

THE ELECTORAL COMMISSION OF KENYA: ITS LEGAL STATUS
AND MODE OF OPERATION

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D E D I C A T I O N

INTRODUCTION:

"To my parents who taught me the art of being patient and struggling as the means to meet ends". democratic process is not jeopardised. To safeguard against any abuses, the constitution has provided for an electoral machinery, central to which is an independent electoral commission. The President has the power to appoint the chairman and not less than four other members. Appointments are made for five year periods, and dismissal can only take place through the procedure that applies to the dismissal of a Judge, i.e. The President shall

A C K N O W L E D G E M E N T

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Finally, I thank Mrs. Philip Omwando, (Priscah) for her relentless effort to spend her valuable time to read and type, my almost illegible handwriting into now readable words of the above dissertation research, I say thanks.

FOOTNOTES

1. S.41 Constitution of Kenya Rev. 1987.
2. S.41 (7)
3. S.41 (5)
4. S.41 (3)
5. S.42 (4) Constitution of Kenya Rev. 1987.

THE ELECTORAL COMMISSION OF KENYA: ITS LEGAL STATUS AND MODE OF OPERATIONINTRODUCTION:

If elections are to be free and fair, it is important to have an electoral machinery which ensures that the democratic process is not jeopardised. To safeguard against any abuses, the constitution has provided for an electoral machinery, central to which is an independent electoral commission. The President has the power to appoint the chairman and not less than four other members.¹ Appointments are made for five year periods, and dismissal can only take place through the procedure that applies to the dismissal of a judge, i.e. the President shall appoint a tribunal, which shall consist of a chairman and not less than two other members, selected by the President from among persons who hold or have held high judicial office in some part of the Common Wealth.² The tribunal shall inquire into the matter and report on the facts to the President and recommend to him whether the member ought to be removed. A member can only be dismissed on grounds of infirmity, misbehaviour or inability to exercise the functions of his office.³

The security of Tenure is necessary to safeguard the independence of the commission.⁴ The commission is not subject to the direction or control of any other person or authority in the discharge of its functions and it may regulate its own procedure. The commission serves three important functions: Firstly, it draws up the constituency boundaries; secondly, it is responsible for the conduct and supervision of elections; and thirdly, the commission also directs and conducts the registration of voters.⁵

FOOTNOTES

1. S.41 Constitution of Kenya Rev. 1987.
2. S.41 (7)
3. S.41 (5)
4. S.41 (9)
5. S.42 (1) Constitution of Kenya Rev. 1987.

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The appointment of returning officers and designation of polling stations is done by the chairman of the electoral commission - government. Normally administrative officers are appointed as returning officers. This situation gives the electorate an impression that there is direct or indirect influence by the government. In order to give the impression that the elections are free and fair, there is need to limit the role of the government in elections. The commission should designate officers to prepare the register of voters and to act as returning officers.

The electoral machinery seeks to guarantee a free and fair election, but still there are many loopholes, such as administrative officers being appointed as returning officers.

My prime concern in this dissertation is to undertake a glance at the electoral commission of Kenya, focusing on its legal status and mode of operation. Chapter one will be concerned with 'ELECTIONS', focusing on the kinds of elections in existence, the constitutional importance of elections and the legal provisions concerning elections in Kenya.

Chapter Two, will Survey the ELECTORAL MACHINERY, giving the historical background of the electoral commission of Kenya; the state of the law in relation to the electoral commission; the functioning of the electoral commission under one-party system and under multi-party system.

Chapter Three, will be dealing with CONCLUSIONS AND RECOMMENDATIONS. Here the weakness of the electoral commission will be specified and remedies suggested.

CHAPTER ONE

KINDS OF ELECTIONS

Elections are part and parcel of a democratic institution; its absence renders the institution authoritarian due to suspicion of power accumulation if, elections are ignored. Elections should be carried out from time to time, at certain fixed intervals, to ensure that power accumulation is checked by the electorate in any democratic state.

Elections can be seen as a procedure recognised by rules of an organization, whereby members of an organization choose a small number of persons to hold office of authority in an organization.¹ Choice may be made by vote or by explicit agreement after negotiation or by the inspiration of God. However, the object of election is or should be to integrate choices made by all individual electors, so as to produce as closely as possible the collective judgement of the electorate as a whole.²

The process of electing requires voting, which can be divided into two main categories: Open voting and secret ballot. Open voting i.e. queing is a method of open voting mainly practised by Liberal Societies; while secret ballot is the method that arose from the desire for secrecy expressed by many societies across the world. Many countries use secret ballot as the main method of conducting elections.

It should be noted that elections first took place in the Greek City states of Eastern Mediterranean in the 5th and 6th Century B.C.³, the epic of tribal mobility was followed by one of peasant agriculture tempered by growing commercial activity and emigration to Greek colonies overseas. From this situation emerged a strife between the well born and the people which affected Greek ideas and practice about institutions almost everywhere. Here we are primarily concerned with voting for people in political authority. At first, voting was by show of hands in public meetings but in cases of otracism and legal decision voting was done in secret by

1. Encyclopedia of social sciences Vol. 5 at page 2 page

1.2 CONSTITUTIONAL IMPORTANCE OF ELECTIONS

The Kenya Constitution provides for the procedures of electing the President in part 1 of the constitution which incorporates the qualifications and disqualifications for candidates wishing to aspire for that office, and immunities the President has by virtue of holding that office. Elections provide the criterion upon which a person to be elected into the office of the President. The constitution provides clearly that, there shall be a President of Kenya, who shall be the head of state and Commander-In-Chief of the Armed Forces of the Republic.⁴ The President shall be elected in accordance with the regulations laid down under the National Assembly and Presidential Election Act⁵, subject thereto with an Act of parliament regulating the election of a President.⁶ The President shall be elected under the universal adult suffrage, registered as electors in a given constituency, and election shall be direct.⁷

The importance of election revolves around the electing the members of parliament, each representing a given constituency. It should be noted that elections provides the criterion effecting transitionalism. For instance, whenever parliament is dissolved, an election of a President shall be held at the ensuing general election.⁸

Elections plays an important role in regard to the composition of Legislators and the formation of the cabinet, which consists of the President, the vice president and other ministers.⁹ The cabinet shall be to aid and advice the President in the government of Kenya. This is as a result of constitutional election.

The Constitution of Kenya attaches conditions to be fulfilled by a person seeking to be elected to the National Assembly. For one to qualify and be elected as a member of the National Assembly, he or she is a citizen of Kenya, who has attained the age of twenty one years, he is registered in some constituency as a voter in elections to National Assembly and he is able to speak and unless incapacitated by blindness or other physical cause, to read the Swahili and English languages

4. The Constitution of Kenya, section 4

5. The National Assembly and Presidential Election Act, chapter 7

well enough to take an active part in the proceedings of the National Assembly.¹⁰

It is clear law that, a person shall not be qualified to be elected member if at the date of his nomination for election is owing allegiance, obedience or adherence to a foreign state, also if one is under sentence of death imposed on him by a court in Kenya, or is under sentence of imprisonment exceeding six months imposed on him, by such court or substituted by competent authority for some other sentence imposed on him by such a court. If adjudged of unsound mind or undischarged bankrupt¹¹, etc.

Elections provides for the nourishment of the democratic process and the spirit of civilian rule, divorced from authoritarian or depositic regimes. Owing to the fact that the constitution is the supreme law of the land, the constitutional provisions related to elections adds more weight to the spirit of a democratic government, upon which totalitarian rules are checked by the fixed regular periods of elections. The citizens are at liberty to discard undesireable representatives by electing a new blood, whom, they shall elect by majority votes, during the exercise of election when comes due i.e. on dissolution of parliament, resignation of the President, expiry of the five year term period, etc.¹²

Elections form the basis of choice among many aspiring candidates for parliamentary representation. The constitution is however, clear that, however seeking to be elected must do so with clean hands i.e. should be free from various handicaps of disqualification as outlined under CAP. 7

The importance attached to the qualification guidelines is to enable competent people to represent the electorates effectively in parliament. For one to be elected as a member of National Assembly, he or she has to be a citizen of Kenya who has attained the age of twenty one years (21), this is presumed age of adulthood, capabl

10. Constitution of Kenya, sections 34 (c)

11. " " " section 35 (b), (c), (d)

12. CAP 7 section 13 (a) (b)

of rational thinking and making wide spectrum of judgements on issues.¹³

He or she must be a registered member in a constituency as a voter in election to the National Assembly; this is to enable the person seeking election to have a clear understanding of the people electing him and be in a position to know the problems facing them in order to air them in parliament for resolutions. This aspect is important because it disqualifies absent speculative candidates who may be only interested from the gains of election to National Assembly, to disappear after it and only to resurface when due.¹⁴

Another condition relates to one being able to speak, and unless incapacitated by blindness or other physical cause, to read the Swahili and English languages well enough to take an active part in the proceedings of the National Assembly. This is so because, the Kenyan population is composed of ethnic groups with diversity of languages of many tribes; rendering the Swahili and English as the official languages acceptable in parliament. For this reason an aspirant has to pass the language proficiency tests during the nomination period prior to the election date.

The moment the aspirant candidate either for presidency or parliamentary fulfills the conditions attached as to soundness. He or she if garners majority votes, automatically will be declared the winner, hence reflecting the electorates choice, and therefore representing a given constituency as a member of parliament or as president, if the later stood as the candidate for presidency with a given supporting party. From this point, those elected acquires legitimization. Once declared winners by various constituency returning officers as election winners. Then notwithstanding any provisions or complaint, they are presumed as the members of parliament until that is rebutted i.e. upon the petition filed against him is determined infavour of petitioner.

In conclusion therefore, the constitutional importance attached to elections are clear that, the members of the National Assembly and the President acquires legitimacy, as a result of electorates choices.

1.3 LEGAL PROVISIONS CONCERNING ELECTIONS

The constitution of Kenya, which is the supreme law of the Republic, provides for the conduction of Presidential and Parliamentary elections under National Assembly and Presidential Elections Act of the laws of Kenya. It is clear law, that every person whose name entered on the register of electors for a particular constituency and who produces an electors card, issued to him in respect of the registration, shall be entitled to vote at any election for that constituency.¹ This means voting is a right recognised in the laws of Kenya to voters, whenever elections are held. This is in accordance with the spirit of democratic doctrines of equality, liberty and fraternity in regard to national matters i.e. elections.²

Every election shall be by ballot, wherein the votes of electors shall consist of ballot papers and shall be held in accordance with the provisions and regulations applicable to the class of elections concerned.³ The balloting system ensures that secrecy of the electors choice is maintained with the spirit of freedom of choice, whole heartedly. This system is opposed to open voting - system of lining behind the candidate or respective agent, which experience shows often breeds to hatred, violence among various staunch supporters of the respective candidates.⁴

Whenever an elector votes, had to do so in respect in a constituency he or she is registered as an elector.⁵ This is to eradicate multiplicity of voting by one similar elector in various constituencies, leading to abuse of democratic election, which is anticipated. The law provides that no person shall cast more than one vote at any particular election.

The returning officers are responsible for providing ballot boxes and ballot papers to each presiding officers as he considers it expedient in effective carrying out the provisions and regulations relating to the elections concerned i.e. presidential or parliamentary.⁶ Every ballot box shall be construed with an aperture which

1. THE NATIONAL ASSEMBLY AND PRESIDENTIAL ELECTIONS ACT, S.14

2. EUROPEAN HISTORY SINCE 1789 UPTO DAY, by Richard Denish

3. CAP 7 Subsidiary section 21

is large enough to receive a ballot paper which is no larger, capable of being sealed so that ballot papers cannot be taken out of the box so long as the seal is unbroken. The presiding officer and the returning officers shall be responsible for the conduction of elections until the whole exercise is fully exercised in accordance with the regulations governing elections. However, note that the ballot papers for use at a presidential election are in form 14⁷; where the election forms part of the joint election shall be printed on paper of a different colour from those for use in the parliamentary election⁹. The persons validly nominated, shall have their names inserted in the ballot papers for an election.¹⁰

Every ballot paper for use at an election shall contain the names and party symbols of the persons validly nominated who are entitled to have their names inserted therein. The ballot must be capable of being folded up; have a number or combination of letter and number, printed on the front, have attached a counterfoil with the same number or combination printed thereon¹¹.

The presiding officers shall allow those candidates or their agents who are present at the polling station before polling commences to inspect the ballot papers provided for use at the polling station and note the serial numbers thereon.¹² This is aimed at creating transparency of free and fair election, which characterises competitive politics, of more than one party state.

CASTING OF THE VOTE

Before the delivery of a ballot paper to an elector, the ballot paper shall be stamped with the official mark of the electoral commission; the number and name of the elector as stated in the copy register shall be called out; the electoral number of the elector to denote that the ballot paper has been delivered but without showing any particulars of the paper. The electors card, shall be stamped to show that

7. CAP 7, Subsidiary Legislations S.14 (1)
8. " " " S.28 (1)
9. " " " S.28 (2)
10. " " " S.28 (3) (a)

a ballot paper has been delivered to him.¹³ Upon receiving a ballot paper, an elector shall submit to having a particular one finger immersed or dipped in the ink of a distinctive colour which is so far as is possible, is sufficiently indelible to leave a mark for the period of the election. This acts as a prove of a person who has already voted, since before, one does not posses such ink mark before he goes to vote. Then from this point, an elector shall submit his identity card to be impressed with the seal of the electoral commission leaving a permanent impression on the card, after receiving a ballot; an elector shall cast his vote in accordance with regulation 30, without undue delay then immediately leave the polling station.¹⁴

An elector shall, upon compling with the above regulations, immediately go into one of the compartments of the polling station and there secretly mark his ballot paper and fold it up so as to conceal his vote and shall then put the ballot paper into the ballot box in the presence of the presiding officer. In case of a joint election, the elector shall follow the procedure set out in paragraph (1) with regard to both ballots and shall put each ballot paper into the ballot box provided for the election concerned.¹⁵

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- 13. CAP 7 Subsidiary Legislation S.29 (1) (e)
 - 14. " " " S.29 (3)
 - 15. " " " S.30 (3)

2:1 HISTORICAL BACKGROUND TO THE ELECTORAL COMMISSION

It is historically clear that, most of Kenya's Laws are received laws from Britain. As from 1895, when the British Company for exploitation called the Imperial British East Africa Company declared, Kenya has her protectorate, that had signalled the start of European penetration of Africa and scramble and partition of African Continent in the 19th century. So to say, Kenya was colonized by Britain, until Kenya attained internal self government in 1963. As from this time, the Kenyans were now governing their country, using the 1963 Constitution. It should be noted that the 1963 Constitution was more of British stereo tape laws.

The establishment of the Legislative Council in 1905 heralded the start of political and institutional representation. This was through the settler agitation; that in 1905, both the Legislative Council and Executive Council were established. The Legislative Council was empowered to enact for peace, order, and good government. The council was defined to mean "The Governor" and such other persons not less than two in number as may be appointed by the crown. Their tenure was subject to the crown's pleasure.

In 1906, there were six official and two non-official members nominated by the governor though that number did not satisfy, the settlers who continued to clamour for further concessions for elective representation. The constitutional development was the concession granted for elective representation in 1916, by the Legislative Council ordinance. The major agitators were settlers. Their interests were in conflict with those of the Asians who had by then started fighting for equal rights with settlers.

It should be noted that the first Indian representative to the Legislative Council was appointed in 1909 to serve for two years. After putting pressure on the colonial government touching on equality of two races, 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 this stage of the protectorate development when the coloured races outnumbered the Whites, it was not desirable that the franchise should not be extended to Asiatic or Natives. In 1919, Legislative Council - ordinance which was sanctioned by an order in council, the Act provided:-

- (i) Full adult white suffrage to increase the white vote in clear apprehension that they may be swamped by the majorities. To qualify as a voter, one had to be an adult and a British subject of European descent or origin; resident in Kenya for at least a period of twelve (12) consecutive months prior to the date of application and resident in the electoral area in which application is made for at least 3 months.
- (ii) A candidate had to satisfy the requirement of nationality and age and have two years ordinary residence in the protectorate. Also be able to read and write and speak English.

Elections were by secret ballot, a system popularised in democratic states.

The ordinance made provision for nomination of two Indian representatives. It is clear in whose interest the Legislative council constituted would serve. It was aimed to satisfy the settlers. Thus in 1922, when the Wood-Winterston Committee recommended that the elective representation should be seven for Whites and four for Indians, the settlers vehemently rejected it. Reason being that it did not give sufficient safeguard to the European Community.

In 1923, the Devonshire White Paper rediscovered that the vast majority living in Kenya namely Africans; and recommended that in whatever the case, African interests

were paramount. Though the paper was an important progress in the interest of the majority, it failed in as much as it was merely declaratory and gave no provision for implementation of its policies, African voices were still ignored.

Prior in 1919, the Native Commissioner being crown officer closest to the African, should represent their interests. The representation by the officer of the crown was sham because he could never be called to compromise his position. Thus the 1923 paper deemed it necessary to change this mucky state of affairs. Its efforts were at best naive. It proposed the nomination of a missionary to advice on African affairs until the time comes when the natives are fitted for direct representation. The policy was naive because it assumed the missionary's acquitance with the Africans needs.

The African political consciousness can be traced to the 1920's. There was a proliferation of political parties based on regional, but rarely national outlook. The most important was East African Association, it called for a protest against the detested "Kipande" (pass), forced labour and hut tax system in 1922, which resulted of disturbances ensued in Nairobi, culminating to the shooting of twenty five dead, and the arrest and subsequent deportation of its leader Harry Thuku, to kismayu.

It should be noted that the first attempt at effective African representative in the Legislative was realized in 1944, when one African was nominated to the legislative - E. W. MATHU, upto that time Missionaries acted as African representatives. In 1952, African representation had increased by six Africans.

Around that time, Kenya African Union (K.A.U) was formed. The union represented African political expression. Political activity could be said to have been conducted outside the legislative. The ban imposed on K.A.U. in the Zenith of Mau Mau independence struggle in 1953, created a vacuum in African political life and again the local native - Tribunal re-assumed constitutional significance. They were used as late as 1954 in the Lythleton Constitution to advice the governor on African representation in the Legislative Council.

It should 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 they nominated 3 to 5 persons to represent the province. Out of the five names the Governor nominated one, though 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. The candidate had to be proposed, seconded and supported by at least seven persons all of whom could be disqualified, if they had a record of imprisonment for more than 12 months.

In 1954, it had become a reality that the Africans were on the ascendent. 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 was 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.

The political violence which found expression in the Mau Mau uprising called for a radical change in administrative approach; it was with this view that the Lyttledon Constitutional changes. It recommended the continuance of the Local Native Council as a bridge between African political needs and the administration. It further recommended that a general election should be held on 30th June, 1955 or six months after the governor declared that the state of emergency was over which ever come earlier.

Under the Lyttleton Constitution, the franchise was extended to Africans. In 1957, the First African elections were held on the basis of Lyttleton Constitution, tribal parties and personality cults. The Lennox-Boyd constitution of 1958, suffice to say that when the eight Africans went to the legislative assembly in 1957, they proved to be ardent scholar of settlers oppositional politics in the legislative and played as a pressure group with splended des~~x~~terity. They decried for more African representation.

By 1960, there can be no claim to an original and effective National party politics. The Kenya African National Union (K.A.N.U.) was regarded as a party of radical Nationalists who despite institutionalised safeguards could just as well nationalise settler property. It was mass party having the largest following: mainly supported by big tribes, namely Kikuyu and Luo. For fear of domination by the large tribes led to the formation of K.A.D.U which vied for leadership. K.A.D.U, had the sympathies of settlers, in exchange of material support and tactical data with the Whites.

In 1961 elections, K.A.N.U won 72% of the popular votes but only 24% of the 65 elective seats. This elections were quasi-representation; the franchise had been extended, as requirements for qualification to vote, included capability to read and write one's own language, be over forty years of age and be an office holder in a wide range 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 west minister model. In 1963, general election, K.A.N.U had another sounding victory both in elective seats and popular vote and formed the government. It should be borne in mind that Kenya was ushered into independence on the basis of multi-party system founded on the Westi-Minister Model Constitution.

In summary therefore, the period 1905-1963 elections were never free or fair, for multiple reasons:

- (i) Elections were based on communal roll and all races did not participate. Hence government formed out of such elections was neither elective nor constitutional.
- (ii) Subordinating the legislative to the executive, the system was opposed to constitutionalism, a concept based on limited government.
- (iii) Throughout that 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 included electoral laws, were weighted towards control radical African Activity upto 1963.

Even the suffrage which was extended to the Africans in the form of adult suffrage in restrictive terms did not reflect free and fair elections, due to tribal loyalties and personality cults, parochialism in outlook, intimidations, threats and promise of gain by supporting one party. The political parties reached independence as more federated ethnic loyalties, grouped around individual personalities. Their immediate concern was for K.A.N.U, the transfer of power and they did not mind majiboism to hasten the realisation of their cherished goal.

TIME OF INDEPENDENCE

Kenya attained independence on the 12th December, 1963. The most important instruments of the transfer of power were the independence Act 1963. The latter was passed by the British rights and legislation in Kenya. The independence constitution was based on the West-Minister Constitutional Model.

It incorporated a bi-cameral legislative and adopted an extensive system of regionalism. This was a quasi-federal arrangement with semi-autonomous regions divided roughly along ethnic lines. Political representation is one of the most fundamental

assumptions of democracy. It is the bottom line of any attempt to translate the theory of freedom of choice into practice. The society is always changing, since social needs are manifested and magnified through qualitative changes, in the society. This underlines the necessity to review constituency boundaries at regular intervals so as to increase the number of legislatives. In order to achieve this fundamental objective, the independence constitution made provision for an independent electoral commission, which would consist of ten (10) members. As one of the basic requirement or safeguards of the constitutional order and vigilant parliamentary institution. The Electoral Commission was an extremely an important body, central to the Kenyan electoral system and was adopted at independence to take after the permanent boundaries commission of England, established in 1944.

The independence constitution provided that the electoral commission of Kenya would consist of:

- (1) The speaker of the senate as chairman
- (2) The speaker of the house of representative as vice chairman
- (3) One member appointed by the governor general in accordance with the advice of the Prime Minister.
- (4) A member representing each region appointed by the governor general in accordance with the advice of the President of the regional assembly in that region.

Thus the commission was to consist 10 members all of whom come from different backgrounds with respect to their appointment. The seven regions had representative both houses of parliament had representative and executive too had a representative. The diverse composition of the electoral commission was designed to ensure that no stone was left unturned and the fairness and impartiality were the basic principles in the discharge of its functions.

2:2 STATE OF THE LAW CONCERNING ELECTORAL COMMISSION

Any issue connected with Presidential and National Assembly elections, including Local government is totally shouldered in the hands of the Electoral Commission. The latter is responsible for the conduction, registration of voters, releasing of the election results if any. It is accountable for the conduction of election-eering process whenever it arises. The constitution provides that:¹

"There shall be an Electoral Commission, which shall consist of a Chairman and not less than four other members appointed by the President".

It can be deduced that the Electoral Commission is a Presidential appointment, a body appointed to discharge its duties for a period of five years subject to reappointment on expiry of that period. The Commission is empowered; to elect its vice-chairman from among its members.² The constitution of Kenya, spells out clearly, persons who are eligible for appointment as members of the Electoral Commission. A person is disqualified on the following grounds:

If he is a member of the National Assembly, therefore being committed to the parliamentary proceedings; and this condition is aimed at making the commission independent in its discharge of its functions.

Also if a person hold office of the public service or in the Armed Forces of the Republic.³ The rationale being that, such a person is likely to prejudice the work of the commission in favour of the government in power, hence eroding the spirit of impartial and fairness the work of the electoral commission.

The constitution states that, the office of the member of the Electoral Commission, shall become vacant:

- (a) At the expiration of five years from the date of his appointment.
- (b) If circumstances arise that, if he were not a member of the commission, would cause him to be disqualified to be appointed as such.

The life span for a member of electoral commission is hereby barely five years in normal circumstances, only to be subject to a different treatment, if he has inability to exercise the functions of his office, whether arising from infirmity of body or mind or from any other cause/or from misbehaviour and shall not be removed unless in accordance to the procedures of dismissing a judge.

The electoral Commission, is given the task of dividing, Kenya into such number of constituencies, having such boundaries and names as may be prescribed by order made by electoral commission.⁴

At the same time, parliament shall be responsible for the prescription of the minimum number of constituencies into which Kenya shall be divided (which shall not be less than 188) or the maximum 210.⁵ The primary work of the electoral commission is threefold:⁶

- (a) The registration of voters, maintenance and revision of the register of voters.
- (b) Directing and supervising the Presidential, National Assembly and Local Government elections.
- (c) Such other functions as may be prescribed by Law.

From the above provisions, the Electoral Commission is conferred the power to carry out its functions in accordance with, spirit of democracy, owing to the fact that, members of the Commission are non partisans i.e. to any party in existence, public service officers etc.

4. Supra Section 41

2:3 THE FUNCTIONING OF THE ELECTORAL COMMISSION UNDER SINGLE PARTY SYSTEM

The Kenya Independence order in Council 1963 provided for an independent Electoral Commission and made provisions for its structure and make up.¹ The Commission was charged with the duty of the delimitation of the constituencies, registration of voters, the conduct and supervision of senatorial and house of representative elections.² The first members of the Electoral Commission were appointed between 1964 and 1965.³ The Speakers of the Senate and House of Representative were full-time members of the commission.

Mr. Leonard James Ngugi, was appointed the first secretary in 1964 and Mr. Darius Msagha Mbela was appointed in 1965. Then the Electoral Commission embarked on the task of reviewing the constituency boundaries. The drawing up of the constituency boundaries was to be based on the population data obtained during a Census carried out by the Colonialist in 1962. The constitution limited the operational axis of Electoral Commission by setting the limits as is the case in single member constituencies. The constituency boundaries had strictly to be within the district and regional boundaries, contained as nearly equal number of inhabitants as was practicably possible.⁴

In 1968, the Secretary to the Electoral Commission Gazetted a notice inviting members of the Public, Institutions and Authorities to subscribe to the Commission concerning the intended constituency boundary review. The Commission invited these memoranda and the subsequent verbal representations with view to ascertaining the opinions of the people as to how constituency boundaries should be delimit in their respective areas. The exercise was important because the boundary delimitation would directly or indirectly affect the future representation in Parliament. It should be noted that the response hereof was not impressive because of many factors

1. Kenya Gazettee Notice No. 105
2. Kenya Gazettee No. 69, S.48(1) page 56

which interalia included inaccessibility to the notices and the general lack of knowledge on electoral boundary matters.

In 1966, the Commission, invited verbal representations in Nairobi on specified dates. Later, the commission visited 19 district headquarters on specified dates, with view to hearing the people who had already submitted written Memoranda, but desired further discussion on constituency delimitation. The commission also heard other people in those districts, like the written Memoranda, the verbal representation had to comply with section 49(3) Kenya Gazettee, number 918 of 1966; with regard to population size in a constituency.⁶

The Commission gave people adequate opportunity to present their views. The views of the public had to be sought on account of constituency boundary, constituency delimitation would future determine political representation; and general political trends.

These representations whether verbal or written, the commission on its own concept of delimitation formed the basis of constituency delimitation. However, the commission had to adhere to the constitutional provisions governing the delimitation exercise, these being that constituency boundaries had to be within a District and region.

From the period 1966, the work undertaken by the Electoral Commission in 1965, was overtaken by events in 1966, which led to a general review of the constituencies. This period Parliament or government amalgamated or introduced a bill to amalgamate the two houses of parliament viz, Senate and House of representative, introduced a bill seeking to direct the Electoral Commission to delimit the constituency boundaries and create new ones. The preamble to the bill declared its intent as:⁷

'... to provide for the review of the number and boundaries of the parliamentary constituencies. Preparatory to the creation of a larger number of constituencies'.

6. Kenya Gazettee Notice No. 918 of 1966

Notwithstanding the strong opposition, the Bill was passed and became Law, pursuant to the Act, the Electoral Commission embarked on the task of constituency boundaries review and thereafter delimited 175 constituencies as authorised by the Act.⁸ The order Gazetted by the Commission was made ineffectual when the Attorney-General introduced another bill in parliament, this time seeking to authorise the commission to delimit 158 constituencies in place of 175. The bill was similar to the first one. The then minister for Economic Planning and Development acknowledging the error in the former bill told the House of representative that:⁹

'... the house will be aware that the parliamentary constituencies (Preparatory Review) Act 1966, became Law. That Act empowered the Electoral Commission to create additional constituencies to a maximum of 175 greater than the number required: namely 117 and 41 seats which in effect gives 158 seats'.

The opposition members who had contended that the earlier bill should **have been** banned were proved right. The Electoral Commission delimited 158 constituencies by carving out constituencies in the Districts represented in the Senate. Since the order Gazetted by the Electoral Commission pursuant to the boundary review, would have no effect unless parliament amended the constitution to facilitate the merger, a bill to that effect was introduced in parliament and by a motion, the publication period of the bill was reduced from 14 to 1 day. The Senate passed the bill on the same day. The opposition vehemently opposed the bill arguing that passing the bill would tantamount to destroying the constitution. The object of the bill was to amend the constitution so as to provide for the merging of the two houses of parliament and establishing a National Assembly comprising one house, consisting of 158 elected members and 12 specifically nominated members. The Act also provided that the seats created in the resultant assembly were to be occupied by the existing Senators.¹¹ This bill sought to give authority to the order promulgated by the Electoral Commission. Under this amendment, parliament would

8. Parliamentary Constituency Review: 1966 S.3(2) p.2

9. Preamble page 302

in future increase the number of constituencies without a further amendment. It also provided that the Electoral Commission would delimit the constituencies for the purposes of National Assembly elections and would give them appropriate names. The Bill was passed within two days and Kenya would now have a uni-cameral Legislature, comprising 158 elected members all representing constituencies. Section 6 (2) (a) provided that:¹²

"Any person before was a senator --- shall be elected member of the National Assembly representing the new constituency".

This demonstrates that like members of the House of representatives who were elected members, the senators would be elected members of National Assembly, representing a constituency corresponding to their respective districts.

The constitution provides for the ceiling and the floor of the number of constituencies to be delimited. The underlying theme is the concept of fairness, which is opposed to find expression in the factors that determine constituency delimitation. Though the Electoral Commission has wide powers, its actual operational axis is limited. Its role has persistently been encroached by the executive. For example, in 1966 when the executive sought to convert Senatorial Districts into constituencies, thus subordinating the role of the Electoral Commission. In legal terms, this fall within the purview of the Electoral Commission. The 1966 experience evidences the executive dictating terms to the commission as regards where to create a new constituency and for whom. It is contended that the executive directly interfered with the independence of the Electoral Commission to the effect that it dictated terms to it via legislation. The commission was unnecessarily overworked, having to re-do the constituency boundary Review with a view to reducing the number of constituencies from 175 to 158 as authorised by the Act.¹³

The Electoral Commission is a Constitutional Standing Committee. It is there all the time and members serve for five years. The President may re-appoint them for

12. Constitutional Amendment Act, Section 6 (2) (a)

13. Supra Section 6 (2) (a)

another term or appoint new ones. The 1985, Electoral Commission was supposed to serve upto 1990 when the President is expected either to re-appoint it or appoint a new Electoral Commission. The members are also remunerated. Under the provisions of section 41 (1) the President may appoint any person to be a member of the commission so long as the total number is not less than 5. The President may only terminate a member's appointment if the question of his removal has been deliberated upon by a tribunal appointed by the President and that the tribunal has recommended a member to be removed. The President may only suspend a member, whose removal is being deliberated upon by the tribunal and such suspension has effect only if the tribunal recommends that he be removed. It would appear that the President has no direct powers of terminating an appointed members term.

The Commission appointed in 1985, did not start its work of constituency boundary review until February 1986. Early that year, the Attorney General had cautioned the commission members that they had to complete the review of the constituency boundaries and names within the shortest time possible.¹⁴ Such a move was a clear prove that they had to complete the review of the constituency boundaries, was an intimidation to the members as opposed to the independence of the commission. The Attorney General was hinting that the Commission should recommend additional constituencies in areas where they felt that such a step would increase parliamentary representation.

The Commission had laid out a procedure of collecting data and information to enable it make recommendations. This was effected by the invitation of memoranda from the public generally through the District Commissioners and District Development Committees. Instead of gazetting the invitations, the secretary to the commission sent letters to the District Commissioners throughout the country. This approach was effective because it catered for a large number of rural people.

The Commission also applied another approach that is a countrywide tour to hear the representations of the administrators, politicians and the General Public, aimed

at ascertaining the facts. During this exercise it took the commission four months to complete data collected during these tours. The drawing up of the constituencies was based on the recommendations from District Development Committees, private individuals and other bodies, and in accordance with the constitutional provisions. The Chairman of the Electoral Commission had said:

"... they are our own based on facts made available to us".

It is clear that these recommendations profoundly influenced the decisions of the commission in the various Districts. In 1986, parliament tabled a bill to amend the constitution of Kenya, to increase the number of constituencies. The object of the constitution of Kenya (amendment) Act, 1986, as set out in its memoranda was:

"... provide for a new minimum and maximum number of constituencies in Kenya".

Under this amendment, the maximum number of constituencies into which Kenya may be divided in was 188. Thus the Electoral Commission had the constitutional mandate to create more 30 constituencies. The Electoral Commission promulgated an order on 27th December, 1986 under the Gazetted order, some constituencies had been split up, others had been reduced in size, some had their boundaries, while 68 had their names changed. This was a whole departure from the previous administration boundary commitment, where administrative boundaries acted as the limits to constituency boundaries. the 1979 population data was used in boundary drawing up. For instance the Electoral Commission transferred Muhaka and Dohu sub-locations of Butere Constituency of Kakamega District to GEM Constituency of Siaya District in Nyanza Province. Ruwe sub-location of Ugenya Constituency of Siaya District was transferred to Mumias Constituency of Kakamega District. Part of the Tharaka constituency had been transferred from Meru to Kitui.¹⁶ These cases illustrate situations in which the Electoral Commission attempted to create a trans-ethnic constituencies, and

15. PREAMBLE pg.1

16. Parliamentary Constituency Review Order 1986

close down the administrative boundary barriers. However, it should be noted that, such a move was accompanied by protests and complaints from narrow groups of people including politicians. This complaints finally led to the Electoral Commission to delimit the constituency boundaries in the manner the people dictated.¹⁷

"... We looked into the complaints and were satisfied that the boundaries needed to be re-adjusted ...". It can rightly be coined that the amendment order was wholly designed to contain the complaints sparked of by the 1986 order.¹⁸

The Electoral Commission of Kenya reviews and delimits constituencies within the framework of the constitutional provisions and other general principles of constituency delimitation. As already observed the colonial legacy of delimitation abiding by district and provincial boundaries is also adhered to. Thus no matter how the boundaries are drawn they have to be within a single district. Experience demonstrates that though constituency delimitation has little chances of being manipulated; gerry-mending may be practised to protect, remove on incumbent member of parliament or create a constituency for a prospective member of parliament. However, there is no evidence to show that the Electoral Commission had such intentions. However, an examination of the exercise reveals that elements of suspicion exists.

The review of the constituency boundary is viewed as the major role of the commission. However, arising from this study it is clear that the commission may only be seen as having discharged its task if it sees the elections reach a logical conclusions. The commission role is small on account that it can order the preparation or revision of voters registration but it is the government which provides the machinery for such registration.

It is submitted that the Electoral Commission should be seen to discharge its functions, otherwise the essential element of democratic character of parliament might

be imperilled or be thought be imperilled. In a constitutional country like Kenya where government has pointed to parliament as the linchpin, it is essential to preserve fairness and honesty in elections to it. Though the elections are well secured by the law; through the participation of the Electoral Commission, abuses of the electoral process cannot however be ruled out. The danger of it or atleast the suspicion thereof are present in the wide powers of the administration vested in the government by the ordinary law.

2:3 THE FUNCTIONING OF THE ELECTORAL COMMISSION UNDER MULTI PARTY ERA

It should be observed that before 1992, Kenya had hardly any significant experience in running multi-party elections. The only two periods within which experimental multi-partyism was practised were 1963-1964 and 1966-1969. Even during this periods, the Kenya African National Union (K.A.N.U) government of the day concentrated its efforts on liquidating rather than nurturing plural politics and liberal democracy. The opposition; Kenya African Democratic Union (K.A.D.U) and Kenya Peoples Union (K.P.U) were through several manoeuvres, some peaceful, others violent extinguished by KANU.¹ In the two multi-party elections in which Africans participated were held under the colonial administration in 1961 and 1963. From 1964 to 1991 all elections were held under the superintendence of either defacto or dejure one party state.²

The 1992 General Elections were the first such multi-party election since independence under multi-party environment, although the independent constitution, based on the Westminster Model had provided for and therefore anticipated multi-party democracy and elections after independence. The lack of experience in plural politics especially in the domain of elections had the negative impact on the conduct of elections. Even good will on part of the government, such eventually can be avoided. Such lack of experience, self induced in Kenya, can occasion minor electoral irregularities but should not be used by any party as an excuse for flawed electoral process.³

The 1966 elections revealed that the government of the day could manipulate constitutional and electoral law, in order to secure its advantage in an electoral contest. Partisan change of law was therefore developed as a campaign strategy in electoral contest. Also from the electoral results, it was clear that the delimitation of

1. NATIONAL ELECTION MONITORING UNIT (NEMU) page 6

2. Ibid - page 6

3. Ibid page 7

the constituencies by the Electoral Commission left a lot to be desired. The population criterion was not emphasized in the delimitation of constituencies. Finally the trend of harassing an opposition party so as to ensure that it could not concentrate properly in the electoral contest started to take root in the 1966 elections. According to the manner in which the opposition was treated, it was clear that KANU had chosen not to fight competitive elections in a fair manner.⁴

The 1992 multi-party elections, was too delicate that each registered party wanted a free and fair elections in an environment of free from suspicion. So the establishment of the electoral body independent to discharge such functions was vital and paramount to give confidence to all respective parties. It is this electoral body or Electoral Commission that would evolve administrative and other mechanisms which would guard against any distortions in the electoral process, that would interfere with and falsify the expression of free will. The most important attribute to such a body is its independence both as perceived and as actually exercised. The independence of the Electoral Commission is achieved basically through the manner of its constitution and the public service records, of the men and women who constitute it. The manner in which they go about executing their duties is largely dictated by the first two criteria.⁵

The Constitutional and legal reforms especially via Act No. 6 of 1992, can be said to have established an independent system of administration of elections. Section of the Constitution establishes the Electoral Commission as an independent institution although the appointment to it are made solely by the President.⁶ However, the President cannot terminate the tenure of a Commissioner except after a tribunal has recommended removal and such recommendation can only be made for, inability of the Commissioner to exercise the functions of his office (whether arising from infirmity of cause) or for misbehaviour. This is the same criterion by which a judge can be removed from office.⁷

4. Ibid Page 7

5. NEMU page 7

6. Ibid page 24

The new section 42A of the Constitution described the role of the Electoral Commission in elections presumably to further ensure the fact that only the commission could discharge electoral responsibilities. Section 42(A) provides:

"The Electoral Commission shall be responsible for:

- (a) the registration of voters and the maintenance and revision of the register of voters,
- (b) directing and supervising the Presidential, National Assembly and Local Government elections, and
- (c) such other functions as may be prescribed by Law."

Before the 1992 elections, the Electoral Commission was responsible by and large for the electoral matters dealing with the preparatory stages of the election, while a supervisor of elections was responsible for the actual conduct of the elections. Act No. 6 of 1992 placed the Electoral Commission in charge of the entire electoral process. The position of supervisor of elections was abolished. The new positions of Director and deputy director of elections were created. These officers were to be appointed by the Chairman of the Electoral Commission. Further, the electoral commission now took charge of Local government elections.

The Electoral Commission created by the 1992 Laws enjoyed the greatest independence and security of tenure ever enjoyed by any Electoral Commission since Independence. Potentially, then it could have conducted non-partisan administration of the elections without fear of reprisals from any quarter. The Electoral Commission was responsible for the administration of the elections on the ground. Such officers include returning officers, deputy returning officers, presiding officers, polling clerks and counting clerks. Although no legal provision forbade the electoral commission from engaging civil servants in these positions, the Electoral Commission avoided such recruitment in preference to persons not employed as public servants. However, retired civil servants were used as well as some quasi-public servants such as Univer-

sity employees.

The training of election officials, especially at the lower levels, was very short and not thorough enough. This eventually created some irregularities in the discharge of electoral duties, reason being inadequate training and some election officials were employed after the initial training and as a result could only be trained in the job.⁸ However, worth focusing is the establishment and maintenance of the electoral register. The registration of eligible voters and the maintenance of an electoral register is one of the hallmarks of free and fair elections. It is the yardstick of voters enfranchisement because it can determine who gets the opportunity to cast his or her vote or not. It should be borne in mind that the manner in which the registration exercise was carried out had permanent bearing on the nature of the elections. It is the quality, accuracy and safety of the electoral process register that provide safeguards against interference with the figures and eventual falsification of election results. The manner in which it carries out and controls the registration exercise determines the legitimacy of the elections in the final analysis.

It is emphasized that the requirement one has to fulfil to qualify for registration be not unduly obstructive of his or her right to vote. Registration should be the facilitator of the people's right to vote. The period within which members of the ought to register should be sufficient to provide an adequate opportunity for them to place their names on the register. This has to be done taking into account the date of elections, the population of eligible voters, the geographical terrain of the country, the requirement to entitle one to register and many other factors that could have a direct bearing on the exercise. To inspire confidence on the whole exercise, after the compilation and closing of the register, it should be made available to the public for inspection. Political parties should be given copies of the entire register. It is at this stage that any complaints raised should be addressed

8. Ibid page 25

and any anomalies detected rectified. After that the Electoral Commission place the register in its conclusive custody.⁹

The 1992 multi-party elections, vividly showed how the Electoral Commission used the Public Media and Newspapers to urge voters to register and vote. The Electoral Commission did not publish a booklet on Election Law for its citizens although it developed one for election officials. The commission did not adopt election materials developed by the legal advice centre in poster form.¹⁰

The 1992 multi-party elections was held under the auspice of election monitoring unit and international observers. This complied with regulation 23 of the Presidential and Parliamentary Elections regulations, 1992. The major umbrella body was NEMU, which consisted of four groups charged with, "inter alia", election observerance of the 1992 general elections. NEMU was comprised of:

- (1) FIDA (Kenya chapter)
- (2) I C J (Kenya Section)
- (3) NECEP
- (4) PCDC

The coming together of the four domestic election monitoring groups meant, the strengthening of the independent Local election monitoring initiative by enabling the groups constituting NEMU to complement their resources, skills and expertise. The Electoral Commission also seemed to be comfortable with a unified domestic election monitoring unit. The monitoring units had various objectives viz:¹¹

- (a) to supplement the existing efforts of independent election monitoring
- (b) to introduce an "opinion poll culture" in Kenya
- (c) to provide information on Kenya's electoral behaviour
- (d) introduce a local initiative to ultimately install and justify the need for a permanent independent electoral committee
- (e) to educate on their rights and implications of their votes in a multi-party system

(f) to facilitate the running, by a team of experts, of an election monitoring training programme.

However, the short term objectives of National Election Monitoring Unit (NEMU) included: the idea of training a cross-section of Kenyan Lawyers, church officials, human rights activists, students and other groups to monitor the elections. To monitor the forthcoming election i.e. 1992 December multi-party elections; particularly on the election day to ensure that the process is fair to all political parties and that any attempt at rigging or other forms of electoral misconduct are noted and reported, and finally to ensure that the voters were well versed in the correct procedures and their voting rights.

The 1992 plural politics in Kenya was followed by the appointment of Mr. Richard Zacheaus Chesoni, as the Chairman of the electoral Commission which was used to oversee the country's first Multi-party elections in almost three decades. His appointment sparked a lot of controversy as to his suitability as Chairman; by major opposition parties, alleging that, Mr. Chesoni was unfit and unqualified to hold office, citing his debts, his bias towards the ruling party and his having been disqualified from being a judge.¹²

Mr. Chesoni, had the responsibility for decisions of constituency boundaries, the registration of candidates. The opposition leaders in July 1992, filed a suit declaring Mr. Chesoni to be unfit and unqualified to hold office citing his debts, his biasness towards KANU and his having been disqualified from the bench. However, Mr. Richard Chesoni, denied the allegations. The case was dismissed for technical reasons. It should be clear that the lawyer who brought the case Kiraitu Murungi, said he sent his clerk five times to the registry of the court to ask for the relevant files but was told they were not available or could not be traced. Mr. Paul Muite, then Secretary of the known the Forum for the Restoration of Democracy (FORD-KENYA), then issued a statement asking whether or not the government had ordered the

bank to write off Mr. Chesoni's 30 Million debt. He received no answer. The fear of the unsuitability of Mr. Chesoni to preside over such an important constitutional body: "Kenyans are familiar with the well known government tactic of writing off loans owed by those it seeks favours from". However, legal sources confirmed to the Independent Newspaper in Europe, that the government had written off the debts of Mr. Chesoni by ordering the state owned bank to cancel it.¹³

As Chairman of the Electoral Commission was at first inaccessible to the Opposition leaders, according to the Commonwealth Observers' report and failed to respond to complaints about the conduct of the Electoral process, including the compilation of the electoral register. The situation was so serious that the Commonwealth Secretary General Chief Emeka Anyouku, visited Kenya to warn President Moi that unless Mr. Chesoni and the Commission acted independently, the creditability of the election would be in doubt. The government, however insisted on keeping Mr. Chesoni on "which made it difficult for the Opposition to have faith in him".

However, the eligibility of the voters in Kenya had to commence on registration as voters. It is not automatic upon the attainment of a certain age, which in law is 18 years. Registration kicked off in 8th June, 1992 at a time when the people displaced by the tribal clashes had not returned to their homes or acquired new domicile so to say, to enable them become eligible voters in their new constituencies. Voter registration law required that a person own property or reside, conduct business or be employed in a constituency for five months prior to the application for registration.¹⁵ It is not surprising that most of the displaced persons found themselves disenfranchised under these circumstances and will have no participation in the coming election. Registration which commenced on June 8, ran for one month only later being extended for 10 days upon outcry by the Opposition of the shortness of the duration. Again, it was initially marked by boycott by the Opposition,

13. 'Independent', Europe's Daily Newspaper page 48, Finance Magazine 31st March, 1993.

14. Nairobi Law Monthly Issue No. 46 page 2

15. - Ibid page 10

which demanded that as estimated 3.5 million youths who had attained the age of 18 years be given National Identity Cards. Election Law requires a person to be possessed of an ID for him to be registered as a voter.¹⁶

The government refused heed calls for extension of time for registration and many eligible were locked out, out of an estimated 10 million eligible voters only 7 million were registered by the end of forty day exercise.

Upon the registration of the opposition parties, and respective nominations of its top officials like the Chairman of the party and constituency party contest, it paved way for the final stretch of campaigning until polls day. The battle was between President Daniel Arap Moi of KANU, Mr. Kenneth Matiba of FORD ASILI, Mr. Oginga Odinga of FORD-KENYA and Mr. Mwai Kibaki of the Democratic Party of Kenya (DP for the country's top post. They were off and running countrywide, soliciting votes after being cleared by the Electoral Commission, to contest the Presidential post. This time, Kenyans were to undergo through a tumultous period with first ever direct presidential election. The advent of the multi-party era heralded a major political development, but that was only going back to a situation that had existed in the 1963 pre-independence general election under the multi-party formula.¹⁷

The main difference between the 1963 elections and the 1992 multi-party elections was the direct presidential elections. In 1963, the system was designed so that the head of the winning party went a head to form a government as Prime Minister. One year after independence, Kenya adopted a republican constitution and the then Premier Mzee Jomo Kenyatta assumed the presidency. He never faced a challenge in his time as Kenya remained a de-facto one party state, save for the three year period the Kenya Peoples Union (KPU) existed. President Moi inherited the same state of affair which remained until 1982, when the one-party situation was formally written into the constitution. Like Kenyatta, before him, President Moi always found himself the unchallenged presidential nominee of the sole ruling party KANU, and there was therefore no need for presidential polls.

16. - Ibid page 12

17. WEEKLY REVIEW 4TH DECEMBER, 1992 page 3

With the return of multi-partyism, the battle between the contending parties was not just the race to form a parliamentary majority but the parallel direct contest between the parties respective presidential nominees. Spicing up the contest were the handful of aspirants representing some of the smaller political parties. They included, the firebrand former member of Parliament for Kitutu Masaba, Mr. George Moseki Anyona, entered fray for his Kenya Social Congress (KSC); radical academic Mr. Mukaru Ngang'a for his Kenya National Democratic Alliance (KENDA) and Dr. Chibula Wa Tsuma, former member of Parliament for Kaloleni, for Kenya National Congress (KNC). The campaigning period was three weeks, which had started with earnest hustling well in advance, with the on-going series of political meeting being campaign rallies in all but name.¹⁹

However, it should be recalled that, a suit by Mr. JARAMOGI OGINGA ODINGA, GITOBU IMANYARA AND KADIR versus THE ELECTORAL COMMISSION,²⁰ the high court on November 12, issued an injunction which nullified Mr. Justice Chesoni's notice of the deadline for elections nomination, thereby restraining the Electoral Commission from carrying out the election process as planned to culminate in a General election on 7th December. The ruling by Mr. Justice Mbaluto nullified Attorney General, Amos Wako's amendment of the election laws, thus compelling the electoral commission to reorganise its programme in accordance with the law, and it later set the election date for 29th December, 1992. This welcome judgment settled a civil suit filed by Mr. Odinga and two other party officials Mr. Imanyara and Mr. Hassan Kadir of FORD-KENYA.

The Kenyans on 29th December, 1992, went to polls, to elect their President, members of Parliament and Local Government Civic Officials. As it turned out, the ruling party KANU, presidential candidate, President Moi, won the majority votes of 1,900,000 while his close candidate Mr. Kenneth Matiba of FORD-ASILI garnered 1,400,000 votes, Mr. Mwai Kibaki garnered 1,100,000 votes and Mr. Jaramogi Oginga Odinga got 900,000 votes to come fourth, by FORD-KENYA. The Opposition wished to turn deaf ear to the

19. - Ibid

20. CIVIL APPEAL No.

election results of 4th January, 1993, but finally gave in after pressure from other foreign countries like the United States, through its envoy or ambassador Mr. Smith Hempstone, who was instrumental in persuading the opposition to accept the results and take up their seats in parliament. This was despite his own admission that the first multi-party elections in almost thirty years had some irregularities. So to say that, the KANU is the government of the day running office under the steership of President Moi until 1997 when the expiry of the five year parliamentary period elapses. I should coin that despite a few imperfections in the electoral process during the 1992 multi-party elections here in Kenya, it was a tremendous achievement owing to lack of experience but of which Kenyans took the interests of the nation at heart and experienced a smooth transition. However, the election results indicated vividly the tribal nature of bloc voting, a fact which Kenyans need to examine if they expect to elect competent members of parliament. To coin it, it was a fair electioneering process experienced by most Kenyans.

C O N C L U S I O N S A N D R E C O M M E N D A T I O N S

This dissertation has attempted to research into the Electoral Commission of Kenya, its legal status and mode of operation; whereby Chapter One, deals with the prerequisite elements of a democratic institution i.e. regular elections at fixed intervals, and the various forms or kinds of elections. It is found that there are different kinds of elections viz, open voting which is mainly exercised by liberal societies, and the secret ballot system which is pre-dominantly done by Western European democratic countries and even the Third World countries including Kenya. The secret ballot system involves a lot of secrecy, a procedure which enables the elector, choosing a candidate of his own choice. Then a brief look on the constitutional importance of elections in the Kenyan situation. It is found that the Constitution of Kenya, which is the supreme law of the land provides for the secret ballot system exercise of electing a Presidential, National Assembly and Civic candidates. So it is clear law that any election arising either by dissolution of parliament or a by-election, the vacant seats shall be filled by holding fresh, secret ballot system elections from the aspirant candidates.

In Chapter Two, mainly concentrates on the components of a free and fair elections in a democratic institution, one of which is the Electoral Commission. The background of it which is majory dealt in this chapter, tracing back to the period of Colonial penetration and colonization of Kenya, until independence period. This provides a vivid clear impression of the nature of the Electoral Commission before independence period in 1963 and the type of Electoral Commission upon attaining independence.

The functioning of the Electoral Commission under the one-party system surveyed extensively, to depict how it operated, pointing out the powers the Electoral Commission have and the results of the exercise of their functions. At the same note, a research of the functioning of the Electoral Commission under the multi-party system thoroughly dealt, thus opening the curtains to make a clear comparison of

the workings of the Electoral Commission under the two periods in question.

Finally, in Chapter Three, concerns majority the writer's efforts to point out the weaknesses of the current Electoral system, by advancing suggested remedies or recommendations which are likely to improve the functioning of the Electoral Commission as an independent electoral machinery which is aimed at ensuring a free and fair elections are held in a multi-party environment. It is therefore my submission that the research carried out in this dissertation has tried to throw light clearly the role of the Electoral Commission of Kenya, under the two periods of defacto and de jure one party rule and multi-party period, last general election in 1992.

CONCLUSIONS AND RECOMMENDATIONS

In appraisal therefore the Electoral Commission continues to delimit constituencies along administrative boundaries; this factors do not yield effective representation in parliament owing to the great disparities of population size and landmass of a given constituency. Democracy entails that there should be equitable representation of the masses in parliament. The great disparities in the geographical size and population density in these constituencies, on the whole. The Electoral Commission has not discharged its functions in a manner that would ensure effective representation. And it is therefore evident that the Electoral Commission/system calls for reform. The reforms should have the effect of making the electoral system fairer.

The concept of democracy takes form in both the Constitution and the Electoral Laws. Areas which need reform includes, the appointment of the composition of the Electoral Commission members, the drawing up of constituencies, catering complaints from the public in regard to orders of the Electoral Commission, etc.

In essence it has been observed that, the strict adherence to administrative boundaries in constituency boundaries in a manner that will ensure adequate representation. This calls for the shuttering of the district and provincial boundaries as a basis of representation. Constituency boundaries should not be restricted by administrative boundaries, in this way the constituencies will probably contain as nearly equal numbers of inhabitants as envisaged by the Constitution, S.42 (3) (a).

In the area of the appointment of members, Section 41 of the Constitution provides that the President appoints the members of the Electoral Commission. The president appoints all members who should not be less than four excluding the Chairman. The President may re-appoint the same members after 5 years. It appears that this mode of appointment could subject the commission to political pressure; to the extent of constituting an interference with the discharge of its functions. It is

suggestable that this problem may be solved if appointments were made by the Judicial service commission. Such a move would ensure fairness and less political influence on the Electoral Commission. Adding on top of that, a negotiated and agreed composition of members of an independent Electoral Commission as "Sine qua non" of open, free and fair multi-party elections. The constituency boundaries commission, which was appointed before multi-party era cannot be a re-baptised Electoral Commission. An Independent Electoral Commission must meet the acceptability of all major political parties involved in the multi-party elections. The members of the commission must be accorded security of tenure of office, be persons of impeccable character and be appointed by an Independent body not the President. All political parties must be involved in the appointment of the Electoral Commission whose Chairman should be a respectable judge or a person who qualifies to be a judge or a retired judge. The members of the commission should work full time and be well paid on an equal scale with the judges of the High Court and the Chairman on an equal scale with the Chief Justice.

In the present Electoral Commission, works in the old constitutional framework upon, which the commission issues orders, which are gazetted in the official paper, the contents which are conclusive. Owing to the fact that, the functions of the Electoral Commission concern the entire country and have implications for all citizens the recommendations of the commission, in any review, should be laid before parliament before gazetted. Parliament should have authority to deliberate on the recommendations and amend such as deems fit. Parliament ought to be the body to approve any recommendations after deliberations upon it. This is because this is a matter of national concern.

Another area which need reform relates to liberalisation of locus standi. Since the constituency boundary delimitation affects all people, Locus Standi ought to be liberalised so that one can challenge a promulgated order, This will mean that any person who has evidence to challenge the validity of the delimitation in one area,

should have a right to petition the High Court and argue his case. The burden of prove in that case lies with the party alleges gerry mandering and should be a heavy burden. This will discourage any frivolous and vexations actions. It means only a person with cogent evidence to substantiate their claims will be able to petition the court. This will enhance efficiency on part of the Electoral Commission and at the same time it would discourage any attempts to manipulate electoral boundaries.

Also the constitution does not make provision as to how the President is to be made aware that a member is no longer capable. Presently a member who is incapable may remain office. It is suggested that a provision should be re-introduced into the Constitution to give a criterion of making the President aware. Then it can be presumed that such a provision would make the members of the Electoral Commission more responsible.

The functions of the Electoral Commission concern the entire country and have implicated for all citizens, the recommendations of the commission, in any review, should be laid before parliament, before gazetted. Parliament should have authority to deliberate on the recommendations and amend such as deems fit. Parliament ought to be the body to approve any recommendations after deliberations upon it. This is because this is a matter of national concern.

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