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ANNEX 2.A

Independent Review Commission (IREC)

An Analysis of the Constitutional and Legal Framework for the Conduct of Elections in Kenya

September 2008
N A I R O B I

Okech-Owiti
Consultant

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CKRC	-	Constitution of Kenya Review Commission
COG	-	Commonwealth Observer Group
DP	-	Democratic Party
EAC	-	East African Community
ECK	-	Electoral Commission of Kenya
EMB	-	Electoral Management Bodies (EMBs)
EOA	-	Election Offences Act
EU EOM	-	European Union Election Observation Mission
FORD	-	Forum for the Restoration of Democracy
FORD-K,	-	FORD-Kenya
IDEA	-	Institute for Democracy and Electoral Assistance
IPPG	-	Inter-Parties Parliamentary Group
IREC	-	Independent Review Commission
KACC	-	Kenya Anti-Corruption Commission
KADU	-	Kenya African Democratic Union
KANU	-	Kenya African National Union
KHCR	-	Kenya Human Rights Commission
KNCHR	-	Kenya national Commission of Human Rights
KPU	-	Kenya People's Union
LDP	-	Liberal Democratic Party
LGA	-	Local Government Act
MP(s)	-	Memebr(s) of Parliament
NAPEA	-	National Assembly and Presidential Elections Act
NARC	-	National Rainbow Coalition
NARC-K	-	NARC Kenya
NCCK	-	National Christian Council of Kenya
NDP	-	National Development Party
ODM	-	in the 2005 Referendum, the
ODM-K	-	ODM Kenya
PNU	-	Party of National Unity
PPA	-	Political Parties Act
SDP	-	Social Democratic Party

1. Introduction

This report is a summary of the constitutional and legislative framework of elections in Kenya. It was commissioned by the Independent Review Commission (IREC), which was mandated to inquire into the 2007 General Elections. The summary is intended to provide a background to IREC's work and eventual recommendations. The broad Term of Reference required the Consultant to 'analyze the constitutional and legal framework and establish the basis for the conduct of the 2007 elections and to identify any weaknesses or inconsistencies in the electoral legislation'.[1]

The Report is divided into three main parts apart from this introduction. The first part provides a historical survey of Kenya's experiences with elections since independence. It, therefore, gives a brief summary of the experiences between 1963 and 1991 and thereafter discusses each of the elections that Kenyans have gone through since 1992. The discussions on the 2007 General Elections include a summary of formal comments made by election observers and their recommendations.

The second part discusses the constitutional and legislative framework for elections, mainly the Constitution of Kenya, the National Assembly and Presidential Elections Act, the Local Government Act the Political Parties Act and the Election Offences.

The third and last part analyses this framework in light of Kenyan and other experiences.

[1] See Annex

2. A Historical Survey of the Electoral Experience in Post-Colonial Kenya

Historical Background

Kenya's electoral history dates to the colonial days. It began in 1905, when an order in council established the first Legislative Council. Subsequent Orders in Council saw subsequent elections held from 1909 through to 1961.

The constitutional foundations of democratic governance in Kenya were first put in place during the Lancaster House Constitutional Conferences of 1960-63. These conferences debated political transition in Kenya and succeeded in substituting British colonial rule with elected African leaders.

In pre-colonial times, there were no centralized political systems resembling states in the modern sense. Communities comprised small units bound together by kinship and other forms of affinity. They planned and pursued common activities guided by well-established norms and customs. The clan was the central unit in most of these societies and was repository of community management and of conflict management and of conflict prevention and resolution. Leadership was based either on age and gender, with male elders forming local councils, or on heredity, such as the *laibon* system of the Maasai community. [2]

From the time the ban on African political parties was lifted in 1960, Kenya has sea-sawed between single-partyism and multi-partyism until the triumph – so far – of *de jure* multi-partyism in 1991:

- 1960-1964: Domination of the political scene by two political parties - the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU)

[2] Kenya Election 1997: Free and Fair? International Commission of Jurists (Kenya Section), November 1997, p. 6

- 1964: voluntary dissolution of KADU and merger with KANU, creating a *de facto* one party system
- 1966: Re-emergence of multipartyism when the then Vice-President, Jaramogi Oginga Odinga, resigned from KANU and launched a new party, the Kenya People's Union (KPU) in which he was joined by 28 other legislators from KANU[3]
- 1969: On the eve of the 1969 General Elections, KPU was proscribed leaving KANU as the only political party and making Kenya – again – a *de facto* one-party state
- 1982: The Constitution was amended[4] to make KANU the sole legal political party and Kenya finally became a *de jure* one-party state[5]
- 1991: After popular campaigns against the *de jure* single-party system, an amendment to the Constitution[6] repealed Section 2A which had made KANU the only legal political party.

It is this last amendment which paved the way for the first multi-party elections since 1966.

The 1992 General Elections

Despite the clamour for the expansion of the democratic space, no other serious amendments were made to the Constitution after the removal of section 2A. Thus, the 1992 General Elections were held under the same Constitution which had been considered as undemocratic, especially its concentration of power in the executive, and under the cloud of the one-party system. During these elections, KANU won 100 out of the 188 seats[7] largely as a consequence of the fact that the original Forum for the Restoration of Democracy (FORD) had disintegrated into FORD-Kenya and FORD-Asili on the eve of the Elections. There were allegations that the elections had been rigged in favour of Moi and KANU,

[3] A constitutional amendment pushed through by KANU required that a person who defects from a party through which he or she entered into Parliament loses his/her seat. This necessitated the 'Little General Elections of 1966 during which KPU put into Parliament only seven MPs, making it a very small opposition party

[4] Constitution of Kenya (Amendment) Act, 1982 (Act No. 7 of 1982); this was after an attempted *coup d'etat* against President Moi's government

[5] Two general elections - 1983 and 1988 - were held under this system

[6] Constitution of Kenya (Amendment) Act, 1991 (Act No. 12 of 1991)

[7] These included 18 seats that were captured without any opposition. Moi won the elections with less than 35% of the votes cast, making his government a 'minority' one

but the petitions filed in the High Court against Moi were dismissed - largely on technicalities.[8]

Following upon the experiences of the 1992 elections, it dawned on opposition parties and civil society organisations and activists that the removal of section 2A did not provide a wide-enough democratic space; particularly, it was demonstrated that there was no level playing field in the electoral arena. It became clear that further reforms were necessary in the political, constitutional, judicial and administrative spheres. These experiences were compounded by the fact that many activities organized to champion reforms were denied licenses and, very often, violently dispersed. Thus, as Kenyans approached the 1997 elections, the clamour for constitutional (including electoral) reform heightened. This gave impetus to an MP-led reform initiative called the Inter-Parties Parliamentary Group.

IPPG, which met outside Parliament, negotiated and recommended a raft of proposals which resulted in the introduction and passage of two bills – a Constitution of Kenya (Amendment) Bill and a Statute Law (Repeals and Miscellaneous Amendments) Bill – which, to some extent, responded to the demands for minimum reforms before elections. A third bill, the Constitution of Kenya Review Commission Bill, 1997, proposed the establishment of a commission to collect, analyse, and collate the views of Kenyans on constitutional change after the elections.[9]

[8] See, for example, Civil Appeal No. 178 of 1993 (unreported), where Mr. Kenneth Nyindo Matiba had appealed against a decision by the High Court to dismiss his petition against Mr. Moi

[9] Altogether, the reform package came to be called the 'IPPG Package'. Once passed by Parliament, the Bills were given prompt Presidential Assent. As an example of the liberalization introduced by the IPP package, the Registrar of Societies was required to register all the political parties whose applications were pending or give an explanation for non-registration. Consequently, e record 16 political parties were registered in the run-up to the 1997 elections

The 1997 General Elections

Of the 27 registered parties, 22 participated in the 1997 general elections and 15 of these fielded presidential candidates[10]. The elections were scheduled for December 29 but officially extended to December 30 as a result of technical problems that occurred at a number of polling stations. In some constituencies in North Eastern and Coast Provinces that were affected by floods, polling went on beyond the official two days.[11]

Compared to past elections, the ECK conducted its affairs more openly during the preparatory stages, giving press briefings and fielding questions. However, it was bedevilled by numerous logistical and administrative problems during the actual elections, giving rise to widespread criticism across the party divide.

The counting of votes continued into the first week of January 1998 in more than 50% of constituencies. It was not until January 6 that all results for parliamentary and civic elections were finally announced.

In the presidential elections, Moi, the incumbent, won with slightly over 40% of the vote.[12]This win was to provide the lesson in the need for 'coalition-building' in the run-up to the 2002 elections.

The 2002 General Elections

A number of developments that had taken place earlier or took place in 2002 made some difference in these elections. Consequent upon the limitation of presidential tenure to two terms of five years, Moi was disqualified from contesting in the 2002 elections. The Statute Law (Miscellaneous Amendments) Act of June 2002:

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[10] Out of these, only five were in serious contention: Moi of KANU, Mwai Kibaki of the Democratic Party (DP), Raila Odinga of National Development Party (NDP), Michael Wamalwa of FORD-K and Charity Ngilu of Social Democratic Party (SDP)

[11] Okech-Owiti (ed) (1998): Report on the 1997 General Elections in Kenya, 29 – 30 December. Nairobi, Institute for Education in Democracy, p. 67

[12] In the parliamentary elections, KANU won 107 seats against DP's 39, NDP's 21, FORD-K's 17 and SDP's 15. Though it won about 51% of the seats, it received only about 38% of the total votes (about 2.24 million), compared to the opposition's 62% (about 3.6 million)

- Provided for continuous voter registration
- Allowed a blind, 'physically disabled' or illiterate voter to freely choose a companion or an assistant (under oath of secrecy) to assist in marking the ballot paper
- Enabled the voter to make any mark to indicate his/her choice of candidate on the ballot paper (except any mark that identifies the voter)
- Provided for the counting of ballot papers at the polling station immediately after the closing of voting, and in the presence of the candidates or their agents.

It is noteworthy too, that a lot of civic education had been conducted through outreach programmes of civil society organisations, and that there was relative peace compared to the politically-motivated violence of the previous elections.

Perhaps one of the most significant political developments was the formation of the umbrella National Rainbow Coalition (NARC). Drawing lessons from the failure of the opposition to dislodge KANU in 1997, fourteen political parties formed NARC to contest the elections against KANU, whose 'Moi-annointed' flag-bearer was Uhuru Kenyatta. NARC fronted Mwai Kibaki as its presidential candidate. During the elections, Kibaki was able to garner 25% in all eight provinces, the highest being in Nairobi (76% of the votes) and the least in N. Eastern (28% of the votes). The KANU presidential candidate, Uhuru Kenyatta managed 25% of the votes in three provinces only – N. Eastern, Eastern and Central provinces. Uhuru had the highest proportion of votes in North Eastern where he garnered 67.1% of the votes. The remaining presidential candidates, FORD People's Simeon Nyachae, SDP's James Orengo and UMA's Ngethe Waweru, did not achieve the required 25% of the votes in any of the provinces.

NARC formed a government in January 2003. However, it was not long before disagreements began to emerge over cabinet and other appointments, corruption and constitutional review, among others. From a political point of view, the most important arena in which these differences were played out was the constitutional review process, especially the 2005 referendum.

The 2005 Referendum

NARC, under the stewardship of Mwai Kibaki, had promised during the campaigns that it would deliver a new Constitution in 'a hundred days' if put into power. A lengthy public consultation process produced the Bomas Draft Constitution in March 2004. But its provisions, notably those reducing the executive powers of the presidency, proved unacceptable to the Government. After a protracted legal wrangle, and amid violent protests in Nairobi, the government secured parliamentary approval for certain key amendments to the Draft Constitution, and a new Constitution Bill was published. This new Draft Constitution came to be known as the 'Wako draft', which was put to a referendum.

The legal framework was provided under the Constitution of Kenya Review (Referendum) Regulations 2005 attached to the Constitution of Kenya Review Commission (CKRC) Act (Chapter 3A of the Laws of Kenya).

The 'Wako Draft', was put to a Referendum in November 2005. It was rejected by 58% of voters. This result was also widely viewed as a vote of no confidence in President Kibaki's government. This prompted President Kibaki to dismiss his entire government and start with a new team which excluded all those Ministers (mainly from the LDP faction of the NARC Coalition) who campaigned and voted against the Wako Draft. Some ministerial nominees rejected their appointments. This effectively marked the end of the NARC Coalition.

The 2007 General Elections

The 2007 General Elections are memorable for the violence that followed the announcement of PNU's Mwai Kibaki as the winner of the presidential race and his hurried swearing in as the President for a second term. Let us first look at the alignment of political parties in the run-up to these elections.

Following the victory of the anti-Wako Draft ODM in the 2005 Referendum, the movement transformed itself into a political party. Matters, however, came to a

head as the party was trying to consolidate itself and choose a presidential candidate. First, Kenyatta withdrew KANU from ODM on the argument that certain guarantees, including KANU's independence and equal partnership within the 'coalition', had not been given. He then aligned himself with President Kibaki, but maintained KANU as an independent party. Then Kalonzo Musyoka 'left' the new party but insisted him and Julia Ojiambo were the rightful custodians of ODM Kenya (ODM-K). Raila Odinga and his 'Pentagon' colleagues[13] 'acquired' the ODM Party of Kenya and transformed it into ODM, which, together with ODM-K, represented the main opposition parties in the 2007 general elections. In the meantime, several of Kibaki's ministers attempted to revive the 'NARC dream' but without NARC. Since the chair, Charity Ngilu, refused to surrender the party, they established NARC Kenya (NARC-K) to galvanise support for Kibaki.

118 political parties[14] fielded candidates for the general elections and a number of these parties formed the Party of National Unity (PNU) coalition group lead by Kibaki seeking a second term in office. PNU was founded in August 2007 and selected as the party for Kibaki's re-election campaign over NARC-K despite resistance from some cabinet members. PNU consisted of a hybrid of coalition partners, with varying degrees of autonomy after a number of these partners decided to contest the parliamentary elections individually whilst maintaining support for Kibaki's candidature for the presidency. PNU was therefore both an informal coalition and a political party in its own right. Many of the political parties comprising the PNU coalition have strong regional bases[15] and collectively formed a broadly national coalition.

[13] Musalia Mudavadi, William Ruto, Najib Balala and Joseph Nyaga

[14] 9 parties registered for presidential, 117 for parliamentary and 118 for civic elections [Source]

[15] FORD-People in the Kisii region of Nyanza Province, led by Cabinet Minister Simeon Nyachae; FORD-Kenya, led by Cabinet Minister Musikari Kombo, in parts of Western Province and the Trans Nzoia District of the Rift Valley; New FORD-Kenya, the breakaway party from FORD-Kenya, rooted in the same regions and led by Cabinet Ministers Mukhisa Kituyi and Soita Shitanda; and KANU under Uhuru Kenyatta in parts of the Rift Valley, North Eastern and Central Provinces, while PNU would primarily focus on the Kikuyu, Embu and Meru regions in Nairobi, Central, Eastern and Rift Valley Provinces.

In early September 2007, ODM elected Raila Odinga as its presidential candidate. In October 2007 the Pentagon was expanded to incorporate the NARC leader Charity Ngilu. Thus, the three main parties PNU, ODM and ODM-K, had Kibaki, Raila and Musyoka as their presidential candidates, respectively. There were six other presidential candidates, among them one woman candidate, Naslin Umar from Nairobi, and Kenneth Matiba, from Central Province, the runner-up in the 1992 elections. However, none of these candidates were able to launch a viable campaign for office.

The elections were held on December 27, 2007. On December 30, Kibaki was sworn in as the president after the ECK announced him the winner. Violence erupted immediately in several parts of the country, notably, Nairobi and Coast, Nyanza, Rift Valley and Western provinces. The violence, which took on an apparently ethnic character, lasted the whole of January 2008 and only abated once the National Accord for power-sharing was been signed by Kibaki and Raila following mediation by Dr. Koffi Annan.

There were allegations of irregularities in the conduct of these elections. These revolved around results being received and announced without the requisite, authenticated documentation, doctoring of results and improper tallying. What happened during the elections and tallying of votes, including the presidential ones, are the subject-matter of the Independent Review Commission (IREC). The violence that followed the announcement of the final results of the presidential election and the swearing in of Mwai Kibaki as the President are the subject of another commission, the Waki Commission. However, a number of observation groups produced reports on the elections, expressing opinions and giving recommendations on various aspects of the elections. We summarise some of the reports below. The intention is to present part of what there is in terms of formal impressions on the December 27, 2007 elections, rather than analyse and present positions. It is for IREC to decide what to make of the reports, taking into account its other sources of information.

European Union Election Observation Mission, Kenya, 27 December 2007: Final Report on the General Elections, 3rd April 2008

The European Union Election Observation Mission (EU EOM) undertook observation in all eight provinces of Kenya. The report observed that within the resources at its disposal, the ECK was able to prepare adequately for the elections both technically and logistically. It enhanced accessibility to voter registration centres, ensured gender balance in the selection of polling staff and generally provided appropriate training for election officials.

However, the appointment of new ECK Commissioners by the President without consultation with opposition parties undermined the confidence in the electoral authority. This mistrust was further fuelled by the failure of the ECK to meet international standards of transparency. Observers and party agents were denied full access to the tabulation of results at national and partly at constituency level.

The ECK announced the final presidential result in the absence of certified constituency results. A full breakdown of presidential results down to polling station level, as commonly and speedily executed in elections following best international practice, has not been published so far.

The observer team recommended that in advance of future elections, the election framework needs reforms to be fully in line with international standards for democratic elections. Other key recommendations include:

- One Kenya Elections Act that consolidates the various and disparate elements of the current election legislation
- A results process that guarantees full transparency at every stage and which enables publishing of results at constituency level upon the completion of tallying and posting of polling station results on the ECK website
- Prioritising the prevention and handling of election disputes, with an independent judicial body being established to deal with complaints and appeals in a timely, effective and transparent manner
- Implementation of polling procedures in a consistent manner

- Selection and appointment of the ECK Commissioners in a manner that ensures confidence by all election stakeholders
- A national voter registration database and computerized constituency registration offices
- A regulatory framework for the audiovisual media and restoration of the independence and public accountability of the Kenya Broadcasting Corporation (KBC).

The Report of the Commonwealth Observer Group on the Kenya General Election: 27 December 2007

According to the report of the Commonwealth Observer Group (COG), the election was significant considering the scale of logistical and operational challenges that the ECK had to put in place for the polls. The COG had, in its Interim Statement commended the professionalism and commitment of the ECK. It formed the view that, up until the conclusion of election day, the process was credible. The COG observed, however, that since polling day it had become obvious that there is a need to have in place improved measures to ensure the timely release of election results and to considerably improve the system of communication between the ECK headquarters and the field. Other key recommendations include:

- Subjecting the process for appointing ECK Commissioners to screening and confirmation by Parliament in order to strengthen the independence of the ECK and further insulate the institution from possible political interference.
- Review of the processes for the transmission and announcement of results
- Review of the polling day procedures and operational arrangements to incorporate a number of features, including transparent and clearly marked, strengthen ECK's capacity to manage polling stations, better layout and clearer directions in polling centres, greater care with the authentication of ballot papers, strict adherence to the procedure for the calling out of voters' names as they are marked off the register, conspicuous identification of all ECK officials at polling stations, adequate lighting for all polling centres and clearer guidelines to presiding officers to determine a valid vote when the intention of the voter is clear

- Implementation of a better system for updating the register of voters and the provision of voters' identification cards
- Implementation of the Political Parties Act of 2007
- A limit on the amount of expenditure that can be incurred during the campaign
- Requiring advertisements to carry some form of identification
- Clear guidelines on advertising with inappropriate content
- Increased training for all media on political reporting
- More effective and consistent training for all domestic observers
- Rulings on election petitions within a specified time period and reduction of the period for lodging legal challenges
- Conclusion of any legal challenge to the election results against a set deadline before the inauguration of newly-elected officials
- Separate funding for female candidates
- Enforcement of laws to protect candidates, particularly women, from violent attacks
- Fostering an environment that is conducive to women's active participation in politics
- Providing adequate funding to ensure that young people are able to genuinely compete in elections.

The East African Community Observer Mission Report Kenya General Elections December 2007

According to the report, the objectives of the East African Community (EAC) Observer Mission were:

- To ascertain whether the elections were free and fair and conform to principles of good governance and democracy in the region
- To look out for best electoral practices that could be emulated in the region
- To widen and deepen cooperation between Partner States in socioeconomic and political affairs.

The report strongly commended the people of Kenya for the high voter turnout, their enthusiasm and commitment to the process, and respect, hospitality and cooperation accorded to the Observer Mission. In the same vein, the Mission

condemned the resultant violence and deeply regretted the senseless loss of life and property. The Mission recommended, among others, that:

- The EAC should establish a regional mechanism to prevent, manage, resolve disputes and conflicts and common mechanisms for the management of refugees in the Region as per Chapter 23 of the Treaty
- The fundamental principle in the Treaty which requires adherence to principles of good governance should be underpinned by enactment of a uniform electoral law and establishment of an East African Electoral Commission
- The EAC should develop a civic education programme that addresses potential challenges of ethnic and tribal tensions within the region.
- Excessive use of force in dealing with protestors should be discouraged
- Those involved in perpetration of political crime and killings should be prosecuted
- The anomalies cited in the tallying process should be investigated and the ECK officials and any other persons found to be responsible should be held accountable
- Electoral legal reforms in Kenya should encompass provision of a time limit within election results should be announced, provision of a specific time-frame within which electoral petitions are disposed of, use of transparent ballot boxes, clarity on qualifications for presidential victory, appointment of the Judiciary, appointment of ECK Officials, use of public resources during campaigns and clarity on powers, authority and autonomy of the ECK
- Political Party leaders should prevail over their supporters to stop violence and engage in collective dialogue for the resolution of the crisis.

The Kenya Human Rights Commission: *Violating the Vote: A Report on the 2007 General Election*[16]

The report of the Kenya Human Rights Commission (KHRC) offers a human rights approach to analysing the 2007 electoral process. The KHRC monitored human rights violations during the 2007 electoral process, including the pre-elections period (and political party nominations), polling day and the post-election period, and concluded that these processes were marked by violations of

[16] February 27, 2008

the rights to life, food and water, security, housing and property ownership, among others.

KHRC's analysis is done around the following themes:

- The Right to Vote
- The Right to Integrity and Security of the Person
- The Right to Freedom of Expression
- The Right to Access Information
- The Right to Freedom of Assembly
- The Right to Freedom of Association
- The Right to Equality and Non-Discrimination
- The Right to Campaign
- The Right to Freedom of Movement
- The Right to Judicial Petition
- Regulation of Political Financing
- Executive Discretion over the Timing of Elections
- Impunity and Prosecution.

Overall, the report concludes that there were violations and makes various recommendations with timelines, in respect of each of these themes. Among these are:

- That the ECK should be disbanded or Commissioners and staff who took part in the irregularities, malpractices and illegalities, resulting in electoral fraud be identified, investigated and prosecuted, and that constitutional, legal, policy and administrative changes be made to replace the current electoral system with mixed member proportional representation
- That the Kenya Police Force should investigate and prosecute those who committed violence, the Commissioner of Police be relieved of his duties and replaced, those among the Kenya Police Force who gave orders to shoot to kill be relieved of their duties and prosecuted, a Police Service Commission be established, within the framework of the Bomas Draft Constitution, and that a Civilian Oversight Body, based on international frameworks for checking excesses of the police, be established
- That the Kenya Police Force and the KNCHR investigate sources of the leaflets, emails, blogs and SMS propounding hate speech and prosecute those responsible, the Kenya Police Force investigates audio and video footage of politicians in campaign rallies to prosecute those

responsible for inciting violence and that Parliament enacts hate speech legislation

- That the Freedom of Information Bill be enacted and related policy formulated and implemented, and that the management of the KBC be de-linked from the state and it be transformed into a genuine national public broadcaster through appropriate legislation and internal policies
- That the state Government restore calm and address underlying issues preventing peace in conflict areas
- That the state, through the relevant Minister, gazette and operationalise the Political Parties Act
- That Parliament amends the Constitution of Kenya to provide for district seats where women contest parliamentary seats, relative to the Bomas Draft Constitution, Local Authorities specify wards where only women contest and that Parliament and the reconstituted ECK work out a formula, through MMPR to provide space for women and other marginalised groups
- That the Kenya Police Force establish a unit to provide security for candidates, especially females, during campaigns and investigate and prosecute all cases of violence against female and other candidates
- That the Chief Justice should institute mechanisms, such as a special court, to hear all petitions before the end of 2009 and that the complicity of the Chief Justice and the judiciary in the electoral failures be examined and addressed
- That the Kenya Police Force, the Attorney General and the KACC should investigate all campaign financing between September and December 2007 and prosecute all those guilty of corruption
- That Parliament alters the Constitution to reduce the powers of the presidency, the, the state undertakes comprehensive judicial and electoral reforms and that the Provincial Administration be abolished
- That the current Attorney General be relieved of his duties, the state establishes Transitional Justice mechanisms.

3. Constitutional and Legislative Framework for Elections

Kenya is in the process of reviewing its Constitution and other Laws. The legal reform content is likely to have a significant impact on the election process.

Currently, the main legal provisions relating to elections are:

- The Constitution of Kenya
- The National Assembly and Presidential Elections Act (Chapter 7, Laws of Kenya)
- The Local Government Act (Chapter 265)
- The Societies Act (Chapter 108)[17]
- The Political Parties Act, 2007
- The Election Offences Act (Chapter 66).[18]

Others which have relevance but which are not discussed here in detail are the Registration of Persons Act, the Penal Code, the Kenya Broadcasting Corporation Act, the Public Order Act.

In summary, the Constitution of Kenya establishes the Electoral Commission of Kenya (ECK) and stipulates its functions. It also provides for the election of the President and members of the National Assembly, and citizenship, which provides the basis for recognition as an elector.

The National Assembly and Presidential Elections Act provides for registration of electors, declaration of vacant seats, elections and election petitions and expenses.

The Local Government Act provides for the establishment of Local Authorities, defines their functions and provides for matters connected and related to those functions. It gives power to the ECK to divide local authorities into various

[17] Now repealed by the Political Parties Act, 2007
[18] The Elections Bill, 2007, is also dealt with, but only to the extent that it introduces new substantive provisions, and only by way of footnote comments

electoral areas and prescribe their boundaries and names. It also provides for procedures for local government elections.

The Registration of Persons Act provides for the registration of and provision of a national identity card to, Kenyans who have attained the age of eighteen years. The cards are used during registration of voters as evidence of age and nationality.

The Societies Act provides for the registration and control of societies[19] and is the legislation under which political parties were registered.

The Political Parties Act, 2007 provides for the registration, regulation and financing of political parties. It replaces the Societies Act under which these parties were registered previously.

The Election Offences Act creates a variety of offences relating to registration of voters and elections, and provides penalties for offenders. Also important in this regard is the Penal Code, the main penal statute in Kenya, under which most illegal acts committed during elections are also prohibited. The offenders could be prosecuted under either of the Acts.

The Kenya Broadcasting Corporation Act is important in the electoral process because it establishes and regulates the public electronic media. It requires that the media treat political parties equally during elections. It forbids discriminatory broadcasting. If political parties so request, it, in consultation with the ECK, prepares a schedule for use of the facility free of charge by the political parties. During campaign periods, the public media are expected to maintain a fair balance in the allocation of broadcasting hours as between different political viewpoints.

The Public Order Act originally required any person intending to hold a political rally to obtain a licence. However, in 1997, arising from the Inter-Parties Parliamentary Group's reform package, this requirement was removed. It was

[19] See long title of the Act

replaced by a provision which requires only that the person intending to hold a rally notify the Officer Commanding a Police Station nearest to the place of the rally. The period of notice required is not less than three and not more than fourteen days prior to the meeting.

The Elections Bill, 2007 is, largely, a consolidation of the provisions of the National Assembly and Presidential Elections Act, the Local Government's Act and the Election Offences Act and addresses elections to the office of the President, to the National Assembly and to local authorities, provides for the procedure and conduct of referenda, and contains provisions to prevent election malpractices.[20]

The Constitution and Human Rights

The Constitution of Kenya makes provision for minimum standards of human rights to be enjoyed by every citizen. Although these standards contain exceptions, they form the constitutional benchmarks for the recognition and implementation of human rights in Kenya.

The main constitutional articles on human rights are in Part V of the Constitution, particularly sections 70-82. A general derogation is provided for under section 83. Enforcement is provided for under section 84.

In summary, they provide for the right:

- To *life*, except when convicted and sentenced to be hanged in respect of a capital offence
- To *liberty*, except under a court order or for other lawful purposes
- To *security and the protection of the law*
- To freedom of *conscience*, of *expression* and of *assembly and association*
- To protection of the *privacy* of the home and other property and from deprivation of property without compensation
- To protection against *slavery or servitude*
- To protection against *forced labour* except one ordered under a court sentence and labour reasonably required as part of normal communal or other civic obligations

[20] See long title

- To protection against *torture* or inhuman or degrading punishment except where it is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit
- To protection against *illegal search* of one's person or property or entry by others
- To a *fair hearing* within a reasonable time by an independent and impartial court established by law
- To every person charged with a criminal offence to be *presumed innocent* until proved or pleads guilty
- To every person accused of an offence to be given *adequate time and facilities to defend* himself or herself
- To every person accused of an offence to *attend the hearing* of the case
- Not to be held guilty of a criminal offence on account of an act or omission that did not constitute a crime at the time it took place
- Not to be *tried again* for an offence on the same facts where one has been convicted or acquitted or pardoned
- Not to be *compelled* to give evidence at his or her trial
- Not to be *convicted* of a crime that is *not provided* by written law and punishment given
- Not to be discriminated against on grounds of race, tribe, place of origin or residence or other local connection, political opinion, colour or creed
- Where detained, to be provided with a statement in writing, in a language he or she understands, specifying in detail the grounds of such detention.

It is, however, notable that, overall, the Kenyan constitutional human rights regime focuses on 'first generation' rather than the 'second generation' and 'third generation' human rights

'First-Generation Human Rights' mainly deal with civil and political rights. They serve to protect the individual from excesses of the state. They were first recognised at the global level by the Universal Declaration of Human Rights (1948) and expanded by the International Covenant on Civil and Political Rights (1976).

'Second-Generation Human Rights' deal with social, economic and cultural rights. In social terms, they ensure different members of the citizenry equal

opportunities, conditions and treatment. They also grant people the right to work and to be employed. They represent things that the State is required to provide to the people under its jurisdiction. At the international level, these rights are covered mainly by the International Covenant on Economic, Social and Cultural Rights.

'Third-Generation Human Rights' focus on communal rights and solidarity. They cover group and collective rights, the right to self-determination, to economic and social development, to sovereignty over natural resources, to communicate, and to participate in the common heritage of mankind.

The constitutional rights, though limited only to the civil and political arena, are important for the present purposes. This is because elections fall within this very arena. The right to participate in political activity, including elections, is guaranteed generally under sections 78 (freedom of conscience), 79 (freedom of expression), 80 (freedom of association and assembly), 81 (freedom of movement) and 82 (protection from discrimination). The other sections may also have relevance depending on the circumstances and consequences of the elections. For example, the right to life[21], to protection from inhuman treatment[22] and to protection from deprivation of property[23] may not be directly relevant to elections in ordinary circumstances, but may be in circumstances of violence prior to, during or after elections, as happened in the 2007 elections.

The Constitution and State Structures

The Constitution establishes a three-arm state structure composed of 'the legislature'[24], 'the executive'[25] and 'the judiciary'[26]. In general, the Legislature is composed of elected and nominated members of parliament, and ex-officio

[21] Section 71
[22] Section 74
[23] Section 75
[24] Chapter III, Constitution of Kenya
[25] Chapter II
[26] Chapter IV

members (Attorney General and the Speaker of the National Assembly)[27]. Its primary function is to make law[28]. It also makes policy and exercises supervisory authority over the Executive through a 'vote of no confidence', a 'vote of censure', and investment and financial controls (budgeting and appropriation, taxation and auditing).

The Executive is composed of the President, the Prime Minister, the Vice-President, members of the cabinet, assistant ministers and the civil service[29]. The main function of the Executive, as the name suggests, is to carry out the policies and laws passed by the Legislature, although it may also propose policies and laws for adoption by the Legislature and play some other roles[30].

The judiciary – or 'Judicature' – is composed of both 'ordinary'[31] and 'special'[32] courts. Its main function is to listen to and decide disputes arising among citizens at various levels.

These three 'arms' of the state are important in elections. This is because they either:

- Provide the basis for elections (the Legislature and the Executive)
- Propose, pass or execute policies and laws related to elections (the Legislature and the Executive)
- Assist in conducting elections (the Executive), or
- Address disputes which arise during elections (the Judiciary).

[27] Sections 30-45
[28] Sections 46-57
[29] Sections 4-22, 26, Constitution
[30] Sections 23-24, 27-45
[31] The Court of Appeal, the High Court and the Magistrates Courts (sections 60-63 and 65),
[32] Parliament has constitutional authority to establish other judicial bodies under section 65 of the Constitution and has done so and created such courts as the Industrial Court (Labour Institutions Act, 2007), the Courts Martial (the Armed Forces Act, Chapter 99), and the Children's Courts (the Children's Act)

The Constitution and the Electoral Commission of Kenya

Establishment, composition and status

Section 41 of the Constitution of Kenya provides for the establishment of the Electoral Commission of Kenya (ECK), qualifications, appointment, removal and tenure of the members (or Commissioners). The ECK must be composed of between 4 and 21 members and a chairman, all appointed by the President. The Chairman of the Commission is appointed by the president while the Vice Chairman is elected by the ECK. It is important to note, parenthetically, that although the President has the Constitutional power to appoint all the Commissioners, the 'IPPG package' discussed above empowered political parties to nominate potential Commissioners for appointment by the President on the basis of their parliamentary strength and as determined by the ECK. This 'deal' was, however, not put into any law and, to this day, remains a 'gentlemen's' or 'ladies' agreement which requires the President's goodwill to implement.

There are no special qualifications for appointment except that the Commissioners must be Kenya citizens and that the Chairman and the Vice Chairman must have been or are qualified to be appointed Judges of the High Court of Kenya. Members of the armed forces, civil servants and members of the National Assembly are expressly barred from becoming Commissioners.

With regard to security of tenure, a Commissioner may be removed only for inability to perform the functions of her/his office or for misbehaviour. Even then, the question of such inability or misbehaviour must have been referred to a tribunal appointed by the President and the tribunal has recommended such removal to the President. Besides, the office of a Commissioner becomes vacant only at the expiration of five years from the date of appointment, or if circumstances arise which disqualifies her/him from such appointment.

As regards independence, the ECK, in the exercise of its functions, shall not be subject to the direction of any person or authority, shall employ its own staff in line with any existing law and shall make its own rules of procedure. Its decisions

are made by a majority of all its members. It is notable, however, that the Commissioners' salaries are determined by Parliament and allowances determined by the President. None of these can be taken away or reduced to the detriment of a member. These expenses are charged to the Consolidated Fund.

Functions

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

- To determine and review constituencies' boundaries and names after a period of 8 to 10 years
- To register voters, and maintain and revise the voters' registers
- To conduct presidential, parliamentary and local government elections
- To promote voter education
- To promote free and fair elections
- To carry out any other functions as may be prescribed by Parliament.

The Constitution confers power on Parliament to provide for an orderly and effective conduct of the ECK's operations and business.

The National Assembly and Presidential Elections Act

The National Assembly and Presidential Elections Act (NAPEA) is the main law dealing with the process of presidential and parliamentary elections. The Act elaborates the functions of the ECK as provided under section 42A of the Constitution.

The NAPEA defines an elector as a person whose name is included in the register of electors, that is, a person registered as a voter.

ECK Staff, Immunity and Code of Conduct

Section 3 empowers the ECK to appoint its staff. It also declares that where police officers have been assigned election duties, they, by that appointment, become election officials subject to the direction and instruction of the ECK.

Section 3A provides for the immunity of the ECK members and officers from personal liability for actions they may take in the course of their duties.

Section 3B establishes a Code of Conduct[33] for ECK members and its staff which re-emphasizes that they must be impartial and not engage in activities which are detrimental to the status of the ECK.

Registration of Voters

Section 4 (as amended[34]), mandates the Commission to prepare or cause to be prepared two types of registers:

- A constituency register in which is maintained the names of those who register in a constituency
- The principal register, which is a combination of constituency registers and any other register that the ECK may direct.

A copy of the part of the principal register that relates to the constituency for which a registration officer is responsible must be given to her/him. A notice should also be given to the public in general, through the official Gazette, that compilation of the principal register has been completed. With exceptions, section 4A (as amended[35]), empowers the ECK to carry our registration of voters at all times, subject to the following exceptions:

- The period between the commencement of the ninety-day period following the office of the president becoming vacant and the time of election of the President
- The period between the dissolution of Parliament and the Parliamentary elections
- The period between the dissolution of a local authority and the date of election of councillors
- The period between the declaration of a vacancy in respect of a by-election and the date of such election.

[33] Second Schedule of NAPEA. See Appendix One for the provisions of the Code
[34] By Act No. 2 of 2002
[35] *Ibid*.

The section also provides for the use of either a national identification card or passport to support an application for registration. Section 5 criminalizes the act of making multiple applications in order to be registered as voters. It is an offence punishable with a fine or penal confinement.

Section 6 disqualifies from registration as a voter any person who was convicted or reported guilty of an election offence within the preceding 5 years.

Sections 8, 9, 10 and 11 state who may challenge and where he/she can challenge, any decision to disqualify him/her from registration. However, it leaves the procedures for doing so to be provided for in subsidiary legislation.[36]

Elections

Sections 12, 13 and 14 provide for the notices which the ECK must send out calling for parliamentary and presidential elections. These are provisions which relate to the initial stages and steps that must be taken to commence the elections. They provide a timetable and the processes to be undertaken. They start with the writ from the Speaker of the National Assembly and end with the returning officer being directed on what he/she has to do to hold the election. Section 15 recognizes the right to vote as set out in section 32(2) of the Constitution but adds that this is subject to the production of an elector's card.

Section 16 creates an additional disqualification to those in sections 34 and 35 of the Constitution in respect of persons convicted or reported to be guilty of an election offence or who hold certain public offices.[37].

Section 17A grants ECK authority in the overall conduct of the elections, with the power to give general directions and exercise supervision and control and to take the necessary measures to ensure that elections are transparent, free and fair.

[36] See the National Assembly and Presidential Elections (Registration of Electors) Regulations

[37] The First Schedule to the Act includes a full-time member of a board, council or governing body, or employee, of a body corporate established by an Act of Parliament other than the Companies Act, the Building Societies Act, the Co-operative Societies Act or the Local Government Act, and an officer other than a Director not employed full-time, or employee of a company incorporated under the Companies Act in which the Government holds fifty percent or more of the shares

Political Party Nominations

Section 17 vests in registered political parties the power to nominate candidates for elections and provides certain legal procedures they must follow or observe in this regard, including:

- Nomination in the manner provided for in the political party's constitution or rules
- Only qualified persons being nominated by the political parties
- The political party bearing expenses of its internal nominations
- Every party notifying the ECK of the persons it has nominated.

Public Officers during Elections

Section 17B forbids public officers[38] from engaging in partisan politics during election time. The Police Act has a similar provision but specifically applicable to police officers only.

Election Petitions

Sections 19-23, 25-26 and 28-31 make provisions for procedures for applications to the High Court for nullification of a President's or an MP's election up to the final determination of the Court. Section 23 specifically provides for the promulgation of practice rules for the Courts to govern the hearing of petitions.[39]

Section 33 provides for moneys to run elections to be voted for by parliament.

Section 34 empowers the ECK to make regulations on matters listed in the section. Section 34A provides for an Electoral Code of Conduct. This Code appears as the Fourth Schedule to the Act.[40] Its object is 'to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear of coercion, intimidation or reprisals.'.

[38] A public officer is defined under the Public Officers Ethics Act, 2003
[39] National Assembly Elections (Election Petitions) Rules
[40] See Appendix Two for the Electoral Code of Conduct

The Local Government Act[41]

The Local Government Act (LGA) (Chapter 265) provides for the establishment of local authorities, defines their functions and provides for matters connected to those functions. Reference is made to Sections 10, 53-54 and 72, and the Fifth Schedule of the LGA. The Act, together with the Local Government Elections Rules, provides for detailed procedures for elections in electoral areas (referred to as 'civic wards').

Local authorities in Kenya consist of:

- City councils (Nairobi only)
- Municipal councils (for large and developed urban areas)
- Town councils (for small normally undeveloped semi-urban and semi-rural areas)
- County councils (for rural areas).

Creation of Electoral Areas

Section 10 of the Act gives power to the ECK to divide local authorities into various electoral areas and prescribe their boundaries and names.[42] The provisions of the Constitution relating to the division of Kenya into constituencies apply to the creation of wards *mutatis mutandis*. As it is with constituencies, there are both elected as well as nominated councilors. The latter are nominated by the Minister in-charge of local authorities. They may not, however, be more than one-third of the elected councillors. The term of office for both elected and nominated councillors is five years, except that in respect of nominated councillors, the Minister may prescribe a shorter period.

[41] The Elections Bill presents a major departure from the current position as far as election and terms of mayors, chairs of councils and councilors are concerned. Under sections 26-30, they are to be elected by the electorate/voters at the same time as the Presidential and National Assembly elections take place. Secondly, under section 34, the term of office of the mayors, chairs and councilors run along-side parliamentary tenure

[42] A local authority may make representation for the alteration of boundaries of an electoral area (section 54)

Elections

Section 58 of the LGA states that the provisions of the NAPEA relating to powers, responsibilities and duties of the ECK apply *mutatis mutandis* to elections under the LGA.

Societies Act

The Societies Act[43] has been repealed by the Political Parties Act.[44] It should be noted, however, that the political parties which took part in the 2007 General Elections were registered under this Act. This section gives a summary of the provisions of the Act. An evaluatory overview is presented in part 4 of this report.

Definition of 'Society'

The Act, under section 2, defines a society to include:

- Any club, company, partnership or other association of ten or more persons, whatever its nature or objects
- Established in Kenya or having its headquarters or chief place of business in Kenya, and
- Any branch of a society,

but does not include building societies (Building Societies Act, Chapter 489, Laws of Kenya), a school registered under the Education Act (Chapter 211), a company incorporated or registered under the Companies Act (Chapter 486), a corporation under any other law, a co-operative society, a trade union (formerly under Chapter 233 but now under the Labour Relations Act, 2007), an association formed by not more than twenty persons for business for profit, a bank registered under the Banking Act (Chapter 488), an international organization of which Kenya is a member, and any association the Minister declares is not a society.

[43] Chapter 108, Laws of Kenya
[44] Discussed in the next session

Registrar

The Act requires the Minister to, by notice in the Gazette, appoint a Registrar of societies to perform the duties and exercise the powers imposed and conferred by the Act. The Minister may also appoint a Deputy Registrar and any number of Assistant Registrars. The Deputy and Assistant Registrars are subject to the directions of the Registrar.[45]

Registration, Cancellation and Suspension[46]

A society can be registered or exempted from registration. Under section 9, every society is required to apply to the Registrar for registration or for exemption from registration. This must be done within twenty-eight days after its formation, and in the manner prescribed by the Act. If the Registrar is satisfied that an application satisfies the requirements of the Act he must register the society or, in case of exemption, do so with the approval of the Minister. Every society which is not a registered or an exempted society becomes an 'unlawful society'.[47] Any person who manages or assists in the management, is a member or attends or facilitates meetings of such a society, is guilty of an offence and is liable to imprisonment for a term of between one and three years or to a fine of between five to ten thousand shillings, or to both.

Where a society is a branch of, is affiliated to or connected with, an association outside Kenya of a political nature, or a proposed officer has been an officer of a society which has been refused registration or has had its registration cancelled, the Registrar *may* refuse registration. However, the Registrar *must* refuse registration where:

- Has objects which are unlawful or prejudicial to Kenya
- The society has been declared dangerous by the Minister
- The society's constitution or rules are inconsistent with any law
- The application does not comply with the Act

[45] Section 5
[46] Sections 9-15
[47] Section 4(1)

- The society does not exist
- The name:
  - is identical to that of an existing society or one whose registration has been refused
  - resembles that of another society as to deceive the public as to its nature or identity
  - is repugnant or inconsistent with any law or is undesirable.

The Registrar may cancel or suspend the registration of a society where it has, since registration:

- Ceased to satisfy any of the conditions for registration
- Engaged in activities that would otherwise have disentitled it to registration
- Contravened the law or its constitution
- Ceased to be a society
- Failed to comply with any requirements of the law or orders of the Registrar.

Prior to cancellation of suspension of registration, the Registrar is required to give notice to the society, where appropriate, to show cause why its registration should not be cancelled or suspended, or put a notice in the Gazette requiring a society to furnish information that it still exists. The Registrar may then cancel or suspend the registration if the society fails to show cause or to prove its existence. An applicant or society may appeal to the Minister within 21 days if it is dissatisfied with the Registrar's refusal, cancellation or suspension of registration. A second appeal lies with the High Court. A political party which is similarly aggrieved by the Registrar's decision may appeal to the High Court within thirty days of such decision.

A Society's Constitution

Under section 19, the constitution or rules of every registered society or exempted society which is formed after the commencement of the Act must provide for all the matters specified in the Schedule to the Act. These are:

- The name of the society

- The whole of the objects for which the society is to be established.
- The persons to whom membership is open
- The rates of entrance and subscription fees (if any) for membership.
- The method of suspension or expulsion of members
- The titles of officers, trustees and auditors and their terms of office, and the method of their election, appointment, dismissal and suspension
- The composition of committees (if any) of the society, the terms of office of members of such committees and the method of their election, appointment, dismissal and suspension
- The authority for and the method of filling vacancies on committees
- The frequency of, quorums for and dates of the general meetings referred to in section 29 of this Act
- The custody and investment of the funds and property of the society, and the designation of the persons responsible therefore
- The purposes for which the funds may be used, and in particular the prohibition of the distribution of funds among members
- The inspection of books and list of members of a society, by any member or officer, under section 28 (1) of this Act
- The annual or periodical audit of accounts
- The formation of branches, if branches may be formed
- The manner of amending the name, constitution or rules of the society
- The manner of the dissolution of the society and the disposal of its property on dissolution.

Change of Officers and Offices, Amendments, Affiliations and Dissolution

A registered society which changes any of its officers or the title of any of its offices, must give to the Registrar notice of such within 14 days of the change. The notice must be signed by three of the officers of the society. The Registrar may cancel the registration of the society if it fails to comply, after giving the society notice to show cause why it should not be deregistered.

Any society which wishes to amend its name or constitution or rules , or to dissolve itself must apply to the Registrar for authorization before such

amendment or dissolution is effected. The application must be signed by three of the officers of the society and must be made within fourteen days of the resolution. A similar application must be made by a society if it wishes to become a branch of, affiliated to or connected with, any organization or group of a political nature established outside Kenya. In all cases, the application must be accompanied by a certified copy of the minutes of the meeting at which the resolution to make such change, affiliate or dissolve was passed.

Restriction of Appointments

A person:

- Who has been convicted of a crime of fraud or dishonesty must not be appointed or elected:
  - as a treasurer, deputy treasurer or treasurer of a society
  - to any office responsible for collection, disbursement, custody or control of funds
  - to be a trustee
- Who is an officer of the society must not be appointed or elected as an auditor
- Who has not been appointed as, or has ceased to be, an officer of a society must not act as such.

Registers, Books and Accounts[48]

A society is required to:

- Keep an accurate and up-to-date register of members
- Keep books of account in which must be entered all moneys received and payments made
- Through the treasurer or any other person responsible, render to members a true and full account of all moneys received and payments made
- Make its books and documents available for inspection by any officer and members, and the Registrar.

[48] Sections 25-28

General Meeting[49]

Every registered society must, at least once in every year, hold a General meeting to which all its members shall be invited, which meeting will be carried out in line with its constitution.

Returns, Information and Documents[50]

Every registered society is required to furnish the Registrar with the returns, accounts and other documents as prescribed. Failure to file the said returns is an offence on the basis of which the Registrar may deregister the society.[51] The Registrar may also call for a copy of its constitution and rules, list of its officers and members, minutes of meetings of any of its organs, list of number of meetings, audited accounts and any other information and documents. The Registrar has discretion to publish any information furnished in the Gazette.

Winding-up[52]

The Minister has power appoint a receiver and to vest in him/her all the property of a society which is unlawful, whose registration has been cancelled or exemption rescinded, or which has ceased to exist. The receiver may proceed to wind-up the society and:

- Where the society is solvent, pay all its debts and propose to the Minister a scheme for distribution of the surplus and implement the same where the Minister approves
- Where the society is insolvent, set aside the funds which are sufficient to meet the costs of winding-up and then divide the balance among proven creditors on a pro rata basis.

Investigation[53]

The Act gives power to a 'requiring officer' (the Registrar, any administrative officer and police officer of or above the rank of an Assistant Inspector) to investigate any aspect of an unlawful, registered or exempted society and to

[49] Section 29
[50] Sections 30-32
[51] Section 30
[52] Sections 33-37
[53] Sections 38, 39

require the attendance of any person she or he believes to have information relevant to the investigation. Besides, the officer has powers of entry, arrest and search.

General Penalty[54]

The general penalty for offences for which no specific penalty id provided for is five thousand shillings for the society and a similar fine and imprisonment for not more than six months or both for the like offence committed by an officer.

The Political Parties Act

The Political Parties Act (PPA), 2007 was enacted with the objective of providing for the registration and regulation of the operations of political parties. The PAA establishes an institutional framework for this purpose, and a fund.

The Registrar and Tribunal

The PPA establishes an office and a tribunal for purposes of the registration and regulation of political parties, and determination of disputes. The office of the Registrar of Political Parties[55] is an office within the ECK. It is charged with the responsibilities of registering political parties and dealing, in the first instance, with disputes arising among members of a political party. For purposes of the first responsibility, the Registrar is required to establish and maintain a register of political parties which contains the names of all registered parties and any other particulars that may be prescribed.[56]

The Political Parties Disputes Tribunal[57] consists of the following members:

- A chairman, who must be a person qualified to be appointed a judge of the High Court
- Two other members of high moral standing and integrity, one of whom must be an advocate of the High Court of Kenya of five years standing.

[54] Section 42
[55] Section 3, PAA
[56] Section 4, PAA
[57] Section 5, PAA

The members are appointed by the Chief Justice for a term of five years and are eligible for appointment for a further term of five years. The appointments are, however, subject to approval by Parliament. Any person who is a member of the public service or takes an active part in the activities of a political party is disqualified from membership of the Tribunal. The Attorney General is authorized to designate a secretary to the Tribunal.[58]

The Chief Justice may remove a member if he or she:

- Becomes an undischarged bankrupt
- Is convicted of a criminal offence
- Is incapacitated by reason of prolonged physical or mental illness from performing his duties, or
- Is otherwise unable or unfit to discharge the functions of the office.[59]

The main function of the Tribunal is to determine:

- Disputes between the members of a political party
- Disputes between political parties forming a coalition
- Appeals from decisions of the Registrar of Political Parties.

All disputes before the Tribunal are expected to be determined expeditiously, but in any case, within a period of three months from the date the dispute is lodged. The decisions of the Tribunal shall be final.[60]

Formation, Registration and Cancellation of Registration of Political Parties

The PAA allows for the formation of political parties in Kenya by a citizen who has attained the age of eighteen years. Political parties may also form a coalition before or after an election, provided that the instruments of the coalition agreement are deposited with the Registrar for the purposes of arbitration in case disputes arise between the parties. The Registrar is, however, prohibited from registering a political party which:

[58] Section 10, PAA
[59] Section 9, PAA
[60] Sections 6, 7, PAA

- Is founded, or seeks to engage in propaganda, on an ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious basis
- Uses words, slogans, emblems or symbols which could arouse ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious division
- Has a constitution or operational ethic that provides for discriminatory practices contrary to the provisions of the Constitution or of any written law
- Accepts or advocates the use of force or violence as a means of attaining its political objectives
- Advocates or aims to carry on its political activities exclusively in one part of Kenya
- Does not allow regular, periodic and open election of its office bearers.

Besides, a person who is a member of the Armed Forces, the Kenya Police Force, the Administration Police Force, the Prisons Service, the Kenya Wildlife Service, the Judicial Service, or any other person who is a public officer:

- Is not eligible to be a founding member of a political party or to hold office in a political party
- Cannot engage in political activity that may compromise or be seen to compromise the political neutrality of his office
- Is not permitted to publicly indicate support for or opposition to any political party or candidate in an election.[61]

A political party is not allowed to have as its founder, leader or a member of its executive any person who is not qualified to be elected as a member of Parliament or councillor, or to hold a public office.

A person is not permitted to be a member of more than one political party at the same time.[62]

An association of persons or an organization must first be registered as a political party before it can operate as such. An application for registration of a political party must satisfy the following conditions:

[61] Sections 12-15, PAA
[62] Sections 16, 17, PAA

- Must be in writing, signed by the applicant or applicants
- Must indicate the name of the party and any abbreviation of its name
- Must be accompanied by a copy of the constitution[63], the prescribed fee and a request for the registration of the emblem it intends to use on ballot papers.

The Registrar may refuse an application for the registration of a political party if the name, or the abbreviation of the name, of the party is, in his/her opinion, unacceptable for a number of reasons listed under section 20. Where the Registrar accepts to register the party, it will first be issued with a certificate of provisional registration within thirty days. This entitles it to operate as a party pending application for full registration, except for purposes of national elections. The party is expected to apply for full registration within one hundred and eighty days from the date of provisional registration; otherwise, its provisional registration lapses. On application, a party will be qualified for full registration and be issued with a certificate if it has:

- Been provisionally registered
- Obtained not less than two hundred members who are registered as voters for the purposes of parliamentary elections from each Province
- On its governing body, a member from each province ordinarily resident or registered to vote in such Province
- Submitted a list of the names, addresses and identification particulars of at least one founding member of the political party ordinarily resident in each District
- Submitted to the Registrar the location of its head office, a postal address and the locations and addresses of any district offices it has.

By virtue of full registration, the party becomes a body corporate with a common seal, perpetual succession and the capacity to sue and be sued in its corporate name.

The Registrar has power to cancel the registration of a political party if he or she is satisfied that the political party:

[63] The matters which must be contained in such constitution are listed in a schedule under section 19, PAA. The constitutions of existing political parties are also required to conform to the schedule

- Is in breach of the provisions of sections 14, 30 and 31, PAA, or a provision of its own constitution
- Has not complied with the provisions of sections 14 and 30, PAA
- Obtained its registration by fraudulent means
- Instigated or participated in the commission of an election offence
- Has not, for each of the two previous general elections, secured at least five percent of the national vote
- Has used moneys allocated to it for prohibited purposes.

The party is, however, entitled to be informed by the Registrar, in writing, of the intention to cancel the registration and be given ninety days to remedy the breach or comply with the provisions of the Act.[64]

The Political Parties Fund

The PAA establishes the Political Parties Fund, to be administered by the Registrar, from any funds provided by the Minister of Finance and contributions and donations from any other source. The moneys from the Fund are allocated to political parties for their use for purposes compatible with democracy. The funds must not be used:

- For paying remuneration, fees, rewards, or any other benefit to a member or supporter of the party
- To finance any matter, cause, event or occasion in contravention of any code of ethics binding on public officers
- For the purposes of establishing any business or acquiring or maintaining any right or financial interest in any business or in any immovable property, unless it is to be used for ordinary political purposes
- For any purpose incompatible with the promotion of a multiparty democracy and the electoral processes.

It is notable that a party is not entitled to benefit from the Fund if its registered national office bearers do not reflect at least a third of either gender.

Parties may source other funds from:

[64] Sections 20-24, 26, PAA

- Membership fees
- Voluntary contributions
- Donations, bequests and grants from any other source, not being a foreign government, inter-governmental or non-governmental organization
- The proceeds of any investment, project or undertaking in which the political party has an interest.

Voluntary contributions and donations from an individual must not exceed five million shillings.[65]

Other Provisions

The PAA also provides for declaration by parties of assets, liabilities and expenditure in relation to elections (section 32), publishing of sources of funds by parties (section 33), audit of political parties' accounts (section 34), keeping and availability of records of a political party (section 35), a duty of a political party to provide the Registrar with any information required (section 36), immunity of the ECK and the Registrar fro things done honestly and in good faith (section 37), public meetings of political parties (section 38), penalties for breach of its provisions (section 41) and winding up of a political party (section 42).

The Election Offences Act

The Election Offences Act (EOA) (Chapter 66, Laws of Kenya) provides for offences which specifically relate to electoral activities. The offences are loosely categorized as 'Election Offences' (Part II, sections 3A-6), 'Corrupt Practices' (Part III, sections 7-11) and 'Illegal Practices' (Part IV, sections 12-14).

General Offences

Section 3 provides for a raft of offences which relate to:

- False statements with regard to registers
- Forging, fraudulently defacing or destroying, or delivering to a returning officer a forged, nomination paper

[65] Sections 28-31, PAA

- Forging, fraudulently defacing or destroying a ballot paper, official perforation, stamp or mark on a ballot paper
- Unlawfully supplying, selling or purchasing, or printing, a ballot paper, or being in possession of a ballot paper with official perforation, stamp or mark, or printing
- Putting into the ballot box anything other than the official ballot paper
- Unlawfully taking out of a polling station or being found, outside the polling station, in possession, a ballot paper
- Unlawfully destroying, taking, opening or interfering with a ballot box or ballot papers
- Unlawfully manufacturing, constructing, importing, having in possession, supplying, using any appliance, device or mechanism for manipulating a ballot paper after deposit in the ballot box
- Unlawfully making any mark on a ballot paper issued to another person
- Voting at any election where one is not entitled to.[66]

Election Offences

This part creates offences which relate to unlawfully dealing with a voter register and elector's cards, unlawful action or conduct by election officers and maintenance of secrecy and unlawful communication at elections by officers, candidates or agents. The penalty for these offences is imprisonment for a period not exceeding five years. The offences under this Part are cognizable and prosecution therefor cannot be instituted without the prior consent of the Attorney General.[67]

Corrupt Practices

Under this Part, offences regarded as 'corrupt practices' are:

- Personation, that is, applying for a ballot paper in another or a fictitious person's name, or in one's name in an election where one has already voted[68]

[66] Those found guilty of these offences are liable to imprisonment for a period not exceeding five years
[67] Section 6, EOA
[68] Section 7, OEA: the offence is cognizable, and a person who applies for a ballot paper is deemed to have voted for purposes of this section

- Undue influence, that is, using or threatening to use force, violence or temporal or spiritual injury, damage or loss, fraudulent device, trick or deception to influence a voter or candidate or nomination of a candidate[69]
- Bribery, that is, giving, procuring, offering, promising, receiving money, office, place or employment, gift, loan or some other valuable consideration in order to influence a voter, an officer or a candidate[70]
- Printing, publishing, distributing, putting up an advertisement, handbill, placard or poster without indicating on its face the name and address of printer or publisher[71]
- Making or publishing any false statement of fact about a candidate's personal character or conduct or regarding the withdrawal of a candidate.[72] [73]

Illegal Practices

Illegal practices are:

- Making or receiving payment or entering into a contract for payment - for the purpose of promoting or procuring the election of a candidate – on account of ferrying voters to or from the poll, or the use of any house, land, building or premises for the exhibition of any bill or notice[74]
- Refusal by an employer to allow an employee to vote or any attempt to interfere with the exercise this right, deduction of an employee's dues or imposition of any penalty on account of going to vote on polling day[75]
- Facilitation of use or use of musical instruments or loud speaker for purposes of political propaganda during polling day.[76]

[69] Section 9, OEA
[70] Section 10, OEA
[71] Section 11(1)(b), EOA
[72] Section 11(1)(c), (d)
[73] The penalty for offences of personation, undue influence or bribery (all of which are cognizable and the prosecution of which requires the Attorney General's consent) is imprisonment for a period of not more than five years (section 11(1), OEA) and for the others and secondary offenders a period not exceeding four years
[74] Section 12, OEA
[75] Section 13, OEA; the penalty is a fine not exceeding fifty thousand shillings or imprisonment for a term not exceeding three years or both
[76] Section 14 OEA; the offence is cognizable and the penalty is a fine not exceeding twenty thousand shillings or imprisonment for a term not exceeding twelve months or both

4. Analysis of the Framework for the Regulation of the Electoral Process

This section summarises the international and regional standards for electoral regulation and practice and then discusses a number of issues by way of a critique of the existing constitutional and legislative framework for elections.

International and Regional Frameworks

A number of international and regional instruments[77] provide for certain standards which national regulatory frameworks for elections are expected to measure up to. We summarise these below.

The Universal Declaration of Human Rights (UDHR) (1948)[78] summarises the requirements of the Declaration with regard to elections. These include:

- Participation in the government of one's country, which could be through elections or referenda, with further emphasis that the will of the people shall be the basis of the authority of government; this also provides a basis for observation of electoral processes
- Holding of periodic genuine elections, which also implies independent and fair election administration
- Universal suffrage and equal suffrage, which outlaws 'gerrymandering' but does not expressly exclude limitations based on age considerations
- Secrecy of the vote, which does not exclude special procedures for persons with disabilities or illiterate voters.

The International Covenant on Civil and Political Rights (ICCPR) (1966)[79] reproduces, in general terms, the provisions and spirit of the UDHR. It states that every citizen must, without prohibited distinctions or unreasonable restrictions, have the right and the opportunity:

[77] For a summary of the content of these instruments, see European Commission (2007): Compendium of International Standards for Elections. European Commission, Brussels; International Institute for Democracy and Electoral Assistance (IDEA) (2002): International Electoral Standards: Guidelines for Reviewing the Legal Framework for Elections. IDEA, Stockholm; IDEA (1997): Code of Conduct for Ethical and Professional Administration of Elections. IDEA, Stockholm

[78] Article 21

[79] Article 25

- To take part in the conduct of public affairs, directly or through freely chosen representatives
- To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors
- To have access, on general terms of equality, to public service in his country.

Under Article 5 of the United Nations (UN) Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965), States Parties undertake *to prohibit and to eliminate racial discrimination* in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law in the enjoyment of political rights. These rights include:

- To participate in elections – which includes to vote and to stand for election – on the basis of universal and equal suffrage
- To take part in the Government as well as in the conduct of public affairs at any level
- To have equal access to public service.

Article 7 of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) requires States Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, to ensure to women, on equal terms with men, the right:

- To vote in all elections and public referenda
- To be eligible for election to all publicly elected bodies.

At the regional level, important provisions are to be found in the OSCE Copenhagen Document (CD) (1991), the American Convention on Human Rights (ACHR) (1969) and African Charter on Human and People's Rights (ACHPR) (1981).

The CD underlines the will of the people as the basis of the authority of government. The participating States are expected to:

- Hold free elections at reasonable intervals
- Permit eats to be freely contested in a popular vote
- Guarantee universal and equal suffrage to adult citizens
- Ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly and the results made public
- Respect the right of citizens, as such or as representatives, to seek political or public office without discrimination
- Respect the right of individuals and groups to establish their own political parties or other political organizations and have the opportunity to compete with each other on an equal basis
- Ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere
- Provide that no legal or administrative obstacle stands in the way of access to the media
- Ensure that candidates who obtain the necessary number of votes required by law are duly installed and remain in office.

The ACHR[80] largely reproduces the provisions and spirit of Article 25 of the ICCPR, except that it allows national laws to regulate participation in government on the basis of language and education, over and above age, nationality, residence, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

The ACHPR provides for participation in government.[81] However, the details on participation in elections are elaborated in **t**he OAU/AU Declaration on the Principles Governing Democratic Elections in Africa (2002).[82]

[80] Article 23
[81] Article 13
[82] Adopted at the 38th Session of the OAU on July 8, 2002, Durban, South Africa. The provisions are similar to those of the CD, except that the OAU Declaration also imposes obligations on stakeholders, for example, to refrain from violence, corruption and discriminatory practices

The Electoral System and Political Parties

The FPTP System[83]

The electoral system of Kenya is, by definition rather than by declaration, a First-Past-the-Post (FPTP) system.[84]

We note in passing that the system provides for the nomination of twelve members of Parliament by the President. This process was introduced during the colonial times and was intended initially to cater for social groups or interests who/which may not be adequately represented through the electoral process. However:

- The provision for nomination does not change the essential character of the electoral system, seeing that the percentage of the membership of Parliament arising from nomination is barely 5.5
- No criteria have been established for determining the social groups or interests to be represented, either generally or in respect of specific nominations
- The practice has not established a *tabula rasa* of social groups or interests that one can state are clearly the beneficiaries of the nominations, or generated, over time, criteria which can be used to determine the groups or interests likely to benefit from nomination
- Anecdotal evidence suggests that nomination is based largely on loyalty and the desire to reward those who staunchly support the party, or the top party officials.

The FPTP is one of the plurality/majoritarian electoral systems. These systems are distinguished largely by the fact that they are based on single-member geographical areas, often referred to as 'districts'. The essential characteristic of FPTP – also referred to as 'winner-takes-all' in common parlance, or 'plurality-

[83] The Elections Bill, 2007, though coming at a point when debates have been held and polemics exchanged over a period on the Kenyan electoral system, takes the FPTP system as a given and makes no attempt to change it

[84] For a discussion on electoral systems, see Reynolds, Andrew, Reilly, Ben and Ellis Andrew (2005): Electoral System Design: The New International IDEA Handbook. International IDEA, Stockholm, Matlosa, Khabele (2003): Survey of Electoral Systems and Reform in the SADC Region. Electoral Institute of Southern Africa (EISA) Occasional Paper No. 12, September

single-member-district' system more technically – is that in an electoral contest, it is the candidate who gets the highest number of votes who wins. This does not necessarily mean that the candidate has received the absolute majority of the votes.

FPTP system is one of the three most common electoral systems, the others being the proportional representation system (PR), and the mixed (FPTP and PR) system. It has been lauded and criticised in almost equal measure. On the positive side, it is considered to be the simplest and easiest to implement, especially in situations where voters may be illiterate.[85] It connects voters to the legislature more directly in the sense that the MP is their constituency ('district') representative. It facilitates a clear choice between political parties, particularly in situations where there are no independent candidates and clarifies the distinction between the ruling party and the opposition party(ies).

On the downside, however, this system is amenable to manipulation through gerrymandering, may give rise to a minority government (and consequently, the majority votes supporting a group of 'opposition' political parties are, in that sense, wasted) and devalues the participation of women and 'minority' groups.

In the context of Kenya, it is clear that we have had experiences where the ruling party and its presidential candidate got less votes than the opposition parties and their presidential candidates put together, respectively.[86] Second, constituency boundaries have been a perennial object of complaint. Indeed, right now as we are gearing for constitutional review and preparing early for the 2012 elections, redrawing of electoral boundaries is one of the issues at the centre of debate. Third, women and minority groups have found it very difficult to increase their representation in parliament and the councils, apart from the problem of sustaining a presidential candidate. Fourth, it is possible to argue – from anecdotal evidence, since inquiries, reviews and analyses are still going on - that

[85] It is also arguable that in the context of Kenya, it is the system people are most used to and is, to that extent familiar to a majority

[86] The 1992 and 1997 General elections are good examples as shown above

the 'winner-takes-all' attribute of the FPTP system, coupled with partisanship arising from either political party, ethnic or class affiliations may have contributed to the tensions which eventually erupted into the violence that Kenya experienced in January and February, 2008. It is noteworthy, in this context, that the 'Accord' which eventually contributed to the cessation of violence represented, at least in its consequences, a system somewhat removed from a 'winner-takes-all' framework.

Political Parties as the Focal Point: Independent Candidature

The constitutional and legislative system on elections focuses entirely on political parties. There is no provision for independent candidates[87], although this is not necessarily excluded by the FPTP electoral system. In a context where political parties may not:

- Necessarily have clear ideological leanings and attendant programmes,
- Be properly organised institutionally,
- Have developed a stable democratic culture,

individuals who may want to participate as candidates within a specific ideological framework and attendant programmes are denied the opportunity. So are voters who may wish to associate with that kind of candidate.

It is possible to argue that this gives political parties an opportunity to grow and organise and sell themselves. This, of course, is a good thing for democracy. However, the Kenyan experience since independence does not bear this out. Indeed, it could be argued that allowing for independent candidates would avoid party-shopping, especially during nominations – a thing that is quite common. It may even put parties on notice that if they do not offer ideologically clear, stable

[87] Germany, the United Kingdom (UK) and Zimbabwe are examples of electoral systems which provide for independent candidates

and democratic leadership, they stand to lose to an alternative route to parliament or council.[88]

Referenda[89]

Neither the Constitution of Kenya, nor the general electoral laws provide for a referendum. It will be recalled that prior to the 2005 Referendum on the 'Wako Draft Constitution', the ECK used regulations attached to the CKRC Act. The Chairman of the ECK was at pains to explain that the referendum should be treated as an election. This may well be true, since the electorate was required to 'elect' between two positions: 'YES' or 'NO' to the Draft. However, the nature of a referendum as we have come to experience it in Kenya, though only over a short historical period, is different from that which the Tanzanians did during the period they were required to say 'YES' or 'NO' to Julius Nyerere as *Chama Cha Mapinduzi* (*CCM*'s) sole presidential candidate. We envisage referenda as a process that will be used to make some weighty politico-legal and economic decision, like the adoption of a draft constitution, or different system of

[88] The Elections Bill, 2007 assumes the existing political party-focussed electoral system. It does not provide for independent candidature

[89] It is noteworthy that the Elections Bill, 2007 devotes a lot of space to the issue of a referendum. Unlike the Constitution and the existing principal legislation, the Bill provides for holding of a Referendum in Part V. The Bill provides for the power to hold a referendum (section 39), the mode of voting in referendum (section 40), the right to vote in a referendum (section 41), notice of holding a referendum (section 42), Referendum Committees and their registration (sections 43 and 44), appointment of a chief agent and other agents (sections 45 and 46) and procedures for the conduct of a referendum, which are the same as those for holding elections (section 47). With regard to offences, section 61(2) provides that 'An offence under this Act relating to an election shall be an offence during a referendum.' In Part VII, there are provisions on petitions in a referendum: the fact that election petition procedures should apply to a referendum petition and referendum petitions (sections 77 and 78), composition of a referendum court (section 79), operation of a declared result submitted to a referendum (section 80), persons who may present and respondents to a referendum petition (sections 81 and 82), filing of a referendum petition (section 83), the duty of the Registrar to make a list of referendum petitions (section 84), the practice, procedure and security for costs (section 85), death of or delay by a petitioner (section 86), hearing of a referendum petition (section 87), provisions as to witnesses (section 88), prohibition of disclosure of vote (section 89), invalid votes (section 90), powers of the court (section 91), petition expenses (section 92) and certification of a referendum (section 93)

government, or economic system. This removes it slightly from ordinary elections[90] [91].

The Constitution, Human Rights and State Structures

Collective Rights and Derogations

We have noted that the human rights provided for in the Bill of Rights in the Kenyan Constitution are only 'First Generation' human rights. This means that such rights as the right to work and to decent living, and collective or group rights are not recognised. These can, therefore, not be reproduced or reflected in electoral laws. We have also noted that section 83 provides certain derogations from the rights contained in the Bill of Rights. It is on the basis of such derogations that laws like the Public Order Act require politicians and political parties who/which wish to hold political rallies must inform the officer in-charge of a police station prior to the meeting. The original intention was to enable security to be provided for the meeting where necessary. However, this has given such officers the discretion and opportunity to 'outlaw' – and even disperse - political rallies even where they have not given adequate proof that security may be compromised.

State Structures and Appointments

The appointment of the judiciary largely by the Executive branch of government, in fact by the president, has become a contentious issue aside from the general concentration of power. The president appoints the Chief Justice solely and the other judges in accordance with the advice of the Judicial service Commission

[90] The UK's Electoral Administration Act, 2006 (Chapter 22) provides for referenda side by side with ordinary elections

[91] The procedure in the Elections Bill for determining whether or not there should be a referendum at any point in Kenya is both dependent on the President and rather convoluted (see sections 39). First, the President determines whether there is an issue to be decided by a referendum. Thereafter she/he refers the issue to the ECK. The ECK is then expected to frame the issue in the form of a question or set of questions that can be answered through a 'YES' or 'NO' vote. The ECK then transmits the question(s) to the Attorney General (AG) who lays it/them before the National Assembly for approval by resolution in its discretion. The AG then publishes the question(s) as approved by the national Assembly whereafter the ECK takes over to conduct the referendum in the manner it would conduct elections. The ECK may assign a specific symbol to the 'Yes' or 'No' answer as it may deem fit.

(JSC), the members of which he also appoints. To the extent that perceptions are important, this situation is deemed to favour the incumbent and to influence the manner in which the judiciary makes its decisions, apart from being seen simply as a concentration of too much power in one member of the Executive. Indeed, after the announcement of the disputed results of the presidential vote, the Orange Democratic Party leaders and supporters vowed not to pursue the dispute through the courts for precisely this reason. Whether the position was right or wrong, the political process gave it legitimacy and pursued alternative avenues for resolving the dispute.

The Constitution and the Appointment of the ECK

As explained earlier, the appointment of the Commissioners of the ECK was considered a contentious issue prior to the 1997 elections, after bitter experiences by the opposition during the 1992 elections. The IPPG recognised this and recommended a process where the president would appoint Commissioners in consultation with the opposition political parties. Though this part of the 'IPPG Package' was not written into the Constitution, Moi abided by it in 1997 and 2002. Come 2007, however, Kibaki ignored this on the basis that he had – which was true - the constitutional authority to appoint the Commissioners. The issue is still contentious and will be during debates on the review of the Constitution and, if not resolved, in the run-up to the 2012 elections.

Another issue which is peripheral but has been canvassed – especially since the December 30, 2007 announcement of the presidential results and the aftermath - is that of security of tenure. Does security of tenure have to be in the form of *difficulty* in removal of officers, or should it be in the *justice* in the process of removal? Does security of tenure guarantee independence, impartiality and good performance? Ultimately, is security of tenure necessary generally, or in respect of the ECK in particular? If so, how should it be assured and for what purpose? These are questions that cannot be ignored, especially taking into account the

performance and demeanour of the ECK during the tallying of the votes and thereafter.

The Societies Act and the Regulation of Political Parties

A number of aspects of the Societies Act are notable, especially as regards political parties. Two, which encompass many issues, stand out. The first of these is that there is no, or any attempt to make any, real distinction between political parties and other types of societies in terms of definition, registration, regulation of operations, offences and penalties, finances and winding-up. Indeed, the only place where any distinction is made is in respect of which institution a society aggrieved by a decision of the Registrar on refusal, cancellation or suspension of registration can appeal to: the High Court for political parties and the Minister – and then the High Court - for other societies. The only other mention of political 'party' is in the Regulations made under section 53. Here, Form A (Application for Registration or Exemption from Registration of a Society) and Form I (Annual Returns) require the society to state 'the name of each organization or group of a political nature established outside Kenya, if any, of which the society is a branch, is affiliated to or connected with'. In our view, the distinction is necessary and essential for various reasons, a few of which are mentioned below.

- The objects of a political party are the pursuit of political power, control of state power and regulation of the activities of the population as a whole, both internally and externally, as opposed to the welfare-oriented objectives of most of the other societies. These objects are radically different. Indeed, the state has found it necessary to exclude 'economic societies' from the Societies Act because of the difference in their activities. That difference is, in our view, even less radical than that between 'ordinary societies' and 'political societies'.
- The structural organization of political parties is likely to be, and is, in practice, more complex than that of the other societies, with layers that are far beyond the simple 'chair'-'secretary'-'treasurer'-'etc' phenomenon, and with mandates that go far beyond 'chairing', 'recording and correspondence' and 'receiving, keeping, paying and recording funds'. Even the leadership of the more prominent political

parties is likely to be made up of people with alot of economic, political and social clout which may be difficult to handle in the context of the Act.

- The day-to-day internal activities of political parties, and activities related to campaigns, elections and governing (once the party/ies is/are in power) are so broad, complex and involving that a Registrar of societies, Deputy and Assistants would need to muster more expertise, power and courage to tackle the issues that arise therefrom. Besides, the kind of moneys handled by these entities are likely to be far more than those handled by most of the 'welfare' societies.
- Some of the offences that political parties may engage in (for example, false promises, hate speech, tribalism/ethnicity and nepotism, bribery and other forms of corruption and violence), especially during their political operations, are characteristically different from those that are ordinarily engaged in by the other societies.

Indeed, these factors underline the inadequacy of the Act as a regulatory framework for political parties. It is probably for this reason that we have a different legislative and structural regime (the Constitution, the National Assembly and Presidential Elections Act, and the Local Government Act, to mention but three) dealing with the political activities of the 'political societies'.

Secondly, the level of discretionary powers given to the Minister and Registrar are overwhelming. Indeed, these discretionary powers are only subject to the appellate jurisdiction of the High Court. It is true that the discretionary powers are fettered by certain conditions; but within these parameters, they are still too wide for the political arena, especially in the era of widening of the democratic space. This is particularly so with respect to registration, cancellation and suspension of registration, 'unlawful societies', and regulation of the day-to-day activities of societies. It is interesting to note that these discretionary powers were used to restrict the registration of other political parties during Kenyatta's regime (particularly 1966-1979) and Moi's regime (1979-1982) when Kenya was a *de facto* one-party state. Yet, more or less the same discretionary powers were used to increase registration of political parties between 1991 and 1997 and, with only slight regulation by the Inter-Parties Parliamentary Group (IPPG)

'Package' in 1997, to progressively enlarge the number of parties registered after 1997, especially since 2002.

It is our humble general opinion that (almost) silently including political parties in the ambit of the Societies Act as it exists was either inadvertent, an unconsidered afterthought, or simply an act borne of ignorance (of the nature of political parties).

Registration of Voters

It is a big improvement that the law was amended to provide for continuous voter registration. However, Kenya still does not have on-line voter registration systems[92] and a system for registration of persons who are resident outside the country. Physical attendance at a registration centre is still the norm, despite developments in technology. It is possible that many Kenyans are disenfranchised as a consequence of this state of affairs.

Campaigns and Expenditure

The Political Parties Act discussed above provides for funding for political parties from the Consolidated Fund (through the Political Parties Fund) and other authorised sources of funding. It also provides for categories of acceptable and prohibited expenditure. The Election Offences Act provides for offences committed in relation to elections with regard to undue influence. We, however, do not have provisions on ceilings of expenditure during campaigns and polling, or the electoral period generally. There are also no requirements for candidates to compile and give reports on their authenticated expenditure to the Registrar. [93]

Voting

Again, as happens with registration, there are no provisions for on-line voting. There are also no provisions for postal voting and voting by proxy. It is obvious

[92] The UK's 2006 Act mentioned above provides for on-line registration
[93] This, sadly, is also the position in the Elections Bill, 2007

that these processes are difficult to implement and may require quite some financial outlay. However, the main advantage is that they make voting more convenient and, consequently, increase the *potential* number of those who may

Offences and Enforcement

As things stand, the ECK has power and authority to act on offences – and breaches of Codes of Conduct - in relation to elections. Many times, the ECK has argued that it does not have teeth, without explaining what teeth it requires beyond the power. This may be partly because there is no actionable responsibility on the part of ECK to act in respect of breaches of both the legislation and Codes of Conduct. Power should come with responsibility to act diligently.[94]

Petitions

There are currently no time-limes in either the Constitution or the electoral laws regarding determination of election petitions. This means that hearing of petitions may continue even upto the next elections, which does not make sense in terms of democratic representation.[95]

[94] Section 62 of the Elections Bill, 2007 explicitly states that 'A member of the Commission or a returning officer may order the arrest of a person who commits an offence under this Act'

[95] The Elections Bill, 2007 is more advanced in this respect since it provides for a time-limit. All election petitions must be heard and determined within a period of one (1) year (section 74)