

**UNIVERSITY OF NAIROBI**

**FACULTY OF LAW**

A project paper submitted in partial fulfillment of the requirement for  
master of laws (LLM) Degree of the University of Nairobi.

**TOPIC:**

**MULTI-PARTY ELECTIONS IN KENYA  
IS THIS A DEMOCRATIC RECONSTRUCTION?**

**BY.**

**SAIDI M.O. KOLI**

**G/62/7909/2003.**

**UNIVERSITY OF NAIROBI LIBRARY**

**P. O. Box 30197**

**NAIROBI**

**SUPERVISOR.**

**PROFESSOR OKOTH OGENDO.**

**Declaration**

I SAIDI M. O. KOLI do hereby declares that this project paper is my original work and has not been submitted to any other University or institution for any award. I hereby now submit the same for the award of masters of Law Degree of the University of Nairobi.



Signed.

**SAIDI M. O. KOLI**

This paper has been submitted for examination for the award of Masters of Laws Degree for which the candidate was registered with approval of University Supervisor

Professor Okoth. Ogendo.



**Dated:** 16/11/06

<b>TABLE OF CONTENTS</b>	<b>PAGE</b>
Table of Contents.....	i
Acknowledgement .....	ii
Executive Summary.....	iii
List of Abbreviation.....	iv
<b>CHAPTER I STATEMENT OF THE PROBLEM.....</b>	<b>1</b>
Justification of the Study.....	4
<b>CHAPTER II: BACKGROUND TO MULTIPARTY ELECTIONS .....</b>	<b>9</b>
The Lancaster House constitution.....	9
The Supervisor of Elections .....	14
Towards Electoral Reforms .....	18
<b>CHAPTER III: DESIGN OF GENERAL ELECTIONS 1997 &amp; 2002 .....</b>	<b>29</b>
<b>CASE STUDY .....</b>	<b>35</b>
<b>CASE I – THE 1994 BI-ELECTION .....</b>	<b>36</b>
<b>CASE II THE 2004 BY-ELECTION .....</b>	<b>37</b>
<b>CHAPTER IV: THE IMPACT OF ELECTIONS IN RELATION TO MULTIPARTY DEMOCRACY.....</b>	<b>46</b>
<b>CHAPTER V: CONCLUSION .....</b>	<b>54</b>
<b>RECOMMENDATIONS &amp; THE WAY FORWARD .....</b>	<b>56</b>
<b>BIBLIOGRAPHY.....</b>	<b>57</b>

# **ACKNOWLEDGEMENT**

I wish to acknowledge with great appreciation the entire staff of the faculty of law, Parklands Campus and particularly those who contributed towards the project paper.

Much appreciation to my immediate supervisor Professor Okoth Ogendero for his invaluable contribution and guidance for an area of study that kept changing by the day.

I also extend my gratitude to all lecturers who guided the LLM 2003/2004 class to successful conclusion of our studies and also wish to thank all the course participants who in one way or another contributed towards the completion of the project paper.

I also wish to sincerely thank Mrs Jane W. Mburu of GTI Embu for the tireless contribution in typing and editing this work.

**Said M. O Koli**

**G/62/7909/2003**

**LLM**



## LIST OF ABBREVIATIONS

DC	-	District Commissioner
ECK	-	Electoral Commission of Kenya
FORD-K	-	Forum for Democracy – Kenya
FORD-A	-	Forum for Democracy – Asili
FORD-P	-	Forum for Democracy – People
IPPG	-	Inter Parliamentary Parties Group
IPK	-	Islamic Party of Kenya
KANU	-	Kenya African National Union
KPU	-	Kenya Peoples Union
LDP	-	Liberal Democratic Party
LATF	-	Local Authorities Transfer Fund
MEGA	-	Meru Gikuyu and Aembu
PICK	-	Party of Independent Candidates - Kenya

## **STATUTES REFERRED TO:**

The constitution of Kenya – Cap 7

The constitution of Kenya (Amendment Act), 1997

The Statute Law (Repeals and Miscellaneous Amendments) Act, 1997

The National Assembly and Presidential Elections Act (Cap 7)

The Election Offences Act (Cap 66)

The Local Government Act (Cap 265)

Gazette supplement No.74 24<sup>th</sup> October, 1997

Gazette supplement No.70 7<sup>th</sup> November, 1997

Gazette supplement No.69 21<sup>st</sup> August, 1992

Societies Act cap.108

-----

## EXECUTIVE SUMMARY

This project paper was carried out with the main objective of determining whether multi-party elections in Kenya have led to democratic realization in the country.

The researcher was out to establish whether multiparty elections produce government that are efficient, non corrupt and responsible. Multiparty democracy is based on election process that determines which party wins the elections and therefore forms the government. There was therefore the need to establish whether the Electoral commission of Kenya (ECK) as established, is truly independent? If so, is it able to design laws that would lead to a truly free, fair and competitive elections? And lastly whether the system of holding three elections on the same day gives the electors a chance to effectively exercise their rights.

The research was based on literature review and case studies. Contemporary literature on the subject was discussed primarily the literature concerning governance and democracy particularly election democracies.

Case studies were discussed from the researchers personal experience as a trainer of election officials in Westlands and Kisauni during the by-elections.

The Two Turn Over test on the consolidation of democracy has been discussed and the theory has been used to determine whether the 1992, 1997 and 2002 elections were free open and fair.

The conduct of the KANU and NARC political parties before and after elections is discussed. Resistance by both the political divide to change and implementation of reforms have shrunked the Inter Parliamentary Parties Groups (IPPG) reforms of 1997. This has grossly undermined the consolidation and deepening of democracy in Kenya.

The researcher has also recommended for reforms and changes that may assist towards election democracy and the consolidation of democratic space in Kenya.

# CHAPTER I STATEMENT OF THE PROBLEM

When in 1992, Kenya held its first multi-party elections after decades of single party elections, it was as a result of response to the dismantling of successive dictatorial authoritarian and military regimes in the continent. The third wave<sup>1</sup> that had swept across the continents had not spared African in general and Kenya in particular.

In 1997 the emergence of IPPG<sup>2</sup> put into place reform that allowed for political space and more room for democratic institutions to participate in multi-party elections in Kenya. For the first time, the electoral commission consisted of members who were appointed by all political parties. The provincial Administrations role in the overseeing political activities were immensely reduced, and a Constitutional Review Commission was to be established after the General elections<sup>3</sup>.

KANU did win the 1992 and 1997 elections and continued to conduct the affairs of the state in the same manner as it did prior to the multi-party elections of 1992. In both the elections KANU came to parliament with barely one third of the vote.

The 2002 general elections saw the removal of KANU and the entry of NARC into the affairs of the state. NARC which was created by merging of several political parties which included LDP – a

---

<sup>1</sup> A wave of democracy is a group of transitions from non democratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period of time. A wave also usually involves liberalization or partial democratization in political systems that do not become fully democratic.

<sup>2</sup> Inter-parliamentary parties group manage to ensure the change and amendments in law that paved way for;  
. Additional members of electoral commission who were appointed by political parties.  
.The Provincial Administration were outlawed from participating and controlling political campaigns throughout the country.  
.All unregistered political parties were registered.  
.Civil society were allowed more space and took up civic education.  
.Free press and coverage of all candidates by KBC be balanced.  
.Nomination MPs be nominated in proportion from all the parties in parliament.

<sup>3</sup> See Joel D.Barkan Njuguna Ngethe: Kenya times again – Journal of Democracy – P1.

splinter group from KANU – came as a relief as the electorate were out to exercise their right in electing a popular ruling party that had promised to deliver where KANU had failed.<sup>4</sup>

The issue that the research is going to explore is whether the reforms that paved way for multi-party elections and the subsequent governments that were elected in 1992, 1997 and 2002 were democratic and whether the elections are an end in themselves; and whether democratic elections guarantee a democratic government.

Huntington argues that the definition of democracy in terms of elections is a minimal definition<sup>5</sup> “To some people democracy has or should have more sweeping and idealistic connotations. To them, “term democracy” means liberte, egalite, fratante, effective citizen control over policy, responsible government, honesty and openness in politics, informed and rational deliberation, equal participation and power and various other civic virtues.”<sup>6</sup>

Democratic elections in Kenya are conducted by the Electoral Commission of Kenya, has the commission been able to exercise its mandate freely and without directions from any other authority? This question will lead to interrogations whether the elections of 1992, 1997 and 2002 have been open, free and fair<sup>7</sup>

---

<sup>4</sup> These promises seem to have foundered due to the non-implementation of more and distrust among the NARC affiliates – particularly on issue of delivering a new constitution.

<sup>5</sup> Huntington: The Third Wave: PP.9 & 10

<sup>6</sup> Ibid:P.9

<sup>7</sup> The Presidential, Parliamentary and Local Atomics Elections are held on the same day.

The logistics and preparations have been haphazard and in many cases, whereas the local and international observers endorsed the fairness of these elections they cast great doubt to the competence of the electoral commission to manage the three elections efficiently – see Barkern & Nyaga pP.7:Kenya Tries Again.



The research will also discuss the design of the elections, the elections in Kenya take place only once in every five years, three elections are conducted the same day and the elector has to cast his votes for three different candidates at the same time, in the same polling station. Would the elections, if, held at different times within the five year period, be more democratic, more open and fair?

### **Research Issues**

The research shall investigate the following issues:

1. Is the Kenya election design truly democratic?
2. How and to what extent has multiparty elections led to consolidation of democracy in Kenya?
3. Is the presidential elections based on parliamentary elections create space for deepening of democracy
4. Whether the Electoral Commission as constituted is independent

# RESEARCH OBJECTIVES

## Main Objectives

The main objective of the research is to establish whether Kenya has achieved democratic reconstruction through multiparty elections of 1992, 1997 and 2002.

## Specific Objectives

1. To determine why governments produced by elections may be inefficient, corrupt, shortsighted irresponsible, dominated by special interest and incapable of adopting policies demanded by public good.
2. To examine the Electoral commission and its structures and to determine whether the commission is truly independent.
3. To propound a theory that the election design as it is now being applied in Kenya is too cumbersome to represent an open, free and fair elections.
4. To come up with recommendations that may improve the electoral system and help consolidate and deepen democracy in Kenya.

## Justification of the Study

The multiparty democracy in Kenya promised to bring with it changes that were desired to make Kenya a country free of corruption; the electorate envisaged the end to politics of patronage and ethnicity. Compared to decade preceding the elections, during which Kenya endured a combination of kleptocratic dictatorship and decline income, the period that followed was marked by substantial political liberalization and modest economic-advance – but not democratization or full scale economic renewal.

In spite of the elections, the Governments that have been produced by these elections have not changed their specie; politics of patronage and ethnicity have taken the centre stage. In 1992 and 1997 and in 2002, after every general election, Kenyans witnessed the appointment of to parastatals and other boards persons who had political and ethnical attachments to the appointing authorities. While the Goldenberg inquiry was going on, the Anglo Leasing Scandal broke out. Thus inefficiency, corruption, shortsightedness and irresponsibility dominated by special interest has been the characteristic of all the regimes that have successfully been elected through a democratic election.

Democracy without good governance and accountability makes nonsense of the electoral process.

It has also been argued that the electoral Commission of Kenya has two different factions, the original eleven (11) commissioners appointed directly by Moi, and the additional ten (10) commissioners appointed by political parties as the result of the IPPG reforms. The commissioners are said to be not partial in mind. Can this commission be said to be independent? The budget of the Commission is drawn from the Treasury and is subject to the budget presented by the Ministry of Finance to parliament for approval. Is this Commission really independent? There is therefore need to explore and establish the independence or otherwise of the electoral commission.

There is also the question of the election design, three different elections held in one day, has been a logistic headache to the electoral commission, and the commission has been repeatedly cited for incompetence when conducting the elections. Would it be impossible to hold three different elections at different times? More democratic space will be given to the electorate and candidates when these elections are conducted at different times. It is the researchers argument that the commission can be more effective in holding these elections at different times.

It is important to point out the possible weaknesses both in the way the Electoral Commission is conducting its business as its functions primarily reflect on democracy. ECK has been dubbed a toothless bull-dog.

Can this change with Reforms?

It is therefore important to study the topic as the reasons that shall emerge will shed light as to why democracy of which many sacrifices have been made by Kenyans of all walks has been elusive.

It is also important to find out why Kenya, which has held elections whenever they are due has not been able to enjoy democratic gains, as KANU & NARC have, after elections that they have won, revenged on promises given before the elections.

The study therefore shall address these questions as they impact on democracy, its consolidation and its deepening, at the end of which the researcher shall make recommendations on the way forward and the pose issues or further research in this area.

The need to explore these questions as a basis for research is based on the fact that Kenya is one of the Countries that have been quite consistent in carrying out periodic elections when due. However the results of the elections have always disappointed its citizenry as the subsequent governments formed have conducted their affairs with the same vices that preceeded the elections.

Elections per se, without reforms cannot lead to democracy.

The researcher who is also an LLM student shall carry out the research in partial fulfillment of the award of masters in Law Degree.



## **Methodology:-**

The research will be carried out in Nairobi and Mombasa. The empirical and anecdotal evidence is used by reference to data from the reports of electoral commission and agencies that monitored the elections. Personal experience from the researcher shall also be narrated in particular where case studies. The Kisauni By-elections of 1994 and 2004 are narrated.

Reference shall also be made from materials obtained in the electoral commissions web site, and other research materials on election process from other countries for purposes of comparative studies.

## **Chapter Breakdown:**

The research will be divided into four chapters:

Chapter I introduces the problem and issues of the elections during the one party state under the KANU regime and its design, conduct and supervision. Historical background of the office of the Supervisor of Elections will be discussed, his powers and independence, the role of the provincial administration and the conduct of election. How much democracy was in place then. Further discussions will be centered on the development towards multiparty elections. The 1992 formation of the electoral commission, its constitution obligations, and independence (if any).

Chapter II discusses Kenya's electoral history leading to the general elections of 1992. Issues of democracy and governance shall be discussed in reference to multi party democracies.

Chapter III discusses the 1997 and 2002 elections and will deal with the question whether the multiparty elections have in anyway contributed towards consolidation of democracy in Kenya. With reference to literature on the subject from scholars and other sources, the research will discuss the

issues of democracy, governance and accountability with particular emphasis on reconstructed states that have emerged since the third wave. Has Kenya consolidated and deepened these gains?

Case study of the two Kisauni by elections of 1994 and 2002 shall be discussed as an example of how the conduct of elections in Kenya still is largely wanting in terms of design, supervision and its administration.

Chapter IV Assesses the impact of elections in relation to theories of multiparty elections and issues on democratic consolidation.

Chapter V Concludes the study and gives recommendations and possible way forward towards deepening of democracy through electoral reforms.



# CHAPTER II: BACKGROUND TO MULTIPARTY ELECTIONS

Kenyan Electoral History - 1963 – 1992

Kenya like many other countries in Africa attained its independence in 1963 after protracted struggle in form of rebellion, arms struggle and political interventions. However, the colonial government had a similar recipe for all the countries that got their independence in the 60's. A model constitution was tailor made for countries that were under the British rule setting out the structures and form of governments these countries would adapt.

## **The Lancaster House constitution**

This is the Independence constitution of Kenya. A constitution which is still in use forty two years later but in such changed form that the amendments over the years have left nothing but a sieve held together by those entrenched provisions of the Bills of Rights. It is however important to have an overview of the constitution as it was in 1963.

The leaders who left the Lancaster House had thought of everything they needed to make Kenya a real democratic country. The constitution took cognizance of the fact that Kenya had diverse political, religious, racial and even tribal interests which had to be addressed to the satisfaction of everyone. But that was not all, regional and 'grassroot' interests were to be addressed as well<sup>8</sup>. The constitutional structures formulated to achieve these concerns were in no doubt elaborate and had a

---

<sup>8</sup> All constituted states in Africa had this model of the constitution, Kenya, Uganda, Zambia, Ghana all had a prime minister initially but on becoming independent, they opted for a Presidential form of leadership with or without a prime minister. In the Kenya situation, the merger of KANU & KADU led towards the erosion of the rights given to the regions – when the 'Majimbo' structure was dismantled.

sense of purpose in terms of their suitability and functions. However, no one did, or if they did, the politicians did bide their time to scuttle what came out of Lancaster House as it made it impossible for any one political party to consolidate power to the exclusion of the other. When KANU won the General Elections, it found out that it had little or no say in those areas and regions where it had no support, the autonomy of the regions and the local authorities were to be the first casualties of the Independence constitution<sup>9</sup>.

Firstly, the political structure of the independence constitution set out a perfect way of which power could be devolved throughout the country. There was a provision for the bi-cameral legislature consisting of a House of Representative and a Senate. The latter was set to act as a watchdog of the lower house. The Prime Minister was a member of the House of representatives. Secondly, that, there were Regional Assemblies with regional presidents of those Assemblies being the political heads within those Regions. Thirdly, the Local Authorities were autonomous and were effectively managing the affairs of their municipalities, county councils and town councils. They collected cess and other rates and rents. They took care of the institution that they managed, schools, dispensaries, health centers, markets, graves, etc. Thus inspite of winning the General Elections, without control over these institutions it was not possible to have them conform to the policies and manifesto of the ruling party so it was argued<sup>10</sup>.

---

<sup>9</sup> In order to consolidate power, Kenyatta removed all the structures which were put in place to safeguard minority and marginalized groups. The Northern Frontier District eventually resulted to the 'shifita War' which has made the area remain marginalized fro decades.

<sup>10</sup> Many districts never recovered the loss of these institutions, local authorities, particularly town councils could no longer give services as they could not raise funds to run schools and dispensaries.

Therefore in 1964 when the Governor General's tour of duty was over, and Kenya became a Republic<sup>11</sup> under the Presidency of Jomo Kenyatta a systematic pattern of dismantling the democratic institutions of the 'colonial era'<sup>12</sup> started in earnest. This was the on-set towards deconstruction of the Kenya state, its institutions, and democracy.

This began by wooing of the opposition political parties to join the government side to foster a government that would unite all Kenyans to avoid politics of divisiveness along tribal lines. KADU the main opposition party accepted the offer and its members crossed the floor en masse and thus began the onset for one party dictatorship. When KADU crossed over, as a political party it came to its demise and has never been resurrected to date.

KADU members were handsomely rewarded particularly the party leaders, they were given ministerial posts and other lucrative awards, a habit later to be inherited upon Kenyatta's death by Moi who was a beneficiary of the KADU's cessation to KANU. From 1964 onwards Kenya became a de facto one party state a status which was later made de jure by insertion of section 2A in the constitution in early 1980's<sup>13</sup>.

The constitution was amended, and on Kenya becoming a Republic, the senate was merged with the house of representatives to form the National Assembly and the Prime Minister was made the President of the Republic and was required to be a member of parliament representing a

---

<sup>11</sup> The constituted state lasted between 12 December 1963 to 12<sup>th</sup> December 1964 thereafter Kenya began its process of disconstituted state.

<sup>12</sup> Multi-party democracy was to be replaced by single-party 'democracy' that degenerated to a one party dictatorship under Kenyatta and Moi.

<sup>13</sup> Kenya became a de Jure over party state in 1982. S.2A declared KANU as the only political party in Kenya.



constituency besides winning a presidential election. Thus the Kenya National Assembly constitutes the President and Parliament<sup>14</sup>.

The Local Authority Transfer of Functions Act –1969 completed the consolidation of power to the central government. All schools, dispensaries and health centers were transferred to the Ministries of Health and Education save for Nairobi city council and Kisumu Municipal Council which retained their mandate on health centers and schools. The Ministry of Local Government was put in charge of overseeing the functions of the Local Authorities thus creating one Ministry that had overwhelming authority to hire, fire, discipline and control the officers of the Local Authority in addition to its mandate to dissolve any local authority before the General Elections.

Once these powers were removed from the regions and the Local Authorities, and parliament now being solely under the stewardship of KANU, political power was now consolidated in the presidency, the power of which was earnestly exercised on his behalf by an executive that controlled all other arms of the government. The legislature and the Judiciary were at the mercy of the executive.

The multi-party elections ended with the merging of KANU and KADU and other lesser parties in parliament in 1964, and for five years the Kenya political scene was saturated with political intrigues and machinations. Political power brokers were within the executive where all democratic values were ignored to the expedience of having parliamentarian and ministers tow the line. Since

---

<sup>14</sup> For a presidential candidate to qualify as a President he must be an elected member of Parliament. This requirement has tied Presidential Election to Parliamentary Elections, and party politics.

then the Minister for State and the Attorney General were and are still powerful individuals whose utterances and actions represent the voice of the State<sup>15</sup>.

This status quo changed in 1969 because of two elements, first the Limuru Conference where the post of the Vice President of KANU and within it the Vice President of Kenya – then Oginga Odinga was dethroned from the succession of KANU leadership by the post being split regionally so that there were seven vice presidents of KANU. Oginga Odinga and those who sympathized with him formed a political party to rival KANU and crossed from KANU to opposition side of the House. But this was not to be, the election law was amended immediately and they were forced to go and seek fresh mandate from the electorate. Thus came the little General Elections of 1969 where KPU could only return its members from Nyanza those from Ukambani and Central Province lost in the little General Elections.

Secondly, 1969, seem to have been a nightmare year for KANU and the Kenyatta regime, for this is same year that a second political assassination<sup>16</sup> that pointed a finger at the state occurred and rocked the countries political scenery particularly so in Nyanza. Thirdly, the visit of Kenyatta to Nyanza to open the Russian Hospital ended not only in violence, but in a riot that saw scores of people dying; followed by detention of the whole leadership of KPU and house arrest of Oginga Odinga. This was the death knell on KPU and there was no more opposition members in parliament

---

<sup>15</sup> Mr Mbiu Koinange and Charles Njonjo spoke for the Government and in the run up to Kenyatta succession debate, Njonjo stopped further discussion and plan to alenate Moi from the succession by threatening to charge the perpetrators with Treason.

<sup>16</sup> Mr Pio Gama Pinto was assassinated in 1964 and Tom Mboya in 1969 these assassinations were the beginning of alienation of those who were deemed to be anti-Kenyatta from the political mainstream and when J M Kariuki was assassinated in 1974, Kenya politics became a tribal affair, with many politicians identifying themselves with welfare associations of their tribes.

as KPU was deregistered as a political party and until Kenyatta's death there was no opposition party in the Kenya Parliament<sup>17</sup>.

Elections under one party system, KANU, which had consolidated all political, executive and judicial powers were conducted by the executive under the office of the supervisor of elections.

### **The Supervisor of Elections**

The supervisor of Elections office was mandated to carry out the functions of supervision and conducting elections from time to time as they arose. He worked under a commission which was appointed from time to time but whose mandate was generally to determine the constituency boundaries thus it was obviously appointed to safeguard political needs of those who were in power at the time. This commission was not independent and relied on the executive for its budgetary needs.

The office of the supervisor of Elections was under total control of the Executive and throughout its tenure the office relied totally on the provincial administration who supplied the staff and other needs. The District commissioners were automatically the returning officers in the constituencies where they were posted as DC's. Their staff were therefore the other officials. It was therefore not surprising that up to the 1992 General Elections, KANU directed the outcome of the General Elections. Executive directives to the returning officers were followed to the letters. There were many election petitions filed after the end of every General Elections citing rigging by the Provincial Administration.

---

<sup>17</sup> It was not until 1992 that the registration of other political parties was accepted through internal and external pressure particularly from the civil societies.



The Third wave came when reconstruction of the Kenya State was the subject of protests, lobbying and outright civil disobedience by various civil societies and politicians who had been locked out of KANU. There was urgent need for registration of political parties, there was need for reviewing of the constitution, and it was apparent to Kenyan of all walks that the end of Moi's authoritarian regime was imminent.

The rise of democracy in the present age was identified by Huntington (1997). 'The first wave of democracy began in early 19<sup>th</sup> century, and led to the triumph of democracy in some 30 countries by 1920. Thereafter, renewed authoritarianism and the rise of fascism in 1920's and 1930's reduced the number of democracies in the world to about a dozen in 1992. There was rise of fascism that led to the Holocaust and other atrocities eroded democratic gains of the 1920's and 1930's.

'The second shortwave of democratization occurred after the 2<sup>nd</sup> world war, which again increased the number of democracies to somewhat over 30. But this, too, was followed by the collapse of democracy in many of those countries. The constituted democracies in Africa succumbed first to various coup detats where countries like Nigeria, Ghana, Uganda and Zanzibar succumbed to military Juntas soon after independence. With military dictatorship all democratic values are diminished, even where such military government tended to civilianize, they never lasted as there were palace revolutions and returned military leaders one after the other even where civilians were incorporated in the military governments. The military rule without the consent of the citizens, they are not elected representatives of the people. Indeed the very first act of the military junta is to declare the constitution as suspended or invalid.

Besides military dictatorship, the other consolidated states in Africa, Kenya, Tanzania, Malawi and Zambia were systematically deconstructed by formation of one party states where all opposition

parties were outlawed or coerced to join the ruling party. Here the shrinkage of democratic space was evident when it came to elections. The party, and not the citizens, was the ultimate organ to decide who would be nominated to contest elections and as was usual, whether a nominated candidate was popular to the electors or not, he would end up the sole nominated candidate. In cases where such candidate lost the elections, the president would nominate him and even appoint him to the cabinet. In Kenya such politicians were referred to as 'selected' members of parliament. When in 1988 Njoroge Mungai lost to Mwangi Muthiora in Dagoretti, he was duly returned to parliament by Moi as a nominated member of Parliament.

One party states practiced authoritarianism, and this led to use of government machinery to silence its critics. There was no separation of power as all organs of the government were under the control of a powerful executive President. The legislature was at his mercy as he had the ultimate weapon of dissolving the parliament and calling for General elections at any time. Thus motions and Bills were bulldozed through parliament that had become but a rubber stamp of executive needs.

Parliamentarians who made their way to the August House without fair competition perpetuated the single-party dictatorship. They are incompetent, they lacked accountability, they said nothing when the executive used pre-judicial tactics to detain 'dissidents' or when the judiciary conducted its business at night by sentencing political enemies of the party to stiff jail sentences on evidence obtained through pre-judicial confessions. In Kenya the going-ons at the torture chambers of Nyayo House showed the desperate means a one-party dictatorship can resort to in order to consolidate its power.

Civil societies and International organizations particularly the World Bank and IMF came out forcefully in criticizing these regimes and demanded for democratic space through good

governance. When the third wave came about and reached Africa in 1980's and 1990's military regimes and one-party dictatorships had to go. Elections were on top of the agenda for creation of democratic space.

“The third wave of democratization began in Portugal in the mid 70's, and has seen democratization occur much faster and on a scale far surpassing that of the two previous waves. Two decades ago, less than 30% of the countries in the world were democratic, now more than 60% have governments produced by some form of open, fair and competitive elections”.

Msekwa (199)<sup>18</sup> argues that ‘The third wave’ of democratization has been characterized by near universal concept of democracy, (as evolved and defined in the countries of the West over hundred of years), with typically the multi-party variety being seen as being the single most desirable and effective means of governance. He further argues that the so called ‘third wave’ has also seen the apparently successful transplantation and propagation of Western style democracy in regions of the world geographically and culturally far removed from the West.

Msekwa and argues for multi-party democracy, a democracy that is devoid of primitive forms of rule like theocracy a military dictatorship. Much as the liberal democracy is a Western ideology, it has non the less been able to survive other forms of governments. Multi-party democracies indeed ensure that a government is accountable to its people by frequent, fair and free elections that are held when they are due and that the loser accepts the outcome of the elections. That there will be a strong opposition party that will hold the government to its pre-election promises. With it, comes other institutions that will allow for good governance.

---

<sup>18</sup> The effects of the first world war and the viza of facism in Germany and Italy saw the first reversal wave of democracy taking place and this led to the second world war. Huttington S.P. After 20 years: the future of the third wave (1997) Journal for Democracy, October, p.4.



Msekwa<sup>19</sup> further maintained that there is a strong practical evidence that the current trend is to define democracy in terms of elections, elections being a method of constituting governmental authority and making that authority accountable to people.

A country holding regular free and fair elections with universal adult suffrage, is deemed therefore to be democratic. Elections are seen as the essence of democracy, which one in turn dependant upon other implied characteristics of democracy (freedom of speech, freedom of assembly, the rule of law etc). It therefore follows in such definitions that these characteristics can only be guaranteed by multi-party system<sup>20</sup>.

He further avers that, in Western political culture, the fundamental features of a political party are shared identifiable ideology, good organization, and discipline. This is not so in non-western countries and Africa can cite numerous example of would be politicians contesting primaries for one party and, if defeated, contesting for another party.

Thus elections and the associated characteristics can only be consolidated as democratic gains if safeguards for individual rights and freedoms like limits on the power of the executive a or an independent judiciary are a reality. A government that is freely and fairly elected cannot safeguard these institutions, then it cannot be accounted a democratic government.

## **Towards Electoral Reforms**

With pressure from international community and the wave that was sweeping the globe after the fall of the soviet regime and the ebbing of the cold war, dictatorial regimes led by single party

---

<sup>19</sup> Multiparty Democracy: The only Political Model for the next millennium?: Parliaments a Governments in the next millennium: P>11.

<sup>20</sup> The End of History: The End of History and the last man (1992) Penguin

hegemonies, military dictatorships and autocratic rules saw the writing on the wall, democratic reforms were no longer negotiable matter, but an essence to democracy. The International Community joined the domestic pressure to force Moi to give more space to democratic ideals starting with allowing the amendment of section 2A of the constitution that had in 1982 made Kenya a de Jure one party state.

“A perpetual theme of Kenya’s democratic transition, like its desultory efforts at macroeconomic reforms, is that reforms has been the product of domestic and international pressure upon a resistant government calls for a return to multiparty politics were first voiced domestically in 1989. Moi stonewalled them until December 1991, relenting only after international donors suspended \$350 Million quick disbursing aid<sup>21</sup>.

These reforms as further stated by Barkan and Njuguna (1998)<sup>22</sup> were purely tactical as Moi’s strategy was merely to amend the constitution to allow more than one political party with the idea of harassing and bribing the leaders of any new party until split occurred or key members defected to KANU.

In reforms leading to the 1992 general Elections. Moi appointed all 11 members of the Electoral Commission, whose mandate was to Supervise and conduct Elections, and determine constituency boundaries, but instead of a supervisor of elections, he appointed a Director of Elections who was responsible for the supervision of the 1992 Elections thus working at cross-purposes with the commission. The commissioners exerted their independence by removing the office of the Director

---

<sup>21</sup> 1989 – Barkan and Njuguna – Kenya Tries Again, Journal of Democracy 9.2 (1998) P.1.

Ibid – P.1

<sup>22</sup> These were the first reforms on the emergence of the IPPG, democratic space was created by creating a level playing field.

of Elections in amendments that followed the 1992 General Elections. Today the Electoral Commission works within the letter of its mandate that it is not subject to the directions of any authority in discharging its duties.

The minimal reforms<sup>23</sup> leading to the multi-party elections of 1992 gave space, if little, to an independent Electoral Commission to conduct the elections in a multi-party democracy. Much as the work of the commission was hindered by lack of fiscal autonomy. The 1992 General Elections were conducted professionally as for the first time since 1964, the General Elections were conducted in the absence of the Provincial Administration. The commission hired and trained its Returning Officers and other election officials from the public at large and the recruitment was based on merit<sup>24</sup>.

With time and after the 1997 IPPG reforms, where further reforms were incorporated to the minimum reforms of 1992, the electoral commission was enlarged by political parties appointing ten commissioners in addition to the eleven appointed initially by Moi.

The commission was strengthened in the sense that the initial eleven (11) commissioners appointed by Moi had shown their will to act independently and professionally, the ten (10) commissioners appointed by political party would and did bring in more professional acumen and independence. A curious event occurred at the eve of the 1997 General Elections when Zaccheus Chesoni was appointed the Chief Justice, then relinquishing his ECK chairmanship to his deputy Samuel Kivuitu.

---

<sup>23</sup> The commission relied on the Treasury for its budget allocation and the clerk to the National Assembly was its accounting officer during the 1992 and 1997 general Elections. It was therefore under the control of the Executive and the Legislature.

<sup>24</sup> Some of the Returning Officers were part of the International Team of Election Officials who conducted the Elections in Cambodia in 1994.



Since then the commission has consolidated and deepened its independence and autonomy. This was quite evident when after the 2002 General Elections, when NARC came to power, and on appointment in 2002 of the Minister for Justice and Constitutional Affairs, the Ministers attempted to bring the Electoral Commission under its umbrella, this was strongly resisted by the commissioners and its Chairman. From then its autonomy and independence has not been questioned.

When Kenya was ranked among the African countries that had totally transformed from a democratic constituted republic to a single party dictatorship, all democratic values were eroded. The country was ruled by a clique that embraced kleptocracy, ethnicity, corruption and totally disregarded the rule of law. Political dissidents were detained without trial. Political parties were banned. Critics of the ruling party were subjected to internal discipline of a Kangaroo court presided over by party machinery that consisted of diehard totalitarians.

That KANU conducted its nominations through party clearance at the Headquarters before presentation of the papers to the returning officers, made it possible to lock out enemies of the parties from contesting the elections. Competition was therefore not open in the KANU nominations.

Since there was no definite dividing line between KANU and the Government. It was equally not possible to succeed on any appeal made against any unfair ruling. The President of the republic was the president of the party and the ultimate authority on determining party nominations appeals<sup>25</sup>.

---

<sup>25</sup> See Prof Okoth Ogendo. *Constitutions without constitutionalism: Reflections on An African Political Paradox*: American council of learned societies (1988). "where he argues that, where, as is often the case in one party presidencies, the Chief Executive, is also de jure (or de facto) leader of the party, the political arena may shrink even further. Skillful manipulation of the party machinery can easily pass its entire mandate on to the Presidency" – p.32.

Parliament was constituted by elected, 'selected' and nominated members of parliament who were endorsed by the party as being political correct. Those who managed to win elections against the party wishes, were consigned to back benches. Constant harassment of Members of parliament was the order of the day<sup>26</sup>.

The courts were used to silence any opposition by civil societies and individuals who were seen as anti-establishment. The Mwakenya trials saw people being prosecuted after working hours and having undergone a gauntlet of police sadists at the Nyayo house dungeons.

There was total abuse of executive powers as the courts and the executive were used to stifle any opposition or threatened opposition to the government. There was therefore no freedom of association, expression or representation in court during the Mwakenya trials.

Corruption was another problem, both minor and grand corruption brought the country to the brink of bankruptcy. The economy was ruined, unworkable policies sent the inflation levels to the highest level since independence.

It was therefore not surprising when the global changes that came about as the result of the collapse of the soviet union, Kenya was one of the countries which had been pointed out as a dictatorship that had to be removed in order to return the country to democracy.

---

<sup>26</sup> In Kenyatta's time, Seroney and Shikuku were arrested from the precincts of Parliament and detained for stating that KANU is dead. Others were jailed for trumped up charges of falsifying mileage claims.

Perhaps what should be interrogated is as argued by Michael Bratton (1998)<sup>27</sup> that elections do not, in and for themselves, constitute a consolidated democracy as it also required civil rights and due process of law, checks on arbitrary executive power, civilian control of the military; and an independent press and civil society. In a consolidated democracy, citizens and politicians alike accept that this array of institutions is the only legitimate arrangement for governing public life if whether the electoral commission has achieved its mandate? Has it been able to utilize its instruments as provided by various statutes governing its functions towards consolidation of democracy?

We have seen both the KANU and NARC governments emasculating the opposition by appointing its members into the cabinet without consultation with party leaders. It is also open secret that members of parliament owe no allegiance to their political parties, in KANU days and now in NARC times, defections from the opposition to the ruling party is the order of the day. It is further alleged that members of parliament accept bribes to determine their conduct in voting for motions and bills. The Electoral Commission has hardly raised its fingers to censure or injure the political parties or the concerned individuals yet these actions amount to election offences. It is equally unconstitutional to appoint members of the opposition to the cabinet without consultation with party leaders.

The international and local observers and monitors of elections have in 1992, 1997 and 2002 General Elections passed the results of the elections as free, open and fair generally in spite of logistical problems faced by electoral commission. However the conduct of political parties prior to and leading to the polling day are characterized with violence, bribery, and intimidation. Tribal

---

<sup>27</sup> 23 – Journal of Democracy 9.3 – second Elections in Africa – P1



cleansing as was seen in 1997 in Rift Valley and Coast Provinces. The IPPG gains in 1992 and 1997 have been eroded by political parties, indiscipline; parliamentary unprofessionalism and emasculation of the opposition parties by the ruling party.

A weak opposition lacking loyalty of its members is unable to hold the government to its promises particularly a government that does not fulfil its pre-election promises.

Free, fair, competitive and frequent elections are the essence of democracy. The electoral commission has attempted to achieve this, but in the absence of the reforms in the other institutions the consolidation of the democratic gains becomes impossible. There is need to check insecurity. Less government and reduction of beaucracy is important towards consolidation of democracy. Bad governance, kleptocracy and grand corruption should be checked for proper service delivery to the citizens to be effective. There is need for freedom of Information Act<sup>28</sup> to be enacted soon. General government reforms should be hastened and the stalled constitutional review completed.

Elections have been used effectively by the KANU regime to stay in power and consolidate its rule for more than forty years. In parliament, election results are important because of the game of numbers, even after the 1992 and 1997 elections the poaching of opposition members into the government ensured that government bills and motions were passed. The NARC government is equally using the same tricks to consolidate its power. The role of Electoral Commission in General Elections and by-elections need to be consolidated by political parties that respect democratic values.

---

<sup>28</sup> P.14 – 24 - The President – Mr Kibaki assured the International Press Institute while giving his key-note address in Nairobi in May 2005, that Kenya would soon enact the legislation which will enable anyone to get access to information from public offices.

Logistic problems that face the commission in every election need to be overcome by changing the design of the elections format. Presidential, Parliamentary and Local authorities Elections should be held as separate and distinct elections.

It is heartening to note that since the 2002 General Elections the ECK has now introduced reforms in its procedures as the votes are counted and announced instantly at the polling stations before tallying. It is therefore less likely to have the election results rigged through theft of ballot papers.

When in 1992, Kenya held its first multi-party elections, this was a result of response to the dismantling of successive dictatorial, authoritarian and military regimes in the continent. The third wave that had swept across the continents had not spared Kenya.

The amendment of section 2A of the Kenya constitution by its repeal opened space for democracy. It was now possible after forty years of Kenya African National Unions (KANU) as a single-party dictatorship to have multi-party elections<sup>29</sup>. The political system in Kenya from then took a dramatic turn and political space for challenging the excesses of KANU was now a reality.

The hope and expectations of the Kenyan people was that, it would now be possible to elect democratically an acceptable government that would be responsible and responsive to the needs of Kenyans. The war waged by civil society and politicians had borne fruit.

---

<sup>29</sup> Section 2A was repealed by Act no.12 of 1991 S.2 but it was not until 1997 when The constitution of Kenya (Amendment) Act No.9 of 1997 expressly provided under S.2 (1 A) that. 'The Republic of Kenya shall be a multi-party democratic state.



However the 1992 General Elections did not change much. KANU did win the General Elections<sup>30</sup> and proceeded to form a government that within its first two years had through defections by the opposition members of parliament to KANU, weakened and divided the opposition to the extent that the minimal reforms of 1992 backfired and the regime resorted to its earlier excesses.

In 1992, the multi-party elections were overseen by an Electoral Commission that was entirely appointed by Moi. The opposition were skeptical on how the elections were conducted and believed that the commission was entirely pro-government. The Electoral commission of Kenya (ECK) lacked autonomy and depended on the Treasury for its finances, the Clerk to the National Assembly was its accounting officer. Resources for conduct of elections were entirely those issued by the government. That ECK was censored by political parties and international monitors and observers due to its ineptitudeness in conduct of elections, called for radical reforms in future.

The minimal reforms of 1992<sup>31</sup> did not give level playing field to all who competed for the elections this then led to the Inter-Parties Parliamentary Group – (IPPG) reforms leading to the 1997 general Elections.

The IPPG reforms that created ‘level playing – field’ for elections and guarantee the participation of the opposition included, the addition of the opposition appointed ten (10) commissioners to the ECK, thus ECK now had 21 commissioners all of whose appointment were political.

The consolidation and deepening of democracy through election reforms interrogates the viability of the instruments that play a central role in election democracy. The role of the Electoral Commission of Kenya is at the centre of this interrogation. Whether the commission as constituted

---

<sup>30</sup> ‘Moi appointed all 11 members of the commission, and forced through a second constitutional amendment that required any presidential candidate to win not only a plurality of majority of the popular vote, but also at least 25 percent in no fewer than five of Kenyas eight provinces” – S.5 (2) of the Kenya constitution.

<sup>31</sup> Barkan and Ngethe – Kenya Tries Again – Journal of Democracy 9:2 pp.5-6.

at the moment is democratic and can exercise its mandate independently is a crucial question. The onset issue is whether the present design of elections (General Elections) are truly able to pass the test of free and fair elections. The laws and the design of election system remain what they were since the days of one party elections. Three elections are held on the same day. Once in every five years. This system need to be reviewed so as to give more space for Kenyans majority of whom are illiterate to exercise their voting rights without confusion.

Political parties that eventually win elections and form governments are also answerable to the electorate. The conduct of political parties and their loyalties determine the nature of government and opposition parties that the electorate depend on. The government has to live up to its promises and the opposition has to be seen to check on the excesses of the government. Have the political parties lived up to the expectations of the Kenyan people? The constant shift of loyalties from nomination to General elections and even after elections defeats the very democratic ideals that they promised the electorate on their elections.

Democratic elections per se, do not ensure the consolidation and deepening of democracy. There must be changes in the structures that were used by the previous regimes, changes towards creating more democratic space.

International community particularly the World Bank, the commonwealth secretariat and the European Union have given the government colossal sums of money towards reforms in the financial sector, the Judiciary, the Civil and Public Services, yet none of these reforms have been implemented. There is resistance to change which factor undermines democracy.

Parliament in Kenya has resorted to parliamentary dictatorship, by taking away development matters and stripping of the executive the power to determine their (MPS) salaries has left the Kenyan Public in outrage<sup>32</sup>.

With free, fair and competitive elections, there must be respect for civil rights, due process for law, checks on arbitrary power of the executive, civilian control of the military and independent press and civil society<sup>33</sup>.

Lastly, the elections of the President which is based on parliamentary election curtails democratic space for both the electorate and the candidate. A different election process for Presidential candidates who need not rely or as a pre-condition to be elected as parliamentarians is desirable. In the past, influential presidential candidates used all means to ensure that they were elected or nominated unopposed as parliamentary candidates. Threats, use state resources and outright violence were used to ensure the candidate was elected to parliament unopposed. Until, 1992, Moi was never challenged as MP for Baringo and also a presidential candidate for the only ruling party Kanu.

---

<sup>32</sup> See: Editorial & comment – Sunday Standard (Nairobi) June 26, 2005: Kenya becoming a Parliamentary dictatorship: The editor argues that the creation of constituency development and bursary funds, which the MPs specifically required to be exclusively controlled by committees of their own choosing and demand for constituency offices are other instances that have drawn public outrage – p.8.

<sup>33</sup> Michael Bratton – Second Elections in Africa – who states that in a consolidated democracy, citizens and politicians alike accept that this way of institutions is the only legitimate arrangement of governing public life.



## CHAPTER III: DESIGN OF GENERAL ELECTIONS 1992 & 2002

The Two Turn over Test<sup>34</sup> by Huntington (1991) postulates that the democratic concept brings about positive consequences of individual freedom, democratic stability, international peace and global freedom. He argues that consolidation of democracy occurs wherever winners of a founding election are defeated in subsequent contest, and the winners, the new winners themselves later undergo an election turnover. Consolidation of democracy involves widespread acceptance of rules to guarantee political participation and political competition. One of the criteria of measuring the role of elections play in consolidation of democracy is through Two Turn Over Test.

The founding elections in Kenya in the multi-party era can be measured by the first multi party elections of 1992 and through the amendment of S.2A of the Kenya Constitution.<sup>35</sup> Whether the elections were free and fair is not the issue, the fact that there was a multi-party election bringing an end to decades of one-party dictatorship was in itself a milestone.

The subsequent elections – the 1997 elections were more competitive, fairer and freer than the 1992 elections. The IPPG<sup>36</sup> reforms, the expansion of the electoral commission to include nominees from the opposition political divide gave Kenyan more democratic space in participation of governance. However two instances occurred that are exception to the argument put forth by HUNTINGTON. First, a Presidential candidate of the 1992 elections, Mr. Matiba and his party Ford-Asili boycotted the elections; secondly the winner of the founding elections, KANU, won the 1997 elections.

---

<sup>34</sup> Samwel P. Huntington, *The Third Wave: Democratization in the late 20<sup>th</sup> century*: Norman: University of Oklahoma Press 1991 P. 266-67.

<sup>35</sup> The amendment allowed for multi-party system of government and culminated in registration of political parties.

<sup>36</sup> Barkan & Njuguna – Kenya Tries again: *Journals of Democracy* – P-5.

Both, the 1992 and 1997 elections had been given a bill of health by international observers and monitors as being free and fair. The electoral commission was slapped on the wrist for logistic problems but not for any misconduct or negligence. Yet there was ample evidence of use of government resources, bribery and in other cases violence by KANU to regain power.

Elections petitions were halted by the new ruling of the courts that required personal service of the process to the respondents. Many of the would be respondent disappeared from the courts jurisdiction only to resurface after the mandatory service period had lapsed. Mr Moi the winning president could not be personally served for obvious reasons. Indeed the courts did not entertain the petition against him for non-service to his Excellency.

The 2002 elections saw the removal of KANU from power. Thus the winners of the founding elections were defeated in subsequent contest and that the Presidential candidate of KANU Mr Uhuru Kenyatta conceded defeat was indeed an acceptance of the results of a competitive election<sup>37</sup>.

In the Two Turn over Test, in respect of Kenya, the 1992 General Elections had not been fully integrated into democratic system of free fair and competitive elections. The Electoral commission membership still constituted of commissioners who were appointed wholly by the Executive, who was also the Presidential candidate. The commission still relied in the Treasury to have its funds and the accounting officer at the time was the clerk to the National Assembly. The opposition parties were numerous some with as little as two candidates in a General Elections. KANU openly used government resources, intimidation and bribery to garner the majority. Indeed the President was sworn in at the state House while the opposition members were still strategizing on how to

---

<sup>37</sup> On 30<sup>th</sup> December 2002 – Mr Kenyatta conceded defeat and brought an end to speculation that KANU was going to contest the outcome of the elections.



reject KANUS' win. This was therefore not the founding election towards democratization in Kenya.

The 1997 elections had every aspect of a founding election. Reforms within the Electoral commission, its independence<sup>38</sup> and financial control in addition to its commissioners being all inclusive saw the beginning of a free and independent electoral commission<sup>39</sup>. It was even more curious that on the eve of the General Elections, the Chairman of the commission was removed and replaced by his deputy Mr. Kivuitu who has since headed the commission and has been instrumental to its independence and autonomy. The IPPG set out a level ground for competition particularly in outlawing the Provincial Administration in Election participation, the repealing of the Chiefs Authority Act and creating more space for political campaigns and association.

The widespread participation of the civil society in matters of governance and democracy and the onset towards constitutional Review were all achievements that added towards the consolidation of the political gains of 1992 and one can say that the 1997 elections were indeed the founding elections.

The year 2002 saw the winner of the founding election losing to the new challengers the NARC coalition. This was indeed the consolidation of democracy as far as the 1997 and the 2002 elections were concerned. Again, the 2002 elections were considered to be free and fair inspite of the now 'usual' logistic problems of the Electoral commission. With the development of rapid communications systems and the revolutionary counting and announcement of results per polling

---

<sup>38</sup> By 1997, the commissioners had dispensed with the office of the Director of Elections, and the supervision was conducted by the commissioners and the Returning officers.

<sup>39</sup> The commission had an undersecretary appointed and an Accountant with the Chairman as the AIE holder. Parliament ceased to control the finances of the commission.

stations, the 'rigging' was totally minimized or missing at polling stations<sup>40</sup>. The Two Turn over Test is yet to be totally acceptable with the coming general elections of 2007.

Michael Bratton (1998)<sup>5</sup> in his article Second Elections<sup>41</sup> in Africa argues that it is a fallacy in themselves to presume that elections constitute a consolidated democracy. This is a fallacy of electoralism, because consolidation of democracy further requires, civil rights, due process of law, checks on arbitrary executive power, the need for civilian control of the military, independent press and civil society. There is in Kenya today an attempt by the legislature to control the executive through the controversial constituency Development Fund<sup>42</sup> and the threatened emasculation of the Local Authority by wresting the LATF fund from them. The Parliamentary Service Commission has equally become 'unpopular' by increasing the allowances, perks, salaries and other emoluments of MPs arbitrarily. With control of the CDF, the MPs have taken over the role of the executive in development matters.

Since Kenya became a republic, parliamentary elections and presidential elections have been held on the same day. At the same time, the Local Authorities elections are held. In the General Election, there are therefore three elections held at the same time. This design of elections has been a big problem in terms of logistics, voter education, counting of votes and movement of essential election materials such as ballot papers and ballot boxes<sup>43</sup>.

Many voters in Kenya are assisted voters and therefore are left at the mercy of the party agents and the Presiding officers. At the counting of voters, the discovery of ballot papers of one election in

---

<sup>40</sup> Tallying of election results became easy and with the use of mobile phones. Polling agents would have known the results even before the announcement by the Returning Officer.

<sup>41</sup> Ibid – P1

<sup>42</sup> The CDF – have been misused by MPs as the funds have been distributed to those areas where they have support – leaving many of the voters complaining.

<sup>43</sup> S-5 - Constitution of Kenya

the ballot boxes of different elections are common place. Thus, many spoilt ballots tend to be those found in wrong ballot boxes. This problem could not arise if the designers of election provided for different days for election of the parliamentarian and a different day for Presidential elections.

The local authorities elections should be held at a different time and not necessarily when the parliamentary and presidential elections are held. The mayoral elections are actually held differently and at a different time from those of councillors and this has worked very well.

Whereas parliamentary elections is the election of members of the National Assembly and is conducted under chapter VII of the law of Kenya, the presidential election is the election of the President in accordance with the constitution<sup>24</sup>. The councilors are elected in accordance with the Local Government Act and regulations. The presiding officers are therefore expected to conduct the elections under three different acts of parliament which provide for different marking and stamping of ballot papers. There are three sets of ballot papers each for individual elections.

The elector has to mark three different ballot papers and cast the ballots in three different ballot boxes. The whole procedure and process is cumbersome as it is tiresome, it is expected that in each polling stream at least eight hundred voters will have voted at the time of closing the polls. The three elections in a polling stream will have at least two thousand four hundred cast ballot papers.

Had these elections been held separately and at a different time, these would be less complaints and the work of the election officers would be much less stressful.

The election of a president is done simultaneously with that of a parliamentarian, the president must also be a member of parliament representing a constituency. Therefore for a person to qualify as a



President of Kenya, he must have been elected as a member of Parliament representing a constituency.

A proper election design should give space for the electors to make up their minds absolutely and there should be minimal room for confusion. Separate elections would be ideal in Kenya's situation either set aside three continuous days for each election or alternatively these elections should be conducted separately and independent of each other.

Presidential elections in Kenya should be held separately from parliamentary elections and that the presidency should not be pegged on the candidate being an elected member of parliament.

Separation of the Presidency from the National Assembly would be a better way forward as this would enhance the president's office, his powers and he will be way out of parliamentary control and blackmail by party members.

A Presidential system like that of the United States of America is more ideal as the president will be answerable to Parliament only when there is a question of his impeachment. Presidential elections separate from those of the National Assembly would open more space for candidates who would contest for Presidency without necessarily vying for parliamentary seats. This would be more competitive and more democratic than the present system<sup>44</sup>.

“The future<sup>45</sup> of democracy in Kenya, as elsewhere, depends on more than electoral politics, important as elections might be to the transition..... The protracted electoral process for 1996 – 1997 has served a welcome catalyst encouraging Kenyans to renew their pursuit of that agenda to its logical conclusion”.

---

<sup>44</sup> Another contentious issue that came before the Bomas Constituency Assembly was the proposal of having ministers appointed from persons who are not members of Parliament or party officials. This is the same with the American system where the President and the cabinet are neither members of the House of Representatives nor the Senate.

<sup>45</sup> Barkan & Njuguna – Ibid p.10

## CASE STUDY

The conduct of Elections in Kenya have been marred with corrupt practices, emanating from sheer violence to utter open bribery of voters. The two bi-elections in this country in Kisauni, and of Mombasa sums up the nature of unfair competition that has been used by candidates and political parties in order to win elections.

Kisauni by-elections of 1994 and 2004 have been used as the basis of the case study for two reasons. Firstly, the 1995 by-election was conducted after the founding election and in multi-party general election where the incumbent, KANU had won the elections inspite of having stiff opposition from other political parties. KANU had excelled in election manipulation to favour its favourite candidates in its one-party rule days. The by-election was a result of court ruling in an election petition that the election court upheld on grounds of violence, corrupt practices and incompetence of electoral commission. It was a by-election that pitted a strong KANU candidate, Emmanuel Maitha against an equally strong Ford Kenya candidate Professor Rashid Mzee. With the minimum IPPG reforms culminating to the 1992 General Elections, the court injunction to ban the guilty party from contesting subsequent General Election was outlawed. The two candidates who were the subject of the election petition were to meet again in the by-election.

The 2004 by-election came as a result of the death of the sitting member of Parliament who was also a minister in the NARC government the late Emmanuel Karisa. The bi-election was the first in Coast province since the removal of KANU from power by NARC government and therefore the Two Turn Over Test comes into play. The candidates were from the two Narc factions and KANU. There was therefore the need to test whether the 2004 by-election would be conducted in a more



democratic manner than the previous one, whether there would be more space for fair competition, party discipline in nomination process and the subsequent elections.

## **CASE I – THE 1994 BI-ELECTION**

Whereas the 1992 General Election were marred by violence, corrupt practices and incompetence, the by-election of 1994 was worse. There was open use of violence and the electorate were divided due to ethnic, religious and party considerations. This by election was the trigger towards tribal clashes leading to the 1997 General elections in the coast as it was perceived that Maitha has lost the by election due to the Islamic factor and the up-country voters. There was violence in the Kisauni areas where up-country people or those who were perceived to be sympathetic to the Ford Kenya candidate were roughed up and every trick was used to ensure they never reached the polling stations.

Maitha was a KANU candidate and had the advantage of the backing from the Provincial Administration. Half-hearted prevention of bribery and violence was feigned by the Provincial Administration. He used ethnic rhetoric in his campaign that pitted the Giriama against the Arabs and up-country people in the constituency. He expected to win the elections as he had successfully petitioned the election of Rashid Mzee, he was equally bitter that the court did not find Rashid Mzee guilty of any corrupt practices.

On the other hand Rashid Mzee had the backing of Ford Kenya then still a strong political party after KANU and he had the Arab votes and of course those of staunch Ford Kenya followers.

At the counting of the votes which took over twenty hours of continuous counting amid interruptions and arguments. And at times counting of votes from particular polling stations,

resulted in every single vote being checked as which amounted to scrutinization of the ballot papers. The returning officers who were highly experienced had to keep up with all the interruptions and the counting continued from 10pm to 3pm the following day.

When it was apparent that the Ford Kenya candidate was going to win the elections, Maitha became restless and violent. He tried to get the Provincial administration to intervene but the jurisdiction was now in the Electoral Commission whose officers gave him no room to interfere with the counting process.

When Mr Maitha requested a re-count the Returning Officer declined on the premise that he had earlier accepted re-counts on almost all polling stations that candidates had requested to be recounted. Mr Maitha and his supporters became violent and attacked the Election Officials, counting clerks and everyone who was in the polling station. This violence was intended to bring the Provincial Administration to his aid, but for some unexplained reason, the provincial administration left the matter to the Electoral commission.

Results were eventually announced and Maitha lost to professor Rashid Mzee.

## **CASE II THE 2004 BY-ELECTION**

Violence started at the level of party nominations. The two parties that initially were pitted against each other were NARC and KANU but after the party nominations, a split in NARC saw one of its candidates move to another political party in protest. The Institute of Education and Democracy gave a clear narration on the type of political party indiscipline that was exhibited by KANU and NARC.

The NARC nominations exercise was characterized by incidences of violence in certain polling stations, due to lack of consistency by election officials and in some centers, voters were found with crude weapons – pangas, axes, rungas carried by one of the candidates, campaigns at nomination centers added to use of violence. Three polling stations witnessed violence, Kongwea Social Hall, Burhani primary school and Mwakirunge all in north coast. Bribery was also noticed to be rampant during the NARC nominations, several agents who were dishing out money to voters were arrested. One of the candidate Ali Hassan Joho gave out money to voters while on door to door campaign. Voters were also treated to traditional Mnazi brew to influence their decisions. The outcome of NARC nomination which saw Hassan Ali Joho declared the winner against Anania Mwaboza, brought about the split of NARC right in the middle with Mwaboza eventually decamping with many coast MPs to a little known party.

KANU nominations were not different, they were marred by violence and bribery. Much as the turn out was low compared to that of NARC, KANU party officials were alleged to have bribed voters. Again like the NARC nominations, the results were contested and a recount was ordered once Maimuna Mwidau was nominated amid protests from other candidates.

Perhaps an observation from the NARC nomination that one needs to interrogate is the immediate switching of losing candidates to other political parties in order to get nominated. It is lack of political discipline and non-acceptance of competition, it is a reversal to any democratic gains. Political parties need to address this lack of faith and loyalty by its file and rank. Out of seventeen candidates who presented themselves for nomination by NARC, four who lost the nominations switched to other political parties that immediately accepted their nominations to contest under their party flags. Our political parties are still a long way towards democratization.



The bi-election was characterized by the same elements of violence and voter bribery, oathing, religion and ethnic considerations. Due to the split in NARC it was not surprising for Anania Mwaboza who vied through an obscure political party to win the bi-election.

From the two cases studies it is clear that elections much as they are a fundamental basis for democracy, are not in themselves a fashion of democracy. Other structures and institutions need to be built side by side with elections to give wide space for democracy.

The violence, bribery, religious and ethnic considerations in the case studies represent the scenario of the conduct of political parties and the electorate. You cannot achieve democratic values and ideals without democratizing the electorate, the elected, political parties and the electoral commission. The appointing of opposition members of parliament to the government and their acceptance of the appointments take root to their fickleness and fecklessness towards their parties and the electorate. The Two turn Over Test in the Kenya situation is way down to four in a scale of zero to ten.

Whereas elections are fundamental to democracy, it is how the elected politicians carry out governance that would determine whether there is any gain in democracy and therefore its consolidation. Michael Brattons assumption that elections never matter for democratization – but further requires space for creation of institutions that will allow for public participation in governance is plausible as further explained by Huntington.

“First, the definition of democracy in terms of elections is minimal definition. To some people democracy has or should have much more sweeping and idealistic connotations. To them, ‘true democracy’ means liberte, egalite, fratanite, effective citizen control over policy,



responsive government, honesty and openness in politics, informed and *rational deliberation*, equal participation and power, and various other civic values”<sup>46</sup>.

These institutions would not in themselves survive without a strong and committed legislature, for it is parliament that makes laws that create space for exercise of democracy. ‘Fuzzy norms do not yield useful analysis. Elections, open, free and fair are the essence of democracy, the inescapable *sin qua non!*’

In the Kenyan scenario, democratic consolidation of the gains achieved since 1992 and 1997 depends mostly on how the institutions and structures set up are allowed to exercise the democratic space. How elected decision makers exercise their power would determine the extent to which a country is truly democratic. The limitation of power is important as elected decision makers do not exercise total power. They share power with other groups in society.

“If those democratically elected decision makers become, however, simply a façade for the exercise of much greater power by a non democratically chosen group, then clearly that political system is not democratic”.

The legislature has come out more strongly in asserting its powers to an extent of emasculating the executive and the judiciary<sup>47</sup>. There is no goodwill towards consolidation of the democratic gains of 1992 and 1997, instead the present ruling clique is doing exactly what KANU regime did under one party dictatorship. Political parties have been harassed<sup>48</sup>, parliamentary and constitutional

---

<sup>46</sup> The Third Wave: Huntington S.P. – P9.

<sup>47</sup> One example is where Parliament ignored the courts injunction and proceeded to receive the Report on the inquiry on Robert Ouko's Death.

<sup>48</sup> In January 2004 the Minister for Justice and Constitutional Affairs threatened the deregistration of political parties that had not made their returns by 31<sup>st</sup> March.

guarantees in principles of liberal democracy have been ignored, much as the political divide has the semblance of multi-party systems, the cabinet comprises of opposition members of parliament who were appointed without consultation with their party leaders. There is strong clamour by politicians of yester years to return the country into politics of tribalism and parochialism, all political parties in the country today are backed up by strong tribal and ethnic affiliations. However, it is the recently formed 'Mega' group that spells the return to the politics of 1970's and 1980's where the leaders depended strongly on their tribal alliances.

There is great fear that we may be moving towards a totalitarian system with a strong single party, strong ethnic affiliation, control of all economic organizations by a beauracracy appointed from the political correct individuals, indeed exist of the Rift Valley Mafia is being replaced by the Mount Kenya Mafia. At the same time, the rise of 'Mega', the talk of revival of KAMATUSA<sup>49</sup> accord will divide the country into different political affiliations without much ideology save that of preservation of the status quo.

Elections therefore, however free, fair open and frequent as is required by law, are not in themselves an end to democracy, but are a fundamental basis for democracy. It is only when other variables come into play, that elections can be measured as appropriate tool for measurement of democratic consolidation. In a transition from non-democratic to democratic regime, as a continuous variable, democracy has the following indications: fairness in elections, free competition, space for campaigns, non-restrictions to political parties, freedom of the press and the measure of democracy is indicated by the variable, of free participation of the citizenry in their day to day affairs, through freedom of information; membership in public bodies and local authorities committees<sup>50</sup>.

---

<sup>49</sup> See Daily Nation of 14<sup>th</sup> June 2004 where Peter Kuguru states that there is no harm for people of the same community uniting for the welfare of their people – P3. Such statements should be taken with caution considering the type of influence the Gema group had on the government of Kenyatta.

<sup>50</sup> This is the proposal made by delegates in the Bomas Draft.

Having established that Kenya has been able to carry out frequent elections, and that these elections have since 1992 been accepted as free and fair by international observers and monitors, and through the Two Turn Over fest, that an incumbent party, participated in and accepted the results of 2002 General Elections, it is apparent that Kenya has in that direction done better than most of the neighbouring countries of the lake region<sup>51</sup>.

The establishment of the Electoral Commission prior to 1992 General Elections, and its subsequent expansion in 1997 and expanded autonomy leading to 2002 General Elections has seen an institution charged with fundamental democratic institution turn into a professional body for supervision and conduct of elections. From the days of 'Mlolongo' in 1987 to the counting of ballot papers and the release of results in polling stations has indeed established a democratic institution. What remains is the establishment of a permanent voter registration system and a political free constituency boundary demarcations. On a scale of zero to ten, the Electoral Commission of Kenya has achieved 7 points; with time and without political interference it will be indeed a bastion of democratic institutions.

The undisputed democratic gains that came with the wave of democracy through force, fair and regular elections in Kenya in 1990's saw the strive for weakening of authoritarian regimes, ie, need for limited government. This was the result of civil societies lobbying and ultimately achieving the guarantee by the government of the formation of constitution of Kenya Review Commission. It also led to minimum reform for the 1992 general elections through revocation of detention, the registration of multiple political parties, formation of the Electoral commission and the 1997 IPPG reforms that created more space for democracy.

---

<sup>51</sup> Ugandas non-party democracy is already turning into one party dictatorship.



The General Elections much as are properly conducted, the candidates who are presented for nomination to the Electoral commission emanate from party nominations. The process of nomination by political parties is crucial test to democracy. The issue that must be interrogated is whether such nominations have been conducted in a transparent and democratic way?

The 1984 and 1987 party nominations in Kenya were the worst ever in any democratic society.

Queue voting was introduced at nominations of the KANU candidates, which was also the political party where whoever garnered seventy five percent of those present and queuing behind the candidate or his/her agent got straight to parliament as a sole nominee of the party. No election were held in respect of such candidate. Big party wigs did all in their powers to see that they were nominated unopposed. Bribery of voters, use of violence, detention and disappearance of potential candidates were the order of the day. Provincial administration was used to the full force, the district Commissioners were the returning officers and whomsoever they declared the winner was hardly removed by any ensuring petition to the President of the Party.

Parliament was therefore inhabited by people most of whom got their way through callous use of unorthodox and undemocratic way to the 'elected' indeed the politicians of the day distinguished between those members of the parliament who were elected and those who were selected. When the 1992 General Election were conducted with minimum reforms, party nominations were still undemocratic. There were numerous political parties formed overnight and it was a common phenomena that a candidate who lost nomination in one party could immediately switch to another party and so on until eventually he would get a party to nominate him.

The same scenario was repeated during the 1997 general Elections, candidate seeked nominations from various political parties after failing to be nominated by their own parties.



This lack of discipline and loyalty by politicians to their political parties erodes democracy as such candidates do from the onset, oppose the fundamental principal of election democracy that is, space for competition and acceptance of defeat after a free and fair elections. It is the same candidates who would in turn cause chaos in the ensuing general elections , their campaigns are violent, coupled with bribery and parochialism.

Once in Parliament, as seen during the 1992, 1997 and strangely 2002 Elections, the political divide that existed during the general elections is severally eroded by the winning party. The governing party has since the 1992 general elections, co-opted members of the opposition into the government by illegally and against the wishes of the electorate, to the government side by appointing them to the cabinet, as ministers, as assistant ministers and to various parastatal bodies This has eroded the strength of the opposition in parliament. With a compromised opposition, the envisaged check and balances expected from them, on government excesses are greatly compromised.

There is little or no democracy and governance ideals in our political parties, politicians use every means available to get to parliament and once there, they compromise their electorates voice in electing them. The government party by poaching the opposition benches go against the wishes of the electorate who never wanted those individuals to form a government, secondly, by the opposition members moving to the government side, they equally compromise their electorate who had voted against the government side. The ideals of a democratic parliamentary systems is highly subjected to the interests of the members of parliament as opposed to that of the electorate.

Political party democracies in Kenya has a long way to go, many of the political parties have yet to hold their own elections and returns to the registrar of societies have been ending for several years.

KANU which held its elections recently<sup>52</sup> ended up a divided house a second time<sup>53</sup> as the elections were not democratic at all.

Political parties discipline and governance are yet to meet the democratic standards that are recognized universally, this is a huge minus to the process of consolidation of democratic gains that Kenyans expected.

---

<sup>52</sup> The Elections which were supervised by the Electoral Commission became a fiasco after the election of the Chairman, the rest of the officials were elected through the show of hands which was quite different from the secret ballot that was used in election of the Chairman.

<sup>53</sup> Prior to this Election, the November 2002 elections saw the breakaway of KANU members who moved to form the LDP and Rainbow Coalition. This time round, KANU has broken into two factions, one led by Biwott and the other by Kenyatta.

## CHAPTER IV: THE IMPACT OF ELECTIONS IN RELATION TO MULTIPARTY DEMOCRACY

The consolidation and deepening of democracy in Kenya through election democracy cannot be judged in isolation without considering whether with the process of election other characteristics of a democratic state have been achieved and entrenched<sup>54</sup>.

Muna Ndulo (1998)<sup>55</sup> observes that ‘free and fair elections are indispensable features of democratic governance. In addition they are the obvious and traditional way of ensuring accountability and providing institutional framework for the peaceful resolution of conflicts among competing political parties.’<sup>56</sup> “Many elections in Africa have been riddled with irregularities not always calculated to defraud but sometimes resulting from the inability of the state to conduct such a formidable managerial and logistical undertaking effectively”.

As observed by Naomi Chazon<sup>57</sup>, (1994) election provide ritual occasions for sanctioning the existing power constellation but allow for precious few opportunities for affecting the composition of ruling circles or policy outcomes.

---

<sup>54</sup> The effect of the waves of democracy in the 20<sup>th</sup> century and the collapse of the soviet union, when the Berlin Wall came down in 1989, saw the beginning of reconstruction of post communism countries and authoritarian regimes in Africa, American assistance in terms of aids in these countries, and in Kenya has taken the form of ‘technical assistance such as helping parliaments update their processes, an independent judiciary, and assisting the drafting of new constitutions and laws:- Constitutions and Emerging Democracies – March 2004 – P21. – Herman Schwatz – Building Blocks for a constitution.

<sup>55</sup> 1998 – National Black Law Journal – The Democratic states in Africa: The challenges for Institution Building – P 89.

<sup>56</sup> IPP reforms in Kenya were specifically meant for creation of even playing field for all political parties in the ensuing elections of 1992, 1997 and 2003.

<sup>57</sup> Report on the commonwealth Observer Group to the South African Elections, End of Apartheid – 26-29 April 1994.

In all elections in Kenya since 1992, the process has not been seriously followed by building of other democratic institutions if anything several reforms have stagnated or are taking such a long time to accomplish, that in the long run this has affected the process of consolidating and deepening of democratic gains achieved since 1992. Muma Ndulo (1948) rightly states that the utility of elections is further undermined by the fact that electoral process is often not accompanied by the building of institutions that foster accountability and greater transparency in the governance of the country.

“The contemporary challenge is to make elections an effective tool for choosing representatives of the people and also to make them an integral process in the construction of a democratic state. At a minimum, national elections must be organized in a manner that ensures maximum participation of all sectors of the population in the political system”.<sup>58</sup>

The Electoral commission of Kenya has the constitutional mandate to ensure that elections as held in Kenya to-day result in the election of representatives at whatever level (be it a Presidential election, parliamentary or local government) the process is faultless and that every person who is eligible to vote is not barred for whatever reason, other than lawful, from participating in the process. Thus, every Kenyan of full age and sound mind if not lawfully barred from participating in the election process, should be given all the necessary opportunity to vote, and also to contest.

The electoral commissions mandate should be enlarged to include the regulation of conduct of political parties. It must have the mandate to register political parties and supervise their conduct. The proposed Political Parties Bill on becoming an Act of Parliament shall be giving the commission the mandate to regulate the conduct of political parties. This will see the commission

---

<sup>58</sup> Ibid – p.89



being more accountable in ensuring that no party takes advantage over the others in the election process. Ruling parties have been notorious in the use of government resources to ensure their retention of power. With the funding of political parties under the supervision of the electoral commission, there will be more accountability by the parties in terms of their discipline and effective participation in elections.

Presently the electoral commission of Kenya can only discipline political parties during the General Election and by-elections only, and only in respect of the breach of Elections Offences Act and The Election Code of Conduct. After the elections, the commission has very little, if any control over political parties, especially their conduct in parliament.

It is further argued by Muna Ndulo (1998)<sup>59</sup> that the design of an electoral system is increasingly recognized as a key level that can be used in the promotion of political accommodation and stability in the ethnically divided society. Poorly designed laws can entrench societal divisions and exacerbate pre-existing conflicts.<sup>60</sup>

“In many African countries, election results show the main political party as having overwhelming support in a core region. This is because for most African politicians the tribe is the base for political activity and tribal sentiment the focus of appeal, which inevitably disables them from rising above tribal interests and pressure in the administration of government. The result is that the government comes to be regarded as one huge cake, already baked, and it is the duty of political leader to serve for his tribe as large a share as possible. Every question whether it be award of scholarships or contracts, appointments in

---

<sup>59</sup> Ibid – p.90

<sup>60</sup> Andrew Reynolds, Constitutional Engineering in Southern Africa, 6 J.Afr. Dem.86-100 (1995).

the public service, economic development or the sitting of industrial projects are viewed from the standpoint of tribal advantage, and support in opposition to dependent upon whether or not it advances the interests of one tribe”.<sup>61</sup>

Political parties in Kenya are all based on ethnic divide with affiliation based on the interests perceived by different political allies, their needs and interests. The NARC coalition in Kenya is but a grouping together of various political parties whose support is based in ethnic and regional interests.<sup>62</sup> When KANU disintegrated as a National movement in 2002 and later in 2005<sup>63</sup>, there is no monolithic political party that has a national outlook in Kenya today. There is therefore need to design the election laws in such way that the winner take all system that creates permanent losers and permanent winners as in KANU days, should be reviewed and give room to a proportional representative system.

Muna Ndulo further argues that in order to enhance democracy, African countries must re-examine the appropriateness of the proportional representation system in their ethnically and racially divided societies. In a proportional representative system the political parties compete for support in multi-member constituencies and the division of seats is determined by the actual support the party receives. The main objective of proportional representation in contrast to the winner take all system, is to ensure that there is a proportional ratio between the votes received and seats allowed to a particular party. The net effect of proportional representation is that all political parties (not only majority or larger ones) are represented in accordance with their support base.

---

<sup>61</sup> Ibid P.90

<sup>62</sup> All political parties are either regional or tribal based.

<sup>63</sup> KANU disintegrated when Uhuru Kenyatta was rejected by a faction (LDP) that later joined NARC and in 2005, Biwott has further confirmed the ethnicity learning by pulling mostly Kalenjin leadership from KANU after losing in party elections.

The above suggestion worked very well in South Africa<sup>64</sup> in Kenya, the Presidential election has a semblance of proportion representation as the candidate is required to get at least 25% of cast votes in at least five of the seven provinces in Kenya. Political parties in Kenya to-day are such that, no single party can on its own be able to win an election with a majority to form a government. There is no winner take all situation in Kenya. This has been further enhanced by the latest division and imminent split of KANU with Biwott leading a mainly Kalenjin based function.

The most credible argument by Muna Ndulo is that the system leads to coalitions and therefore weak governments. The NARC Coalitions is perhaps the weakest and the exclusion of KANU<sup>65</sup> from the government of national unity, makes KANU a minority and therefore perpetually on the verge of making all sorts of aggravated threats and use of extra constitutional action to ensure its survival.<sup>66</sup>

The choice of the electoral system is therefore important and the IPPG gains should be stretched further to accommodate a system that is all inclusive and does not discriminate. Much as election is an expensive affair, democracy is invaluable. Separate elections for each of the elections held during the Kenya General Elections should be assigned by the Electoral Commission in order to create more space and certainty of choice for the electors.

Electoral law should equally empower the electoral commission to be the custodian of the authority to register political parties, monitor their conduct and have the statutory power to regulate their affair as far as the election laws are concerned. The political parties Bill, coupled with Election

---

<sup>64</sup> Ibid – P.91

<sup>65</sup> The KANU MPs in the cabinet were appointed without consultation with party leadership.

<sup>66</sup> Uhuru Kenyatta has taken up a court case to challenge the appointments.



offences Act and The Election Code of Conduct one the statutes in the right direction and should be used in designing appropriate election laws.

On the Election of the President, the Kenyan system is that the President is directly elected in a National election. It is argued that a good constitutional design for divided societies dictates against directly elected presidents<sup>67</sup>. In Africa this has led to disputes by losers and the Savimbi theory - where losers attribute to cheating and rigging as the cause of their loss. In extreme cases it has led to incumbents using state machinery to ensure they win or keep the status quo regardless of the outcome of elections. In other cases, as was in Ghana and Nigeria military intervention followed the declaration of every general election – particularly where the winning candidate is not popular with the military. The election of Masood Abiola is one such incident, the military hi-jacked the process and declared the elections invalid.

In his article Sustainable Democracy Formalism and substance, Shahid Qadir (1993)<sup>68</sup> warns against quick conclusion of the fact that democratization has come as a complete change to the earlier autocratic and authoritarian ruler.

“Indeed, the most of the recent transitions are re-democratization” where there has been an earlier incomplete democratic experience only to be followed by a return to a period of authoritarian, military or other dictatorial rule”.<sup>69</sup>

The case of Togo is still fresh in the recent happenings where on the death of President Eyademma who had come to power through military coup and later civilianized by conduct of elections, upon

---

<sup>67</sup> Muna Ndulo – Ibid – P.92

<sup>68</sup> Qadir, Uapham and Gills – Sustainable democracy Formalism Substance Turrd World Quarterly vol.14 No.3, 1993 – P416.

<sup>69</sup> Ibid P- 416



his death, his son was immediately declared the successor President through palace coup by military ~~just~~ amid protests from international community, the ensuing elections still elected him as the President. This in Shahid Quadis' argument is indeed a warning that the immediate democratic gains need time to be observed before conclusive attributes can be made on their succession. He say that upon careful consideration, recent political trends should be viewed as transitional and inconclusive, reflecting as they do contradictory realities – on the one hand there is an opportunity for lasting democratic consolidation, while on the other hand there remains considerable risk of reversion to autocracy.<sup>70</sup>

With a strong and independent electoral commission, the gains Kenya achieved since 1992 could be consolidated particularly in the event the recommendations of the constitution of Kenya Review commission is taken into account.

Juan Linz and Alfred Stepan (1996)<sup>71</sup> on consolidation of democracy state that minimal conditions that must obtain before there can be any possibility of speaking of democratic consolidation is that there must be a state in existence as 'No state, no democracy' without a states existence there can be no existence of a democracy. In modern policy, free and fair elections must be held and citizen must effectively have their rights protected by a rule of law.

Authoritative elections presupposes a functioning state. Secondly, that democracy cannot be thought as consolidated until a democratic transition has been brought to completion. A necessary but no means a sufficient condition for the completion of democratic transition is the holding of free and contested elections on the basis of broadly inclusive voter eligibility.

---

<sup>70</sup> Ibid P- 416

<sup>71</sup> Safina was later registered as a political party during the second reform of the IPPG in 1997 and Muite is currently the only member of Parliament elected under the party flag.

Thirdly that no regime should be called a democracy unless its rulers govern democratically. In that, they should not infringe the constitution, violate the rights of individuals and minorities, impinge upon legitimate functions of the legislature, and failure to rule within bounds of state law.

## CHAPTER V: CONCLUSION

On whether the Election process in Kenya has consolidated or deepened democracy in Kenya, it is evident that much as the Electoral commission of Kenya has struggled to assert itself by fighting for its autonomy, it still requires to be restructured by reducing the number of commissioners and employment of professionals who will be responsible for the conduct of the commissions mandate.

The commission will have a greater mandate and say on the registration of political parties and their conduct, a function which the commission can only do, at present, during the General Elections. With the enactment of Political Parties Bill, then the mandate of the Electoral Commission will create more space towards consolidating and deepening of democracy.

The conduct of political parties, both KANU and NARC on forming governments after the 1992, 1997 and the 2002 General Elections, never carried out any major political or structural changes and have been reluctant to implement reforms. The Civil Service Reforms, Legal Sector Reforms and Financial Section Reforms financed by the World Bank and other countries have not been implemented.

The role of the civil society has been so compromised by many of its leaders being given to lucrative appointments in the centre government, parastatals and universities.

The civil society is no longer taking its role seriously. By removal of Moi from power, diluted the role of the civil society in Kenya.

“A strong civil society, articulates values and constrains governments. It provides the base from which independent political parties can organize themselves, and is especially important in fostering an alternative leadership from the government in power, and providing it with authority and support”.<sup>72</sup>

Elections, however free will not contribute to deepening of democracy without changes in the other institutions that are part of democratization. The NARC government has not taken serious the principles of the rule of law and good governance.

Failure of fulfilling the pre-election undertakings, coupled with disregard to the rule of law by the government have led to the shrinkage of democratic space that was created by the third wave. IPPG reform can only bear fruit when the constitution of Kenya Review Commission eventually winds up and a new constitution is enacted. There is therefore no deepening of democracy since the IPPG reforms took root in the Kenya political system.

Presidential Elections, Parliamentary elections and local government Elections should be held separately in order to allow the electors to exercise their democratic light without confusion. The elections laws should be amended as the present design has led to logistic and operations difficulties when these elections are held on the same day.

---

<sup>72</sup> C-Clapham – Democratisation in Africa: obstacles and prospects – Third World Quarterly vol.14. No.3 – 1993 – p.436 – 437.



## RECOMMENDATIONS & THE WAY FORWARD

1. The government should take immediate steps to ensure that reforms in the Legal sector, Financial sector, Public sector and civil service are implemented.
2. Election laws should be amended to enable the Electoral commission of Kenya to be autonomous and more professional.
3. The Election design should give room for separate elections to be held at a different time.
4. The Electoral Commission should in future carry out three different elections as this would be more democratic than the present system which confuses the electorate and is a burden in terms of logistics and finances.

# BIBLIOGRAPHY

ANDREW REYNOLDS

DAILY NATION

BARKAN & NJUGUNA: KENYA TRIES AGAIN JOURNAL OF DEMOCRACY 9.2 (1998)

wysiwyg//494/http://jhupress.jhu.e...al..of-democracy/v009/9 2 barkar.wt

FRANCIS FUKUYAMA (1992) The End of History: The End of History and the last Man (1992)

publishers Penguin.

HUTTINGTON S.P. (1991) The Third Wave - Democratization in the late Twentieth century

University of Oklahoma Press: Norman.

HUTTINGTON S.P. (1997) "After 20 years: The Future of the Third Wave: Journal for

Democracy:." October.

MICHAEL BRATTON (1998) Second Elections in Africa Journal of Democracy – National

Endowment for Democracy and the John Hopkins University Press.

Wysiwyg://232/http://jhupress.jhu.e....1 of – democracy/v009/9

MSEKWA PIUS (1999) Multi-Party Democracy: The Only Political Model for the next

millennium?: Parliaments and governments in the next millennium. Cavendish Publishing Ltd.

MUNA NDULO (1998) The Democratic State in Africa: The Challenges For Institution Building

National Black Law Journal 70.

UNIVERSITY OF NAIROBI LIBRARY  
P. O. Box 30197  
NAIROBI

MAIN REPORT OF CONSTITUTIONAL REVIEW COMMISSION: (2002) CRC Kenya

OKOTH-OGENDO (1998) Constitutions Without Constitutionalism Reflexions on an African Political Paradox American Council of Learned Societies.

228 East 45<sup>th</sup> Street, New York, NY10017 - 3398

PROFESSOR ALFRED CHANDA: Good Governance and Human Rights

SHAHID QADIR, CHRISTOPHER CLAPHAN & BARRY GILLS (1993) sustainable democracy formalism Vs Substance: Third World Quarterly.