

Report

of the

Independent Review Commission

on the

General Elections held in Kenya

on 27 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

Your Excellency

REPORT OF THE INDEPENDENT REVIEW COMMISSION

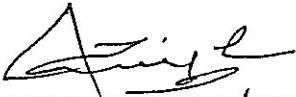
We, the members of the Independent Review Commission, appointed by you to inquire into all the aspects of the general elections held on 27 December 2007 with particular emphasis on the Presidential Election, and to report to both your good self and the Panel of Eminent African Personalities within a 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

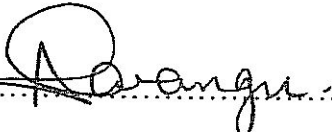
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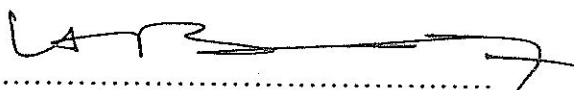
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EXECUTIVE SUMMARY

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 hustled 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 Kiseru, 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 in 1997. 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 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 legislatures 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 assess 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)

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 sully 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 Musvoka 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 observation

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 *Kenians 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 where 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

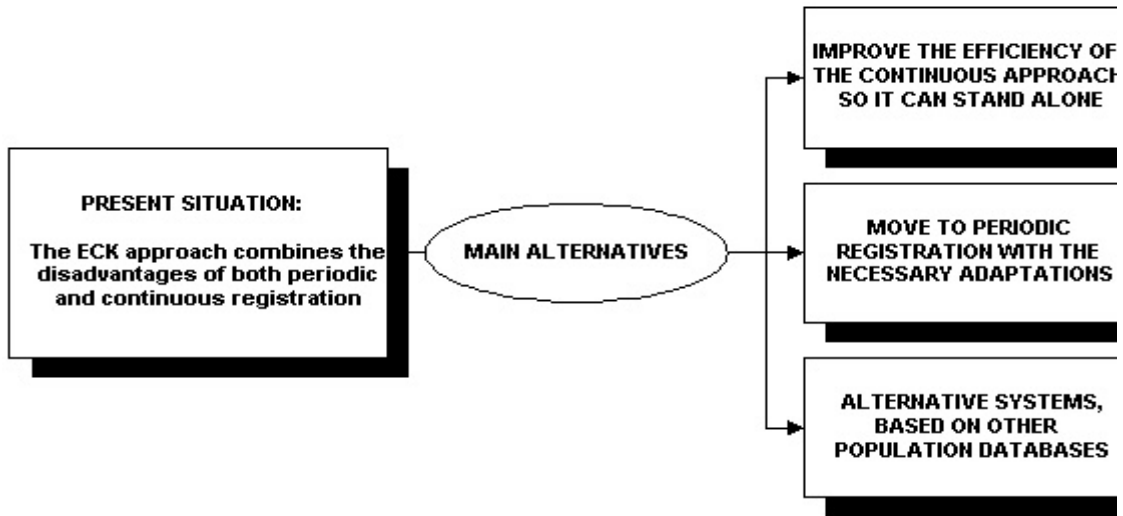
The introduction of continuous registration, perceived as a forward step in 2002, has in practice created a system that combines the cost of both the periodic and the continuous systems of registration. It has resulted in an extended network of district offices whose main purpose, in non-election years, 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 it 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 cooperate 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 in 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 be 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”, “Kijji” and the song by Miuga Njoroge sung in Kikuyu dialect on Kameme and Inoro 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 (SPRR). 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 campaigns. 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.

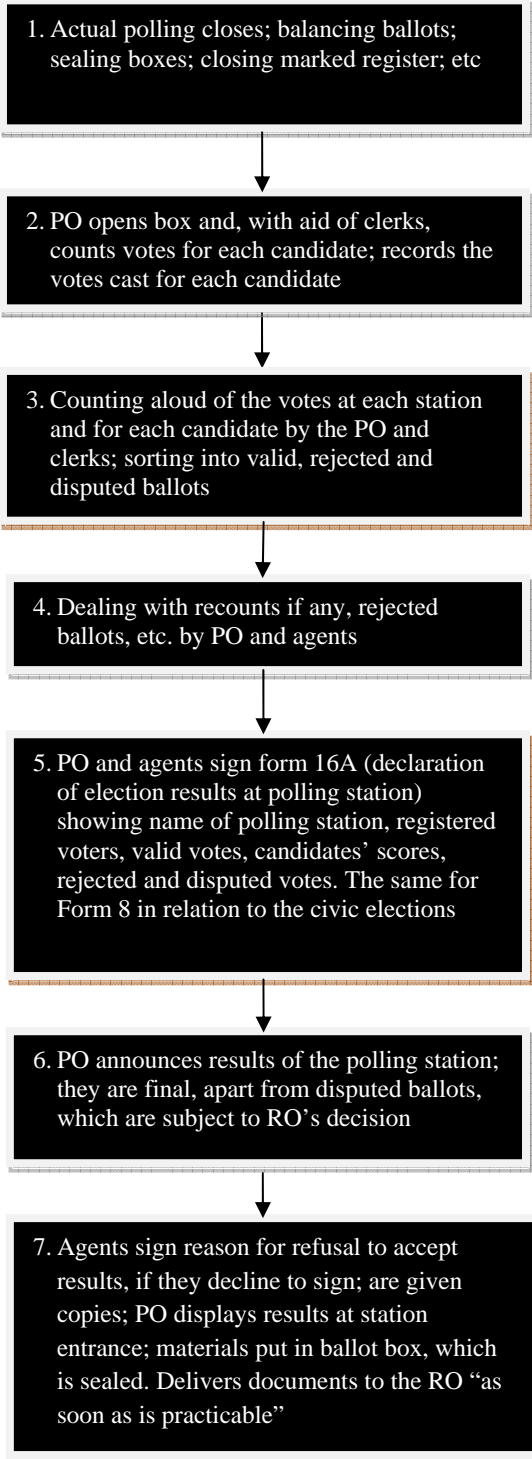
The returning officer was then to make his way to KICC immediately, even though some of the training material used the phrase, “within two days”. He had to bring with him all results and relevant tallying forms from the constituency, and in particular the original, statutory form 16. Upon arrival, he 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.

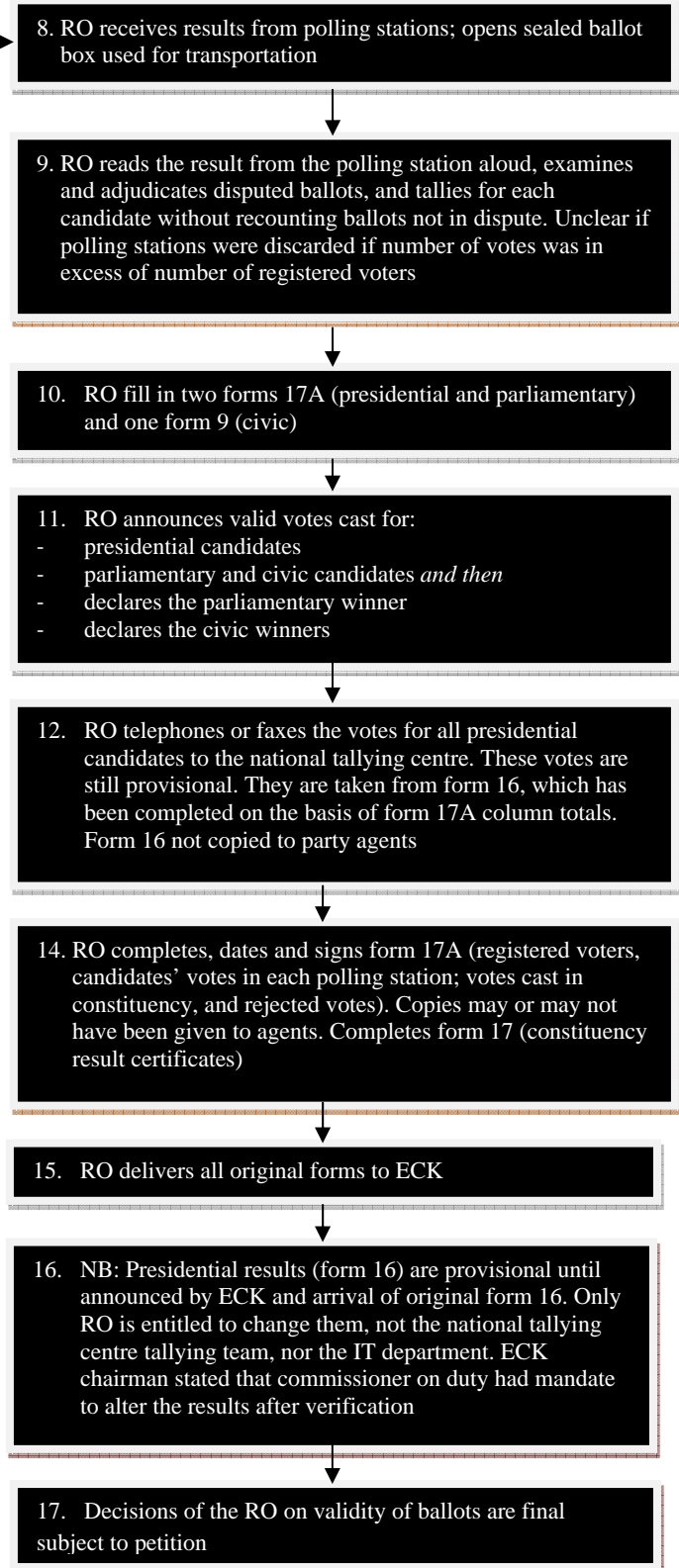
This was extremely unfortunate, as it meant that such necessary – probably unavoidable – changes were not dealt with identically. Some were accepted and changed in the database more or less immediately, others were not, and others again were changed or changed back between the announcement of the presidential 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

POLLING STATION LEVEL:



CONSTITUENCY 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 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”



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



20. 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 forms 16A 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		
	VOTES ACCORDING TO		DIFF	VOTES ACCORDING TO		DIFF	VOTES ACCORDING TO		DIFF
	IREC	ECK		IREC	ECK		IREC	ECK	
KALOENI	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 2007 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 2007 general 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, advertent 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

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 hullabaloo 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.

