paul	*613*	*623*	*623*	*10*
Kariuki Maina John	*4,915*	*5,036*	*5,036*	*121*
Kimani Mathew Mwangi	*2,244*	*2,194*	*2,194*	*(50)*
Kioi Mark Kamande	*803*	*756*	*756*	*(47)*
Macharia Francis Gachihi	*2,481*	*2,345*	*2,345*	*(136)*
Maluki Mohammed Omari	*187*	*3,553*	*3,553*	*3,366*
Mwangi Peter Kamade	*16,806*	*16,531*	*16,531*	*(275)*
Mwaura John B Kirore	*1,439*	*1,458*	*1,458*	*19*
Mwirigi Maurice Njunguna	*811*	*798*	*798*	*(13)*
Nganga Samwel Kamunu	*392*	*403*	*403*	*11*
Ngugi Martin Njunguna	*307*	*272*	*272*	*(35)*
Ngwiri Simon W. Kimani	*225*	*200*	*200*	*(25)*
Njue John Muguini	*187*	*158*	*158*	*(29)*
Wainaina Peterson	*357*	*349*	*349*	*(8)*
Watailor Stephen N Kinuthia	*6,335*	*5,221*	*5,221*	*(1,114)*
Total valid vote	56,457	58,163	58,163	..
Rejected	..	736	736	..
Total votes cast	..	58,899	58,899	..
Turn-out	..	83.52%	83.52%	..

Source: Copies of form 16A's; ECK

Noted issues

- A number of forms 16A signed by deputy presiding officer
- Some forms 16A not in file but figures read from form 17A

8.11 North Imenti

Presidential

Presidential analysis for 051 North Imenti

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Presidential:				
Kibaki Mwai	*89,691*	*84,006*	*78,684*	*(11,007)*
Kukubo Nixon	*22*	*20*	*18*	*(4)*
Matiba Kenneth	*46*	*45*	*37*	*(9)*
Musyoka Stephen	*821*	*460*	*802*	*(19)*
Mwangi Pius	*115*	*113*	*107*	*(8)*
Ngacha Joseph	*301*	*245*	*476*	*175*
Ngethe David	*60*	*26*	*16*	*(44)*
Odinga Raila	*3,617*	*3,300*	*3,370*	*(247)*
Rajput Nazlin	*30*	*52*	*25*	*(5)*
Total valid vote	94,703	88,267	83,535	
Rejected	..	..	653	
Total votes cast	..	..	84,188	
Turn-out	..	..	67.92%	

Source: Copies of form 16A's; ECK

".." means figure not given in original document.

Noted issues

- A number of forms 16A not in file, and a look at form 17A shows that the names of those stations are indicated but no results entered. They are blank in form 17A.
- Some forms 16A not signed by presiding officers.
- Two forms 16A with identical results (in 054 Gikumeme primary school).
- Some problems in entries of polling station 135 Njuri Ncheke street in form 17A
- A correct addition of candidates' results from polling stations gives different aggregate figures in form 17A, as follows: Kibaki Mwai 85,178; Kukubo Nixon 20; Matiba Kenneth 45; Musyoka Stephen 460; Mwangi Pius 112; Ngacha Joseph 250; Odinga Raila 3,295; Rajput Nazlin 52; and Ngethe David 26. This translates to total valid votes 89,438.

Parliamentary

Parliamentary analysis for 051 North Imenti

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of 17A totals & ECK final result	Variances
	A	B	C	D	C - A
Parliamentary:					
Akandi Fredrick Kiogora	*1,785*		*1,252*		*(533)*
Angaine John Mugambi	*11,235*		*9,266*		*(1,969)*
Gichuru Francis Xaxier	*1,157*		*1,008*		*(149)*
Kiogora Abonyai Mutuerandu	*3,407*		*3,770*		*363*
Marete Isack Kinoti	*264*		*596*		*332*
Mbeeria Jeremiah baariu	*1,353*		*1,219*		*(134)*
Mbuba Peter Rwanda	*449*		*526*		*77*
Meenye gideon Kaumbuthu	*9,531*		*8,275*		*(1,256)*
Mugah Paul Murungah	*1,119*		*975*		*(144)*
Muthamia Morris morgan	*1,028*		*706*		*(322)*
Mwiraria Daudi	*22,867*		*20,422*		*(2,445)*
Mburugu Ephriam mwirigi	*766*		*574*		*(192)*
Ringera Karambu Lilian	*2,073*		*1,758*		*(315)*
Ringera Stephen Kirimi	*2,066*		*1,758*		*(308)*
Ruteere Silas Muriuki	*33,444*		*30,603*		*(2,841)*
Terah Flora Igoki	*1,469*		*720*		*(749)*
Total valid vote	94,013	..	83,364	83,428	..
Rejected	..	..	794	794	..
Total votes cast	..	..	84,158	84,222	..
Turn-out	..	..	67.90%	67.95%	..

Source: Copies of form 16A's; ECK

Note: Addition in final ECK result for valid is wrong, correct addition in column D.

".." means figure not given in original document.

Noted issues

- A number of forms 16A not in file, and a look at form 17A shows that the names of those stations are indicated but no results indicated. They are blank in form 17A ; others are cancelled out.
- Identical results in 011 Madaraka primary school streams A and C.

8.12 Wajir North

Presidential

Presidential analysis for 034 Wajir north

	Own addition of form 16A results and correct additions	Results in form 17A	ECK final published result	Variances
	A	B	C	C - A
Presidential candidate:				
Kibaki Mwai	*5,084*	*5,244*	5244	*160*
Kukubo Nixon	*5*	*5*	5	-
Matiba Kenneth	*6*	*5*	7	*1*
Musyoka Stephen	*30*	*29*	29	*(1)*
Mwangi Pius	*4*	*3*	3	*(1)*
Ngacha Joseph	*6*	*6*	6	-
Ngethe David	*4*	*4*	4	-
Odinga Raila	*5,166*	*4,988*	4988	*(178)*
Rajput Nazlin	*6*	*5*	6	-
Total valid vote	10,312	10,289	10,292	*(20)*
Rejected	35	28	-	
Total votes cast	10,347	10,317	10,292	
Turn-out	72.99%	72.78%	72.60%	

Source: Copies of form 16, 16As and 17 from ECK

Noted issues

- Few issues noted, save for the fact that our own count indicates 35 rejected votes, 28 indicated on form 17A, but final results show none.

Parliamentary

Parliamentary analysis for 034 Wajir north

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Parliamentary candidate:				
Abdullahi Ibrahim Abdi	*147*	*147*	*147*	-
Ahmed Maalim Omar	*877*	*877*	*877*	-
Ali Abdi Hussein	*1,933*	*1,933*	*1,933*	-
Ali Abdullahi Ibrahim	*3,675*	*3,675*	*3,675*	-
Mohammed'Hussein Gabbow	*3,675*	*3,675*	*3,675*	-
Omar Hassan Elmi	*7*	*7*	*7*	-
Total valid vote	10,314	10,314	10,314	-
Rejected	32	33	-	
Total votes cast	10,346	10,347	10,314	
Turn-out, %	72.98%	72.99%	72.76%	

Source: Copies of form 16, 16As and 17 from ECK

Noted issues:

- Few issues noted, save for the fact that our own count indicates 5 "objected to" votes, which are not indicated on the final result. These could not have been later classified as "rejected votes", as number of rejected votes moves from 32 to 33 only.
- In this constituency where there was a tie, fate of these 5 'objected to' votes is crucial.

8.13 Kieni

Presidential

Presidential analysis for 082 Kieni

	Own addition of form 16A results and correct additions	Results in form 17A	ECK final published result	Variances
	A	B	C	C - A
Presidential candidate:				
Kibaki Mwai	*72,354*	*72,054*	*72,054*	*(300)*
Kukubo Nixon	*9*	*6*	*6*	*(3)*
Matiba Kenneth	*13*	*12*	*12*	*(1)*
Musyoka Stephen	*62*	*58*	*58*	*(4)*
Mwangi Pius	*26*	*25*	*25*	*(1)*
Ngacha Joseph	*153*	*150*	*150*	*(3)*
Ngethe David	*7*	*5*	*5*	*(2)*
Odinga Raila	*612*	*580*	*580*	*(32)*
Rajput Nazlin	*6*	*6*	*6*	-
Total valid vote	73,242	72,197	72,896	*(346)*
Rejected	..	161	161	..
Total votes cast	..	72,358	73,057	..
Turn-out	..	85.44%	86.27%	..

Source: Copies of form 16, 16As and 17 from ECK

".." means figures not given in original document.

Noted issues

- Some forms 16A missing in file but were also not entered in 17A
- Some forms have name of same presiding officers but signatures look different
- Number of registered voters indicated in form 17A (87,200) differs from that indicated in ECK final result (84,687).

Parliamentary

Parliamentary analysis for 082 Kieni

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Parliamentary candidate:				
Gichuru Michael Wachira	*388*	-	*377*	*(11)*
Gitonga Peter Mathenge	*1238*	-	*1252*	*14*
Kairu James Wanderi	*310*	-	*600*	*290*
Karanja John Kamunya	*86*	-	*243*	*157*
Karanja John Muhia	*289*	-	*140*	*(149)*
Kihagi Isaac Ngatia	*2,564*	-	*2,272*	*(292)*
Macharia Edwin Mwangi	*5,331*	-	*5,335*	*4*
Maina Muchiri Kiuma	*482*	-	*421*	*(61)*
Muriithi Kenneth Kamunya	*183*	-	*855*	*672*
Murungaru Christopher Ndarathi	*8,827*	-	*8,460*	*(367)*
Ndung'u James Mathenge	*287*	-	*255*	*(32)*
Wachira Charity Gathoni	*124*	-	*66*	*(58)*
Wanderi Francis Mathenge	*625*	-	*599*	*(26)*
Warugongo Nemesyus	*50,793*	-	*51,394*	*601*
Total valid vote	71,527	..	72,269	*742*
Rejected	..	..	1,629	
Total votes cast	..	..	73,898	
Turn-out, %	..	..	87.26%	

Source: Copies of form 16, 16As and 17 from ECK

Noted issues

- A few Form 16A not signed by presiding officers
- Some two of them appear to have different signatures of the same presiding officer

8.14 Lari

Presidential

Presidential analysis for 105 Lari

	Own addition of form 16A results and correct additions	Results in form 17A	ECK final published result	Variances
	A	B	C	C - A
Presidential candidate:				
Kibaki Mwai	*49,280*	*49,276*	*49,276*	*(4)*
Kukubo Nixon	*7*	*8*	*8*	*1*
Matiba Kenneth	*15*	*7*	*7*	*(8)*
Musyoka Stephen	*70*	*32*	*32*	*(38)*
Mwangi Pius	*16*	*16*	*16*	-
Ngacha Joseph	*157*	*67*	*61*	*(96)*
Ngethe David	*4*	*4*	*4*	-
Odinga Raila	*458*	*457*	*457*	*(1)*
Rajput Nazlin	*3*	*3*	*3*	-
Total valid vote	50,010	49,864	49,864	*(146)*
Rejected	740	218	218	
Total votes cast	50,750	50,082	50,082	
Turn-out	85.45%	84.33%	84.33%	

Source: Copies of form 16, 16As and 17 from ECK

- Few issues noted, except variances in final ECK results.

Parliamentary

Parliamentary analysis for 105 Lari

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of ECK official final result	Variances
	A	B	C	D	C - A
Parliamentary candidate:					
Burugu John Njuguna	*7616*	*7,615*	*7615*		*(1)*
Chege Mburu Tiras	*456*	*456*	*456*		-
Gitonga Gichuru Philip	*208*	*211*	*211*		*3*
Kagunyi Njari Francis	*8739*	*8,876*	*8876*		*137*
Kamau Anthony Njihia	*104*	*97*	*77*		*(27)*
Kimani Douglas	*386*	*343*	*343*		*(43)*
Kimani Ndungu Walter	*3,837*	*3,836*	*3,836*		*(1)*
Kimathi James Viscount	*3,254*	*3,654*	*3,654*		*400*
Kuria Kimani David	*2,303*	*2,280*	*2,280*		*(23)*
Mwai Wangui Pauline	*450*	*455*	*455*		*5*
Mwaura David Njuguna Kiburi	*11,847*	*11,855*	*11,855*		*8*
Mwangi Jonah Mburu	*8,005*	*8,804*	*8,835*		*830*
Mweja David Wairiri	*938*	*938*	*938*		-
Nganga Caroline Wambui	*336*	*326*	*326*		*(10)*
Nyambura Samuel Njagu	*112*	*110*	*1,110*		*998*
Nyota Njohn K	*767*	*772*	*772*		*5*
Turuthi Gad Githengu	*52*	*53*	*53*		*1*
Total valid vote	49,410	..	50,681	51,692	*1,271*
Rejected	468	..	334	334	
Total votes cast	49,878	..	51,015	52,026	
Turn-out, %	83.98%	..	85.90%	87.60%	

Source: Copies of form 16, 16As and 17 from ECK

Noted issues

- Some wrong entries for candidates' results in 17A
- Some forms 16A not signed but just stamped with ECK presiding officer stamp

8.15 Malava

Presidential

Presidential analysis for 155 Malava

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Presidential:				
Kibaki Mwai	*18,152*	*17,969*	*14,712*	*(3,440)*
Kukubo Nixon	*66*	*40*	*92*	*26*
Matiba Kenneth	*119*	*146*	*126*	*7*
Musyoka Stephen	*346*	*342*	*340*	*(6)*
Mwangi Pius	*102*	*85*	*99*	*(3)*
Ngacha Joseph	*365*	*94*	*147*	*(218)*
Ngethe David	*83*	*128*	*72*	*(11)*
Odinga Raila	*26,355*	*25,818*	*19,891*	*(6,464)*
Rajput Nazlin	*27*	*26*	*28*	*1*
Total valid vote	45,615	44,648	35,507	
Rejected	..	..	71	
Total votes cast	..	..	35,578	
Turn-out	..	..	52.91%	

Source: Copies of form 16A's; ECK

".." means figure not available in original document.

Note: These figures obtained with 22 forms 16A that were not in file and figures were missing in 17A. If those are included, totals and variances might change.

Noted issue

- The first 17, and another set of forms 16A, in total 22 of them, not in the constituency file and not in form 17A.

Parliamentary

Parliamentary analysis for 155 Malava

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of 17A totals & ECK final result	Variances
	A	B	C	D	C - A
Parliamentary:					
Caleb Ambulwa Murudi	*183*	*189*	*291*		*108*
Edward Juma Saya Malovi	*448*	*411*	*305*		*(143)*
Mukonyi Stephen Aswala	*142*	*159*	*82*		*(60)*
Nambwa sakaya Musavinyi	*20,466*	*19,323*	*18,641*		*(1,825)*
Sakataka William	*530*	*978*	*427*		*(103)*
Sakwa Tom Alphew	*154*	*2,852*	*107*		*(47)*
Soita Peter Shitanda	*21,059*	*20,038*	*19,374*		*(1,685)*
Tanga Harrison Webbo	*600*	*974*	*395*		*(205)*
Wakukha George Munji	*1,125*	*1,095*	*832*		*(293)*
Total valid vote	44,707	46,019	41,864	40,454	..
Rejected	..	..	1,119	1,119	..
Total votes cast	..	..	42,983	41,573	..
Turn-out	..	..	63.92%	61.83%	..

Source: Copies of form 16A's; ECK

Note: Wrong additions of valid in ECK figures. Correct additions gives 40,454 valid votes, as done in column D.

These figures obtained with 22 forms 16A that were not in file and figures were missing in 17A. If those are included, totals for candidates and variances will increase.

Noted issue

- The first 17, and another set of forms 16A, in total 22 of them, not in the constituency file and not in form 17A.

8.16 Masinga

Presidential

Presidential analysis for 066 Masinga

	Own addition of form 16A results and correct additions	Figures from form 16	ECK official, published result	Variances
	A	B	C	C - A
Presidential candidate:				
Kibaki Mwai	*2,341*	2,344	*1,038*	*(1,303)*
Kukubo Nixon	*37*	38	*33*	*(4)*
Matiba Kenneth	*22*	112	*107*	*85*
Musyoka Stephen	*33,659*	33,729	*21,225*	*(12,434)*
Mwangi Pius	*29*	47	*35*	*6*
Ngacha Joseph	*42*	31	*42*	-
Ngethe David	*6*	4	*3*	*(3)*
Odinga Raila	*387*	462	*238*	*(149)*
Rajput Nazlin	*155*	165	*221*	*66*
Total valid vote	36,678	36,932	22,942	*(13,736)*
Rejected	..	..	399	
Total votes cast	..	..	23,341	
Turn-out	..	..	45.50%	

Source: Copies of form 16, 16As and 17 from ECK

".." means figures not given in original document.

Noted issues

- Mishandling of certain pages of form 17A explained by the returning officer in a letter to ECK. The explanation might need to be scrutinized for consistency and accuracy.
- Even with this RO explanation, the final ECK results greatly differs from the form 16 results, which is the statutory basis for any ECK announcement.

Parliamentary

Parliamentary analysis for 066 Masinga

	Own addition of form 16A results	Results in form 16	ECK official final result	Corrected ECK final result	Variances
	A	B	C	D	C - A
Parliamentary candidate:					
Kabaka Boniface Mutinda	*3,094*	*2,901*	*2,901*		*(193)*
Katu Peter Masilu	*362*	*370*	*370*		*8*
Kiala Bernard Muia	*4,122*	*4,052*	*4,052*		*(70)*
Kiluta Ronald John	*2,223*	*1,892*	*1,892*		*(331)*
Kisulu Festus Kivata	*429*	*314*	*314*		*(115)*
Kithyaka Joseph Muthami	*230*	*214*	*214*		*(16)*
Kitua Daniel Muinde	*1,033*	*882*	*882*		*(151)*
Mbai Benson Itwiku	*10,274*	*9,164*	*9,164*		*(1,110)*
Mbaluka Joel	*2,519*	*2,245*	*2,245*		*(274)*
Musila Paul Muoki	*2,348*	*2,179*	*2,179*		*(169)*
Mutisya Josephat Mutunga	*288*	*263*	*64*		*(224)*
Mutisya Simon Makao	*73*	*64*	*64*		*(9)*
Mutuku Peter Nicholas	*769*	*552*	*552*		*(217)*
Mutunga Sheila Phyllis Mwikali	*394*	*379*	*379*		*(15)*
Mwalyo Joshua Mbithi	*9,024*	*8,435*	*8,435*		*(589)*
Ndivo Rosalia Kanini	*150*	*99*	*99*		*(51)*
Ndolo Simon Silla	*80*	*90*	*90*		*10*
Ngungu Janet Syovata	*171*	*167*	*167*		*(4)*
Wambua Lois Mutanya	*117*	*109*	*109*		*(8)*
Total valid vote	37,700	34,371	34,371	34,172	
Rejected	..	547	547	547	
Total votes cast	..	34,918	34,818	34,719	
Turn-out, %	..	68.06%	67.87%	67.68%	

Source: Copies of form 16, 16As and 17 from ECK

".." means figures not given in original document.

Noted issues

- Some form 16A missing names of candidates
- Some form 16A not signed by presiding officers; others signed "for" presiding officer
- Same number of missing forms 16A (22) in the constituency file and in 17A

8.17 Changamwe

Presidential

Presidential analysis for 009 Changamwe

	Own addition of form 16A results and correct additions	Results in form 16	ECK final published result	Variances
	A	B	C	C - A
Presidential candidate:				
Kibaki Mwai	*15,151*	*9,366*	*9,366*	*(5,785)*
Kukubo Nixon	*20*	*15*	*15*	*(5)*
Matiba Kenneth	*20*	*15*	*15*	*(5)*
Musyoka Stephen	*8,368*	*5,347*	*5,347*	*(3,021)*
Mwangi Pius	*121*	*74*	*74*	*(47)*
Ngacha Joseph	*67*	*44*	*44*	*(23)*
Ngethe David	*18*	*14*	*14*	*(4)*
Odinga Raila	*29,648*	*17,706*	*17,706*	*(11,942)*
Rajput Nazlin	*55*	*33*	*33*	*(22)*
Total valid vote	53,468	32,614	32,614	*(20,854)*
Rejected	509	..	-	
Total votes cast	..	..	32,614	
Turn-out	..	..	30.33%	..

Source: Copies of form 16, 16As and 17 from ECK

".." means figures not given in original document.

Note: Figure for rejected in column A could be an underestimation because some form 16As were not indicating figure of rejected votes in respective polling stations.

Noted issues

- Mostly, some forms 16A figures entered wrongly in form 17A
- Major discrepancies between our own totals and final ECK results

8.18 Machakos Town

Presidential

Presidential analysis for 070 Machakos town

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of 17A totals & ECK final result	Variances
	A	B	C	D	C - A
Presidential:					
Kibaki Mwai	*4,954*	*4,547*	*3,187*		*(1,767)*
Kukubo Nixon	*35*	*36*	*24*		*(11)*
Matiba Kenneth	*36*	*36*	*28*		*(8)*
Musyoka Stephen	*55,785*	*53,167*	*41,295*		*(14,490)*
Mwangi Pius	*70*	*68*	*41*		*(29)*
Ngacha Joseph	*69*	*67*	*50*		*(19)*
Ngethe David	*17*	*17*	*11*		*(6)*
Odinga Raila	*1,515*	*1,312*	*812*		*(703)*
Rajput Nazlin	*406*	*359*	*353*		*(53)*
Total valid vote	62,887	59,609	45,811	45,801	
Rejected	..	..	2,839	2,839	
Total votes cast	..	..	48,650	48,640	
Turn-out	..	..	51.29%	51.28%	

Source: Copies of form 16A's; ECK

".." means figure not given in original document.

Noted issues

- Some form 16A not in file and form 17A; some are blank even in the 17A

Parliamentary

Parliamentary analysis for 070 Machakos town

	Own addition of form 16A results	Results in form 17A	ECK official final result	Correct addition of 17A totals & ECK final result	Variances
	A	B	C	D	C - A
Parliamentary:					
Benson Bahati Mutua	*240*	..	*272*		*32*
Daudi Fredrick Mwanzia	*13,545*	..	*13,607*		*62*
Jones Kavivya Nzau	*609*	..	*1,023*		*414*
Kaloki Collins Kitaka	*7,207*	..	*6,908*		*(299)*
Kamelo Alfonce Mwangangi	*2,049*	..	*2,138*		*89*
Kimanthi Florence mbeti	*2,484*	..	*2,507*		*23*
Kimeu Charles Nthiwa	*242*	..	*283*		*41*
Mbithi Roseann Katheu	*272*	..	*278*		*6*
Mothoka Stephen Makau	*896*	..	*946*		*50*
Mukua Solomon Kimuyu	*176*	..	*169*		*(7)*
Munyaka Victor Kioko	*25,186*	..	*24,647*		*(539)*
Musyoka Susan Mbinya	*6,064*	..	*6,049*		*(15)*
Musyoki Alphonce Mbinda	*999*	..	*986*		*(13)*
Mutua Richard Mulu	*165*	..	*331*		*166*
Mwamisi Timothy Wambua	*872*	..	*720*		*(152)*
Nzengu Edward Kioko	*1,351*	..	*982*		*(369)*
Total valid vote	62,357	..	61,848	61,846	..
Rejected	..	..	1,010	1,010	..
Total votes cast	..	..	62,858	62,856	..
Turn-out	..	..	66.28%	66.27%	..

Source: Copies of form 16A's; ECK

Note: Addition in final ECK result for valid is wrong, correct addition in column D.

".." means figure not given in original document.

Noted issues

- Some form 16A not in file and form 17A; some are blank even in the 17A
- Many differences in valid votes at the polling station level

8.19 Central Imenti

Presidential

Presidential analysis for 052 Central imenti

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Presidential:				
Kibaki Mwai	*58,811*	*43,410*	*43,410*	*(15,401)*
Kukubo Nixon	*16*	*8*	*8*	*(8)*
Matiba Kenneth	*19*	*13*	*13*	*(6)*
Musyoka Stephen	*185*	*130*	*130*	*(55)*
Mwangi Pius	*69*	*51*	*51*	*(18)*
Ngacha Joseph	*256*	*157*	*157*	*(99)*
Ngethe David	*16*	*12*	*12*	*(4)*
Odinga Raila	*1,585*	*1,108*	*1,108*	*(477)*
Rajput Nazlin	*15*	*18*	*18*	*3*
Total valid vote	60,972	44,907	44,907	
Rejected	..	..	302	
Total votes cast	..	..	45,209	
Turn-out	..	..	57.78%	

Source: Copies of form 16A's; ECK

".." means figure not given in original document.

Noted issues

- One form 16A not in file; figures obtained from form 17A.
- Large discrepancy between own additions and form 17A and ECK final results

Parliamentary

Parliamentary analysis for 052 Central Imenti

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Parliamentary:				
Imanyara Gitobu	*14,980*		*14,601*	*(379)*
Kirea Salome Gathuni	*463*		*447*	*(16)*
Kirima Moses Nguchine	*10,074*		*9,936*	*(138)*
Kirugi Nelson Kaimeny	*3,499*		*3,415*	*(84)*
Kiugu Geoffrey Muriungi	*11,491*		*11,395*	*(96)*
M'Itwerandu Fabian Murugu	*1,426*		*1,418*	*(8)*
M'Mugwika Kimathi Samuel	*1,150*		*1,096*	*(54)*
M'Mukindia Joseph K. Laiboni	*3,187*		*3,244*	*57*
M'Mukiri Andrew Kinyua	*948*		*670*	*(278)*
Magiri Mwirigi Edward	*321*		*345*	*24*
Mboroki Dennis Mbichi	*3,140*		*3,214*	*74*
Mithega Martin Mugambi	*2,757*		*2,710*	*(47)*
Mugendi Samwel	*1,841*		*1,829*	*(12)*
Murithi Mercy Gacheri	*352*		*358*	*6*
Muthuri Domnic Charles S	*1,354*		*1,243*	*(111)*
Mwiti Gershon Kimeu	*1,287*		*1,281*	
Wambutura Justus Gitobu	*3,027*		*3,003*	*(24)*
Total valid vote	61,297	..	60,205	..
Rejected	..	..	602	..
Total votes cast	..	..	60,807	..
Turn-out	..	..	77.72%	..

Source: Copies of form 16A's; ECK

".." means figure not given in original document.

Noted issues

- A few form 16A entered wrongly in 17A; others incomplete as they miss names of some candidates

8.20 Saku

Presidential

Presidential analysis for 043 Saku

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Presidential:				
Kibaki Mwai	*7,124*	*7,124*	*7,124*	-
Kukubo Nixon	*6*	*6*	*6*	-
Matiba Kenneth	*9*	*9*	*9*	-
Musyoka Stephen	*1,232*	*1,232*	*1,232*	-
Mwangi Pius	*3*	*8*	*8*	*5*
Ngacha Joseph	*27*	*27*	*27*	-
Ngethe David	*4*	*3*	*3*	*(1)*
Odinga Raila	*5,682*	*5,682*	*5,682*	-
Rajput Nazlin	*11*	*9*	*9*	*(2)*
Total valid vote	14,098	14,100	14,100	
Rejected	115	..	115	
Total votes cast	14,213	..	14,215	
Turn-out	73.85%	..	73.86%	

Source: Copies of form 16A's; ECK

".." means figure not given in original document.

Noted issues

- No issues noted in this file.

Parliamentary

Parliamentary analysis for 043 Saku

	Own addition of form 16A results	Results in form 17A	ECK official final result	Variances
	A	B	C	C - A
Parliamentary:				
Abduba Alexander Barilleh	*38*	*42*	*42*	*4*
Adams Hussein Sheikh	*59*	*66*	*66*	*7*
Falana Jarson Jillo	*3,828*	*4,080*	*4,080*	*252*
Safe Mohammad Adan	*1,602*	*1,692*	*1,692*	*90*
Sasura Hussein Tarry	*4,665*	*4,913*	*4,913*	*248*
Waqo Halakhe Dida	*3,077*	*3,215*	*3,215*	*138*
Total valid vote	13,269	14,008	14,008	
Rejected	..	206	206	
Total votes cast	..	14,214	14,214	
Turn-out	..	73.85%	73.85%	

Source: Copies of form 16A's; ECK

Note: Addition in final ECK result for valid is wrong, correct addition in column D.

".." means figure not given in original document.

Noted issues

- Few issues noted, save for the variances on between own aggregates.

9 RESULTS GENERATION AND TRANSMISSION PROCESS

In order to clearly understand the process undertaken in generating and transmitting results (in other words, how the data evolves bottom up) we attempted to reduce into a simple diagram the process of vote counting, tallying and declarations at the polling station, constituency and national level. This process is outlined in the Presidential and National Assembly Act (cap 7 laws of Kenya), regulations contained therein, and subsequent amendments that have been effected over time. This process is shown in the diagram on the following page. [4]

The ECK maintains rigorous system of recording results, tallying them and transmitting them from the polling station or stream up to the national tallying centre. There are statutory forms that must be filled and signed by the respective election officers. The forms are also supposed to be signed by candidates or their agents, if and when they are present in the polling station or constituency tally centre. These statutory forms for parliamentary and presidential elections are as follows:

[4] Obtained from guidelines issued to polling and counting clerks, presiding officers, returning officers by ECK; and regulations from sections 34 to 41 of the Presidential and Parliamentary Elections Act. Also, from transcript of meeting between ECK officials and IREC commissioners held on 16 and 17 May 2008. Colored boxes show step that would normally involve some quantitative additions, transferring of figures, etc.

- Form 16A: Declaration of presidential/parliamentary results at polling station (contains registered voters at a polling station, total valid votes, rejected and disputed votes, and the total votes cast for each candidate). It has a non-binding provision for candidates or agents to sign.
- Form 17A: Declaration of results at Constituency level, and its filled by the returning officer at the constituency using all form 16As from polling stations in that constituency. Shows names of polling stations, votes cast for each candidate in all stations, and total votes for each candidate in that constituency. It has a non-binding provision for candidates or agents to sign.
- Form 16: Certificate of results of presidential/parliamentary election, at constituency level; (contains name of returning officer, names and total votes for each presidential candidate, and number of rejected votes). It has no provision for candidates or agents to sign.
- Form 17: Certificate of Results of Parliamentary Election (issued by the returning officer at constituency level showing the name, party and occupation of the candidate who has been elected as MP)

While these forms are essential in the results process, the most important is the form 16, prepared and signed by the returning officer only at the constituency level. It is treated by the ECK as the most final indicator of the results for an entire constituency. The original forms 16 for presidential elections are added up to determine the presidential election winner. By law, any changes to the form 16 can only be made by the returning officer; not even the ECK or its commissioners can make changes in it, even when errors are discovered at the national tally center. In terms of the parliamentary election, once a candidate has been issued with the form 17, he is deemed to be elected as MP. Any disputes arising thereof, cannot even be determined by the ECK, but an election petition court. The returning officer therefore determines a great deal in the final results of the presidential and parliamentary elections.

POLLING STATION LEVEL:

1. Actual polling closes; counting the balance ballots; sealing boxes; closing marked register; etc

2. PO opens box and, with aid of clerks, count votes for each candidate; record the votes cast for each candidate

3. Counting aloud of the votes at each station and for each candidate by the PO and clerks; sorting between valid, rejected, and disputed ballots

4. Dealing with re-counts if any; rejected ballots, etc., by PO and agents

5. PO and agents sign form 16A (Declaration of election results at polling station) showing name of polling station, registered voters, valid votes, candidates' score, rejected and disputed votes. The same for Form 8 in relation to the civic elections

6. PO announces results of the polling station; they are final, apart from disputed ballots, which are subject to RO's decision

7. Agents sign reason for refusal to accept results, if any; are given copies; PO displays results at station entrance; materials put in ballot box, which is sealed. Delivers documents to the RO "as soon as is practicable"

CONSTITUENCY LEVEL:

8. RO receives results from polling stations; opens sealed ballot box used for transportation

9. RO reads the result from the polling station aloud, examines and adjudicates disputed ballots, and tallies for each candidate without recounting ballots not in dispute. Unclear if polling stations were discarded if number of votes was in excess of number of registered voters

10. RO fills two Forms 17A (presidential and parliamentary) and Form 9 (civic)

11. RO announces valid votes cast for:
- Presidential candidates
- Parliamentary and civic candidates
- Declare the parliamentary winner
- Declare the civic winners

12. RO telephones or faxes to the National Tallying Center the votes for all presidential candidates. These votes are still provisional. They are taken from Form 16, which has been completed on the basis of 17A column sums
Form 16 not copied to party agents

14. RO completes, dates and signs form 17A (registered voters, candidates' votes in each polling station; votes cast in constituency, and rejected votes). Copies may or may not have been given to agents. Completes forms 17 (Constituency Result Certificates)

15. Delivers to ECK all original Forms

16. NB: Presidential results (Form16s) are provisional until announced by ECK and arrival of original Form 16. Only RO is entitled to change them, not the national tallying center Tallying team, nor the IT department. ECK Chair stated that Commissioner on duty had mandate to alter the results after verification

17. Decisions of the RO on validity of ballots are final save during petition

→ To national level

NATIONAL LEVEL:

From constituency level ----------

18. Provisional presidential results are received by phone or fax by one of ten Tallying teams (each handling 21 constituencies). The team fills a constituency-specific pre-printed form and verifies authenticity of results by calling back to the RO (did it always happen?)

19.
- The team leader delivers the filled-out form to the IT department, who enters the data into the computer and prints a form with the presidential results as received from the RO and passed on by the verification table. One of the ECK commissioners announces the presidential results for that constituency based on the provisional results.
- When the RO arrives with the original Form 16 (and accompanying documents), he is shown the form with the printed (in some cases also announced) results; he compares with his original results and signs on if they are identical. It thereby becomes final. If they are not identical, he/the team staff corrects manually the figures on the form. The form is then taken to the IT department, who enters the corrected data in the computer and prints a new result sheet, which is then authenticated by the RO.
- Unclear if corrected results were announced as such. The IT department in some cases declined to change corrected results, claiming that results could not be changed after having been announced.
- Evident disagreement between ECK senior staff and Commissioners on the correct procedures in such cases; this might explain some of the problems identified.
- The tallying teams in some cases checked the correspondence between Form 16 and other Forms (17A). This was, however, the exception rather than the norm.
- Final presidential results when all 210 Forms 16 have been entered and tallied – or when remaining constituencies could not any longer change the outcome.
- The ECK Chairman fills Form 18 and delivers it to the winner of the presidential election "at the time and place where the new president shall take the oath of office"

20. Gazettement of the names of those elected. ECK notifies Speaker of the National Assembly of tied elections

21. Disputes over counting or tallying to be lodged to ECK within 24 hours; to order a count provided an ECK decision shall be made within 48 hours of that request. Where a further dispute arises, this has to be taken to an election petition court within 28 days.

10 RECOMMENDATIONS

Statistics and numbers are central in any given election. The elaborate preparation by all actors participating in an election comes down to be principally determined by the process of how results are handled, managed and announced. This makes the system of handing these results a paramount anchor upon which free and fair elections should be built.

There are many aspects, however, that go into making and election free and fair, such as the legal framework in place, structure, access and efficiency of the electoral management body (EMB) and the role of other actors such as political parties, media, observers and non-state actors. The recommendations made herebelow, should be seen in the context of proper structures and laws that need to be put in place for these other factors that relate to elections.

The problems encountered by our reading of the results documents of the 2007 elections—most of which are highlighted in this report—point to a number of failures, principally on the part of the ECK, and in general on the presiding officers, returning officers and clerks hired to run the election. There are major system failures, personnel failures, organizational failures, and severe technological handicaps and human error that certainly contributed to a flawed election, and as we have seen in many cases, candidates not getting correct results, and a wrong parliamentary declaration. These failures should not be tolerated in any modern and decent election.

We therefore make the following observations:

A. Strengthening the electoral management system as far as results process is concerned. The lowest unit at which results start being generated is the polling station level, when presiding officers collate results from polling streams and tally them onto the form 16A. A system of minimizing clerical and numeric errors should be implemented right from this level, up to the national level where the presidential tally and announcement is made. This ranges from employing more competent clerical staff, adequate and effecting training, plus ensuring that whatever automated or technological system is designed, is used from the polling station level to ensure errors are not replicated upwards on the results processing chain.

B. Whilst more accountability—in terms of making it mandatory on the part of ECK to have candidates or agents sign form 16A and 17A—might create a bottleneck because of more time taken to confirm and recheck results by agents, it would certainly aid in ensuring that different checks and balances are employed in ensuring that results are entered correctly in all statutory forms, and all additions or tally of votes for candidates is done without any flaw at all. At the very least, the ECK should consider employing a proof-readers, or numeric clerical officers, whose sole duty it to check entries and additions of results in statutory forms. This could be done randomly or using a structured system of identifying forms/stations for proof-checking and that sort of work.

C. The accuracy and integrity of a results system lies in the ability for a) peer-review and b) corrective measures being implemented when errors are discovered. The provision for presiding and returning officers to have agents sign forms 16A and 17A is a self review mechanism. However, this is not the case when it comes to form 16—the principal document that is used by ECK to announcement presidential and parliamentary winners. This is a weakness in that system, as the most important document in an election can be filled by one

person, either at his station or at the national tally centre. It should be recommended that form 16 be countersigned by agents, and unlike the form 16A and 17A where this depends on whether agents are present at the time of filling, counter-signing of form 16 should be made mandatory.

D. Related to this, there is a fundamental flaw in the manner in which parliamentary declarations are made. Presently, the returning officer completes the form 16 and issues a form 17 certificate to the parliamentary winner. Any disputes arising from this can only be resolved by an election petition. Not even the ECK can reverse or change glaring errors in parliamentary declarations. So we have a system where ECK cannot reverse or review decisions of personnel hired on a temporary basis, whose decisions constitute the national assembly. This is a major flaw, and should be revised to ensure that just as polling station/presiding officer results are provisional until confirmation by returning officer, the returning officer results/decisions should be provisional until confirmed by the ECK or its commissioners, and after this level, that is when the election petition mechanism should apply.

E. A lot has been said and discovered regarding automating the process of handing, tallying and counter-checking results. There have been proposals to automate the systems in terms of using computers or mobile technology to aid in this process. That should be the way to go. However, before the system is automated, it should certainly be streamlined in order to build in integrity. Automating a flawed system would only make detection of anomalies and fraud even harder. Streamlining the results tallying process needs to be done in terms of ensuring that it's manned by competent, and well-trained clerks, having extra personnel for proof-reading and checking right entries and made, and ensuring that there is a window that is open for review and correction of errors by senior electoral staff. The right cultural attitude, infrastructure and work ethic toward technology also needs to be in place. Only after this, should we automate the system. This should be done as a matter of priority; as the above table showed, investing in an automated or technology-based system would have made a whole lot of differences in some of the results announced.

F. Use of technology should also be implemented in order to enhance, not only integrity and accuracy of results, but to increase speed of transmission, storage, and further analysis and audits by the ECK. If the law does not recognize results that are transmitted or tallied electronically, this technical solutions should, at least before the law is amended, be used as a parallel system for providing a back-up system for ensuring accuracy of tallies and results, while still using the paper-based system of statutory forms.

G. ECK should consider issuing out serialized statutory forms, to ensure that there is a clear line of responsibility and accountability over forms that are issued out *vis-a-vis* those that are returned to the national tally center. The serialization can take the form of the existing format of: province / constituency number / polling center number / station or stream number. For instance, a form for Uhuru primary school (016), in Nairobi's (01) Kamkunji constituency (002), where this author voted, could be: 01/002/016/B. This would ensure cases of photocopies being admitted as proof of results is stopped, cases of form 17A tallies being made without all forms 16As is minimized, and a least someone is held accountable for electoral forms that are used to hold and carry results. All corrections or changes done on these forms must be clearly

justified and the person doing the changes must be witnessed by at least agents or observers or both. Unilateral changes in forms should be prohibited.

H. At all levels where tallies are conducted, there is clearly a need of getting clerks and officers and who are competent in dealing with data or numeric information. Whilst we should not be having statisticians as clerks or returning officers, there is clearly room for improvement in terms of the caliber of staff hired. As the case of Changamwe constituency showed, where an elderly returning officer, admitted to having wrong results because of fatigue, possibly pressure from agents and supporters, the ECK should not be relying on age or experience in past elections as a major the criteria in hiring election officers.

I. Part of the problem of the results is that the ECK was making announcements even in cases where there were anomalies or disputes. As we have seen in several cases, there are announcements that were made which differ with form 16 figures. Whilst the ECK cannot wait indefinitely to satisfy all parties, there should be a good measure of prudence, care and most of all, certainty in what is being announced at the national tally or press center, as it's very hard to undo—at least in the public mind—what has already gone out.

J. Finally, while we can build water-tight systems, the good will and faith of men is crucial. The law and results systems cannot seal every possible weakness in the results management process. Here, the integrity and good faith of officers will be essential, and perhaps the greatest determinant of how best we plan, manage and audit future elections.

NOTE ON ALLOCATION OF NOMINATED SEATS UNDER PR

1. The nominated seats according to the Constitution of Kenya

The electoral system in Kenya can be described as a special case of a parallel system. According to the Constitution of Kenya, the country is divided in 210 constituencies, each of which elects a representative under plurality rules (usually called First-Pass-The-Post or FPTP systems). However, according to Section 33, there are also 12 members nominated by the parties represented "according to the proportion of every parliamentary party in the National Assembly". Before discussing the specific case of Kenya, this note will provide a brief description of the basic issues related to the allocation of seats under proportional representation systems.

The key issues and the underlying logic in FPTP systems (or, more generally, systems that operate under plurality rule) are quite different to those under Proportional Representation - PR systems. In the case of single-member constituencies under plurality rule, the main concern is the delimitation of constituencies, since it is there that the main opportunities for manipulating the system exists. These issues will be discussed in a separate note. But there is no complexity in a FPTP system in the allocation of seats – whoever gets the more votes in the constituency is the elected representative[1]. Under this kind of systems there is a high degree of disproportionality between popular vote and allocation of seats. But this is not considered a problem, but part of the essential logic of the system. In "normal" political systems[2], FPTP gives an ample edge to the winner, considered as an important contribution to governability.

On the other hand, the logic of Proportional Representation (PR) systems is the allocation of parliamentary seats to parties in proportion to the votes cast at an election. In this kind of systems, proportionality is one of the big virtues, and it is expected that the allocation of seats will mirror the distribution of popular vote. Although it is not the

[1] In case of a tie, all FPTP systems have specific rules on how the situation will be solved (through a new election, drawing of lots, etc.).

[2] There are a number of circumstances in which FPTP will produce a degree of proportionality. That will be the case if the electoral strength of the different parties is geographically concentrated. It will produce anomalous results in cases where there is a great dispersion of candidacies, which would result in a large number of wasted votes (that is, votes casted for non-elected candidates). In the 2007 elections, for instance, in 35 of the 210 constituencies, the winner obtained less than one third of the votes and, in one extreme case (Emuhaya) only 13%.

only consideration usually taken into account, it is the essential characteristic of a PR system.

2. On magnitude of constituencies and electoral formulas

PR systems require multi-member constituencies. The number of seats to be allocated within each of these multi-member constituencies is usually called the "magnitude of the constituency" and, as it will be discussed below, is one of the key elements in a PR system. The number of seats in a constituency varies from two, in the case of Chile, to more than one hundred in several countries. The fact that there are not one but several winners (defined as those candidates that are awarded seats) introduces an additional issue: the need of a "formula" for allocating seats to winning candidates. Such a need emerges from the fact that parties (or independent candidates) will most usually obtain a fractional percentage of the votes cast, while seats allocated to any one party must be a whole number. For instance, in an election where 75 seats are contested in a single constituency, a party might obtain a fractional percentage of the votes – let us say 23.45%, but it would not be possible to allocate to that party the 23.45% of the seats (which would be 17.59 seats). Seats allocated to such party must be a whole number – either 17 or 18 in this specific case. The same phenomenon will happen with all the other parties. An electoral formula is essentially a mathematical process for transforming fractional percentages of votes into "whole number" seats.

The number of seats to be allocated or magnitude of the constituency and the electoral formula are the two basic determinants of the degree of proportionality in the allocation of seats. The magnitude of the constituency has an overwhelming importance. Proportionality increases with the magnitude of the constituency. In countries that use national constituencies for parliamentary seat allocation the magnitude of the constituency is usually very large (usually with 100 members or more), and this alone would ensure significant proportionality almost irrespective of the formula used. However, this is not the case with smaller constituencies. Very small constituencies produce very disproportional results no matter the formula used. An extreme case is Chile who uses proportional representation and two-member (binominal) constituencies. The practical effect of this system is that the first and the second parties will get one

seat each, unless the winner receives more than 2/3 of the votes in the constituency[3]. Twelve seats, as is the case of the nominated seats in Kenya, can be considered as a case of medium magnitude, in which, as it will be discussed below, the choice of formula has a significant impact.

The identification of electoral formulæ for transforming votes into seats is one of the main issues that need a clear-cut definition in countries where proportional representation is used. A number of different and complex computational arrangements have been devised – it was a favorite pastime of mathematicians in the XIXth and early XXth centuries. These mathematicians and electoral experts shared with ECK the basic purpose of designing methods that would bring - among other considerations – logic and justice in the allocation of seats under proportional representation.

The electoral formulæ used by PR systems to allocate seats can be classified in two basic families: the Largest Remainders/Quota (LR) and the Higher Averages/Divisor (HA) systems. All of them have specific characteristics and different impacts, and the discussion on the advantages and disadvantages of the available alternatives still rages in academic circles. In the next two sections both approaches will be discussed and, within each "family" the several alternatives that have been proposed will be presented.

3. The Largest Remainders/Quota family

In all Largest Remainders/Quota systems, the first step is to define and calculate a "quota" of votes that entitles parties to a seat. The next step is to divide the number of valid votes obtained by each party by the chosen quota. A party gets as many seats as it has quotas of votes. If the party obtains 17,000 votes and the quota is 5,000, the party will be allocated three seats. However, these steps will not always provide for the allocation of all seats, as a number of votes will be left over after the allocation of full quotas – 2,000 votes, in the example above. Furthermore, some small parties will not gain sufficient votes to obtain a full quota.

[3] The system was specifically designed with such purpose by the military government before the advent of democracy. As it was expected that the center left coalition would win the elections, the chosen system ensured that there would be over representation of the second coalition, formed by center right parties.

How are then the seats not allocated in the initial calculation divided between the parties? The simplest and most popular method is the Largest Remainder system. After direct allocation of seats to the parties through the use of a quota, the remaining seat or seats are allocated on the basis of the votes remaining after the allocation of full quotas. The parties with the largest remainders – from there the name of the family – receive one seat each. Allocation of seats according to the largest remainder is the common feature of all the members of this family. The differences are related to which "quota" is used under alternative approaches.

The **Hare** is the oldest and simplest quota: it is simply the number of valid votes divided by the number of seats at stake in the constituency. In the following example, involving a constituency with 100,000 votes, ten seats and six competing parties, the seats are allocated on the basis of Largest Remainders and a Hare quota.

100,000 VOTERS, 10 SEATS - Using LR - Hare Quota (HQ) = Total Votes/Seats = 10,000

PARTIES	A	B	C	D	E	F	TOTAL
Votes	47000	16000	15900	12000	6000	3100	100000
Party Votes/Quota = $V_{a...i}$ / HQ	4.70	1.60	1.59	1.20	0.60	0.31	
Seats for full quotas	4	1	1	1	0	0	7
Remainders [4]	0.70	0.60	*0.59*	*0.20*	0.60	*0.31*	
Seats for largest remainders	1	1	0	0	1	0	3
TOTAL SEATS	5	2	1	1	1	0	10

The problem with the use of the largest remainders is that there might be "paradoxical" results[5] and/or a degree of apparent unfairness, as shown by the example: Party C, with 15,900 votes receives the same number of representatives as Party E with only 6,000.

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[4] We are using here fraction of quotas rather than number of votes. It facilitates calculations without affecting the results.

[5] One of the most popular is the so-called Alabama Paradox. The Alabama paradox was the first of the apportionment paradoxes to be discovered. After the 1880 census, C. W. Seaton, Chief Clerk of the U.S. Census Office, computed apportionments of seats to States for all House sizes between 275 and 350, and discovered that Alabama would get 8 seats with a House size of 299 but only 7 with a House size of 300. In general the term *Alabama paradox* refers to any apportionment scenario where increasing the total number of items would decrease one of the shares. No method, however, has been found perfectly satisfactory in practice.

This introduces a significant discrepancy in terms of equality: Party E votes have 2.65 times the weight of C's[6].

In order to overcome some of the problems discussed above, several alternatives have been proposed, all of which attempt to reduce the relative importance of remainders in the allocation of seats by using lower quotas. Among the alternatives to the Hare quota, the most popular are the **Hagenbach-Bischoff** Quota, which is the number of votes divided by the number of seats plus one and the practically identical **Droop** Quota, which only adds one to a Hagenbach-Bischoff Quota[7]. For the **Imperiali** Quota the number of votes is divided by the number of seats plus two. In the chosen example the value of the different quotas is as follows:

Hare	**(Votes/Seats)**	**(100,000/10)**	**= 10,000.00**
Hagenbach-Bischoff	**Votes/(Seats +1)**	**(100,000/11)**	**= 9,090.91**
Droop	**(Votes/(Seats +1))+1**	**(100,000/11)+1**	**= 9,091,91**
Imperiali	**Votes/(Seats +2)**	**(100,000/12)**	**= 8,333,33**

The following table calculates the allocation of seats using the Droop Quota[8].

100,000 VOTERS, 10 SEATS - Using LR - Droop Quota = 9,091.91

PARTIES	**A**	**B**	**C**	**D**	**E**	**F**	**TOTAL**
Votes	**47000**	**16000**	**15900**	**12000**	**6000**	**3100**	**100000**
Party Votes/Quota = $V_{a...i}$ / HQ	**5.17**	**1.76**	**1.75**	**1.32**	**0.66**	**0.34**	
Seats for full quotas	**5**	**1**	**1**	**1**	**0**	**0**	**8**
Remainders	*0.17*	**0.76**	**0.75**	*0.32*	*0.66*	0.31	
Seats for largest remainders	**0**	**1**	**1**	**0**	**0**	**0**	**2**
TOTAL SEATS	**5**	**2**	**2**	**1**	**0**	**0**	**10**

[6] "Unfairness" tends to be random, and depends on the distribution of votes. In the example above, a minimal change of 100 votes from E to C results in a different distribution, as Party E loses its seat which is obtained by C.

[7] The main difference between Hagenbach-Bishoff and Droop is that Droop will never allocate more seats than available, while this might happen with Hagenbach-Bischoff and Imperiali in certain cases.

[8] Hagenbach-Bischoff and Imperiali would produce the same results in this specific case.

As it can be seen in the Table above, the use of a smaller quota results in the allocation in the first round of eight rather than seven seats, and in the final distribution of the remaining seats Party E loses its seat, which now goes to C.

A last alternative – as well as a special case - within the family of highest remainders/quota is the so-called Jefferson quota. A Jefferson quota is a quota that will allocate all seats in the first round, without need to resort to allocating seats through the largest remainders. In the case under discussion, 7,950 would be a Jefferson quota[9], with the following results:

PARTIES	A	B	C	D	E	TOTAL
Votes	47000	16000	15900	12000	6000	100000
Elected seats/Allocated seats	5.91	2.01	2.00	1.51	0.75	
Allocated Seats for full quotas	5	2	2	1	0	10
Final allocation of additional seats	5	2	2	1	0	10

4. The Highest Averages/Divisor family

The use of the Highest Averages/Divisor methods requires the number of elected seats of each party to be divided successively by a series of divisors. Seats are then allocated to parties that secure the highest resulting quotient or average, up to the total number of seats available. These "averages" are not really averages as normally defined but depend on the given set of divisors that a particular system prescribes.

One of the most popular Highest Averages formula is **D'Hondt**, under which each party's votes are divided by 1, 2, 3, 4 etc. Seats are allocated to the largest

[9] The use of a Jefferson quota will produce exactly the same results as D'Hondt , to be discussed in the next section. There is not a single Jefferson Quota, but a group of numbers that will fulfill the condition of allocating all seats without the need to resort to Largest Remainders (Hamilton's invention, by the way). The lowest Jefferson Quota in this case is 7834 and the highest 7950. All numbers in between will produce the same allocation of seats and none of them will require the use of remainders. There are different ways of calculating a Jefferson Quota. The simplest one, used here, is to take advantage of the fact that the number corresponding to the last allocated seat under D'Hondt is always the highest Jefferson Quota.

quotients/averages[10]. In the following table the D'Hondt is used to allocate seats using the same set of data as in the previous example:

100,000 VOTERS, 10 SEATS - Using HA D'Hondt

PARTIES	A	B	C	D	E	F
VOTES	47,000	16,000	15,900	12,000	6,000	3,100
Divisors						
1	47,000	16,000	15,900	12,000	*6,000*	*3,100*
2	23,500	8,000	7,950	*6,000*		
3	15,667	*5,333*	*5,300*			
4	11,750	*2938*				
5	9,400	*1880*				
6	*7,833*					
TOTAL SEATS	5	2	2	1	0	0
Average votes per seat	9,400	8,000	7,950	12,000	0	0

An alternative that has been proposed is the Sainte-Laguë method, which uses the divisors 1, 3, 5, 7, 9, etc.[11] In the following table Sainte-Laguë is used to allocate seats using the same data as in the previous example:

100,000 VOTERS, 10 SEATS - Using HA Sainte-Laguë

PARTIES	A	B	C	D	E	F
Votes	47,000	16,000	15,900	12,000	6,000	3,100
Divisors						
1	47,000	16,000	15,900	12,000	6,000	*3,100*
3	15,667	5,333	5,300	*4,000*	*2,000*	
5	9,400	*3,200*	*3,180*			
7	6,714	*959*				
9	*5,222*					
TOTAL SEATS	4	2	2	1	1	0
Average per seat	11,750	8,000	7,950	12,000	6,000	0

[10] In the specific case of D'Hondt, each quotient represents the average number of votes per seat that will result if the party obtains that number of seats. This will ensure that when all seats have been allocated the average number of votes required to win one seat shall be as near as possible the same for each party.

[11] The formula for Sainte-Laguë is $V_i / 2S_i + 1$, where V_i and S_i have the meanings described in note 7.

Most of the countries applying Sainte-Laguë use a modified version, replacing the first divisor with 1.4, which makes more difficult for smaller parties to obtain a seat – Party E would lose its seat which would be awarded to Party A. On the other hand, the Danish system uses 1, 4, 7, 10, 13, etc. as divisors. They increase so fast that large parties are quickly cut down – much to the benefit of smaller parties[12]. At the other extreme the Imperiali Highest Average system[13] uses as divisors 1, 1.5, 2, 2.5, 3, etc. and is the formula most favorable to large parties. The slowly-increasing divisors of Imperiali results in larger parties gaining many seats before their quotients are reduced below those of the smaller parties. In the case used in the example, Party A would win 7 seats and B, C and D one each.

5. Proportionality versus "Governability"

There are two dimensions under which the different formulæ can be compared. One significant issue is proportionality: To what degree do different electoral formulæ affect the correspondence of vote shares with shares of legislative seats? Ranking PR formulæ has been approached both theoretically and empirically, yet agreement is not universal. The most widely accepted ranking is Lijphart's[14], which considers LR Hare and LR Droop methods to be the most proportional, closely followed by HA Sainte-Laguë. LR Imperiali, HA D'Hondt and HA Imperiali, favoring as they do larger parties, have greater disproportionality.

However, what is a minus from the point of view of proportionality becomes a plus from the point of view of governability. It is argued that electoral formulæ that favor large parties will have a beneficial impact from the viewpoint of governability. It is assumed that a stronger majority for the winner will facilitate decisive decision-making[15]. In

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[12] In this specific case, the results are the same as in Sainte-Laguë, but in most cases it will allocate seats to smaller parties, like F. The precise formula for the Danish system would be $V_i / 3S_i + 1$, where V_i and S_i have the meanings described in note 7

[13] Not to be confused with the Imperiali quota, previously discussed in relation to the Largest Reminders systems.

[14] Lipjhart, Arend. 1986. "Degrees of Proportionality of Proportional Representation formulas" In *Electoral Laws and their Political Consequences*, ed. Bernard Grofman and Arend Lijphart, New York, Agathon Press.

[15] Thus avoiding some typical forms of ungovernability related to executive legislative conflict, like stalemates, impeachment, vetoes, cabinet instability, which in extreme forms can escalate to constitutional crisis and regime breakdown. The bias toward the largest party is one of the arguments usually mentioned in connection to the advantages of plurality in single member constituencies or FPTP (First Past the Post).

Note on Allocation of Nominated Seats under PR

situations with many small parties the formation of coalitions might be necessary and some of the smaller members might have a disproportionate influence on certain issues[16]. Similarly, quite frequently smaller parties are based on personality, represent extremist points of view and/or are not programmatically distinct. From this point of view, formulæ that have the effect of reinforcing (even if to a small degree) the majority of larger parties[17] are preferred. In this connection, the systems more favorable to large parties are both LR and HA Imperiali, followed by HA D'Hondt, modified HA Sainte-Laguë and LR Droop, with LR Hare and HA Danish as the least favorable to larger parties.

6. On Thresholds

An election threshold is a clause that stipulates that a party must receive a minimum percentage of votes, either nationally or within a particular district, to get any seats in the parliament. The effect of the threshold is to deny small parties the right of representation, or force them into coalitions. Many people hold that this makes an election system more stable by keeping out radical factions.

All systems have thresholds of representation: that is, a minimum level of support that a party needs to gain representation. Thresholds can be legally imposed (formal thresholds). According to the ACE Electoral Knowledge Network, there are 65 countries that do not have formal thresholds, and 43 that do have. Even when not legally imposed, they exist as a mathematical property of the electoral system (effective or natural thresholds). The reason for having such a large number of countries without threshold is that they might not be necessary because the "natural" thresholds implicit in the electoral system are high enough. Natural thresholds are related to the magnitude of the districts: in a ten-member district, the natural or effective threshold would be around 5% even using a system that favors small parties, like LR Hare. The eventual need for formal thresholds usually arises under List PR in the case of very large constituencies or under Mixed Member systems for the national compensatory lists.

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[16] For instance, the influence of small religious parties on Likud coalitions in Israel.

[17] The bias in the LR Imperiali was quite favourable to the Christian Democratic governments in post-war Italy.

7. The use of PR for the allocation of nominated seats in Kenya

As mentioned in the initial section, according to Section 33 of the Constitution of Kenya, there are 12 members nominated by the parties distributed "according to the proportion of every parliamentary party in the National Assembly". Section 33 also establishes that "the proportions ... shall be determined by the Electoral Commission after every general election and shall be signified by the Chairman of the Commission to the leaders of the concerned parliamentary parties, the President and the Speaker."

The Constitutional disposition should have been complemented with a regulatory framework at lower levels. However, the Act on Presidential and Parliamentary Elections is silent on the subject, and the ECK has not issued any regulation or statement concerning the process for allocating the nominated seats. Apparently, this was never done, and as late as 5th March 2008 the question has not been solved. According to Point 4 of the Minutes of a meeting of the Legal Electoral Reforms Committee of the ECK held on that day, entitled Nomination of Members of Parliament and Councilors, "the Committee will make proposals for drafting of regulations for the criteria for nominations under Section 33 of the Constitution." (our underlining). It should be noted that the allocation of seats for the 2007 election had been done two months before, in January 2008. Since different formulas will result in different allocation of seats, this is an important gap in the legal framework, which seems to have existed for the last 11 years.

Given this gap in the regulatory framework, the only alternative available is to attempt to identify the formulæ used through an analysis of the allocation processes themselves, which will at least indicate which electoral formulæ are compatible with the decisions finally made by the ECK.

In 1997, 10 parties obtained elected seats in the Parliament, as follows:

KANU	DP	NDP	FORD-K	SDP	SAFINA	FORD-P	SPK	KSC	FORD-A
107	39	21	17	15	5	3	1	1	1

On the basis of that distribution of elected seats, the application of the different electoral formulæ would have produced the following results:

ALLOCATION ON NOMINATED SEATS IN THE 1997 ELECTION

ELECTORAL FORMULA	KANU	DP	NDP	FORD-K	SDP	SAFINA
Largest Remainders – Hare Quota	6	2	1	1	1	1
Largest Remainders–Hagenbach-Bischoff	7	2	1	1	1	0
Largest Remainders – Droop Quota	6	2	1	1	1	1
Largest remainders – Imperiali Quota	7	2	1	1	1	0
Jefferson Quota	7	2	1	1	1	0
Highest Averages – D'Hondt	7	2	1	1	1	0
Highest Averages – Sainte-Laguë	7	2	1	1	1	0
Highest Average – Modified Sainte-Laguë	7	2	1	1	1	0
Highest Averages - Imperiali	9	2	1	0	0	0
Highest Averages – Danish System	6	3	1	1	1	0
ECK allocation of seats	6	2	1	1	1	1

Three members of the Largest Remainders/Quota family (Hagenbach-Bischoff, Imperiali and Jefferson) give the marginal seat to the largest Parliamentary party (KANU at the time) and take it from SAFINA. The same result is produced by the application Highest Averages with D'Hondt, Sainte-Laguë and modified Sainte-Laguë Divisors. Highest Averages with Imperiali and Danish Divisors produced slightly different results. None of them would have allocated the marginal seat to SAFINA. The Danish formula would have allocated the seat to DP, while the large-parties-friendly Imperiali Divisor would have given nine seats to KANU, two to DP and one to NDP. As indicated in the table, the only formulæ that produce results identical to the ECK allocation of seats are Largest Remainders with Hare or Droop Quotas, which are by far the most commonly used members of this family.

In 2002, only seven parties obtained seats in the Parliament, and the distribution was much more skewed than in 1997: the three largest parties obtained 96.7% of the Parliamentary seats. The full allocation of seats is given below:

NARC	KANU	FORD-P	SAFINA	FORD-A	SISI KWA SISI	SHIRIKISHO
125	64	14	2	2	2	1

Note on Allocation of Nominated Seats under PR

On the basis of that distribution of elected seats, the application of the different electoral formulæ would have produced the following results:

ALLOCATION ON NOMINATED SEATS IN THE 2002 ELECTION

ELECTORAL FORMULA	NARC	KANU	FORD-P	SAFINA	FORD-A	SISI KWA
Largest Remainders – Hare Quota	7	4	1	0	0	0
Largest Remainders–Hagenbach-Bischoff	7	4	1	0	0	0
Largest Remainders – Droop Quota	7	4	1	0	0	0
Largest remainders – Imperiali Quota	8	4	0	0	0	0
Jefferson Quota	8	4	0	0	0	0
Highest Averages – D'Hondt	8	4	0	0	0	0
Highest Averages – Sainte-Laguë	7	4	1	0	0	0
Highest Average – Modified Sainte-Laguë	7	4	1	0	0	0
Highest Averages - Imperiali	8	4	0	0	0	0
Highest Averages – Danish System	7	4	1	0	0	0
ECK allocation of seats	7	4	1	0	0	0

As in 1997, the allocation of seats by the ECK is consistent with Largest Remainders with Hare and Droop quotas. Given the lop-sided results, a Hagenbach-Bischoff Quota, as well as three of the Highest Averages formulæ (Sainte-Laguë, modified Sainte-Laguë and Danish) would have produced a similar allocation of seats. The two Imperiali formulae, the Jefferson Quota and HA D'Hondt would have taken away the nominated seat allocated to Ford-P and awarded it to NARC.

In 2007, the ECK faced for the third time the issue of the allocation of nominated seats. Given the fact that elections were expected to have closer results, the importance of the electoral formula for the allocation of nominated seats became increasingly important. In this situation, it would have been expected that the ECK would have analyzed the available alternatives, consult them with the political parties and other relevant stakeholders, and make a decision on the subject before the elections, for the sake of transparency and fairness. But, as mentioned above, none of this was done, and the

issue of establishing regulations on the subject only appears to have been discussed in March 2008, two months after the seats were allocated.

In 2007, the dispersion in the allocation of seats increased significantly. The results were as follows:

ODM	PNU	ODM-K	KANU	SAFINA	NARC-K	NARC	FORD-P	Group 1	Group 2
99	43	16	14	5	4	3	3	2	1

Group 1: **DP, Chama Cha Uzalendo, Party of Independent Candidates of Kenya, New FORD-K and Sisi Kwa Sisi obtained two seats.**

Group 2: **Kenya National Democratic Alliance, KADDU, Mazingira Greens, FORD-K, FORD-A, Kenya African Democratic Union - ASILI, UDM, Peoples Party Of Kenya and Peoples Democratic Party one seat.**

In 2007, the four of the standard electoral formulæ that have a bias for smaller parties (Large Remainders with either Hare, Hagenbach-Bishoff or Droop Quotas, and Highest Averages / Danish) would have allocated the seat as follows:

ELECTORAL FORMULA	ODM	PNU	ODM-K	KANU	SAFINA
Largest Remainders – Hare Quota	6	3	1	1	1
Largest Remainders – Hagenbach-Bishoff	6	3	1	1	1
Largest Remainders – Droop Quota	6	3	1	1	1
Highest Averages – Danish System	6	3	1	1	1

As it can be seen, all of them would allocate the marginal seat to SAFINA. The five remainder formulæ – Largest Remainders with an Imperiali Quota or a Jefferson Quota, and Highest Averages D'Hondt, Sainte-Laguë and Modified Sainte-Laguë – that give an edge to the larger parties would allocate the 12 nominated seats as follows:

ELECTORAL FORMULA	ODM	PNU	ODM-K	KANU	SAFINA
Largest remainders – Imperiali Quota	7	3	1	1	0
Jefferson Quota	7	3	1	1	0
Highest Averages – D'Hondt	7	3	1	1	0
Highest Averages – Sainte-Laguë	7	3	1	1	0
Highest Averages – Modified Sainte-Laguë	7	3	1	1	0

Note on Allocation of Nominated Seats under PR

As it can be seen, all of them would award the marginal seat to the largest party in terms of Parliamentary representation, ODM, rather than to SAFINA.

A last alternative that might be evaluated is the impact of the introduction of a threshold for receiving nominated seats. If it is decided (somewhat unconstitutionally) that only parties who had more than 3% of the seats in Parliament would be allowed to receive nominated seats, SAFINA would have been excluded, since in that case only parties with at least 7 seats would have been able to participate in the allocation of nominated seats. If a 3% threshold is used; all formulæ have give the marginal seat to ODM[18].

Comparing the results of the allocation under all electoral formulæ considered with the allocation of seats decided by the ECK in January 2008, the result is as follows:

	Allocation of nominated seats				
Political party	**ODM**	**PNU**	**ODM-K**	**KANU**	**SAFINA**
Electoral formulae					
Large Remainders with Hare, Hagenbach-Bishoff or Droop Quotas, and Highest Averages / Danish	6	3	1	1	1
1					
Largest Remainders with Imperiali Quota, Jefferson Quota, Highest Averages D'Hondt, Sainte-Laguë and Modified Sainte-Laguë, 3% threshold	7	3	1	1	0
To be compared with					
ECK allocation of seats	6	3	2	1	0

From the analysis of the 1997 and 2002 allocation of nominated seats, we have deduced that only the use of a Large Remainders approach with a Hare or a Droop Quota would have been consistent with the allocation decided by ECK. Hare, particularly, is the common sense choice of persons who may feel uncomfortable with the mathematical complexity of some of the other methods, and we strongly suspect it

[18] With the exception of Highest Averages with an Imperiali Divisor, which is, as almost always, a rather special case. No country uses it at present, as it has the strongest bias towards large parties. It would give ODM nine of the nominated seats and the remaining three to PNU.

was the method used in those two occasions. However, as it can be seen in the table above, the use of LR/Hare would have awarded the seat to SAFINA. All the other approaches, including the eventual use of thresholds, would have awarded the seat to ODM.

What makes it more difficult to understand the allocation made by ECK is that there is no Quota – and one could not possibly exist – within the family of Largest Remainder systems that would allocate a seat to ODM-K. Larger quotas would allocate the seat to SAFINA, and smaller quotas to ODM. Similarly, it does not – and cannot - exist within the family of Highest Average systems a set of Divisors that would allocate a seat to ODM-K. Slowly increasing divisors would allocate the seat to ODM, while rapidly increasing ones (as the Danish divisors) would give it to SAFINA.

It can also be shown that the allocation decided upon by the ECK is the most disproportional of all available alternatives. There are several measures of disproportionality. The best known are the Loosemore-Hanby Index (LHI= 1/2 Σ ABS (S%-V%)) and the Gallagher Index (GID = SQRT of $\Sigma(S-V)^2/2$). Using the Loosemore-Hanby Index, the disproportionality of the formulæ that give the seat to SAFINA is 6.64, while the allocation to ODM decreases disproportionality to 3.53. The disproportionality of the allocation decided by ECK allocation is significantly greater - 8.76. If we use the Gallagher Index the picture does not change. The values for the first two alternatives are 5.78 and 2.73 respectively, while the value of the index for the ECK allocation increases to 6.39. The ECK allocation is the most disproportional according to both indexes.

CONCLUSIONS

1. Given the limited number of nominated seats to be distributed, it should be expected that different formulas for allocation would produce different results. The initial part of this note analyzes the characteristics and impact of the ten formulæ used in practically all known cases of PR systems.
2. The electoral formula used for the allocation of seats by the ECK was not discussed with political parties or other relevant stakeholders before the election,

and has not been made public even after a decision concerning the allocation of seats has been made. The evidence suggests that such regulation does not exist, as its future development is recommended by an ECK Committee as late as March 2008.

3. The electoral formula used in 2008 for the allocation of the nominated seats is not and cannot be the same as those used in 1997 and 2002.
4. Four of the standard electoral formulas used in PR systems – LR with either Hare, Hagenbach-Bishoff or Droop Quotas, HA / Danish – would have given the marginal seat to SAFINA. Five of the remainder formulæ – LR with an Imperiali Quota, Jefferson Quota, HA D'Hondt, Sainte-Laguë and Modified Sainte-Laguë – would have allocated the marginal seat to ODM. HA Imperiali would result in 9 seats to ODM and 3 to PNU.
5. A Quota within the family of Largest Remainder systems that would allocate a seat to ODM-K does not – and cannot - exist. Larger quotas would allocate the seat to SAFINA, and smaller quotas to ODM. A Divisor within the family of Highest Average systems that would allocate a seat to ODM-K does not – and cannot - exist. Slowly increasing divisors would allocate the seat to ODM, while rapidly increasing ones would give it to SAFINA.
6. The use of a 3% threshold for the allocation of nominated seats would have cancelled the possibility of allocating a seat to SAFINA, but in this case the marginal seat would have been allocated to ODM under all analyzed electoral formulae.

RECOMMENDATIONS

1. Although the subject has not been discussed in the note, for the sake of brevity, it should be pointed out that nominated seats were introduced a long time ago, in a different political context, for purposes that are not particularly relevant in present

time and/or can be substituted with alternative measures[19]. Given the significant difference in size of the constituencies in Kenya[20], it would be better to conduct a re-delimitation of the constituencies that elect members to 222, and eliminate the nominated seats. That would have no cost for the Public Treasury and would significantly diminish the constituencies' size discrepancies.

2. If the nominated seats are maintained, the electoral formula that the ECK proposes to use should be discussed and agreed in advance by political parties and other stakeholders. Transparency in such process would be essential and the characteristics and expected results of the available alternatives should be fully discussed.

3. On the basis of such discussions, the ECK should produce regulations on a well-defined and unambiguous approach to the allocation of nominated seats that leaves no place to interpretation. Similarly, the calculations involved in the application of the formulæ should be made public.

It is possible now to make some comments on the ECK approach. A first question is in order. Has been the system employed by ECK utilized in any other country? Has the system being recommended in technical writings on allocation of seats under PR? Has it been designed by ECK itself? It is perhaps by ignorance in our part that we have not been able to identify examples of use of the system, and any light that can be thrown on the decision-making process related to the formula will help in the final formulation of the note.

POST-SCRIPTUM - The formula used by the ECK

The previous sections are the text of a document presented to one of the technical workshops organizsed by IREC. The analysis did not include at the time the criteria

[19] For instance, if the purpose of nominated seats is to allow the appointment of ministries that had not been elected as MPs (which we believe was the original purpose of its establishment) it would be sufficient to introduce the reforms that would allow to appoint the President to a certain number of non-Parliamentary Ministers.

[20] The average number of voters in the 10 largest constituencies is 136,204, and only of 15,126 in the smallest 10.

used by the ECK for the allocation of such seats, as it was not made public. After the workshop, we received a detailed note from ECK indicating the way in which this was done for the 2007 elections, which makes it possible to add this section.

In the next few paragraphs, we will reproduce the arguments included in the ECK letter, and add some comments and questions below each quote. The ECK note begins by stating that:

> *Section 33(3) of the Constitution of Kenya empowers parliamentary parties to nominate MPs according to the proportion of every parliamentary party in the National Assembly etc. The ECK has always construed this to mean the number of **elected** MPs of each party has in the National Assembly.*

It should be noted that both the initial version of the note and the present comments have used the number of elected MPs at the time the decision was made, that is, 207 elected MPs.

> *ECK's calculations are shown in the attached paper marked "ECK1". Accordingly, ODM's score was less than **6**, but as is ECK's tradition, as the decimal was **.5** and more it was awarded **6** seats. ODM-K scored less than **1** but under the same practice it was awarded a seat on account of its score of more than decimal **.5**. Safina scored far much under decimal.**5** – i.e **0.28986** which can be rounded up to 0.3 at the highest. At that stage 11 of the 12 seats available were distributed.*

NOTE: ECK calculations (as relevant) from the "ECK1 annex" are as follows:

	Nº of MPs	*Total No of MPs*	*RATIO*	*ROUNDING OFF*
ODM	*99*	*207*	*5.73913*	*6*
PNU	*43*	*207*	*2.49275*	*2*
ODM-K	*16*	*207*	*0.92754*	*1*
KANU	*14*	*207*	*0.81159*	*1*
SAFINA	*5*	*207*	*0.28986*	*0*
Other parties	*...*	*207*	*...*	*0*
TOTAL	*207*	*207*	*12*	*10*

According to the paragraph and the table, the "ratio" results from dividing the number of elected MPs for each party by a Hare Quota (equal to the total number of elected MPs divided by the number of nominated seats – 207/12= 17.25). The first round of seat allocation is done by rounding up this ratio to the next integer, with the results given in

the last column. The text is in clear contradiction with the criteria defined (as well as with the table provided by ECK itself). At this stage only 10 of the 12 seats available are distributed (6 to ODM, 2 to PNU, 1 to ODM-K and 1 to KANU) rather than 11, as indicated in the written text. Obviously, Safina did not get any seats at this stage. The next step refers to the allocation of the remaining seats. According to ECK:

> *Neither ODM nor ODM-K had an automatic right to the balance of **1** seat. ECK considered (a) which of the two had a better decimal rate than the other and obviously it was ODM-K with **0.92754** while ODM had **0.73913**. Safina score of **0,3** could not compare to these two in any way. Hence it was ignored.*

What the paragraph is telling us is that, for the allocation of the remaining seats the highest of the fractions in the "ratio" were considered. Since ODM-K has the highest fraction, the seat was awarded to them. However, as demonstrated beyond doubt above, two, rather than one seat, have to be allocated at this stage. Using the "highest fractions" criteria the results are as follows:

PARTY	RATIO	FRACTIONS	Allocation of additional seats
ODM	5.73913	*0.73913*	0
PNU	2.49275	*0.49275*	0
ODM-K	0.92754	0.92754	1
KANU	0.81159	0.81159	1
SAFINA	0.28986	*0.28986*	0
Other parties	...	...	0

The allocation of seats, according to ECK's own arguments should have been:

PARTY	First Round allocation	Second Round allocation	Total as of ECK letter	ECK Official allocation	Difference
ODM	6	0	6	6	-
PNU	2	0	2	3	+1
ODM-K	1	1	2	2	-
KANU	1	1	2	1	-1
SAFINA	0	0	0	0	
Other parties	0	0	0	0	
TOTAL	10	2	12	12	0

Note on Allocation of Nominated Seats under PR

As it can be seen, using the criteria indicated in the letter, and comparing with the official allocation of results, Safina would not have obtained a seat, but KANU was deprived of a seat that was allocated to PNU. ECK continues its argument as follows:

> *Then (b) ECK considered the fact that ODM-K won three times number of elected MPs than Safina. It appeared to ECK that on further basis ODM-K deserved the extra seat as against SAFINA. If one was to divide the two (2) seats awarded to ODM-K with ODM's score each seat would have been backed by **0.46** while if it was awarded to Safina the seat would have been backed by **0.3** score, which is lower. The same reasoning removes the extra seat from ODM to ODM-K. That was the logic behind the decision.*

The mathematics involved in this argument is not very clear. But the concept of "backing" seems to refer to the ratio of elected to nominated seats, except that in the ECK reasoning the fractions seem to have been used to evaluate the degree of "backing". However, if what we want to ensure that the allocation of nominated seats is such that the average number of seats required to win a nominated seat is as near as possible the same for each party, then the formula to be used should be HA D'Hondt or the Jefferson quota, since they are designed so as to produce such results. This is not the case with the formula used by the ECK, as shown in the two tables below:

Table 1 - Ratio elected seats to nominated seats

	ODM	PNU	ODM-K	KANU	Average
ECK officially announced result	16.5	14.3	8	14	17.5
ECK results corrected as per formula provided to IREC	16.5	21.5	8	7	17.5
Highest Averages D'Hondt or Jefferson Quota	14.1	21.5	16	14	17.5

Table 1 – Disproportionality Indexes

	Loosemore-Hanby	Gallagher
ECK officially announced result	8.76	6.39
ECK results corrected as per formula provided to IREC	6.47	5.78
Highest Averages D'Hondt or Jefferson Quota	3.53	2.73

The ECK also takes issue with one of the recommendations of the briefing note: "... the electoral formula that the ECK proposes to use should be discussed and agreed in advance by political parties and other stakeholders. Transparency in such process would be essential and the characteristics and expected results of the available

alternatives should be fully discussed. ... On the basis of such discussion, ECK should have produced regulations on a well-defined and unambiguous approach to the allocation of nominated seats that leaves no place to interpretation. Similarly, the calculations involved in the application of the formulae should be made public." ECK counter-argument is as follow:

> *ECK at that stage exercised its discretion. It may have been more prudent to summon the parties concerned but the atmosphere was too polarized especially against ECK. In any case ECK would still announce its finding as no agreement could be expected from the political parties. Your Commission is at liberty to suggest the right formula to be legislated upon for the future and indeed this seems desirable. However, as matters stand now, there is no formula in the Constitution or in any other legislation hence ECK has no power to create a formula for that would constitute legislation without constitutional support. But as the law stands, ECK, with respect, does not accept it was wrong in its decision.*

A few points can be made in relation to this argument. First, and most obvious, ECK did exactly that for which it now argues it "had no power". After the election, ECK did allocate the seats and, in so doing, ECK did use a formula/criteria of its own, without legislative and/or constitutional support. However, the constitutional and legal right of the ECK to do so was never contested, either in the original briefing note or here. Indeed, the original version quoted the intention of the Legal Electoral Reforms Committee of the ECK to "make proposals for drafting of regulations for the criteria for nominations under Section 33 of the Constitution". Similarly, the liberty of IREC to suggest a formula is not at stake – although the Final Report might not include specific recommendations on the subject, but rather a discussion on the basic principles so as to contribute to a necessary political debate. These were not the intentions of the note. Other than sharing with other colleagues in the Commission the basic principles and the logic of the allocation of seats under proportional representation, the briefing note was related to the characteristics of decision-making on the subject within ECK and, particularly to:

- A discussion on the formula/criteria for the allocation of seats should have taken place well in advance of the elections, when passions were not as heated as afterwards. This was a must, since, as exhaustively argued in the original

briefing note, different formulae produce different allocations. However, if conducted before the elections, the discussion of formula/criteria is rather abstract. The discussion and the decision did not take place before the election and, because of that omission, the ECK is being sued.

- The formula/criteria chosen by the ECK is different from those used in other countries that organize their elections under PR, it is not included and discussed in the books on the subject and it is quite difficult to defend from a technical point of view. Furthermore, it produces results that are much more disproportional than any other formula available. Last, it is inconsistent with the formula/criteria used in past elections.
- There are computational errors in the application of the formula. This was hinted in the original briefing note, but clearly confirmed through the use of the criteria (including the annexed apportionment table) that were provided in the last letter.

Obviously, all the arguments advanced in this or the previous note stand to be rebated. It is only hoped that the counter-arguments will have the same methodological seriousness it is hoped this note has.

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