

**FIRST DRAFT**

**Administering Security and Integrity in Kenya's Presidential Elections**

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### Research questions and arguments

This paper interrogates three research questions regarding the administration of security and integrity in Kenya’s presidential elections. First, why is security and integrity important in Kenya’s presidential electoral process? Second, what has been Kenya’s experience regarding security and integrity in presidential elections? Third, what role can key actors in managing and

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administering security and integrity in the next presidential elections play? I argue that the President has a duty to implement the 2010 Constitution's provisions on security to deliver timely, free, fair, and credible presidential elections. Second, the President and administrative bureaucracy have a duty to ensure integrity in the next presidential elections, to facilitate constitutional government, succession, transition, and political inauguration of the Second Republic.

### 1. Why is security and integrity important in Kenya's presidential electoral process?

#### 1.1. Why are presidential elections important in Kenya?

- Why not succession through dynasty? Selection? Military or civilian coup? as has been the case in many African states? Presidential elections are a constitutional and juridical requirement. And they must meet standards under human rights, the rule of law and constitutional government.
- Importance of presidential elections include the fact that elections are a means through which citizens exercise their constitutional and democratic rights to elect their Chief Executive Officer; the President.
- Elections are a means through which citizens delegate their sovereign power or the constituent power to elected representatives led by the President.

#### 1.2 Why the need for security during presidential elections?

- The right of citizens to security of person; security of property...
- The high stakes in presidential elections – traditional powers associated with the presidency.
- The potential of presidential elections to result in conflict, violence, and related insecurity.

#### 1.3 Integrity in presidential elections: what it entails

- Integrity as a tool to ensure security of the process - without integrity and security electoral malpractices likely to occur, for instance, voter manipulation, destruction of ballots and other election materials, incitement, rise of militias and tribal gangs, rigging, bribery, among other electoral misconduct. These undermine the process.
- What of qualifications of presidential candidates? How does this affect security? integrity of the process?

### 2. What has been Kenya's experience regarding integrity and security in presidential elections?

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- President Jomo Kenyatta (1964 – 1978) (1963, 1969, 1968? 1974): Kenyatta and the question of presidential electoral integrity and security: whether to conduct elections? When? Questions of violence in 1969...Banning of opposition, detention of opposition; role of provincial administration; intelligence service... Supervision of Elections in A-G's Office
  - President Daniel arap Moi (1978 – 2002); (1978, 1979, 1983, 1988, 1992, 1997, 2002) Moi: the date as a secret weapon; electoral violence in the contested presidency in the multiparty era; the role of the provincial administration (the DC as returning officer...), security agencies, courts and the militia.
  - President Kibaki (2002-) (2002; 2007) Kibaki and the presidential electoral euphoria of 2002; electoral violence in 2007; the role of the provincial administration (especially AP); the militia; whether and when to conduct presidential elections under the 2010 Constitution: August 2012? December 2012? March 2013? August 2013? Ever? The case of county commissioners; the case of police reforms (status quo through stalemate?), reconstruction of the High Court, Court of Appeal and Supreme Court through Judges and Magistrates Vetting Board, Deputy CJ's case...
3. What role can key actors play in managing and administering security and integrity in the next presidential elections?

There are at least two typologies on the role of key actors: in the next Presidential election, these may be governmental or non-governmental; they may also focus on security or general integrity in the next presidential elections. The integrity agencies include Ethics and Anti-Corruption Commission (EACC), Kenya Revenue Authority (KRA), Independent Electoral and Boundaries Commission (IEBC), Law Society of Kenya (LSK), National Cohesion and Integration Commission (NCIC), Courts and judges *qua* judicial officers or quasi-judicial contexts (eg CJ's pronouncements on significance of integrity of the candidates).

### i) Role of the Government agencies

- Security apparatus – the Police, the Administration Police, the NSIS, the Kenya Defence Forces (KDF) - Kenya Army, Kenya Navy and Kenya Air Force.
- The Executive – presidency and its agencies. What if the sitting President has a preferred candidate or project or designer president-in-waiting? (Moi 2002; Kibaki 2012/13?)

### ii) Role of IEBC

- What powers does IEBC have in dealing with security issues?

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- Clearance of candidates to vie for the presidency?
- iii) Role of the Registrar of Political Parties (RPP)
- iv) Role of political parties and contestants
- v) The role of Civil Society Organisations (CSOs)- LSK, ICJ Kenya, Federation of Women Lawyers (FIDA), Women's Political Caucus, Kituo cha Sheria, Kenya Human Rights Commission (KHRC)... for instance: Civic education, litigation...
- vi) Role of voters and the citizens generally.

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## **Administering integrity and security in Kenya's presidential elections**

**Prof Ben Sihanya, JSD (Stanford)**

### **1. Presidential elections in Kenya: the context**

#### **1.1. Constitutional and political context**

Presidential elections in Kenya generate a lot of political heat, ethnic tension and political and class power struggles. This has mainly been due to the fact that presidency has been the imperial and patrimonial dispenser of state power and largesse, it has been the prize that ethnic, class and related interest groups sought to capture. It should be noted that the advent of multiparty politics in Kenya made the presidential race competitive. And the traditional power associated with the office made it even more competitive.

The 2010 Constitution seeks to balance, share and rationalize the powers associated with the presidency. This has been achieved through at least three means: first, the devolution process and decentralization of power and resources to County governments; second, the restructuring and empowering of other arms of government, for instance Parliament and Judiciary; and third, empowering of independent commissions, and the civil society, among others. Despite or because of the attempts to rationalize the powers of the presidency, competition to capture the presidential seat is unlikely to reduce. This is partly because the Constitution 2010 creates an ambivalent presidency: potentially powerful or imperial; potentially powerless (or lame duck). Hence the competition to capture the presidency come the next general elections.

A considerable number of Kenyans have declared their interest in the presidency. These include Raila Odinga, Uhuru Kenyatta, Musalia Mudavadi, Kalonzo Musyoka, William Ruto, Martha Karua, Eugene Wamalwa, Peter Kenneth, Raphael Tuju, James Ole Kiyiapi, among others. A typology is emerging regarding the presidential candidates: the first tier, second tier and third tier. How do you classify the foregoing candidates?

#### **1.2. The research questions and the arguments**

I argue that three parameters should help define who the fourth president becomes chronologically or the president of the second Republic conceptually. First, the presidential candidate's reform credentials for constitutional implementation and judicial reform. Second, the candidates' respect for institutions, including party discipline. And third, the candidate's cross ethnic appeal and respect for integrity and security. Issues of whether some of the

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candidates are qualified to vie for the presidency have arisen. There has been debate whether prospective presidential candidates facing charges of crimes against humanity at the International Criminal Court (ICC) at the Hague should vie for the presidency. Do such persons fail the integrity test? What of presidential candidates with a criminal record? Do they pass the integrity test? What is a criminal record as far as integrity is concerned? What is the role of Independent Electoral and Boundaries Commission (IEBC), Registrar of Political Parties (RPP) or the relevant political party in this regard? What of the courts? Further, the campaigns are already generating ethnic tension. The Prime Minister has quoted the National Security Intelligence Service (NSIS) in Parliament regarding possible violence in the coming general elections. How are IEBC, security agencies, National Cohesion and Integration Commission (NCIC) and related bodies dealing with issues of hate speech, incitement and related activities? There are also problems regarding procurement of the Biometric Voter Registration (BVR) or electronic voter registration system.<sup>2</sup> This has led the IEBC to resolve that they will use the discredited manual voter registration system. How does this impact on security and integrity of the electoral process? Thus the issue of managing and administering security and integrity in presidential elections in Kenya needs to be clearly considered.

The following core questions relating to presidential elections will be answered in the paper. First, why is security and integrity important in Kenya's presidential electoral process? Second, what has been Kenya's experience regarding integrity and security in presidential elections? Third, what role can actors key in managing and administering security and integrity in the next presidential elections play?

I argue that the President has a duty to implement the 2010 Constitution's provisions on security to deliver timely, free, fair, and credible presidential elections. Second, the President and administrative bureaucracy have a duty to ensure integrity in the next presidential elections, to ensure constitutional government, succession, transition, and political inauguration of the new Republic.

## **2. Importance of security and integrity in Kenya's presidential electoral process**

### **2.1 The need for integrity in elections**

The Constitution of Kenya 2010 bestows all the sovereign power to the people of Kenya.<sup>3</sup> This power can be exercised by the people of Kenya either directly or through their democratically elected representatives. This provision underscores the crucial function that elections play in a democratic society. Elections are a means through which the people recruit leaders and thereby

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<sup>2</sup> Unease over Biometric Voter Registration, Standard Digital at [http://www.standardmedia.co.ke/?articleID=2000062675&story\\_title=Unease-over-Biometric-Voter-Registration](http://www.standardmedia.co.ke/?articleID=2000062675&story_title=Unease-over-Biometric-Voter-Registration) (accessed 2/8/2012).

<sup>3</sup> Article 1 Constitution of Kenya 2010.



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delegate their sovereign power to elected representatives. The holding of free, fair, timely, credible and regular elections is further considered a basic element of constitutional government and democracy. Other elements of a constitutional government and democracy include: fundamental freedom and fundamental rights, the rule of law, separation of powers, checks and balances, parliamentary representation, democratic pluralism and freedom of the media.<sup>4</sup>

It has been noted that elections have become a major factor in the stabilisation and democratisation of emerging democracies and post-conflict countries.<sup>5</sup> There is a great potential for elections to bring about chaos and distort the economic progress and development of a country. Thus the need to ensure that the people have confidence in the electoral process. Such confidence can be gained where elections are managed efficiently, with integrity, and that no external factors influence the outcome of elections. Such external factors might include insecurity, ethnicity, propaganda, and vote(r) manipulation, among others.

Electoral integrity is placed within a framework of promoting democracy, respect for fundamental freedoms and human rights. Elements that promote such electoral integrity also include: holding free elections at regular intervals; guaranteeing universal and equal suffrage; respecting the right of citizens and parties to compete for office; the absence of violence or intimidation; non-discriminatory media access; ensuring votes are cast by secret ballot and results reported honestly and openly; and ensuring candidates receiving the necessary support are permitted to hold office until their term expires

This paper reviews measure that need to be put in place to ensure that there is integrity in the presidential electoral process. The argument is that the integrity in the management and administration of security will also lead to integrity in the electoral process. We also take a peak at other integrity issues, for example, the integrity of contestants, the integrity of political parties, among others.

### **2.2 Why are presidential elections important in Kenya?**

The institution of the presidency, as noted earlier, is highly regarded in the Kenyan society. This is partly due to the historical powers that have been associated with the office. As a result, presidential elections in Kenya have been hotly contested and have been subject of numerous controversies. For example, the results of presidential elections have been challenged in almost

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<sup>4</sup> Paula Becker and Dr. Jean-Aimé A. Raveloson (2008) “What is Democracy,” Friedrich-Ebert-Stiftung (FES) with the collaboration of Friedel Daiber (University of Trier).

<sup>5</sup> Winrich Kühne (2010) “The Role of Elections in Emerging Democracies and Post-Conflict Countries: Key Issues, Lessons Learned and Dilemmas,” Friedrich-Ebert-Stiftung (FES) International Policy Analysis at <http://library.fes.de/pdf-files/iez/07416.pdf> (accessed July 1, 2012).

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all the general elections held in Kenya since 1992.<sup>6</sup> This leads to several questions: why are presidential elections important in Kenya? Why not succession through dynasty? Why not through selection? What about military or civilian coup as has been the case in many African states?

Presidential elections are important for several reasons.

First, presidential elections are a constitutional and juridical requirement. The requirement for holding presidential elections has been and is entrenched in the Constitution, the supreme law of the country. Democratic principles dictate that it should be a constitutional right for the people to elect a democratic government to govern their country. The traditional head of government in Kenya is the president. In this regard, the office of the president plays important constitutional roles. Article 131 of the Constitution enumerates the authority of the office of the presidency.

The President of Kenya, therefore:

- i) is the head of state and government;
- ii) exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries;
- iii) is the Commander-in-Chief of the Kenya Defence Forces;
- iv) is the chairperson of the National Security Council; and
- v) is a symbol of national unity.

Further, the president performs important functions as outlined under Article 132 of the Constitution. In addition to these important functions, the next President of Kenya will perform an important function of facilitating constitutional implementation. It should further be noted that the conduct in office of the next presidency will define Kenya's constitutional jurisprudence regarding the institution of the presidency, and its relationship with Parliament, judiciary, the administrative bureaucracy and county governments.

It is for this reason that presidential elections must meet standards under human rights, the rule of law and constitutional government.

Second, presidential elections are important due to the fact that they are a means through which citizens exercise their constitutional and democratic rights to elect their Chief Executive Officer, the President. Article 38 guarantees Kenyans political rights which include the right to vote in any elections and referendum.

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<sup>6</sup> It is only in the 2002 presidential elections that no petition challenging the winner of the elections, Mwai Kibaki, was lodged. Why? Simply because Uhuru Kenyatta conceded defeat, or because the defeat and the cross-ethnic support for change was overwhelming?

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Third, elections as a means through which citizens delegate their sovereign power to elected representatives, led by the President. We have earlier noted that the people of Kenya delegate their executive authority to the national executive, which is headed by the president. The President is thus a direct representative of the people and is given authority by the people to make executive decisions on their behalf.

The President also makes decisions that affect the nation as a whole. The President at times delegates his or her powers to other persons whom he or she selects. It is expected that the presidency will select persons who respect the Constitution, the people, and the responsibility bestowed on them. It is thus important that Kenyans have a President who acts constitutionally and represents the will of the people. Numerous occurrences in the recent past are a pointer as to just how important it is for the presidency to act constitutionally. Gazette Notice No.6937 of May 23, 2012 publicized the appointment (or deployment?) of 47 County Commissioners by the President<sup>7</sup>. He stated that it was in accordance with section 17 of the Sixth Schedule of the 2010 Constitution which requires a restructuring of provincial administration.

His decision was nullified by the High Court because he had failed to consult with the Prime Minister and he made his appointments with blatant disregard for the two thirds gender rule entrenched in the Constitution. In addition to this, High Court Judge Mumbi Ngugi also held that the appointments lacked a competitive and participatory selection process which involves public participation in picking candidates.<sup>8</sup>

Acting Minister for Internal Security and Provincial Administration (Yusuf Haji) and Internal Security Permanent Secretary Mutea Iringo went to court to defend the appointment of the 47 commissioners without the back up of the Attorney-General who also deemed the appointments to be unconstitutional and was in support of the High Court's judgment.<sup>9</sup>

These controversies are bad for the security situation of the country especially during the pre-election period. It should be noted that these County Commissioners that were appointed sought to replace Provincial Commissioners (PCs) and District Commissioners. PCs and DCs were in charge of co-ordinating security operations at the provincial level. They were directly answerable to the President and implemented his direct orders. It is expected that the new County

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<sup>7</sup> Standard Digital, State Defies Court's Ruling on County Bosses, at [http://www.standardmedia.co.ke/?articleID=2000061620&story\\_title=State-defies-court%E2%80%99s-ruling-on-County-bosses](http://www.standardmedia.co.ke/?articleID=2000061620&story_title=State-defies-court%E2%80%99s-ruling-on-County-bosses) (accessed 3/8/2012).

<sup>8</sup> Citizen News, Court Nullifies County Commissioners, at <http://citizennews.co.ke/news/2012/local/item/2183-court-nullifies-county-commissioners> (ruling of June 29, 2012) accessed 2/8/2012

<sup>9</sup> Standard Digital, Kenya Washes Dirty Linen in Court at <http://www.standardmedia.co.ke/?articleID=2000062096&pageNo=1> (accessed 2/8/2012).

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Commissioners would continue to play the same role as PCs and DCs in the county but ensuring that they respect the spirit of devolution. County Commissioners would thus be the President's representatives in the counties and had been charged with co-ordinating the functions of the executive in the county, security being one of them. Therefore, the matter of appointing such important security agents in counties needs to be taken more seriously. Remarkably, the Constitution places the security mandate in the relevant security agencies discussed in this paper and not in the Provincial Administration.

### 2.3 Why the need for security during presidential elections?

There are at least three reasons why security is important during presidential elections. First, it is a constitutional right. Citizens are guaranteed the right to security of person and the right to security of property. Second, the high stakes in presidential elections make it a matter of security concern. This, as has been stated, is mostly due to the traditional powers associated with the presidency. Third, there is a high potential of presidential elections to result in conflict, violence, and related insecurity.

Article 29 of the Constitution 2010 guarantees the right to freedom and security of all Kenyans. The provision protects citizens from being subjected to any form of violence from either public or private sources. The state and its organs in charge of security are thus bestowed with the duty to ensure that Kenyans enjoy this right to freedom and security. They are to ensure that the people are protected from insecurity emanating from any quarter public or private. As earlier stated, security has become an issue of major concern in Kenya's presidential elections. Policies and measures need to be enforced to remedy this situation in line with the Constitution.

Article 238 of the Constitution of Kenya 2010 provides that national security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability, and prosperity, and other national resources. The national security organs as per Article 239 are the Kenya Defence Forces; National Intelligence Service and the National Police Service. How are these organs preparing to guarantee security in the next presidential elections?

Security in presidential elections has been the primary responsibility of the state through its various agencies like the Minister for Internal Security, PS for Internal Security; Kenya Police, General Service Unit (GSU), Criminal Investigation Department (CID), the Administration Police; NSIS; and the Provincial Administration. This list includes the Provincial Commissioners (PC), District Commissioner (DC), District Officer (DO), Chief, Assistant Chief, *Mukuru*<sup>10</sup>,

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*Mlango*,<sup>11</sup> Village Elder ...), among others. The Independent Electoral and Boundaries Commission (IEBC) is also a critical player in this.<sup>12</sup>

State-sponsored pre-election violence was probably invented in 1969 when President Kenyatta visited Kisumu in what was called the Kisumu Massacre or “incident.” According to Prof Atieno Odhiambo, President Kenyatta called opposition leader Jaramogi Oginga Odinga and his supporters *unprintable* names, including *vinyangarika*, and... your Mothers’ c....<sup>13</sup> The crowd was furious, having lost Tom Mboya to the Kenyatta Government through an assassination in July and Mau Mau lawyer CMG Argwings Kodhek having been “road accidented” February 1969. Police opened fire and killed children, men and women who had attended or lined the roads to welcome Kenyatta. Odinga and his supporters were detained. Opposition Kenya Peoples Union (KPU) was banned. Now Kenyatta could easily conduct presidential elections which he had postponed in 1968. Prof Macharia Munene also cites the rendition in Prof Atieno Odhiambo’s work. Prof Munene states that he listened to the expletives before the radion was switched off.<sup>14</sup>

During the 2008 post-election violence, a total of 1,133 people died as per the Waki Commission report<sup>15</sup>. Additionally, 117,216 private properties were destroyed and 350,000 people displaced<sup>16</sup>. It was felt that the levels of violence and destruction would have been minimized had the Police responded in a professional and non-partisan manner.<sup>17</sup>

Policing by the Kenya Police has in recent years been undertaken through a highly centralized command structure from the Police Headquarters in Nairobi’s Vigilance House. This has eroded the powers of the provincial and district commanders (some of whom may be county administrators) and contributed to widespread dissatisfaction amongst police officers, stifled police initiative and alienated members of the public. During the post election violence, there were even areas in Kenya where the police were found to have aided members from one tribal community in combating members of another community. This contributed further towards administrative impunity and insecurity of Kenyans.

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<sup>13</sup> See a verbatim rendition in Kiswahili and English in E.S. Atieno Odhiambo (2004) “Ethnic cleansing and civil society in Kenya 1969-1992,” 22:1, *Journal of Contemporary African Studies*, 29-42. Press

<sup>14</sup> See Macharia Munene (2012) *Historical Reflections on Kenya: Intellectual Adventurism, Politics & International Relations* University of Nairobi Press

<sup>15</sup>

<sup>16</sup>

<sup>17</sup> Republic of Kenya (2009) *Report of the National Task Force on Police Reforms*, Government Printers, Nairobi (Philip Ransley Report)

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The 2010 Constitution elevates the governance in Article 10 which outlines national values and principles of governance. These include good governance, human rights, the rule of law, participation of the people, among others.

### **2.4 Integrity in presidential elections: what it entails**

Security as a tool to ensure integrity of the process - without security electoral malpractices likely to occur, for instance, voter manipulation, destruction of ballots and other election materials, incitement, rise of militias and tribal gangs, rigging, bribery, among other electoral misconduct. This undermines the process.

What of qualifications of presidential candidates? How does this affect security? Integrity of the process?

### **2.5 Security and governance questions in African and International conventions and treaties**

Security and governance are not only a matter of national concern, but also African regional and international concern. The world is now a global village thanks to the tremendous advancements in information and communication technologies. Further, countries of the world benefit greatly from each other through trade practices, exchange of services, tourism, among others. Therefore, the state of poor governance and insecurity in any one given country is a threat to the world.<sup>18</sup>

As such, major African and international conventions and treaties have addressed the security situation and the governance issue as matters of human rights. The focus, as earlier stated, has been on the security of the person and property.

#### **2.5.1 AU Charter**

*Article 4 of the African [Banjul] Charter on Human and Peoples' Rights* Human states that beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right. It goes without say that this right was grossly violated during the 2007/08 post election violence.

#### **2.5.2 OAU/AU Declaration on the Principles Governing Democratic Elections in Africa – 2002**

The African Union (AU) formulated Principles Governing Democratic Elections in Africa. These principles spell out the principles of democratic elections, the responsibilities of member states, election rights and obligations.

Governments of member States commit themselves to do the following (part III of declaration):

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<sup>18</sup> Cf. Somalia, Libya, Egypt ...

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- i) take necessary measures to ensure the scrupulous implementation of the above principles of democratic elections spelt out by the OAU.
- ii) establish where none exist, appropriate institutions where issues such as codes of conduct, citizenship, residency, age requirements for eligible voters, compilation of voters' registers, etc would be addressed;
- iii) establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections;
- iv) safeguard the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders, during electoral processes;
- v) promote civic and voters' education on the democratic principles and values in close cooperation with the civil society groups and other relevant stakeholders;
- vi) take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, in order to maintain peace and security;**
- vii) ensure the availability of adequate logistics and resources for carrying out democratic elections, as well as ensure that adequate provision of funding for all registered political parties to enable them organise their work, including participation in electoral process.;
- viii) ensure that adequate security is provided to all parties participating in elections;**
- ix) ensure the transparency and integrity of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and by accrediting national and/other observers/monitors;
- x) encourage the participation of African women in all aspects of the electoral process in accordance with the national laws.

Under Rights and Obligations, provision 9 states that no individual or political party shall engage in any act that may lead to violence or deprive others of their constitutional rights and freedoms. Hence all stakeholders should refrain from, among others, using abusive language and/or incitement to hate or defamatory allegations and provocative language. These acts should be sanctioned by designated electoral authorities.

### **2.5.3 African Charter on Democracy, Elections and Governance**

Article 8 of the African Charter on Democracy, Elections and Governance calls upon State Parties to eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance.

Article 11 of the same Charter provides that the State Parties shall undertake to develop the necessary legislative and policy frameworks to establish and strengthen a culture of democracy and peace.

Kenya needs to make steps to beef up the governance of its elections to be compliant with Chapter 5 (“the Culture of Democracy and Peace”) of the African Charter on Democracy, Elections and Governance.

Article 11 instructs the State Parties undertake to develop the necessary legislative and policy frameworks to establish and strengthen a culture of democracy and peace whereas Article 12 obligates State Parties to undertake to implement programmes and carry out activities designed to promote democratic principles and practices as well as consolidate a culture of democracy and peace.

It further recommends that to this end, State Parties shall do the following:

- i) Promote good governance by ensuring transparent and accountable administration.
- ii) Strengthen political institutions to entrench a culture of democracy and peace.
- iii) Create conducive conditions for civil society organizations to exist and operate within the law.
- iv) Integrate civic education in their educational curricula and develop appropriate programmes and activities.

Lastly, Article 13 demands that State Parties take measures to ensure and maintain political and social dialogue, as well as public trust and transparency between political leaders and the people, in order to consolidate democracy and peace.<sup>19</sup>

#### **The right to security and right to life**

The right to security is closely connected to the right to life. The security of a person greatly determines whether that person will enjoy his right to life.

Article 6(1) of the International Convention on Civil and Political Rights (ICCPR) provides that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. During election related feuds, there is gross violation of this right. About 3000 lives were taken during the 2007 post election violence. The Government

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<sup>19</sup> Cf. 2008 Coalition Government.



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of the day did not do much to punish the culprits nor did the leaders at the time make formidable attempts to quell the violence (some even incited it).

Furthermore, according to Art 26(1) of the Constitution of Kenya 2010, every person has the right to life. Sub article 2 further elaborates that a person shall not be deprived of life intentionally, except to the extent authorized by the Constitution or any other written law.

### **2.5.4 UN Charter**

Article 1(1) states that one of the purposes of the United Nations is to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

This entails ensuring there is peace in all countries (Kenya included) at all times and taking necessary steps to restore peace and security where there is a lapse. This is probably why members of the international diplomatic community (like Koffi Annan) were involved in the restoration of peace in the country after the post election violence.

### **2.5.5 Universal Declaration of Human Rights (UDHR)**

Article 3 of the UDHR declares that everyone has the right to life, liberty and security of person. This Article imposes an obligation on all states to ensure that they guarantee security of the person. The issue of security of property is addressed by Article 17 of the UDHR. Article 17 of the Universal Declaration of Human Rights (UDHR) provides that everyone has the right to own property alone as well as in association with others and that no one shall be arbitrarily deprived of his property.

During the 2007 post election violence, thousands of Kenyans were deprived of their right to property and displaced from their homes due to tribal altercations that arose after the elections. Since then, many people are yet to get their land back though some have been compensated.

## **3. History of elections in Kenya – insecurity and fraud**

As earlier stated, there has been an array of incidents before, during and after the electioneering period which have in the past undermined the credibility and integrity of the electoral process. Those which directly affect the administration of presidential elections include electoral fraud, voter manipulation, destruction of ballot papers, and bribery. Others affect the general political process regarding presidential elections, namely negative ethnicity, tribal clashes, rise of tribal militias, and incitement by politicians, among others. These and other related incidents are a pointer to the inefficiencies associated with provision of security during elections. It should be noted that the unchecked escalation of election offences is hazardous to the state of security in a

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nation especially if such offences touch on presidential elections. Stakes are always very high in a presidential race partly due to the historical power associated with the office of the presidency. It has sometimes been termed a zero-sum game; with distinct winners and losers; not a positive sum or win-win game.

Immediately after independence, Kenyatta was declared President by constitutional or Parliamentary fiat from December 2, 1964. No elections were held in order to give all Kenyans an opportunity to elect a President of their choice; nor was a referendum held on this fundamental constitutional change.<sup>20</sup>

From 1964 to 1969, the House of Representatives had the power to elect the President. This changed with the 10<sup>th</sup> Amendment (Act No. 45 of July 12, 1968), which provided that the President was to be elected through a popular vote.<sup>21</sup> President Kenyatta died in office in August 1978. He made sure that he never faced any (democratic) presidential election in 15 years – he and his kitchen cabinet, the constitutional, political party and electoral process was always to make Kenyatta President. The main one was that the president of Kenya African National Union (KANU) would be the President of the Republic and KANU was the only party. And he made sure he was the president or leader of KANU.

President Moi assumed office in August 1978. Moi's rule until 1992 was no different from President Kenyatta's as far as presidential elections were concerned. KANU remained the only political party given the 1982 constitutional amendment making Kenya a *de jure* one party state. Moi was always the president (and later chair) of KANU, and hence the sole President.<sup>22</sup> This was the height of undemocratic rule, and the subversion of presidential elections and constitutional government.

In 1992, Section 2A which had declared KANU the sole political party was repealed and multi-partism allowed. The advent of multiparty politics in Kenya made the presidential race competitive. Since the presidency has been the imperial and patrimonial dispenser of state power and largesse, it has been the prize that ethnic, class and related interest groups sought to capture. The result has been that violence, tribal clashes, and related security challenges always marred the presidential race henceforth.

President Moi won the 1992 and 1997 Presidential elections with less than 50% of the popular vote, respectively.<sup>23</sup> Both victories were questioned in the High Court for not being free and fair, in *Matiba v. Moi* and *Kibaki v. Moi*, among others. He did not contest the 2002 elections because

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<sup>20</sup> **Contra Njoya** which claimed that a referendum has always been a mandatory requirement in major constitutional changes.

<sup>21</sup> Yash Pal Ghai and JWPB McAuslan, (1970) *Public Law and Political Change in Kenya*, Oxford University Press; David Goldsworthy (1982) *Tom Mboya: The Man Kenya Wanted to Forget...*

<sup>22</sup>  
<sup>23</sup> **actual percentages**

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he had served two terms.<sup>24</sup> President Mwai Kibaki won the historic 2002 elections and vied for re-election in December 27, 2007. He was declared the winner in elections that have been described as fraudulent and irregular. The 2007 elections resulted in deadly violence that rocked most parts of the country claiming more than 1000 lives.

Several questions have been asked regarding the 1992, 1997 and 2007 presidential elections. Whose responsibility is it to ensure the integrity of the electoral process? Whose responsibility is it to ensure security of the citizens exercising their constitutional and democratic right? And whose responsibility is it to ensure the integrity of law enforcement apparatus? What should be done to those who breach their constitutional or judicial obligations? The proper appreciation of the foregoing questions will help prevent similar occurrences in future presidential elections.

#### **4. What role can key actors in managing and administering security and integrity in the next presidential elections play?**

The oncoming elections will demand particular due diligence on the part of those managing and administering security because the new constitutional dispensation has brought with it new dynamics. Instead of having polls for three seats (councilor, MP, President), voters will cast a vote for six seats (county assembly representative, female county representative, county governor, MP, Senator, President). Furthermore, there is the possibility of a run-off for presidency in the event that neither of the candidates clinches a majority of the votes (50% + 1) during the initial ballot.

With more seats and higher stakes, there is a high likelihood that political tension will be greater than ever. The leeway for rigging will also be broadened by the more complex logistics that may cause confusion and disorder which create loopholes for electoral fraud. It is in view of this that stringent measures must be taken in order to ensure that the elections are free and fair, and that there is utmost security.

Within the context of a representative democracy, elections must be perceived and managed as a process and not as a one off event that happens only on a given day or over a limited number of days. It is rather a process, known as electoral process or electoral cycle which can evolve in a continuous manner almost without interruption between two elections. The electoral cycle can be divided into three phases, namely, pre-electoral phase, electoral phase and post-electoral phase. Different actors play various roles in managing and administering security and integrity in the electoral cycle.

There are at least two typologies on the role of key actors: these may be governmental or non-governmental; they may also focus on security or general integrity in the next presidential

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<sup>24</sup> Section 9(2) of the Constitution; *Matiba v. Moi, op. cit.*

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elections. The integrity agencies include Ethics and Anti-Corruption Commission (EACC), Kenya Revenue Authority (KRA), Independent Electoral and Boundaries Commission (IEBC), Law Society of Kenya (LSK), National Cohesion and Integration Commission (NCIC), Courts and judges qua judges (e.g. CJ's pronouncements on significance of integrity).

### **4.1 Role of the government agencies**

#### **4.1.1 Role of Security apparatus**

Security apparatus in Kenya include the police, the Administration Police, the NSIS, the Kenya Defence Forces (KDF) (Kenya Army, Kenya Navy and Kenya Air Force). These agencies are specifically charged with the responsibility of ensuring there is security in Kenya. They thus ensure internal security and border security of the country.

Several questions have arisen: How do we ensure that these security apparatus are not abused (especially by the executive or incumbent president) in safeguarding Kenyans during presidential elections?

It has to be appreciated that the Kenya Police has however failed to the extent that the National Task Force on Police Reform was created. During the 2008 post-election violence, a total of 1,133 people died as per the Waki Commission report. Additionally, 117,216 private properties were destroyed and 350,000 people displaced. It was felt that the levels of violence and destruction would have been minimized had the Police responded in a professional non-partisan manner.<sup>25</sup>

Policing by the Kenya Police has in recent years been undertaken through a highly centralized command structure from the Police Headquarters in Nairobi. This has eroded the powers of the provincial and district commanders and contributed to widespread dissatisfaction amongst police officers, stifled police initiative and alienated members of the public. During the post election violence, there were even areas in Kenya where the police were found to have aided members from one tribal community in combating members of another community. This contributed further towards administrative impunity and insecurity of Kenyans.

We then ask, what is their role in the new constitutional dispensation?

#### **4.1.2 Role of the National Police Service under the new dispensation**

As has been noted, elections remain a main trigger of violence and insecurity, and security forces (police, gendarmerie, military) do play a key role in electoral processes in the region. Their involvement is organized very differently from country to country, and the track record of this involvement is mixed. The debate continues about how to provide security during electoral

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<sup>25</sup> Report of the National Task Force on Police Reforms, 2009 (Ransley report), *op.cit.*

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processes, and how to make sure that the involvement of the security forces does allow for free and fair elections.

Section 24 of the National Police Service Act, 2011 provides for an array of functions that relate to administration of security. The following are some of the general functions of the police:

- (a) Provision of assistance to the public when in need;
- (b) Maintenance of law and order;
- (c) Preservation of peace;
- (d) Protection of life and property;
- (e) Investigation of crimes;
- (f) Collection of criminal intelligence;
- (g) Prevention and detection of crime;
- (h) Apprehension of offenders;
- (i) Enforcement of all laws and regulations with which it is charged; and
- (j) Performance of any other duties that may be prescribed by the Inspector General under this Act or any other written law from time to time.

It is expected that the National Police Service will diligently perform their duties during presidential elections to ensure for peaceful transition. Collaboration of the police service with the IEBC is key to achieve security during elections. We have noted that elections are a process. Therefore, security apparatus need to closely monitor the electoral process to prevent acts of insecurity.

Parliament is expected to debate and pass new legislation governing security. The National Intelligence Service Bill, National Security Council Bill and Kenya Defence Forces Bill are all expected to be passed by August 26, 2012. However, there is doubt as to whether or not this deadline will be met seen as MPs who were meant to start debating the Bills on August 1, 2012 are yet to do so. In any event, what would be the quality of rushed Bills? What has the Government been waiting for?

Clause 5 of the National Intelligence Service Bill provides that the National Intelligence Service (NIS) shall be responsible for security intelligence and counter intelligence to enhance national security. It is tasked with an array of duties. Those that relate directly to security during elections include: detecting and identifying any threat or potential threat to national security; advising the President and the Government of any threat or potential threat to national security (eg political or ethnic violence); and safeguarding and promote national security, national interests, sovereignty and the economic wellbeing of the republic and its citizens within and outside Kenya. In performing the foregoing duties, NIS will effectively ensure that there is peace and security during elections.

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Clause 3 of the National Security Council Bill tasks the National Security Council with addressing both internal and external aspects of national security. Election related unrest is a threat to internal security and if the Bill is passed, the National Security Council will be expected to liaise with other security organs to prioritize the programs, projects and activities that address the internal interests on the national security of the Republic.

### **4.1.3 Role of the executive – presidency and its agencies**

The executive has played a role in ensuring elections through its various agencies like the Minister for Internal Security, PS for Internal Security; Kenya Police, GSU, CID, the Administration Police; NSIS; and the Provincial Administration (including the PC, DC, DO, Chief, Assistant Chief, Mukuru, Mlango, Village Elder ...), among others.

The executive under the new dispensation will still continue to control important security agencies. The President still remains the Commander-in-Chief of the Kenya Defence Forces and the chairperson of the National Security Council. In this regard, the presidency will continue to make important security decision, albeit with introduced checks and balances mainly from parliament.

This begs the question: what if the sitting President has a preferred candidate or project? (Moi 2002; Kibaki 2012/13?); what if the sitting president is seeking re-elections? (Moi 1992, 1997; Kibaki 2007?)

### **4.1.4 Role of IEBC**

What powers does the body have in dealing with issues of security concern?

- Clearance of candidates to vie for the presidency?

Article 88(4) of the Constitution outlines the functions of IEBC. The Electoral Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards;

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- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
- (j) the development of a code of conduct for candidates and parties contesting elections; and
- (k) the monitoring of compliance with the legislation required by Article 82 (1)
  - (b) relating to nomination of candidates by parties.

IEBC Act outlines the general principles that the Commission should adhere to in performing its functions. Section 25 of the Act states:

“In fulfilling its mandate, the Commission shall, in accordance with the Constitution, observe the following principles—

- (a) freedom of citizens to exercise their political rights under Article 38 of the Constitution;
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities and other persons or groups with special needs;
- (d) universal and equal suffrage based on the aspiration for fair representation and equality of votes;
- (e) free and fair elections, which are—
  - (i) by secret ballot;

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- (ii) free from violence, intimidation, improper influence or corruption;
  - (iii) conducted independently;
  - (iv) transparent; and
  - (v) administered in an impartial, neutral, efficient, accurate and accountable manner;
- (f) undertake elections on a regular basis in accordance with the Constitution;
- (g) ethical conduct; and
- (h) fairness.”

Previously, incidents of insecurity have occurred in Kenya due to lack of mistrust of the electoral body by Kenyans. It has been noted that allegations that the then Electoral Commission of Kenya (ECK) was biased in administering or managing presidential elections, fuelled the post-election violence.<sup>26</sup> Is the Bio-Metric voter registration saga likely to compromise the status of IEBC as a fair manager of the election process? Some people are already suggesting that the switching back to manual voter registration will negatively affect the integrity of elections. What should the IEBC do to rectify such a presumption?

The IEBC needs to be fair in administering elections and take its functions and responsibilities seriously. Electoral crimes should not be condoned. Further, the Commission needs to demonstrate its independence by reprimanding or taking actions against politicians whose actions undermines the integrity of elections regardless of their status in society.

### 4.1.5 Role of political parties and contestants

There is need for party discipline. Political parties need to be in the forefront in condemning acts that are likely to undermine the integrity of elections and lead to insecurity. For example, parties need to take stringent measures to ensure their presidential contenders do not spread hate speech, or involve in any electoral offences.

Section 15 of the Political Parties Act 2011 states that a political party is entitled to protection and assistance of the State security agencies for the purposes of facilitating peaceful and orderly meetings. Political parties should thus cooperate with security agencies in this regard.

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### **4.1.6 Role of the Peace Committees under the Elections Act**

Section 17 of the Second Schedule to the Elections Act, 2011 provides for a peace Committees. It states:

“(1) The Commission may establish peace committees in every constituency during an election and referendum period.

(2) Every political party, referendum committee, candidate, official and agent shall—

- (a) acknowledge the activity of peace committee established at the constituency level by the Commission;
- (b) ensure attendance of the peace committee meetings convened at the constituency level on behalf of the Commission; and
- (c) cooperate in the official investigation initiated by the peace committee on issues and allegation arising at the election period.

(3) The peace committee shall have power to—

- (a) reconcile warring parties;
- (b) mediate political disputes in the constituencies;
- (c) liaise with government security agencies in the constituency and report suspected election malpractices; and
- (d) report any violation of this Code to the Committee for appropriate action.”

### **4.1.7 Implications of the Leadership and Integrity Bill on elections in Kenya**

There has been much speculation concerning the ramifications of the Leadership and Integrity Bill, and especially its effects on aspiring state office candidates who have poor track records.

Section 12 of the Bill states that:

A State officer shall practise and promote the principle that

- a) state officers should be selected on the basis of personal integrity, competence and suitability;
- b) elected in free and fair elections;
- c) Selected or elected or appointed in accordance with the qualifications prescribed under the Constitution or legislation.

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### **State officers should be selected on the basis of personal integrity, competence and suitability**

- Who will determine whether candidates for state offices vying in elections are of the required moral standard? What exactly is meant by “suitable” and with which scale will integrity, competence and suitability be weighed?

### **Selection or election or appointment in accordance with the qualifications prescribed under the Constitution or legislation**

- With proper administration of elections, this can be ensured.

#### **4.1.8 Whose responsibility is it to administer free and fair elections?**

- Article 88 of the Constitution of Kenya 2010 provides for the formation of an Independent Electoral and Boundaries Commission. This Commission is to be responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution. Pending its formation, the Interim Independent Electoral Commission of Kenya (IIEC) was set up on May 7, 2009. The commission was set up to replace the previously disbanded Electoral Commission of Kenya that was widely blamed for the election violence after the Kenyan general election, 2007. The commissioners were sworn in on May 11, 2009.<sup>[1]</sup>
- Having free and fair elections involves ensuring that there is security.

#### **4.1.9 Leadership and integrity under the 2010 constitution**

Values and principles have merely been debated in the context of the appointment, election or operation of State officers. According to Article 75 of the Constitution, a State officer is to behave whether in public and official life, in private life or in association with other persons, in a manner that avoids the following:

- a) any conflict between personal interests and public or official duties;
  - b) compromising any public or official interest in favour of a personal interest;
  - c) demeaning the office the officer holds. This has a history from the Public Officer Ethics act (POEA), 2003.
- Failure to abide with the above listed provisions will render the officer to be subject to disciplinary procedures which may include removal from office. This means that

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State officers are obliged to carry themselves in the most transparent manner possible and should not attempt to derive any form of personal advantage from their offices.

### **4.1.10 Role of the Registrar of Political Parties (RPP)**

Section 34 of the Political Parties Act 2011 outlines the functions of the Registrar of Political Parties. These include:

- (a) register, regulate, monitor, investigate and supervise political parties to ensure compliance with this Act;
- (b) administer the Fund;
- (c) ensure publication of audited annual accounts of political parties;
- (d) verify and make publicly available the list of all members of political parties;
- (e) maintain a register of political parties and the symbols of the political parties;
- (f) ensure and verify that no person is a member of more than one political party and notify the Commission of his findings;
- (g) investigate complaints received under this Act; and
- (h) perform such other functions as may be conferred by this Act or any other written law.

**How has RPP performed its role with respect to the registration of and discipline within political parties? What about individual politicians some of who are prospective presidential candidates? How has RPP dealt with cases of “defection”?**

**4.2 The role of Civil Society Organisations** - LSK, ICJ Kenya, Federation of Women Lawyers (FIDA), Women’s Caucus, Kituo, Kenya Human Rights Commission (KHRC)... Examples include: Civic education, litigation, as in the case on leadership and integration in the next presidential elections<sup>27</sup> ...

### **4.3 Role of voters and the citizens generally**

The need for voters to respect the electoral process. Voters not to involve themselves in acts of hooliganism, electoral misconduct, bribery among others. The duty of voters to report to the relevant authorities any contestants who promote or involve themselves in electoral misconduct. Voters need to be vigilant.

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### 5. Conclusion

The next presidential elections are expected to inaugurate the Second Republic under the Constitution 2010. But they could also perpetuate impunity associated with the First Republic. Security and integrity will make a major difference on whether the presidential elections are timely, free, fair and credible. The President, and the administrative bureaucracy have a major role to play in delivering the next presidency and constitutional government.

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