

CONSTITUTIONAL PRACTICE IN KENYA WITH SPECIAL REFERENCE
TO ELECTION PROCEDURE AND PRACTISE.

Dissertation submitted in partial fulfilment of the
requirements for the LL.B. Degree, University of Nairobi.

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ACKNOWLEDGEMENTS.

I take the opportunity to thank all those people who,

directly or indirectly, have contributed to making this study what it is. Among others I express my most sincere and profound thanks and appreciation to my supervisor, GUTTO, S.B.O. of the Institute of Development Studies, who read the original manuscript and passed valid and erudite criticisms thereon without which this work would be a muddled jumble of ideas without coherence. I cannot forget all my classmates who helped me in this exercise. Lastly, though not least, my heartfelt thanks are extended to Miss STELLAH RUTHUKU who together with her friends managed to reduce my otherwise illegible handwriting to mandatory type at very short notice.

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CONSTITUTIONAL PRACTICE IN KENYA WITH SPECIAL REFERENCE TO ELECTION PROCEDURE AND PRACTICE

INTRODUCTION:

On 8th November, 1979, Kenya held her third national Assembly elections within the framework of a de facto one party state. One of the principal tenets of constitutional practice is that elections should be held at frequent intervals so as to ensure the existence of a democratic representative government. Generally, elections in developing countries are not important because they do not constitute any significance changes in either the composition of the government or the ruling elite. Elections are important in terms of legitimisation, evolution, and routinisation of the procedural and structural mechanism of the Executive to maintain itself in power. This study will, therefore, set out to examine how the electoral system is constitutional in as much as the provisions that relate to elections are or are not observed. The general theme is that elections in Kenya have neither been free or fair due to express or implied circumstances in Kenya.

The first chapter will examine the colonial background to elections in Kenya with a view to analysing the development or otherwise of the electoral system. It will be argued that the system of election did not develop during the colonial era because the colonial government was never known or designed for scrupulous respect for constitutional provisions. Secondly, elections during the colonial period had the perpetuation of the colonial system with all its defects as its primary purpose. The election system, it will be argued, was so structured as to ensure the attainment of specific policy goals as seen by the colonial administration. The analysis in this chapter is important in determining whether the weaknesses inherent in the Kenya's electoral system today are the result of historical factors or results from an undertaking by the independent government to ensure that elections served specific policy interests as viewed by the ruling elite after independence. The analysis will aim to indicate whether or not the flaws in the present electoral system are the result of colonial heritage and the legacies left at independence.

Chapter Two will involve a descriptive analysis of election laws as they are in Kenya. The analysis of the legal framework is aimed to indicate the importance legal provisions attached to elections and the attitude of the ruling elite towards such provisions for elections. The central theme will be that election laws are not bad per se. They are designed to ensure that elections are free and fair. The novelty of the law is however eroded by the interaction of a multiplicity of factors. These factors include social and political variables that may operate as express or implied limitations on election laws. Such variables include the nature of the class relations in Kenya, the position of the ruling party vis a vis the government, the Executive elimination of the opposition and its conduct of campaigns to mention but a few. Regard will be had to the electorates' right to elect any candidate freely and fairly as provided by or under the law. The relationship between candidates and those in power or some political coterie and how this relates to the principle of free and fair elections shall be examined. Thus, the chapter will seek to determine whether due to pressure group politics and the involvement of the Executive, election laws, like all laws, are in content and practice an instrument of class domination. This is more so in constitutional terms where freedom and fairness in elections are sought to be institutionalised through several safeguards for example the electoral commission and voting by secret ballot. It is the aim to see the operational effect of these safeguards in elections.

The third Chapter gives an analysis of elections petitions and the courts attitude towards them. The primary aim is to examine the independence of the Judiciary from the other arms of the state in the determination of petitions some of which are of interest to the ruling elite. It is argued that though seemingly independent express and implied limitations attach to this independence. The theme is that the Judges' independence is limited through legislation where the Executive finds reason to intervene coupled with the Judges class, educational and religious biases. It will be argued that the Judiciary is not fully free from political influence and that on occasions their decisions are tailored

to those political realities that are prevailing. The "insulation" of the indigenous Judges from hearing and determining elections is presented as an incidence of the limitation in the independence of the Judiciary. It will further be argued that though expatriate Judges can, and do, arrive at correct decisions on issues of local significance like oathing, the indigenous judge may be held to be better equipped to decide on such issues due to his background. It is suggested that "insulation" implies isolation and that it is wrong because the Judiciary does not operate in a vacuum.

Lastly, Chapter Four of this study is comprised of conclusions of importance derived from the general body of the study. These conclusions are accompanied by recommendations on how the electoral system may be considerably bettered. These conclusions are not in any way exhaustive. Only the most important are presented and, therefore, other conclusions may be found in the general body. As indicated at the beginning, elections in Kenya have limited significance and one hopes that through such a study, the attitude towards elections will change to reflect trully its importance in an ordered society.

CHAPTER I - A HISTORICAL PERSPECTIVE.

INTRODUCTION.

This chapter will trace the historical development of the electoral process in Kenya from the first decade of this century to independence. A historical perspective in a study of this nature is important in two major respects; firstly, it answers the question whether or not elections were ever free or fair in the period under discussion and secondly, whether the pre-independence system has any direct bearing on the present electoral system. The latter seeks to determine whether the electoral process as it stands today is an anachronism inherited as part of the colonial legacy or whether it is the creature of contradictions inherent in the post-independence society. The general hypothesis here is that elections had never been free or fair in the period prior to independence and that, as will be discussed in more detail in chapter II, this may have contributed to the state in which the present electoral system stands.

THE HISTORICAL FOUNDATION OF THE ELECTORAL PROCESS.

The establishment of the Legislative council in 1905 heralded the start of political and institutional representation. The history of politics in Kenya occupies an interesting position among all other dependencies due to the influence exerted by immigrant races on political development. The legal forms employed and the institutions and structures of government and administration which were established in Kenya conformed to the pattern in all dependencies save as to the influence of immigrant races. Southern Rhodesia (now Zimbabwe) and South Africa were similar to Kenya in that there was impact of settler economy in these countries. The pattern we have alluded to was based on "two great principles viz (1) the colonial government is subordinate to the imperial government" (1) From that premise one may conclude that the institutionalization and operation of democratic concepts in the then dependent Kenya were at the best a myth. Constitutional development in Kenya is reflected in the changing composition and the Executive council up to independence.

Political consciousness and constitutional development went side by side in Kenya. A study of the politics of the pre-independence period ~~discovers~~ discovers the preeminence of immigrant races in Kenya. It was through settler agitation that in 1905 both the Legislative Council and Executive Council were established. Our interest here is more with the former than the latter of the two bodies. The legislative council was empowered to enact for peace, order, and good government.^{2A} The council was defined to mean the "Governor and such other person not less than two in number as may be appointed by the Crown. Their tenure was subject to the Crown's pleasure" ² The manner and form of unofficial ^{members} representation did not even attempt to be democratic. In 1906 there were six official and two non official members nominated by the Governor. Of course these could not have satisfied the settlers, by then a small but influential group, who continued to clamour for further concessions for elective representation. The Ordinance further made provisions for election of two Indian representatives, a structure

The next stage in constitutional development was the concessions granted for elective representation in 1916 by the legislative council Ordinance. It must be borne in mind that the main protagonists for constitutional change in this period were the settlers. Their interests were in conflict with those of the Asians who had by then started fighting for equal rights with the settler, indeed, the first Indian representative to the Legislative Council was appointed in 1909 to serve for two years. He fought pressure to bear on the colonial government on matters touching on equality of the two races and, consequently, due to settler influence he was not re-elected. The committee set up in 1916 to study the details of elective representation recommended against property qualification and for female suffrage of the protectorate and was "of the opinion that at this stage of the protectorate development when the coloured races outnumbered the whites it is not desirable that the franchise should be extended to Asiatic or natives" ³ but instead recommended a small representation for them through nominations. The settler agitation was succumbed to through the provisions of Legislative Council-Ordinance, 1919⁴ which was

sanctioned by an order in council-the East African order in council, 1919. The act provided for full adult white suffrage to the 1919 Legislative Council. Committee had recommended that the increase the white vote in clear apprehension that they may be swamped by the majorities.⁵ Qualifications for,

voters was in all ^apractical ^zsenses lenient. To qualify as a voter, one had to be an adult and a British subject of European descent or origin, ordinarily resident in Kenya for at least a period of twelve consecutive months prior to the date of application, and resident in the electoral area in which application is made for at least three months. A significant omission was the literacy requirements which was later advantageously used against other races.

...until the time comes when the natives are fitted for direct representation. A candidate under the Ordinance of 1919 had to satisfy more stringent requirements. They had to satisfy the requirement as to nationality and age and have two years ordinary residence in the protectorate, be able to read and write and speak English. The elections were by secret ballot, a system popularized in so called democratic states to mystify political realities, and the tenure was three years. The Ordinance further made provisions for nomination of two Indian representatives. At this juncture one can clearly determine in whose interests the Legislative Council so constituted would serve.

...system in 1922 as a result of which disturbances ensued. The establishment of a legislative council with an official majority served to pacify the settlers. They were at this time determined to secure their interests against encroachment by other majority races. Thus in 1922 when the Wood-Winterton Committee recommended that the elective representation should be seven for whites and four for Indians, the settlers vehemently rejected it!.....mainly on the ground that it gave no sufficient safeguards to the European community against Indian predominance in the future."6 The commission's recommendations seem to have found expression the following year in what was regarded as a betrayal by the settlers. This was the famous Devonshire White paper of 1923. The paper "rediscovered" the vast majority living in Kenya, namely the African and recommended that in whatever the case, African interests were paramount. Though the paper was an important progress in the interests of the majority, it failed in as much as it was merely declaratory and gave no provision for implementation of its policies.

Upto and until 1923, the African voice was ignored. The 1919 Legislative council Committee had recommended that the

Native Commissioner being the crown officer closest to the African should represent their interests. This was not a novel policy statement since he was ostensibly already representing their interests. Representation by an officer of the crown ^{was sham because he} could never be called upon to compromise his position. Thus the 1923 paper deemed it necessary to change ⁹ this mucky state of affairs, Its efforts were at the best naive. It proposed the nomination of a missionary to advise on African affairs "untill the time comes when the natives are fitted for direct representation." ⁷ The policy was naive because it presumed the missionary's acquitance with African needs.

African political consciousness can be traced to the 1920's. In the early 1920's, there was a proliferation of political parties based on regional, but rarely national, phenomenon. The most important political organization that gave expression to African needs and aspirations was the East African Association. The association called for a protest ^e against the detested "Kipande" (Pass), forced labour and hut tax system in 1922 as a result of which disturbances ensued in Nairobi culminating in the shooting of twenty-five dead and the arrest and subsequent deportation of its leader, Harry Thuku, to Kismayu.

African political demands led the colonial authorities to reformulate their approach. Native Tribunals were formed in the 1930's. The Tribunals were never intended to act as political forums in any independent sense given the fact that they were controlled and manipulated by the colonial administration, for example, the D.C. who was a white was an ex-official chairman of the Tribunals. The Tribunals "were an attempt at representational administration" ^{may} ~~any~~ ⁸ This one ~~any~~ observe that the period up to 1923 was an epitome of settler attempts to gain supremacy in the protectorate. Their zeal may be said to be important in one respect, namely that it helped Kenya along the path of constitutional progress faster than in other African dependencies. For instances in Uganda where British presence was felt ^{at the same time} ~~earlier~~, the Legislative Council was not formed until 1920. The period is also marked by African obsequiousness in the face of enormous multi-dimensional frustrations from the settlers, and the Administration. The major constitutional change in this period was the progress ⁹ representation in the Legislature based on a communal roll.

The first attempt at effective African representation in the Legislature though advocated as early as 1923 was not realised until one African was nominated to the Legislative Council in 1944.¹⁰ Up to that time missionaries acted as African representatives. As such they were nominated unofficial members of the Legislature. The 1929 Hilton Young Commission had recommended retired civil servants in place of the missionaries to represent Africans. The Kikuyu Central Association was at the time demanding nothing less of representation by Africans. African representation was confined to a ^{single} missionary until 1934 when nominees of African interests were increased to two.¹² The two had to be nominated without restriction of age or profession - this it was contended, was an administrative discretion therefore not a constitutional safeguard. African representation had increased to representation by six Africans by 1952.

At around that time, Kenya African Union was formed.¹³ The union, (hereinafter K.A.U.), represented African political expression. Political activity could, therefore be said to have been conducted outside the Legislature. The ban imposed on K.A.U. in the zenith of the Mau Mau independence struggle in 1953 created a vacuum in African political life and again the Local Native Tribunals re-assumed constitutional significance. They were used as late as 1954 in the Lyttleton Constitution to advise the Governor on African Representation in the Legislative Council."¹⁴ It must be noted that earlier in 1948 a measure of elective representation was introduced. Each local Native Council sent three people to a meeting in which the Provincial Commissioner presided and where they nominated three to five names of persons to represent the Province. Out of the five names the Governor nominated one though he was not bound to nominate the person who received the most votes in the provincial meeting. This was of course, "Sham" democracy. In the 1952 elections a candidate was not restricted by age or property but had to pass ^{an} English test and to have had not been imprisoned for more than six months (though the Governor could exempt a candidate from this disqualification).

The candidate had to ^{be proposed} ~~propose~~, seconded and supported by at least seven persons—all of whom could be disqualified if they had ~~been~~ a record of imprisonment for more than twelve months. Civil servants were not required to resign to contest. Nominations were discussed by District Advisory Nomination Committee and later by the constituency Advisory Nomination college at Provincial level. This system "was certainly not unsuccessful, it did however discourage the emergence of any African electoral organization, so that there was a sharp distinction between the process of choosing African members of the legislative Council and the beginnings of African Party Organization."¹⁵

On the other hand, it may be observed ^{that} the other races had made more headway in elective representation than the meagre six Africans nominees in 1952. As has been mentioned in 1920 a provision was made for the election of two Indian member to and ne unofficial member to be nominated to represent Indians.¹⁶ The provisions were implemented in 1924 by the legislative council (Amendment) ordinance.¹⁷ By the amendment five Indians were to be elected on a communal roll. Their qualifications were that an Indian had to be a British subject of Indian origin or an Indian under ^{the} suzerainty of his majesty. There was no literacy test. The Arab to qualify had to be a male and a British subject under the suzerainty of his majesty who was able to write Arabic or Swahili in Arabic characters.¹⁸

By 1948,¹⁹ the unofficial were a majority in the legislative council. The Indians, ever-so zealous about the common roll, realised the danger it entailed since at this period of ~~imminent~~ African political awakening both the Indians and Europeans could be swamped by the Africans at polls. The common roll Indians envisaged was one which catered only for the whites and Indians.

By 1954, it had become a reality that the Africans were on the ascendency. ^{The period} 1923-1954 marks a significant step towards the eventual goal of elective representation. By the end of the period the Europeans still had a majority in the legislature but Africans were increasing speedily. The period is marked by constitutional and communal disputes. It is a time when the settlers tried to consolidate their power through the Legislative and Executive Council. At the same time the Indians through the Indian office were fighting for equality with the whites. The changes made during the period were radical only in the context of the time at which they were conceded. The Africans had by then become more insistent in their demands for political emancipation.

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~~for political emancipation.~~ Their frustrations were given expression in the Mau Mau struggle and the resultant administrative action to devise a cure for the fervent nationalism. The Legco and its elective system did not satisfy the Africans and the proscription of their party K.A.U. and ~~hence~~ ^{the} detention of its ~~wounds~~ ^{also failed}. The Legislature was useless as a vehicle of change and it is observed that "political organizations were not integrally tied to the representation in the council, and much of the political activity was not reflected in the Council. African political groups were becoming active, but there was little opportunity of expressing their views in the Council,"²⁰ and they pursued the only course open to liberty-armed struggle. By 1952 democracy or for that matter constitutional practise was non-existent.

The political violence which found expression in the Mau Mau uprising called for a radical change in administrative approach. It was with this in view that the Lythleton commission was launched ^{in 1954}. The commission drafted a plan ^{the Lythleton constitution} intended to effect gradual constitutional changes. ^{If you remember the constitution} ~~This came to be known~~ of the local Native Council as a bridge between African Political needs and the administration.

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administration. It further recommended that "general elections should be held on 30th June 1955, or six months after the Governor declared that the state of emergency was over whichever came earlier. It proposed that no changes should be effected in the proportion of membership in the Legislative Council, Council of Ministers or in the communal franchise. It was intended to initiate a method by which Africans can play a prominent part, of the best method of choosing African members of Legislative Council". 21 pursuant to the recommendation, the Coutts committee of 1955 was established to investigate and advise on the best system or systems to be adopted in choosing African representative members of the Legislative Council bearing in mind the differences that may exist between areas, and also to draw up any draft rules that may be necessary to authorise the suggested procedure.

Under the Lyttleton constitution, the franchise was extended to Africans. It was a qualitative franchise, pursuant to Coutts Committee recommendations. To qualify as a voter one had to be, an adult (21 years and over) of Form two education level, getting an income of £120 per annum or property worth £500, a graduate or a senior member of a tribe, and meritorious service. Candidates were required to have an income of £240 or property worth £700 be educated to intermediate level or above and be ordinary resident for two years. The contribution under which the Africans were to be elected contained curious provisions. Under it, there was the possibility that an African could have upwards of three votes, while another had none. All the provisions and recommendations of Lyttleton and Coutts that were envisaged by the authorities as useful were incorporated in the Legislative Council (African Representation) ordinance, 1956. 22 By this time, the vote was regarded with reference to Africans not as a public right, but a privilege to be won through qualification!

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By 1955, therefore the colonial authorities had been rudely awakened to the fact that African predominance in the area was eminent. They had to resolve this looming danger through inter alia legal provisions which ensured that only a group of Africans who appealed to them gained access to seats of power. The year 1955 onwards saw the encouragement of simple and orderly African Political life based on district organisations except in the central province (the Mau Mau Districts). The issues discussed in such organizations tended to be local and parochial. In 1957 the first African elections were held on the basis of the Lyttleton Constitution, tribal parties and personality cults. As will be discussed later, this tendency may be said to be continuing. This was, therefore the basis of 1957-1958 elections and the Lennox-Boyd constitution, 1958. Suffice it to say that when the eight Africans went to the Legislative Assembly in 1957, they proved to be ardent scholars of settler oppositional politics in the Legislature and the group of eight African Representatives played the role of a pressure group with splendid dexterity. They clamoured for more African representation. This oppositional rigidity led to re-evaluation of the Lyttleton Constitution and its eventual re-formulation in the Lennox-Boyd Constitution 1958. Thus by 1960 there can be no claim to an organized and effective National Party politics.

The sporadic nature of approach by the District parties called for a centralised party organization on national scale to bring unity. In effect then and "against this background, what the formation of Kenya African National Union in 1960 signified was not the emergence of a new Political culture or ideology, but simply as stated in its inaugural manifesto - to bring unity of purpose and action, so necessary for any country for freedom and Independence. 23 The political upsurge of 1955 onwards signified a change of policy as Africans now inexorably fought for the

transfer of power to them. The colonial authorities on the other hand, to safeguard their property interests had to co-opt some of the emergent political figures in their system for the smooth continuance of the system after Independence.

Kenya African ^{National} Union was regarded as a party of radical Nationalists who, despite, institutionalised safeguards, could just as well nationalise settler property. It was also a 'mass party' in that it had the largest following being the political expression of the large tribes, for example, the Kikuyu and Luo. The fear of domination by the large tribes led to the formation of the opposition party Kenya African Democratic Union (K.A.D.U) which vied for leadership. K.A.D.U had the sympathies of the settlers and was in fact in exchange of material and tactical data with the whites, especially Blundell's ^{all white} New Kenya Party (the party was a clear attempt at sustaining European interests). K.A.D.U leaders had, therefore, "elevated ethnic fears (especially on land) and animosity into a political principle which in fact given constitutional form. This arose from lack of common fundamental values. In this regard K.A.N.U had failed (as it continues to do) to give an ideology of value and failed to create a united front". 24

In the 1961 elections, K.A.N.U. won 72% of the popular votes but only 24% of the 65 elective seats. This can be explained by the fact that the composition of the Legislature had its basis in multi-racialism to safeguard minority interests. 25 This multi-racialism was the vines that dibilitated party organisation. ²⁶

26 The 1961 elections were quasi-representative. The franchise had been extended. Requirements for qualification were capability to read and write ones own language, be over forty years of age and be an office holder in a wide range of schedule posts at the time of registration and have a minimum income of £75 per annum. The stage had now been set for the transfer of power to Africans in the parcel of the westminister model.

As said earlier ²⁷ ~~27~~ K.A.D.U. was a party formed due to lack of common values and out of ethnic fears. The Majimbo constitution of 1962 ²⁸ bears testimony to this. Disunity was clearly shown by Ngei's desertion of K.A.N.U to form the African Peoples Party (a party with Akamba domination). This the 1963 elections which ensued may not be correctly labelled as free or fair. It was mared by tribal loyalties - as seen in the A.P.P. case and was generally held on the basis of threats to the person or property of opposition parties, intimidation and promise of gain ²⁸. K.A.N.U had another resounding victory including elective seats and formed a government. From this point onwards, the K.A.N.U. government concentrated on the centralization, stability and Legistimation.²⁹

Before and for a short time after 1963 the Senate established by the Majimbo constitution operated as a political supervisory body over regional institutions.³⁰ It was vested with power to delay legislation. Thus Kenya was ushered into independence on the basis of a multi-party system founded on the westminister model constitution. Why this tread failed to gain root is a different consideration. It is evident that by 1963, the constitutional evolution had ensured a majority of Africans in elective representations. It was a goal for which they struggled and shed blood but eventually attained.

After 1963, the politics of National building could, it is ^{submitte} ~~said~~ start because as it is ^{said that} ~~said~~, "the politics of Nation building could not start until K.A.N.U had won a straight democratic election. In the phoney period of two years before the elections of May, 1963, K.A.N.U was almost brought to its knees by frustrations of opposition and delay including the defection of Paul Ngei.. to form the A.P.P". ³¹ This was the closing of an important chapter in the evolution of Kenya's electoral process.

CONCLUSION

By way of conclusion, one may observe that during the period under review, that is 1905-1963, elections were never free or fair for multiple reasons. Firstly, in the earlier part of the period elections were based on a communal roll and all races did not participate. Thus, the government formed out of such elections was neither elective nor constitutional. ^{it was racist} Secondly, by subordinating the Legislature to the Executive, the system was opposed to constitutionalism, a concept based on limitation of government. The colonial government was never distinguished by a scrupulous regard for constitutional niceties. Thirdly, even later in the period white condescendence vitiated the freedom and fairness of elections, example, the opinion expressed in Lyttleton constitution that with respect to Africans the vote was not a public right but a privilege.

Throughout the period law was used (in elections) as an instrument of class domination, particularly since the colour differentiation coincided with socio-Economic stratification. The inherent institutions, which include electoral laws, were weighted towards control radical African activity upto 1963. Fourthly, even when the suffrage was extended to the African's in the form of adult suffrage with ^{restrictive terms} ~~qualitative~~ aspects it was not reflected in free and fair elections due to tribal loyalties and personality cults, parochialism in outlook, intimidations, threats and promise of gain by supporting one party. Indeed the political parties reached independence as mere federated ethnic loyalties group^ed around individual personalities. Their immediate concern was, for K.A.N.U, the transfer of power and they did not mind Majimboism to hasten the realisation of their

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cherished goal. For K.A.D.U., it was limitation of the government's powers in the interests of ethnic minorities. The administration therefore, had never espoused any tradition of government by rules as a legitimate system, much less the constitution as a sacred and basic law laying down the major institutions of state and prescribing the norms by and within which they must function. Such was the state in which the African state started to operate. For all purposes and intents the inherited structure was opposed to constitutional or democratic practice as it was for despotic and authoritarian rule.

CHAPTER 1FOOTNOTES

1. WIGHT - British Colonial Constitution P.17
2. Legislative Council Ordinance No. 4 of 1905
3. DILLEY - British Policy in Kenya (New York Thomas Nelson & Sons, 1937) pp. 49-52
4. NO 22 of 1919
5. For a comprehensive discussion of this paper see DILLEY, Ibid. P.51
6. WOOD WINTERTON COMMITTEE, 1922, Para. 8
7. GHAI AND MACAUSLAN - Public law and Political changes in Kenya (Oxford University press Nairobi 1970) at p. 49 generally.
8. OKOTH - OGENDO H.W.O - "The politics of constitutional change in Kenya" African Affairs Vol. 71 no. 2§2
9. Two Indians and eleven Europeans were to be elected on a communal roll in 11 constituencies - see MACHENZIE W.J.M: Five elections in Africa: African elections in Kenya (Oxford, Claredon press, 1960)
10. E.W. MATHU; among other aspirants were P.M. Koinange who campaigned among African areas using his father's influence.
11. Royal instructions 1927. Government Notice 248 of 1927.
12. Royal instructions 1934. Government Notice 256 of 1934.
13. 1944
14. MACHENZIE op. at. p. 322
15. H.W.O. Okoth - Ogendo - op. at p.9
16. Royal instructions 1920 - section XV
24. Legislative Council Ordinance 1905

17. No 1 of 1924
18. Ghai & MacAuslan - op. cit. p52 generally
- 19 Pursuant to Royal instructions 1948 sects
XV - XIX, unofficials were increased to 22 the
officials remained 18.
20. Ghai & MacAusla -
op.cit P 65. For a further discussion
see generally Civil ROSBERG and
JOHN NOTTINGHAM - The myth of Man Man
(New York, Praeger, 1967)
21. MACKENZIE W.J.M. o. cit. p. 399
22. No 10 of 1956
23. Okoth - Ogendo - Supra, p. 11
24. Okoth - Ogendo - Supra, pp 11-15 generally
25. 20 out of the 25 elective seats were reserved for
Europeans, Asian, Arabs in the ratio of 2:8:10 respectively.
There were twelve national members in three groups: Africans,
Europeans, Asian - Arab
26. See Clyde Sangher and John Nottingham (1964) Journal of
Modern African Studies p24 (1964) vol. 2 No 1 p.1 onwards.
27. Footnote 24 supra
28. Clyde Sangher and John Nottingham op. cit p. 30
29. Okoth - Ogendo op. cit. generally
30. 561 constitution of Kenya, 1962
31. John Nottingham: " The Kenya general elections 1963"
Journal of Modern African Studies Vol. 1 no. 1 p.1 (1964)

THE ELECTORAL SYSTEM IN POST INDEPENDENCE KENYAINTRODUCTION

The chapter sets out to evaluate the applicability and effectiveness of electoral laws in Kenya. The aim is to give a description, of what is involved at the various stages of the electoral procedure with a view of analysing the constitutionality of the procedures and their impact on constitutional practice. The Chapter will also attempt to examine the structure and operation of the administrative machinery which is charged with the duty of effectuating the election exercise freely and fairly. The foregoing framework shall necessitate a consideration of the normal administrative requirement of impartiality and efficiency in the handling of elections; an analysis of those administrative aspects that may be held to be peculiar to the Kenyan situation in the constitutional framework; the applicability of election laws to realities of Kenya's socio-economic set-up; and, finally, a discussion of the whole political system as well as its performance in the election context. Thus, though this is a legal not a political study, a social scientific approach is appropriate if the salient features of elections in Kenya is to be grasped. This study includes an examination of both the Presidential and parliamentary elections.

I THE LEGAL AND ADMINISTRATIVE FRAMEWORK

The basic instruments providing for the rules and regulations that govern elections in Kenya are the Constitution¹, The National Assembly² and Presidential Elections Act,² and The Election Offences Act³ and the Kanu Constitution. This section will involve a consideration of the constituencies, franchise, nomination and campaigns in the general elections. The period under discussion extends from the dawn of independence to the present day with a view to determining the development or otherwise of the electoral system from the colonial experience discussed in the previous chapter.

(a) Constituency Boundaries

Kenya like most other former British dependencies borrowed and adhered to the concept of single member constituencies.

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This inheritance became more of a vivid reality in 1964⁴. During the colonial administration, the district was a major electoral unit⁵. The District is still an important unit under the independent administration in matters both administrative and political. It is argued that the district is essential in the ruling parties, structural machinery.⁶

After the abolition of regionalism in 1964 the constitution made provision for the number of constituencies that are to be in Kenya. It is provided that Kenya is to be divided into such number of constituencies having such boundaries and names as may be prescribed by the Electoral commission provided that such number of constituencies shall not be over one hundred and sixty eight (168). Demarcation of constituency boundaries depends on population, ethnicity, communications and demographic features⁸ - such criterion for demarcating constituency boundaries was enhanced by the British administration policy of divide and rule. Inevitably, the designation of constituencies in reference to ethnicity has led to a situation where parochialism has been heightened. Ethnicity has had the further effect of exacerbating tribal feelings which it is the avowed dedication of the government to eradicate⁹. The Kenyan experience has indicated that though the constituency boundaries are not manipulable they nevertheless fall prey to the "safe-seat" doctrine where an individual sits as a constituency representatives without fear of removal. This doctrine has, except for the 1979 elections, had practical significance in Kenya. It is invariably the case that the President and his vice-President and most senior cabinet Ministers are never opposed in Kenya and they have been constituency representatives since the first Parliament. But this phenomenon may^{also} be explained not in terms of boundaries but rather of domination through economic power and other aspects of force.

The Kenya parliament is comprised of one hundred and fifty eight elected members. In addition the president is empowered to nominate up to twelve members to the National Assembly from amongst persons who, if duly nominated would qualify to be elected as members of Parliament.¹⁰ This power may be used advantageously to minister a majority in Parliament.

The constitution or the electoral laws lay down no criterion upon which the president will nominate persons and, therefore, he is at liberty to nominate only such people as to whose subservience he is assured. This number of nominated members put together with the Front Benchers gives the President a substantial following if not on outright majority. Such power to nominate, it is submitted, should be vested in the National Assembly or the Electoral Commission. This would negate personal relationship to the President or his close aides from being used as the criterion for such nominations.

The constitution provides the ceiling and the floor of the number of constituencies. The underlying theme is the concept of fairness which is supposed to kind expression in the factors that determine the constituency boundaries. The constitutions to ensure that the boundaries reflect a time picture of fairness provides that the authority which names and constitutes constituencies, shall at intervals of not less than ten (10) years review the boundaries and names of the constituencies, and it is empowered to order any alteration names, boundaries or numbers and gazette every such order^{II}. The commission has been candidly inactive except in 1979 when attempts to have it function were thwarted by political squabbling which led to the shelving of the commissions recommendations.

II FRANCHISE AND CANDIDATURE

It is considered appropriate to study these two institutions together due to their numerous interactions in operation. As already observed¹² though the colonial government was not distinguished by a scrupulous regard for constitutional niceties ~~it~~ endeavoured on the eve of its departure to instil a system of constitutional rigidity as the only means of safeguarding minority interests and to forestall - civil strife¹³. Before independence, property status, education, race and merit were cardinal considerations in the extension of the franchise. This being the system which the nationalist struggled against it found aversion in their eyes. They were resolved to overhaul and replace this system with an unspecified other which was reflective of social realities

The 1962 and 1963 elections saw the concept of elections based on a communal roll fought and defeated. The nationalists and party stalwarts were in agreement that the policy of one man one vote should operate. The settlers and the local foreign interests were not prepared to support such a policy because it could clearly spell their doom. Nationalist pressure nevertheless prevailed. In those elections Kenya African National Union swamped Kenya African Democratic Union (hereinafter KANU and KADU respectively). This one-man-one-Vote elections were competitive and inter-party but all subsequent elections have become increasingly intra-party and non competitive.

It is clear that if pluralist democracy is analogous with competitive elections, then the only era of democracy was 1962-1964 when both KANU and KADU parties actively engaged in the election exercise. This was therefore, the only time that the electorate was given a choice between alternative policies presented by either party. The period 1962-1964 saw KADU play an important role as the opposition party. This did not, however, last long. The role KADU had initiated did not last long primarily due to intimidation, coercion, cooptation and the lack of an ideology of values to weld the party together as an enviable opposition apparatus¹⁴. Kenya is not a de jure one party state¹⁵ and therefore the dissolution of KADU and its merger with KANU may not be explained fully in strict constitutional terms. The opposition had never been seriously given cognisance by the rulers. Jomo Kenyatta, the then Prime Minister, had observed before the dissolution of KADU that whereas the opposition may be recognised, unnecessary criticisms would not be "tolerated" He added that Kenya was prepared to uphold the basic freedom of the individual within a one party framework and that "at this stage ----- we find ourselves with myriad relevant grounds and conditions for a one party state. It is inevitable".¹⁶

The dissolution of KADU and the emergence of a defacto

one party democracy was an indication of the leaders zeal to remain in power. The need of a Presidential system of government "embodying the facts of national leadership as seen in the eyes of the people, the concept of collective ministerial responsibility and the supremacy of parliament was noted". This statement underscored the intention of the leaders of KANU to perpetuate their rule under one party democracy. The leadership sought to strengthen the Executive over the other organs in order to remain in power. By 1965 the Executive had been remarkably strengthened by the removal of serious administrative handicaps imposed by the independence constitution. Thus, one party democracy and a strong executive go hand in hand. This leads to the monopolisation of policy decisions and implementation which may be reflected in opposition and political dissidence.

The rise of KPU may be said to have such a background. It was symbolic of the disunity which pervaded KANU'S rank and file in Parliament and in politics.¹⁸ This disunity and indiscipline was presented by the Executive as a constitutional issue which was to be solved through legal procedure such as those laws which were designed to protect the electorate from political careerists demanding that a member who crosses the floor shall vacate his seat.¹⁹ The emergence of the Kenya Peoples Union in 1966 as an opposition party, therefore, led to the first real test of constitutional durability in Kenya and to the emergence of political survival through the constitution as a primary motive. The KPU quarrel with the leadership of KANU before they left the party was partially a question of policy decisions and partly a question of ideology. The importance of the emergence of KPU lies in the fact that for the first time ideological differences sought expression in institutional terms. As observed earlier, KANU lacked an ideology of value from start. Its barest attempt to formulate ideology is found in sessional paper No. 10 of 1965 which, as some writers have observed is "----- a document which ^{was} neither a political philosophy nor a plan but a simple answer to public demand for an ideology." ^{19(a)} The new opposition

tried to give the public an ideology but its success was marred by Executive intervention through the administrative machinery.

Various methods of removing opposition were resorted to in both the KADU and KPU cases. As professor Nwabueze notes opposition parties do not dissolve of their ^{own} free will KADU was forced to dissolve through "-----the mass defection its parliamentary members ----- ^{procured} ~~procured~~ through pressure exerted on the members" and KPU was forced out of existence through a technique to make life as intolerable as possible for the opposition members by various forms of discrimination and victimisation ----- until, their will broken they join the ruling party".²⁰ The turn "The turn coat" legislation requiring that a parliamentary seat be vacated by any member who resigned from the party was the first calculated step to put the KPU to political ~~oblivion~~ ^{division}.²¹ Under the legislation, ^efresh mandate from the electorate was required and when it was sought by KPU members in the little General Elections in 1966 only nine (9) KPU members retained their seats. The standing orders were amended to the effect that for a party to be recognised as an official opposition it must have thirty or more members and thus KPU could not be recognised as an official opposition.² To make matters worse for the opposition, further amendments to the constitution²³ and to the Preservation of Public Security Act²⁴ were made. The president was thereunder empowered to bring with operation Part III of the Preservation of Public Security, Act provided he brought that fact to the notice of Parliament within twenty eight days after the coming into operation of the Part. Before that amendment the notice was required to be given within seven (7) days and it could only be approved by a majority of the sitting members. Under the Amendments, the President required only a simple majority to bring part III into operation. It is surprising that such an important piece of legislation passed through Parliament in four (4) hours²⁵. This legislation was used as an instrument of political coercion.

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In 1969, the late President Jomo Kenyatta, involved §85 of the constitution and thereby brought into operation Part III of the Public Security Act under which he proscribed KPU and detained or restricted its leaders. The banning of KPU restored Kenya to the "cherished" position of a defacto one party democracy and, as in the case of KADU not by the "voluntary" choice of the people but by the exercise of sheer political power of the rulers.

Kenya as from 1969 became a one party state due to the economic and political considerations. The ban on political parties, express or implied, does not necessarily weld the general public to the ruling party. The differences between various social groups and between classes still exist but are merely insulated from exploitation by rival parties. The fact of political suppression makes the conflicts and jealousies intra-party. Unity in such a party ultimately depends on the authority and prestige of the government and the personality of the President. Allegiance and unity forged on such circumstances can neither be voluntarily nor wilful and on that score, if no other, it would be wrong to say that KANU is, or has ever been a "mass party". This is more so in the light of the fact that the very existence of a defacto one party state may lead to a person being excluded from active participatory politics where party membership is required. It is arguable that a party reserves the right to regulate its membership but such an exercise should not be seen to exclude any person from admission solely on grounds of past membership to a defunct opposition.

This we may say that Kenya is a one party state and it is within that framework that the electoral system may be analysed. The process of election starts with the registration of voters. Registration is arranged on a constituency basis. ~~The Registration is arranged on a constituency basis.~~ The Registration exercise is subject to the direction and supervision of the Electoral Commission under the provisions of Sec 4I of the Constitution.

The registration of voters determines who is or is not eligible to be an elector. Only persons who, are citizens of Kenya, over eighteen years, have been residents in Kenya for a period of not less than one year ~~since~~ ^{in the} period immediately preceding the application to be registered, or has been ordinarily resident in Kenya for a period or periods. —

Turn overleaf

It is not clear how a person who has left his constituency of origin is to be regarded. It would appear reasonable that he may be registered in such constituency if he meets the requirements stated above. An investigation conducted by the writer reveals that such people are readily registered in such constituencies despite the fact that they may not have lived there for the last ten or more years. In other cases they were held not to be eligible to be registered. It is submitted that such people should be given the freedom to choose where to exercise the right to vote.

A look at the newspaper reports at or about the election time in 1979 reveal that numerous protestations were lodged by some candidates and the administration officers over the transportation of voters who often fall in the curious category assigned. It is, however, not the writers contention that there were no attempts, successful or otherwise, to transport voters to various constituencies from the urban area 31. It is clear that no person can be registered in the constituencies 32. Whereas the spirit of the law is in that regard laudable, its implementation is strenuous and requires a great expenditure of both time and manpower.

In 1979, the registration exercise took place before elections. In comparison to other years the turnout for registration was better. This may be due to the fact that there were success at appeals by the administration, which was charged with the task of carrying the exercise, for people to register as voters. Statistics indicate that 75% of the approximately 6 million eligible voters registered.

It is significant that KANU, the only party sponsoring candidates in the preliminary elections played virtually no role in encouraging people to register as voters. This does not compare with the role played by the de jure one party in Tanzania which is active in process of registration in appealing to voters. Registration is not ~~merely~~ depends on individual initiative. The Electoral Commission is relied on to see that registers in a period of not more than ten years and it did so in 1979. By and large it may be observed that the franchise is large if side but the choice between policy alternatives is non-existence since by elections KANU group seeks to recruit new members to its ruling class and to promote others within that class.

amounting in aggregate to not less than 4 years in the last eight years immediately preceding the application and who has been a resident in the constituency for at least five months in the last twelve months immediately preceding the date of application or that he has been carrying on business in the constituency for such period, has lawfully owned land there, or has been employed there for such period as aforesaid 27. A person may not be qualified to be registered if he has been adjudged to be of an unsound mind, or is undischarged bankrupt or if he is detained in lawful custody, or has been reported guilty of an election offence by an election court 28. A person reported guilty of an election offence may now be pardoned by the President under a 1975 Amendment 29.

It is not clear how a person who has left his constituency of origin is to be regarded. It would appear reasonable that he may be registered in such constituency if he meets the requirements stated above. An investigation conducted by the writer reveals that such people are readily registered in such constituencies despite the fact that they may not have lived there for the last ten or more years. In other cases they were held not to be eligible to be registered 30. It is submitted that such people should be given the freedom to choose where to exercise the right to vote.

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For a person to qualify as a candidate he must be, registered as a voter in a constituency, a Kenyan citizen, proficient with both English and Swahili, nominated by a party in the manner prescribed by or under the law 33. The language requirement amended the law as it stood since 1974 under which provisions a person who passed the Kiswahili test was eligible to be elected. The 1979 amendment made it a requirement that any intending candidate be conversant with both English and Kiswahili 34. The language requirement is intended to ensure that only persons who are capable of taking an active part in the affairs of the National Assembly are elected. The High court of Kenya recently nullified the elections of one member who was found to have attained his language proficiency certificate through fraud or or deceit by using another person to sit the language tests for him 35.

A person shall not be qualified for nomination for elections to the National Assembly if he, owes allegiance to any foreign state, is under sentence of death or imprisonment for six months or more, is an undischarged bankrupt or hold or acts in any public office or the armed forces or has an interest in Government contract 36.

A recent ground for disqualification has been enacted through an amendment ~~has made the law more enacted through an amendment~~ to Section 35(1) and (6) of the constitution. The amendment has made the law more stringent for public servants who would wish to contest elections by providing that the minister for the time being responsible for elections may provide for the disqualification of any person holding any prescribed office if he has not formally resigned by a specified date of which shall not be less than six months before the date of nomination 37. This led to the resignation of a number of parastatal executives to try their hand in politics with differring luck. The legislation was intended to restrain such executives from using their considerably influential and profitable positions to gain an upper hand at the campaign stage or before it.

It is further provided that a person under a sentence of death or imprisonment for more than six months is disqualified for nomination 38. This ground, unlike its equivalent disqualifying a person from being registered as a voter which requires merely that a person be much lawful custody 39, is grave. For a person to be disqualified for nomination he must have been sentenced by court to a term of imprisonment as prescribed or is sentenced to death. For a person to be disqualified from registration it is not necessary that he has appeared in court and has been sentenced. This anomaly is difficult to explain but may be the rationale is that a person shall not be barred from being elected on frivolous grounds.

Provision is further made that a person is not validly nominated unless he is nominated by a political party in the manner prescribed by or under any Act of Parliament 40. The Act is reference to which the provision is made is the National Assembly and Presidential Elections Act (cap.7) . The Act provides that a candidate must

party district officers will sit on the National Executive and shall be nominated by a political party on the basis of a simple majority of votes. Such person must have complied with the constitutional provisions for the qualifying to be elected into the National Assembly and must have adhered to the election rules of his party.

few party branches remain active-----but hardly constitute a viable It is to be contended that these provisions are inhibitory on political activity and restrictive on candidature. Only candidates who legally must be sponsored by a political party, may be granted licenses to hold political rallies. This implies that independent candidates cannot be nominated and their views can never be expressed. It is also clear that such provision can be used by the Executive party machinery to exclude people from politics. This has happened in Kenya and continues to happen 41.

the constitution provisions for qualification for elections are The KANU constitution provides that in matters pertaining to elections, the National Executive council has the ultimate jurisdiction to clear candidates but whereas that is with letter of the constitution and the election laws, it is doubtful whether it is within the spirit of either. The constitution has laid down the grounds for qualification for a person to be nominated as a candidate in elections to the National Assembly. All other instruments should not be only give expression to those provisions but must be seen so to do. It is doubtful whether the High Court arrived at the correct decision when it held that it could not enjoin the Returning Officer when it held that it could not enjoin the Returning Officer in Kisii to accept a candidates nomination papers 42(A) If the court found that the candidate could be validly nominated then it should have enjoined the Returning Officer to accept the nomination papers as a matter of course. The important issue for the court to decide is whether a person has qualified under the constitution to be nominated as candidate. If the answer is affirmative it would appear ultra-vires the constitution to refuse to admit or clear a person except on very exceptional grounds. in the

The reasons why some candidates are not cleared are dubious while others are downright unconstitutional. It is a mockery of democracy and judicialism for some high placed authorities to assert that the ruling party cannot be taken to court 44. With the foregoing analysis it is reasonable to conclude that party clearance smacks of political recruitment and clientelism and hence, some candidates are not given clearance certificates. This has become the situation because details of procedure in the clearance of candidates is not defined. The other reason that may be forwarded to explain the party leadership's unwillingness to clear some candidates is the idea of want of organisational link between those managing the Central Government and those in the periphery". 45 disorganisation.

It is suggested that it would be safer to select candidates for the preliminary elections through a delegates conference. This should be both at the party district level and at the national level where aspiring candidates ought to appear in person. This method would remove the element of malice involved in clearance. It should further be provided that both Government members and

party district officers will sit in the National Executive and share responsibilities equally. This type of organisational framework would require a strong mass party 46. Kanu is not such a party as has been suggested "because-----as an organisation it does not exist outside the chambers of the national assembly. A few party branches remain active-----but hardly constitute a viable apparatus for linking the central government with the grassroots of Kenyan society. For this reason Kenya is called a no party state"47. Party reorganisation was started in 1979 but full reorganisation has yet to be realised. It is interesting to note that except for party machinery used in 1974 and 1979, outright physical restraint has been used 48.

Another solution to party exclusionary tactics would be ^{to} embed in the constitution provisions for qualification for elections as independent candidates. This would include amendments to both the constitution and the Elections Act (cap.7) but such a measure would be expedient. Not all Kenyans are certified members of the ruling party body and soul and it is curious that when provision is made for a parliamentary candidate to be supported by fifteen signatures in his nomination forms non-members of the party are not expressly excluded from giving their signatures. It is also true that the law provides for the machinery of party preliminaries and numerous voters in those elections are not KANU members. The validity of nominations based on such elections may well be challenged. The withholding of the right to be elected from people of Oginga and Anyona's calibre by means of party and legal machinery leaves a personality vacuum in Kenyas political scene. It is probable that electoral laws were well intended but it is also clear that they have not been fully successful with respect to franchise and candidature.

the voters role in the constitution should, be seen to discharge this duty effectively if its estate is to remain. Regulations of corporations, imaginary or probable, will always be directed against the administration if it continues to be in charge of the registration exercise. - 28 - functions of the Commission are seen to fall in total disrepute especially with regard to its role to direct and supervise elections.

The process of elections commences immediately the campaign starts. The basic postulate with regard to campaigns is that they can never be fair or be seen to be fair if they continue to be conducted under the auspices of the administration. The relationship between the Executive and the administration is at the root of these suspicions. The primary object of elections in Kenya is not to provide the voter with a choice of policy alternatives. It is to reward new individuals within that elite so as to renew the legitimacy of that elite in the minds of the electorate. With that view in mind in nomination, selection and campaigns the administrative machinery is used to ensure that candidates who do not find favour in the eyes of the ruling elite are frustrated.

THE ELECTORAL MACHINERY AND THE EXECUTIVE

The central role of parliament as perceived by the constitution would be subverted if the government was seen to be directly or indirectly involved in its effectual determination^{of elections}. To this end the law has attempted to put fetters on government participation in the election process so as to ensure freedom and fairness. Most of these checks are ineffective. The constitution provides for the Election Commission to be the body to direct and supervise elections and it is supposed to be free and subject to no persons directions. So the commission is also charged with the duty of drawing up constituency boundaries.

Despite the verbiage in constitutional terms given to the Commission its actual operational axis is limited. Its role has been persistently encroached upon by the Executive. A most glaring example of its ineffectiveness was seen in 1966 when it was sought to convert the senatorial districts into constituencies. Legally this was a job for the Commission but the conversion was given expression through an Act of Parliament. The Government involvement demarcating constituency boundaries may in certain cases lead to the practice of gerrymandering.

The commission has not been seen to be involved in the registration exercise despite the fact that the constitution makes provisions for that. This task is usually undertaken by the Executive through its periphery adjunct, the administration. The Executive may abuse the registration process by refusing to register would-be voters. This was the case in a recent petition where, though the ground failed to succeed, it had been alleged that five hundred voters whose names started with the letter "M" were missing from the voters roll 51. The Commission should, be seen to discharge this duty effectively if its esteem is to remain. Accusations of malpractices, imaginary or probable, will always be directed against the administration if it continues to be in charge of the registration exercise. The functions of the Commission are seen to fall in total disrepute especially with regard to its role to direct and supervise elections.

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This is clearly what happened recently when the Attorney General, Charles Njonjo, resigned to contest the Kikuyu parliamentary seat. Njonjo's progress to elected office was meticulous. He had actively campaigned for Amos Nga'nga during the 1979 general elections and it possibly could not have been a coincidence that Njonjo announced his resignation the day after Nga'nga vacated his seat. The former member of parliament is now the Chairman of Tana River Development Authority. Njonjo's posters were on the streets the same day he resigned and declared his candidature. He was seen talking to groups of Kikuyu constituents in newspaper photographs nearly every day. It appears that the state machinery thought nothing of this. When Njonjo was the Attorney General he had sought rigorous enforcement of the law limiting elections to three weeks after the nomination day. There can be no question but that he actively campaigned at a time when candidates were not allowed by law to campaign, and that the Government acquiesced in his conduct. Such meetings as were held by the candidate at that time were unlawful assemblies but the state machinery was not mobilised as could be the case for other candidates. It was demonstrated that the administration could not take action if it appeared to the Executive policy to support a candidate. This is another aspect of elections where the Electoral Commission could operate as an independent organ to ensure fairness. It is however the case that the novelty perceived by the constitution for the Electoral Commission has not been seen to be real.

Campaign dialogue, it may be noted, never points to ideology because, as contended earlier, such an ideology does not exist 53. In that light elections are not intended to confer an opportunity on the electorate to participate in the deliberation and formulation of data. The aim of elections in Kenya as seen by candidates is to provide an opportunity to join the national patriarchy's material resources. The main weapon of the candidate is, therefore, economic dynamism. One who has or promises to a chance of bringing a better economic perspective in development in the constituency stands a better chance of winning the elections. In a clientelist electoral system these linkages are better in economic respects and are able to perpetuate their leadership.

Ostensibly to check campaign expenditure, a piece of legislation was rushed through parliament to set a ceiling on such expenditure. This was an amendment to the elections Act (Cap 7) 54. The maximum was set at forty thousand shillings. Whereas this law may have had good intentions its operational significance are yet to be evidenced. To suppose that by passing legislation money will not be expended to influence voters would be banking too much on the politicians moral scruples and lack of ingenuity. Campaign funds are known to be distributed to relatives and friends long before the election period.

The limitation of campaign time and expenditure gave an unfair advantage to the incumbents. Firstly, the challenger could not be expected to familiarise themselves with the constituency in three weeks so as to be able to formulate proper campaign policy. The economic advantage which the challenger might have could not be effectively used otherwise the validity of the elections may be challenged on that ground. Lastly, since door to door campaigns are not allowed by the law, a new candidate cannot expect to lessen his problems by employing this method of campaign. Further there is no provision barring the holding of party meetings during or before the election period. It is ^{sub} admitted, therefore, that most of the incumbent members who are party leaders, may, and do, call party meetings for campaign purposes.

Before the polls candidates are given election symbols. These are given on the nomination day which was 18th October in the 1979 general elections. Symbols are used in campaigns and during the voting. The symbols are of some psychological importance to the electorate. Depending on the major preoccupation of the electorate the symbol may have an impact on them. A "panga" or "jembe" (hoe) symbol do have an impact on a rural farming community 55.

Voting in Kenya is by secret ballot. This is one of the safeguards imposed by the constitution to ensure that the franchise is exercised freely and fairly. Every candidate is allowed at least one agent in the polling station who is entitled to witness the marking of the ballot for illiterate voters so as to ensure that such candidates are registered voters in the constituency and that they have voted for the candidate of their choice 56. The election agent has to be given a letter of appointment which he hands over to the presiding officer in order to be admitted in the station. Despite these precautions ^{agents} candidates are at times barred from witnessing the marking of the ballot for illiterate voters 57. Through such conduct, the very basis of democracy and the principle of free and fair elections are negated.

The Regulations to govern elections are found in Regulations 23-30 of the Regulation of the National Assembly and Presidential elections 58. These regulations govern voting by secret ballot, the designation of polling stations, the erection of polling booths, the conduct of voting and the principles applicable in the counting of votes. Regulations as to the principles applicable in the counting of votes was abused in 1979. In 1979 in one counting ^{exercise} of votes was instance ^{where} a recount was needed, the Returning Officer counted only the votes of the petitioner and thereby declared the second respondent elected 59. The petitioner established that that irregularity had caused him to lose the elections and the petition succeeded. Regulation 26 provides that no person shall communicate with a voter within the precincts of the polling station. What amounts to communication is not defined but it is submitted that it may be constituted by the wearing of a badge or vest of any candidate. A symbolic ~~of~~ badge or walking stick of a candidate is also a means of communication.

national machinery. With this combination of factors Moi was at himself a ticket to the presidency.

The law provided that polling will commence at 6.00a.m. and terminate at 6.00 p.m. but a later directive from state house allowed voting to continue until the last voter had cast his ballot. This extension was deliberately and mischievously ignored in various polling stations resulting in the departure of some voters before casting their votes. There is evidence that some electors were allowed to vote before the designated day 60. Whether this practice is allowed by the law is not the concern of this chapter but it would seem that the courts think that it may be implied in the law. On the whole a breach of these regulations may be a ground for nullifying elections. It seems, therefore, odd that the court nullified elections because of an irregular recount of votes but declined so to do where voting before the election^{day} constitutes the irregularity. One may also note that despite the apparent stringency of the law loopholes still exist which vitiate the principle of free and fair elections, both intra-party and extra-party opposition. The techniques that may be resorted to include the refusal to grant

III PRESIDENTIAL ELECTIONS

Presidential elections have never been a reality in Kenya. Provision is made that the President shall remain in power for five years. Elections to the office of the President may be held either during the general elections or in the event of the office falling vacant. After the death of Jomo Kenyatta in 1978, the present President acceded to the office without problems due to the interaction of several factors.

One of these factors is the constitutional provisions regulating the manner in which the office of the President shall be filled after it falls vacant following the death or incapacity of the President 61. The constitution provides that the Vice-President shall act for ninety (90) days within which time elections for the office of the President shall be called 62. Within that time the Vice-President may be able to use his administrative powers to personal advantage. In 1976, a motion was defeated in Parliament which sought to amend the constitution to bar the Vice-President from automatically assuming the functions of the office of President in the event of the office falling vacant. The constitution was, therefore, so framed that except by direct physical intervention, Moi had to assume the Presidency for at least 90 days within which elections were to be held.

The calling of presidential elections in 1978 was merely ritualistic. The constitution had already given a situation where Moi could undoubtedly succeed. He could meet all the constitutional requirements for a candidate for Presidency. To this factor was added the fact that during Kenyatta's rule Moi was the state vice-president and the Vice-President of the ruling party. In that sense he could bank on his influence both in the state machinery and in the party. The period following Kenyatta's death was marked by a general sense of insecurity and indecision. The public was craving for a calm transition. The cabinet was as quick to endorse Moi's sole candidature as were party district and national machinery. With this combination of factors Moi seemed himself a ticket to the presidency.

Presidential candidates are nominated by political parties with each party nominating one candidate 63. Kenya has only one political party and Moi had already been endorsed as its candidate. At grassroot, the Vice-President is never opposed and as such Moi was assured of being elected unopposed in his constituency. To that extent he was assured of becoming president with party support. This he could ensure by being the highest ranking officer in the party. It has been observed that "the real power in the party is its President or Chairman who invariably is also the Chief Executive and head of state". It is in him that the powers of the party and its primacy are lodged, and this concentration of functions serves to subordinate--- other organs of the party to him"64. With this Superior position of the president within the party he can be able to exclude through party machinery, any would be challengers.

The powers of the President in this regard may be used to eliminate both intra-party and extra-party opposition. The techniques that may be resulted to include the refusal to grant party compliance certificates and detention.

The combination of these factors and the fact that Kenya is a defacto one party state means that the electorate has never been afforded the opportunity to freely and fairly chose their head of sate. Official opposition, wherein an alternative in the presidency may found, was firmly crushed in 1969. Members of the president's party stand in owe of the president and are not ~~want~~ to come to open confrontation with him in elections or policy. The constitutional structure is such that it ensures that a smooth transition of power in the Presidency occurs. The party structure also seems to foresee the succession in the heirarchical order to the Presidency of the state and party. Inevitably, as Nwabueze puts it,

"the office has become an inheritance which must ~~be~~ be rendered secure by the liquidation of open and organised opposition---- and they would stay in power for as long as the people wanted them, which, given the indefinite eligibility for reelection means in effect for life, the only difference being that every five years or so they submit themselves to the ritual of an election" 65. This has been the case in Kenya and if events are anything to go by the same will hold true for quite some time.

The Presidents's position as chief Executive vests in him enormous powers to deal with political opposition. An instance when such powers were utilised to such an end is the arrest of a candidate and his detention on the eve of the nomination day because he was opposing a close confidant of the President. 66 The Public Security Act is invoked in such instances. This legislation has been called "a piece of legislation with few rivals for ^{confidence} rivale and obscurity".67 Whereas this may be overstating the truth, the Act does certainly vest the President with untold powers. In one instance the powers were used to ban the official opposition and detain its leaders68. As long as this remains the position free and fair Presidential or Parliamentary elections will remain mythical.

Short of outright coercion, the President at times resorts to subtle persuasion through the legal framework. This includes constitutional revisions aimed at ensuring the supremacy of the President and his party. Most of these revisions "---- have not only been piecemeal, but give the impression of being ad hoc. They are rushed through parliament, in most cases with the suspension of the rule of the standing orders requiring fourteen days publications of any proposed legislation 69. ~~One~~ other example is the requirement for a member to vacate his parliamentary seat upon resigning from the party on whose ticket ~~on whose ticket~~ he was elected 70. Yet another example is the enactment of legislation vesting emergency powers in the President to exercise the same subject to the approval by Parliament within twenty-eight days 71. Executive or Presidential intervention in elections may be implied in the presidential power to pardon election offenders 72. The position at law before the enactment of that legislation was that a person reported by the election court of being guilty of an election offence was disqualified from contesting elections for five years. The new Act amended §35(4) and §27 of the constitution by including the power to pardon election offenders to the Presidents prerogative power of mercy to mercy. This was an unwarranted vesting of constitutional propriety in the President to use as he desires.

It is noteworthy that unlike Kenyatta who assumed a hands-off posture, save for one instance when he had to intervene, in elections, his ~~predecessor~~ ^{successor} has shown an unconcealed zeal for active involvement in election politics. Like his predecessor, Moi barred Oginga and other KPU members, including the Government critic Anyona, from contesting but he also campaigned fairly overtly against some candidates--especially those who were in Kenyatta's inner circle - in the elections.

In effect, therefore, Presidential elections in Kenya are both mythical and heresy. It does not appear that the position will change in the foreseeable future. The factors which have made the office an inheritance are numerous and correlative. The powers vested in the President further negate the principle of free and fair elections in preliminary elections if it is known or suspect that he is supporting certain candidates against others.

CONCLUSION:

Election laws generally have good objectives. In their enforcement, however, the laws are open to manipulation from the Executive and from the candidates. This manipulation of the laws ~~vibrates~~ ^{negates} fairness and freedom in elections. This is due to the fact that constitutional provisions are regarded as mere declaration of national aspirations and their breaches are not considered serious. In that regard election laws are not bad per se. The role played by the administration in the enforcement of election laws and the conduct of elections has subsisted in independent Kenya. The administration's involvement in elections

FOOTNOTES

has its effect in the general analysis of the fairness or otherwise of elections. This involvement makes the government to be treated with a combination of awe and suspicion in the field of elections. Lack of a proper opposition machinery as observed earlier makes elections in Kenya senseless and ritualistic. The electorate is never given a choice of policy alternatives in elections because elections are used as a legitimisation process for the ruling clique. Political intimidation, and suppression have the effect of negating the principle of free and fair elections. Even with laws which are not bad per se the electoral process in Kenya can not be termed as either fair or free.

1. The constitution of Kenya, 542
2. Ibid
3. MICHAEL CHIFFE - One Party Democracy: The 1965 Tanzania General Elections (Nairobi, EAPH, 1967) Chapter 1 and 2
4. Acts No 40 and 45 of 1966 and 1968 respectively - the constitution of Kenya, 533.
5. Section 42 (4) a,b,c of the constitution
6. See chapter I of these dissertation
7. Carl Barnstein "The independence Bargain"
8. BRASHEAR, B.G. - Presidentialism in Commonwealth Africa (OUP 1977) p 218
9. 55 and 532 of the constitution
10. Daily Nation August 14th, 1964
11. House of Representatives Debates, Vol. 15 cols. 1260-1261 14th August 1964 UNIVERSITY OF NAIROBI LIBRARY
12. East African Standard, 24th June 1965, 11th February 1966 and 15th February 1966 indicate dissenting views on presidential debate on Rhodesia
13. Act No. 4 of 1967, Section 40(1) of the constitution
14. Okoth-Ogendo op. cit. p 24
15. Mvumbere, supra. p219
16. Ibid
17. Standing Orders, 1960
18. Act No. 13 of 1960
19. Cap 57
20. Okoth-Ogendo. Supra p. 13
21. Legal Notice Nos. 2993-2998; 3094-3095; 4101 of 1966
22. 543(1) of the constitution
23. 543(2) of the constitution
24. Act No. 25 of 1975
25. This was revealed in a interview with P. E. Holt (P.C. M. Urubi province) on June 16th 1980
26. The majority of the complaints arose in constituencies which are near urban areas.
27. Section 43 (4) of the constitution.
28. Section 34 of the constitution
29. Act No. 55 of 1979
30. Election Petition No 13 of 1979 - Mohammed Jubat Ali and Abdullahi Girat Danyo Vs U. K. Githinji and Ibrahim Abbas Noor
31. Section 35
32. Act No. of 1979
33. Sect 35 (1) of the constitution
34. Sect 43(2) c of the constitution
35. Sect 34(d) of the constitution

FOOTNOTES

1. The constitution of Kenya, 1969
2. Cap 7, laws of Kenya
3. Cap 66, laws of Kenya
4. Clyde Samghes and John Nottingham - "The General Elections 1963" in (1964) Journal of Modern African Studies Vol. 2 No. 2 No. 1 p24
See also H.W.O. Okoth-Ogendo - "The Politics of constitutional change in Kenya 1963-1969" in (1972) African Affairs Vol.71 No. 282pl
5. H.W.O. Okoth-Ogendo Supra pp 10-15
6. CHERRY Gertzel - Government and polictics in Kenya (Nairobi, EAPH, 1972) p 36
7. The constitution of Kenya, 542
8. Ibid
9. LIONEL CLIFFE - One Party Democracy: The 1965 Tanzania General Elections (Nairobi, EAPH, 1967) Chapter 1 and 2
10. Acts No 40 and 45 of 1966 and 1968 respectively - the constitution of Kenya, 533.
11. Section 42 (4) a,b,c of the constitution
12. See chapter I of these dissertation
13. Carl Barnestein "The indepence Bargain
14. NWABUEZE, B.O. - Presidentialism in Commonwealth Africa (OUP 1977) p 218
15. 55 and 532 of the constitution
16. Daily Nation August 8th, 1964
17. House of Representatives Debates, Vol. II Part II, cols. 1208 14th August 1964
18. East African Standard, 24th June 1965, 8th July 1965, 11th February 1966 and 15th February 1966 indicate disunity over a parliamentary debate on Rhodesia
19. Act No. 4 of 1967, Section 40(1) of the constitution
- 19(a) Okoth-Ogendo op. cot. p 24
20. Nwabuere, supra. p219
21. Ibid
22. Standing Orders, 1968
23. Act No. 18 of 1966
24. Cap 57
25. Okoth-Ogendo Supra p. 13
26. Legal Notice Nos. 2983-2988; 3094-3095, 4101 of 1966
27. 543(1) of the constitution
28. 543(2) of the constitution
29. Act No. 25 of 1975
30. This was revealed in a interview with P.K. Boit (P.C. Nairobi province) on June 16th 1980
31. The majority of the complaints arose in constituencies which are near urban areas.
32. Section 43 (4) of the constitution
33. Section 34 of the constitution
34. Act No. 55 of 1979
35. Election Petition No 18 of 1979 -
Mohammed Jubat Ali and Abdullahi Sirat Osman Vs G. K. Githinji and Ibrahim Abbas Noor
36. Section 35
37. Act No. of 1979
38. Sect 35 (1) of the constitution
39. Sect 43(2) c of the constitution
40. Sect 34(d) of the constitution

CHAPTER III

41. Ex-KPU detainees were barred in 1974 and again in 1979. Another person who fell victim of the provision was George Anyona.
see Daily Nation 16th October, 1979
42. 53 of the Constitution of the Kenya African National Union.
43. The validity of any law is subject to conformity with the constitution is invalid to the extent of that in con inconsistency - 53 of the constitution.
44. Daily Nation 17th October, 1979
45. HERMET ROSE AND PIERRE ROQUIE: Elections without choice: (Dar-es-salaam, OUP, 1975) pp 90 - 112
46. Lionel Cliffe, op. cit Chapter I generally
47. Hermet Rose and Roquie, Supra, pp 95-96
48. Lawrence Wambaa intended to oppose the then Minister of state in the office of the president in 1969 and was detained on the day before the nomination day.
49. 517(4) of cap 7 laws of Kenya
50. 541 of the constitution
51. Election Petition No 2 of 1979
MAINA WANJIGI Vs NICHOLAS GOR AND P.K. BOIT
52. In the last general elections campaigns were from 18th October 1979 to 8th November, 1979.
53. NWABUEZE, B.O. constitutionalism in emergent states
54. Amended 518(B) of cap 7 laws of Kenya and set the statutory maximum of campaign expenditure at 40,000/=. Act No. 19 of 1979
55. Lionel Cliffe, Supra Chapter VII
56. L.N. 211 of 1969 Regulation 29 of the Election Regulations
57. See Election Petition No 2 of 1979
Election Petition No 24 of 1979
Election Petition No 12 of 1979
Election Petition No 3 of 1979
58. L.N. 211 of 1969
59. Election Petition No 3 of 1979
STEPHEN ONDIEK OLUOCH Vs STANLEY THUG AND MATHEWS OGUTU
60. Election Petition No 8 of 1979
William Murgor Vs Francis Kaino and Joel Ingonga
61. 56(1) of the constitution
62. 56(2)a of the constitution
63. 55(3)a of the constitution
64. Nwabueze op. cit. p242
65. The "Three years loyal" membership to the party demanded in the 1974 elections and the refusal to grant compliance certificates to Anyona, Odinga, Aneko and others are to reveal such techniques in operation.
66. Nairobi Times 4th November, 1979 p.1. A candidate in the 1979 elections revealed how he had been detained for offering to oppose a Minister of State P.M. Koinange in 1969.
67. John J. Okumu - The Government and the constitution in Kenya: DECEMBER 1967 East African Journal p 11
68. Footnote 26 supra
69. OKUMU, supra pp 11-12
70. Act No. 17 of 1966; S 40(1) of the constitution
71. Act No. 18 of 1966
72. Act No. 1 of 1975, 535(4)
- 42A. Anyona had sought an injunction to enjoin the D.C. Kisii from either declaring his nomination invalid or refusing to accept the same: The Standard 16th October, 1979 pl

CHAPTER III

THE LEGAL AND JUDICIAL ASPECTS OF ELECTION OFFENCES

INTRODUCTION:

The judiciary is one of the three organs of the state. It is the organ that deals with balancing of the individual rights and the state or other organizations and between individuals. When one talks about the legal and judicial aspects of election offences the argument rests on the fact that such offences are distinct as viewed by the judiciary and as prescribed by statute. The issue of election petitions deriving from election offences supplements any analysis as to the application or otherwise of the principle of fair and free elections.

In determining whether an election offence has been committed the freedom of the judiciary may be interfered with and, this begs the question of the independence of the judiciary from other both the Executive and the legislature. The interference of these organs should be seen together with any other factors that influence a judge in the determination of petitions arising out of alleged election offences and irregularities. Such other factors include, if it is accepted that law is an instrument of class domination, the judges social status, cultural, educational and political and ^{class} political background.

The approach of the judges to various socio-economic peculiarities in Kenya shall be assessed. These peculiarities include the value and significance of the traditional oath in elections in modern Kenya, and, in the light of economic stratification, the significance of such offences like bribery

and treating in elections. It is interesting to note that in 1974 nearly all petitions which alleged oathing ^{as a} ~~as a~~ a major ground succeeded despite the fact of the high standard of proof required to establish the offence.

The basic premises in this chapter are that the judiciary is not entirely independent in deciding election petitions founded on election offences and malpractices. This is so because of the fact that though ^{the} Executive or Legislative interference in the decisions may not be direct, it usually takes a covert and subtle form. The opinion of the judge on any issue is also heavily influenced by other express or ^p implied limitations of his independence. The express limitations include the substantive and procedural law while the implied limitations are caused by cultural, educational, class and political background. It will be the argument that at times the judiciary is not at grips with social realities and that this is reflected in their judgements, whether or not such judgement is correct.

(A) PETITIONS.

The constitution of Kenya provides that in the determination of questions as to membership in the National Assembly the High Court has jurisdiction to decide whether a person was validly elected or whether a seat is vacant.¹ This provision finds expression in the National Assembly and Presidential Elections Act² (hereinafter the Election Act) which provides that an application challenging the validity of the election results or the declaration of vacancy in a seat in the national assembly shall be by way of a petition to an election court consisting of three (3) judges.³ Our concern here is with petitions challenging the validity of elections to the national assembly which are required to be instituted within fourteen days after the publication of results on the gazette.⁴ Such an application to challenge the elections may be made by a candidate or voter in the elections to which the application relates of, by the Attorney General.⁵ Upon receipt of such application, the election court may, though it never has, reject it summarily or, fix a date for its hearing.⁶ That being the statutory and constitutional basis of petitions, may it suffice to say that the validity of elections may be impeached for an election offence or irregularity that background, it is necessary to see how

the judiciary maintains its independence with regard to petitions and the socio-economic realities of election offences.

(5) The Independence of the Judiciary.

The independence of the judiciary as already indicated, may be interfered with actually or constructively with reference to election petitions. It is evident that this interference has been more constructive than actual. The argument is not that if interference is indirect it does not affect the independence but that intervention, in what form soever, is impermissible in any constitutional democracy. It is through elections that leaders are chosen and mandated to conduct the affairs of the state ^{and} ^{affairs} and, therefore, the decision of the court in a petition should not be tampered with and least should it be upset by any authority. S44 of the constitution provides that the ^{decision of the court is not} subject to appeal and therefore it behoves upon all interested parties to ensure that the decision stands if democracy and constitutionalism are to prevail. It is, however, clear that such a position is utopian. Interference with judicial decisions has since colonialism, been a feature of government. Indeed, "the --- position of the judiciary did not change with independence. The independent government realising the importance of a subservient Judiciary in the interpretation and enforcement of policy, has not taken steps to legitimise it (judiciary). We find that the higher ^{and} courts are still managed by expatriates." The judiciary is used as a tool in the interpretation and enforcement of policy today as it was during the colonial administration. How this affects the independence of the judiciary in the interpretation of the laws relating to elections petitions ^{concerning the officers} may be seen in the light of a few petitions.

The petitions that are most telling of the independence of the judiciary in petitions are those that concern government sponsored or favoured candidates and the ordinary man. Such petitions give revelations of the extent of judicial independence in that it is in such cases that the Executive may

independence in that it is in such cases that the Executive may intercede ⁱⁿ the judicial process to ensure judgement in favour of the government party thereto, These petitions more oftenly than not involve personalities in the cabinet who, due to their advantaged positions, are able to intimidate both the voters and the candidates. The collusion of the state apparatus in such conduct is, at times, explicit. Our concern here is to see how the judiciary operates when important decisions, likely to entail political of administrative repercussions, are before it.

Though the validity of the election of some cabinet members and national notables have been challenged in the 1979 general elections, the petition which can possibly determine the extent to which interference, if any, have ^{been} taken place is RAPHAEL SAMSON KITHIKA MBONDO V LUKA GALGALO AND PAUL NGEI.⁸ The facts here were that the petitioner was an intending candidate at the preliminary elections for the parliamentary constituency of kangundo in 1974. The petitioner withdrew from the elections before the nomination day. He alleged in respect of the withdrawal that he was illegally and improperly prevented from contesting the elections, inter alia, by the second Respondent personally threatening the petitioner with danger to his life unless he withdrew. As a result of his withdrawal the second respondent was the only candidate who was validly nominated and, consequently, returned to parliament unopposed. The Petitioner alleges that the conduct of the respondent constituted the offence of undue influence under s9 of the Election offences Act⁹ (hereinafter the offences Act). S9(c) provides that ^{any} person ^{person} directly or indirectly, inter alia, makes use of or threatens any force or violence for the purposes of:-

"inducing or compelling any person to refrain from becoming a candidate or to withdraw if he has become a candidate" ^{commits the offence}. In allowing the petition the court observed that:-

"He (the second respondent) was in our opinion acutely conscious of his high government position and it was this which moved him, ---- to a sense of outrage when he learnt that he was to be opposed by the petitioner-----to whom he referred to as "little"man"¹⁰

It is the contention of the writer that the decision of the court was correct in points of law and fact but what

happened after that decision is what is of importance in assessing the independence of the judiciary. The petition was the first during the history of Kenya which dēvested a cabinet minister of his parliamentary seat. It is a landmark decision in that it showed that the judiciary was prepared to balance the rights of a commoner with those of an important person and by implication those of the Executive. The decision of the court not only invalidated the election but had the further effect of barring such respondents from contesting elections for a period of five years from the date he^t reported^{was} guilty of the election offence in question.¹¹ This decision was followed by a hasty amendment to the constitution empowering the president to pardon election offenders who would otherwise be barred from contesting elections.¹² The criterion for the exercise of that discretion was not provided and the President could use his sole discretion in the matter.

The amendment is curious in certain respects. First, it clothed the President with constitutional propriety to ~~offend~~^{pardon} election offenders. This was in addition to his prerogative of mercy provided under §27 of the constitution. In the use of such powers harm may naturally befall some people. Secondly, the amendment, as in the 1966 amendment requiring members who resigned from their seats in parliament, was rushed through parliament with obscene haste and in breach of the fourteen days notice requirement on any bill seeking to amend the constitution. The bill went through all the stages in one day with only two members objecting to the bill.¹³ Anyona one of the two members who opposed the bill said that:-

"Anyone who breaks the law while being elected and is later found to have committed an offence-----in the High Court before European and not African judges should not only be thrown out of parliament but should be jailed----. If leaders are going to be chosen in ways which are illegal, and they are pardoned for the illegality, then you will find some people locking up their opponents in houses to prevent them from presenting their papers."¹⁴ Anyona was challenged by the Attorney General for

~~casting~~
casting

improper motives on the sponsors of the bill.

The sponsor(s) of the bill was, undoubtedly, the Executive. The bill was so timed as to make its first beneficiary the second respondent in the above petition, a cabinet minister and a friend of the President. It is clearly manifested that that was the intended purpose of the legislation by providing that it will operate retrospectively. The effect of this amendment, it is contended, was to render otiose the decision of the court in the Ngei petition. This ^{amendment} effect although retrospective, had the effect reducing the independence of the judiciary but before a detailed analysis of that contention is made, it is necessary to see how the same modus operandi could have been used in the 1979 elections if the President had opted to use the amendment as it was used in 1975.

IN TITUS KITILI MBATHI V JOSEPH THUNGU AND DANIEL

MUSYOKA MUTINDA¹⁵ a cabinet minister's election was again being challenged. The petitioner alleged that there was connivance between the second respondent and the administration through the active intermediation of the respondent's brother who was a senior civil servant. The petition further alleged acts of bribery in that the second respondent had, during the campaign period, given or caused to be given money and material to induce voters to vote for him. It was also alleged further that he had deliberately delayed a cheque issued by the government for \$15000/= in aid of school which cheque the respondent produced during the campaign period to influence voters. It was also alleged that the petitioners agent were not allowed to witness the marking of ballot papers for illiterate voters on the polling day.¹⁶

The second respondent had also caused the polling to slow down when he handed a note to the presiding officer at one polling station.¹⁷ He, the second respondent, had exceeded the statutory maximum of expenditure in campaigns.¹⁸ The petitioner had polled 9365 votes against the second respondents 9759.

In allowing the petition, the court held that the second respondent was guilty of the election offence of bribery as prescribed in the offences Act.¹⁹

He was also found to be guilty of using undue influence in the elections by the provision of the delayed government cheque. The court further held that there were irregularities in the polls manifested in the disallowance of the petitioners agents to witness the marking of the ballot for illiterate voters and that there was poor arrangements in the voting process causing undue delay. In the light of the offences proved, the second respondent could only contest the ^{by-}elections if the President pardoned him which discretion he did not exercise.²⁰ The by-election was won by the petitioner.

The other 1979 election which may be relevant in determining the extent of executive interference in the judicial process is ARC BISHOP STEPHEN OLUOCH V STANLEY THOO AND MATTHEW OGUTU.²¹ Here the petitioner alleged that Ogutu the second respondent, had committed either by himself or through agents the offence of bribery ^{by} providing food to voters in the queues²² and during the campaign when he gave cash to influence voters at night meetings.²³ It was further alleged that there was active collusion between the respondent and the administration with chiefs acting on his behalf to harrass the petitioners ^{supporters} voters.²⁴ The petitioners ~~were~~ further alleged to have been refused to witness the marking of ballot papers for the illiterate voters. Irregularities were further alleged to have occurred when voters were turned away from Sigalame polling station²⁵ and through the returning officer refusing a recount for 11 candidates and proceeding to declare the second respondent elected.²⁶ The agents of the petitioner were not allowed to escort the ballot boxes.²⁷ The second respondent polled 12452 votes against the petitioners 12429 votes. The court found in favour of the petitioner observing that at sigalame

"The presiding officer prevented people from voting when they were entitled to vote. At least five hundred people who attended the station to vote did not do so.²⁸ The elections were ^{but,} nullified, ^{and} the petition took a dramatic turn of irony when the court found that the petitioner was guilty of an election offence observing that "It is in line that he (the petitioner) has succeeded

on two grounds each of which is fatal to the election. And by presenting the petition as he has brought to light what was clearly a wrong procedure in the recount of votes and also of grave irregularities at Sikalame polling station---- but we find that by taking into his possession the ballot papers he was himself committing an election offence."²⁹ The petitioner could, therefore, not contest the By-elections. The offence alleged is constituted under 53 of the elections Act which provides in paragraph (6) that the offence is committed where a person is found "in possession of a ballot paper if not entitled to be in possession of one". The second respondent was, however, absolved of guilt as to the commission of an election offence. He contested the by-elections and lost. The finding of the court that the petitioner had committed an election offence whereas strictly legal may have been a disguised attempt to ensure that the respondent did not get stiff competition from the petitioner in the by-elections and hence stood a better chance to win.

On the strength of the Ogutu and Mutinda petitions a conclusion may be drawn that the independence of the Judiciary is rarely, if ever, interfered with. This may not necessary exclude the argument that the executive's non-interference was the result of the electorates manifest opposition to the respondents in both cases which was real on fact that despite their advantageous positions and the electoral malpractices they perpetrated, the margin of votes between them and their rivals was small. Several facts surface from the Ngei^{supra} petition. The petition may lead to the conclusion that by sponsoring the bill ^{and} making its operation retrospective, the Executive and the Legislature were impliedly encroaching on the independence of the judiciary by making ineffective its judgement. On the other hand it may well be argued that by allowing the due process of the law, up to the determination of the petition to proceed, the Executive sought not directly to interfere with the judicial process but to manifest its interference by way of legislation only after the decision of the court.

On the whole the impact is the same because even such mode or delay of interference has the same effect as direct interference, namely, to overturn the ruling of the court.

The independence of the judiciary may also be said to be eroded with respect to the principle of using only expatriates Judges as a means of "insulating" the African judges from politics. One judge has argued that such "insulation" is tantamount to doubting the African judges impartiality.³¹ The writer agrees with the judges view entirely on the point that such insulation implies that African judges cannot be impartial in certain cases for example where elections are concerned. The insulation not only implies that African judges cannot be impartial but has the effect of isolating the judiciary from the people they serve. This isolation was seen as wrong by R.M.Kawawa when he said that-

Judicial officers,-----are servants of the people and as such they must identify themselves with the people they are serving; by this I mean that our judicial officers should know the people as much as if not more than they know the laws of this contry"³²

It is contended that insulation is a wrong principle on the circumstances of Kenya. The African judge in the High Court is as much a creature of the system as the expatriate judge. He, like his white counterpart, has his political, class, religious and cultural biases. As part of the system, the judge, whether indiguious or expatriate, has to chose between service to the people or to his employers and, invariably, judges chose the latter. The influence of class pervades the judges irrespective of colour. In agreeing to be influenced by the Executive or to owe allegiance to it the acknowledges that in any conflict between him and the government he stood to lose. Therefore, the petitions reviewed show that the independence of the judiciary is not total but qualified. The petitions were correctly decided but had there been any conflict between the interpretation of substantive law and Executive

to conform with government policy.

(ii) The Socio-Economic Aspects of Election Offences.

It has already been posited that the exclusion of indeginous judges from the hearing and determination of elections is a form of uniting the independence of the judiciary. Expatriate judges cannot be held to be well versed in some peculiar aspects of life in Kenya which may arise during the course of trying petitions. It is not however the contention of the writer that African judges are versed in all the various aspects of social peculiarities. The argument is that, their education, class and political biases notwithstanding, there are instances where African judges may be preferable to expatriates. This is particularly so where oathing is a major ground. Given the social and economic stratification of the Kenyan society, it is inevitable that varying degrees of importance are attached to a case as aforesaid by the various classes and communities. The argument in this section will be that whereas such practices do in fact derogate from the principle of free and fair elections, their overall impact and significance is oftenly over-dramatised. This is partly due to the lack of ^{Knowledge} petitions and, partly, because in the perspective of time various electoral malpractices do not necessarily influence the outcome of elections.

S2 of the offences Act does not define what an election offence is but provides that it is an offence described in part III of the Act. Oathing constitutes the offence of undue influence under the offences Act. The first petition where oathing was pleaded as a major ground came before the court in 1975 in FRANCIS PHILLIP WAMBUA V LUKA DAUDI GALGALO AND SIMON KITHEKA KIILU.³³ In this petition, the petitioner alleged that the Kithitu oath was administered to a public meeting at Masinga market in Yatta Constituency. The ritual was performed with the concurrence and connivance of the second respondent and in his presence. The oath required voters to vote for the second respondent on the pain of temporal or spiritual injury. In consequence electors voted for the second respondent or did not vote at

about oaths and elections thus:-

"That-----in any case whatever the use and utility of oaths in the past they are out of place in the political circumstances of the Kenya of today. The constitution allows citizens free votes. An oath would by putting shackles on that freedom subvert the constitution."³⁴

The writer wholly agrees with the opinion of the learned judges. The truth is, however, that some of the blatant lies told by the second respondent to the court could not have been dared before an African judge. In leading evidence in rebuttal of the alleged oath-taking, the second respondent argued that in Yatta constituency, a large number of the people were highly educated, that the peasants equalled the businessmen in number, that the Akamba today do not cling to custom and therefore there was not much superstition among the ordinary people because the majority of the Akamba are devout Christians³⁵ Surely that was nothing but falsehood.

Oathing was held to constitute an offence under §59 of the offences Act. The decision of the court in KIILU's petition was followed in SIMBON MUSAU KIOKO V LUKA GALGALO AND FREDRICK MULINGE KALULU³⁶ where oathing was alleged to have taken place in a public rally. The second ground of the petition in this petition was that the respondent used a fraudulent trick, device or deception to influence voters to vote for him. This ground will be discussed shortly.

William Murgor v Joel Ingonga + Francis Muthwa

In 1979 three petitions alleged oathing as a major ground. These were DR. JULIUS KIANO V KENNETH S.N. MATIBA AND HUDSON MISIKO³⁷ BAHATI MUSILA SEMO V WALTER MUGANDA AND MOSES B. MUDAVADI³⁸ of these three only the Murgor petition has been decided. The petitioner there had alleged that the Kelaenjin Monyonyo oath had been administered at a public meeting with the concurrence and connivance of the second respondent during the 1979 elections. Unlike the Kiilu petition⁴ in the 1974 elections, the Murgor petition failed. In dismissing the petition, the Chief Justice, Sir James Wicks, said that the allegation was baseless because oathing could not be condoned by the administration "far less during periods

of election"⁴¹ It appears, therefore, that the judicial trend in 1979 is to dismiss petitions where oathing is alleged to have been administered to persons in the open especially at rallies. This may be a reasonable approach because the impact may be said to be diluted as such. Where, however, the oath is orally taken in private, such circumstances may impel the court to decide in favour of the petitioner. Kianos petition falls under that category but by the time this study is printed the case will not have been decided. It is noteworthy that the Kikuyu and Akamba people regard the oath with more respect than other tribes. The use of the oath negates the principle of free and fair elections. It is regarded with distaste by the courts as demonstrated in 1974 when the majority of the petitions which had oathing as a major ground. The benches aversion to oath is, it is argued, the product of its cultural background and education. The judge who listens to such petitions regards the oath as the nadir of primitivity.

Within the African communities the oath was sparingly used and only in cases of ^a dire necessity. It was used as an instrument of welding the community together in pursuit of common goal or in the interest of justice. The oath had the effect of building the person taking it to a mode of conduct which was in line with social goals. Today with the disintegration of society it is basically used for selfish ends, for example, in elections to bind the voters upon pain of spiritual or temporal injury to vote for a particular candidate.

Bribery, as indicated in the Mutinda Petition ^(supra) reviewed earlier, consists in the direct or indirect giving of money or other valuable consideration to induce a person to vote or procure votes for a candidate. It may also be constituted in the procurement or giving, by or on behalf of a candidate, any office, place or employment so that the person so given may vote for a candidate or procure votes for him or refrain from electing another candidate. 44

In the Titus Mbathi V Mutinda 46 bribery was constituted

in the giving of material and money to voters in order to influence them to vote for the respondent. In the Kiano petition, ^(supra) both oath-taking and bribery are major grounds. The petitioner alleges that voters all over the constituency were given cash inducement to vote for the respondent. Such gifts, it is further alleged, were accompanied by procreation and or promises of employment to the young voters. Given the financial hardships of rural Kenyans, election, time offers them the chance when they can get some money for their voters. The populace is more often than not ready to sell their

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overleaf

The court said that the fact that the respondent had been elected through bribes should not be a ground for disqualification of the electorate, where the electorate is free to vote and they are free to exercise the franchise freely and bribery does not vitiate the process of voting for political candidates. It also noted that the law provides for the highest bidder. The fact that the respondent in this regard may be the result of the difficulty to correctly determine what is or is not bribery during elections.

Two petitioners of any have relied on all of the above grounds, but none of them have been published or cause to be published before or during elections. Any false statement of fact is related to the personal character or conduct of any individual candidate or to cause or attempt to cause or during elections, for the purpose of promotion or procuring the election of any candidate, any false statement of the character of any candidate. In the Kiano petition the petitioner alleged that the respondent used fraudulent trick device or deception by allowing a plane, his (respondent's) election symbol to be used in the polling stations, dropping leaflets and distributing bills which were to portray the petitioner as a corrupt person who was not interested in the welfare of the constituency. In finding for the petitioner, the court said that it was immaterial that distribution was from an employee, if the essence to the commission of the offence is that such bill is printed, published or posted up.

votes for needd hard cash. Such gifts are not however at law of any force. The donee of such gifts may elect to elect any other candidate. It is not rare to hear such slogans among the public like "To X for money and to "Y" with votes."⁴⁷ Given that the candidates are essentially pretty-bourgeoisie town dwellers, the electorate finds itself justified to take their money because election time is the only time that members, more oftenly than not, return to their constituencies.

The courts have not treated bribery seriously except in the Mutinda case. The procurement of votes through bribes should not be condoned because it deprives the electorate, where the electorate is really improverished and they mostly are, of the freedom to exercise the franchise freely and bribery also minimises the chances of winning for poorer candidates. It also makes politics a game for the highest bidder. The indolence of the courts in this regard may be the result of the difficult to correctly determine what is or is not bribery during elections.

Few petitioners if any have relied on S11 of the offences Act which makes it an election offence to publish or cause to be published before or during elections any false statement of fact in relation to the personal character or conduct of any individual candidate⁴⁸ or to make or publish, before or during elections, for the purposes of promoting or procuring the election of any candidate, any false statement of the withdrawal of any candidate.⁴⁹ In the Kalulu⁵⁰ petition the petitioner alleged that the respondent used "fraudulent trick device or deception" by allowing a plane, his (respondent's) election symbol to fly over several polling stations dropping leaflets and defamatory handbills which seemed to potray the petitioner as a corrupt person who was not interested in the welfare of the constituency. In finding for the petitioner, the court held that it was immaterial that distribution was from an earoplane. Of the essence to the commission of the offence is that such bill is printed, published or posted up. In

In JOSEPHAT ANJUGUNA KARANJA V MANASEH KABUGI AND ARTHUR MAGUGU,⁵¹ petitioner alleged that the petitioner had been guilty of two election offences, namely, that he gave food or other drinks to people to influence them to vote for him and that he had distributed published material containing false statements about the petitioner. He alleges that in the cartoons so published he is depicted as an irresponsible person who had caused great suffering to university students while he was the vice chancellor by inviting the police to come and beat students. This petition is yet to be decided but the petitioner contends that the publication of the leaflets caused him to lose in the elections.

Irregularity are In William Cherop Murgor⁵³ S11(d) of the Election offences was invoked. It was alleged that the respondent had caused false statement of the petitioners withdrawal to be circulated in consequence of which he lost the elections. This ground was not specifically proved and the court dismissed the petition. The courts attitude towards offences under S11 of the offences Act is difficult to determine because either the section is pleaded as a minor ground or no evidence is called to establish the ground.

Treating is defined as the giving or procurement of any food or drink or the provision of money by or on behalf of the candidate, ^{to an elector to influence him or her} not to vote at all or not to vote for another candidate.⁵³ It is desirable that this offence be repealed. It is difficult for the court to determine for what purpose such nourishment or victuals were given. The provision of food and drink is an accepted form of hospitality and one is considered rude if he does not provide the same to visitors or friends. There should be a difference between treating during the polls and during campaigns. For the reasons above the court should be hesitant to pronounce any conduct as treating in the latter case. In Ogutu's petition, the grounds was specifically pleaded though it did not

succeed.

All the petitions included nearly similar irregularities pleaded. An irregularity does not bar a person from contesting the by-election if the elections are nullified on that ground.⁵⁴ Such irregularities are in the counting as is alleged in the Ogutu petition, ^(supra) communications within the polling station by a person other than the Presiding Officers⁵⁵ refusal to allow agents to witness the marking of the ballot for illiterate people or the incapacitated⁵⁶ and failure to comply with the language requirement. In one petition, as has been mentioned, the holder of a language proficiency certificate was not the person issued with the same because he was illiterate and in that petition the court did not hesitate to nullify the elections.⁵⁷ The consequences of an irregularity are by far less severe than those attached to the commission of an offence.

CONCLUSION.

It is to be observed that judicial approach is influenced by both express and implied factors. The express factors are both the substantive and procedural rules of law. The implied factors are those pertaining to class, political belief, cultural, religion and ethnicity. Despite the seeming independence of the judiciary in petitions, these factors operate to militate that independence. Limitations may also take the form of direct or indirect executive or legislative interference in the due judicial process. It has also been argued that the insulation of African judges, ostensibly from political influence, is an unjustified limitation of the independence of the judiciary.

The importance of election offences can only be understood in the light of the circumstances of the society within which they are perpetrated. This is so, for example, where perjury is alleged as that involves a sociological understanding of the community within which

it was administered and their views thereon. The judges should therefore interpret the Election Act in accordance with the social political and economic realities of the society in order to arrive at the correct decision. Finally, it may be observed that increase of petitions in the 1979 general elections as compared to other elections is an indication of developing political and constitutional awareness.

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1. Constitution 23(4).
2. Constitution of Kenya (No. 1) Act, 1979.
3. Act no. 14 of 1974.
4. Kenya Review (Richard Last M.P.), One Last Thing, Kenya Daily Nation, December 27th, 1979.
5. Election petition no. 17 of 1979.
6. Kenya Review 15th February, 1980.
7. Weekly Review 4th February, 1980.
8. Kenya Review 5th February, 1980. See also Daily Nation 20th February, 1980.
9. Election offences Act (Cap. 66) s10.
10. Ibid. s20(b) See also Daily Nation 15th March, 1980.
11. Election petition No. 3 of 1978.
12. Kenya Review 15th February, 1980, supra.
13. Ibid. Nation 6th February, 1980 col 1 and 2.
14. Daily Nation 7th February, 1980 pl.
15. Daily Nation 6th February, 1980 pl.
16. Kenya Review 15th February, 1980 pl.
17. Ibid.
18. Daily Nation 15th April, 1980, supra.
19. Ibid.
20. Jirra. ibotocpi 37.
21. An interview held with Justice Othman Sallal on 15th June, 1980.
22. Justice Othman Sallal's speech to judges and magistrates on the new law. Daily Nation 10th November, 1980 pl.
23. Election petition no. 26 of 1974.
24. Ibid s12.
25. Ibid s11.

CHAPTER III

FOOTNOTES.

1. The constitution of Kenya s44(1)
2. Cap 7.
3. The National Assembly and Presidential Elections Act, s 19.
4. National Assembly and Presidential Elections Act, s20.
5. The Constitution of Kenya, s 44(2).
6. The National Assembly and Presidential Elections Act, s22.
7. Kihoro cerere: Judicial Review, LL:B Dissertation, 1976, p26.
8. Election Petition no 16 of 1974.
9. Cap 66
10. Supra p.13.
11. The Constitution s34(4).
12. Constitution of Kenya (Amendment (No.2) Act, 1975.
Act no. 14 of 1975.
13. George Anyona (Kitutu East M.P.), Chelgat Mutai (Eldoret North)
14. Weekly Review. December 22rd, 1975. p6
15. Election Petition no.17 of 1979.
16. Weekly Review 15th February, 1980. P8
17. Weekly Review 22rd February, 1980 P6
18. Weekly Review 8th February, 1980 P7. See also Daily Nation
20th February, 1980 P28
19. Election offences Act (cap 66) s10.
20. Ibid. s20(b) see also Daily Nation 15th March, 1980 p1
21. Election Petition No. 3 of 1979.
22. Weekly Review 15th February, 1980, supra
23. Daily Nation 6th February, 1980 pp1 and 3.
24. Daily Nation 7th February, 1980 p1.
25. Daily Nation 8th February, 1980 p1.
26. Weekly Review 15th February, 1980 p1.
27. Ibid.
28. Daily Nation 29th April, 1980. Supra.
29. Ibid.
30. Jufra. footnote 37.
31. An interview held with Justice Mathew Muli in his Chambers
on Friday 13th June, 1980.
32. RASHID M.KAWAWA "A speech to judges and Magistrates conference
Dar-es-salaam. Daily New 12th November, 1968 p1.
33. Election Petition no.20 of 1974.
34. Ibid p12.
35. Ibid p10.

36. Election petition no. 24 of 1974.
37. Election petition no.1 of 1979.
38. Election petition no. 12 of 1979.
39. Election petition no. 8 of 1979.
40. Supra.
41. Daily Nation 3rd April,1980.
42. Weekly Review 15th February,1980 ibid.
43. s9 of cap 66.
44. supra.
45. s10(i) of cap 66.
46. supra.
47. The writer noticed this in his own constituency where despite random distribution of much needed cash by one of the candidate he failed to win the elections (Kangema constituency).
48. s11(c) of cap 66.
49. s11(d) of cap 66.
50. supra.
51. Election petition no. 20 of 1979.
52. Supra.
53. s8 of cap.66.
54. Ogutu's petition, supra.
55. Regulation 29 and Mudavadi's petition, supra.
56. This irregularity appears in virtually all petitions.
57. Election petition 18 of 1979- Mohammed Jubat Ali and Abdullahi Sirat Osman V G.K.Githinji and Ibrahim Abbas Noor.

... in order to ensure that the executive's policies are implemented. In this respect it is probable that in all respects while parliament's legislative power has increased its control over the executive has diminished. It is recommended that any constitutional amendments to election laws as provided in the constitution and, for that matter, the amendment of any constitutional clause should be supported by a majority of all sitting members in strict compliance with the standing order. Any of the crucial clauses should only be amended after a referendum has been held.

CHAPTER IV.

CONCLUSIONS AND RECOMMENDATIONS.

The concept of a democratic government is underscored by both the constitution and election laws. As observed earlier election laws are not bad "per se" but given the circumstances of their operation and application they have failed to ensure free and fair elections in Kenya. This as noted earlier has been so due to the manipulation of the laws by unscrupulous individuals. If it is accepted that laws are used as a means of class domination, then election laws serve the purpose of perpetuating the rule of the petty-bourgeoisie in whose interest the law operates. The principle of free and fair elections as underscored in the constitution is thereby negated as it always was during colonialism.

Constitutional breaches in elections are regarded as a matter of course depending on the relationship between the leaders and the candidate. Where it appears that the tenor of election laws restricts the operation of the state machinery for definite ends amendments are made in pursuit of those ends. The amendments are usually irregular for failing to comply with the standing orders requirement for fourteen days notice on any motion seeking to amend the constitution. Thus Parliament is used by the Government to legislate hastily in order to ensure that the Executive's policies are implemented. In this respect it is probable that in all respects while parliament's legislative power has increased its control over the Executive has diminished. It is recommended that any constitutional amendments to election laws as provided in the constitution and, for that matter, the amendment of any constitutional clause should be supported by a majority of all sitting members in strict compliance with the standing orders. Any of the crucial clauses should only be amended after a referendum has been held.

Administrative involvement in elections makes the election process appear to be a state sponsored fanfare. In operation the administration has not done any thing to alleviate the fear and suspicion with which its conduct of elections is viewed. On the contrary the administration has been known to negate ^{the electoral process the} maintainance of which it is charged ^{with}. Political favouritism has been noted across the Republic. The involvement of the administration in the election has made the public distrust elections and lose faith in it. The administration should not only be excluded from the electoral process but also from politics. It should always be regarded as an impartial institution.

The politics of elections and their conduct should be organised by an independent body. The constitution has made provision for the existence of such a body which is the Electoral commission. As indicated earlier, the operational significance of this body is debatable. Its functions have for the most part been assumed by the administration. This brings ^{into} disrepute ^{and} disrespect to the body. It is suggested therefore, that the commission should be seen to start functioning effectively if fairness in elections will be a reality. By becoming active the commission may well exclude the administration cum executive interference therewith. Since the manner of its appointment may subject the commission to political pressure it is suggested that other than the President nominating the members thereof, the task should fall on Parliament. The commission has up to date failed to prove itself as an enviable constitutional watchdog in elections.

The socio-economic circumstances pertaining in Kenya also contribute the victory of any named candidate. The relations of production in Kenya dictate that only those in the higher tiers in the social economic stratification may have the chance of contesting if, not winning, elections. Economics dictate that only the candidate who can promise and or has the ability to bring development in an economic perspective stands a chance of winning and is supported by the impoverished rural populace. The ability or promise to develop the constituency

The judiciary is part of our system of government. The judges in the bench are identifiable to a strata in the social stratification and they accommodate the biases and prejudices both cultural, educational or political of that class. In the determination of elections, the judges operate under that framework. All the judges who hear and determine election petitions are expatriates not suitably conversant with peculiar African practices. The insulation of African judges from politics by refusing to allow them to hear petitions should cease so that the African judges may help to make judgements in case where African practices are under consideration. This is not, however, to suggest that the indigeneous judges are not a tool of class domination but the premise is that ^{they} may be particularly well suited to decide some issues. It is observed in some petitions that the position of the judiciary has not changed since independence as is a aversion to political opposition. The colonial government needed a subservient judiciary. The independence government feeling its dependency on the judiciary in the interpretation and application of policy has continued the trend. In any event where the judiciary becomes untractable it stands to lose ^{it} because the Executive could use its powers to subdue dissidence from its policy.

Presidential elections are a myth in Kenya. The mere opposition to policy, open opposition to the president aside, is suppressed with untold zeal. The flexing of the presidential muscle is felt in politics and administration, in parliament and in the party and in every sector of civil life. Direct opposition to the president is wounding trouble. As head of state and party enormous powers vest in him and he uses the same to pre-empt opposition through either intimidation or co-optation.

Constituencies, it may be noted, still continue to follow the policy of divide and rule much cherished by the colonial administrations. Except in urban areas there are no trans-ethnic constituencies. This inevitably heightens ethnic animosities and makes leaders sectional and parochial in outlook.

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Since only KANU may sponsor candidates in parliament elections, and since opposition is nipped in the bud, independents exist as the only alternative to organised opposition. The constitution as it stands requires that every candidate be sponsored by a political party. Amendment should be made to make provision for independent^s and this may go a long way in establishing to reality the now mythical principle of free and fair elections in Kenya.

Lastly since Kenya is a defacto one party state, and since opposition is trampled, it behoves upon the rulers and party leaders to at least give a semblance of democracy in the party operation. Every KANU member, even those with ordinary membership, should be free to contest elections without the rigours of looking for a clearance certificate. This suggestion is given in connection with cases where the party's ^{party} beureaucratic framework has operated to lead to the exclusion of oppositional elements.

■ Elections, therefore, have never been, and it appears will never be, fair unless the social structure is transformed. With the inter-play of the various legal, political and economic factors alluded to in this study the election system calls for re-structuring along legal and social lines if fairness is to be instituted. In Kenya, therefore, the election laws and the constitution are noble manifestations of the commitment to democracy and constitutionalism, but they have been so manipulated as to make nonsense of the principle of free and fair elections.

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