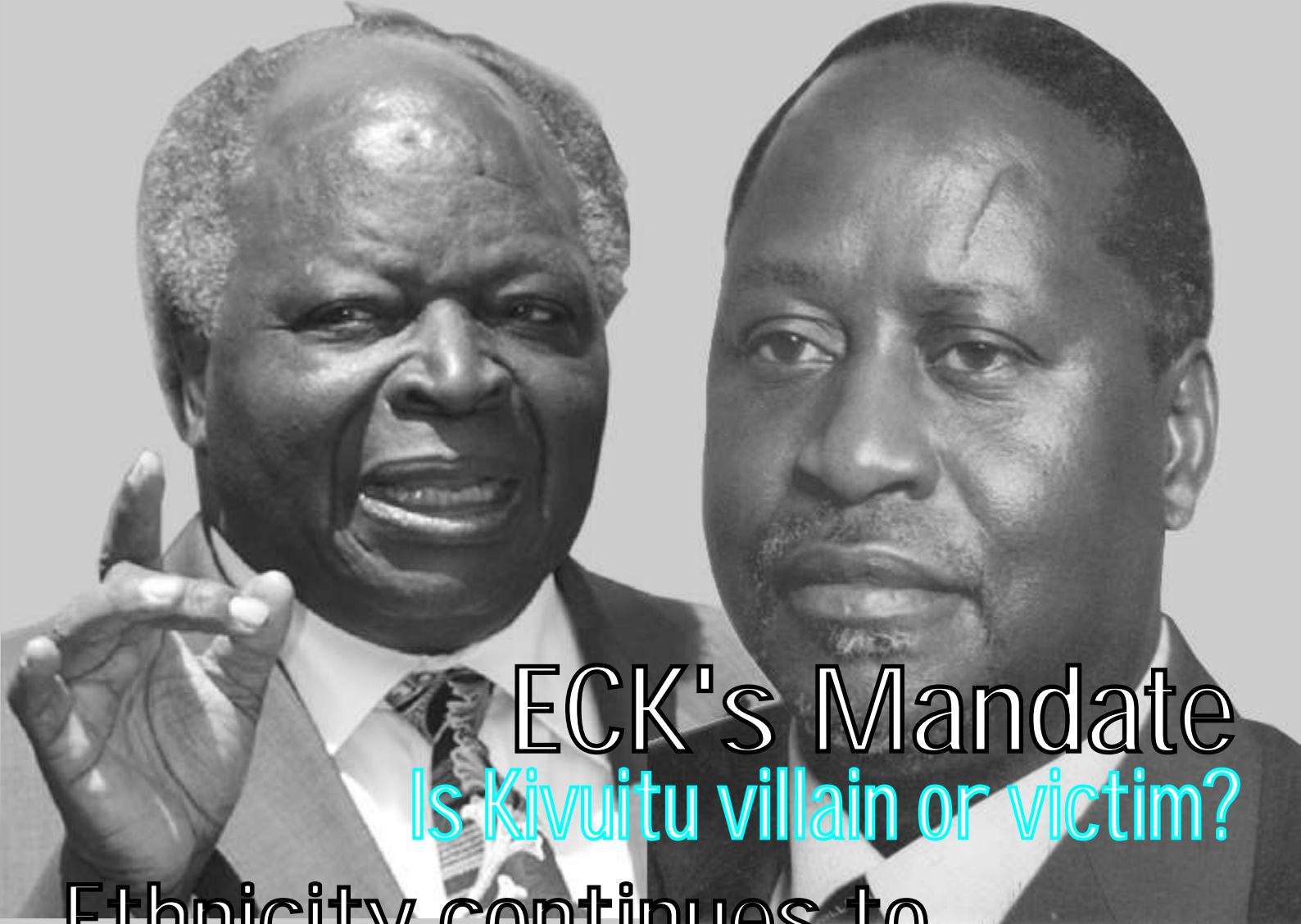


# KatibaNews

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JAN '08 NEWSLETTER

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## ECK's Mandate Is Kivuitu villain or victim?

### Ethnicity continues to plague African politics

### 'TIS THE SEASON OF GOING TO COURT

Will petitions of the December polls see light of day?

### THE CURRENT STATE OF CONSTITUTIONAL REVIEW PROCESS IN KENYA



This newsletter is meant to:

- 1 Give critical analysis of democracy and governance issues in Kenya.
- 2 Inform and educate readers on the ongoing Constitution Review Process.

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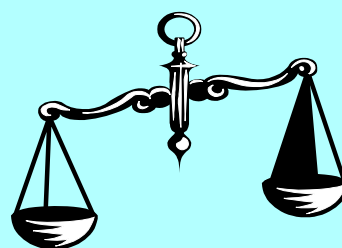
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## THIS MONTH JAN 2008



## Contents

- 3 ECK's mandate: Is Kivuitu villain or victim?
- 6 Ethnicity continues to plague African politics
- 9 'Tis the season of going to court: Will petitions of the December polls see light of day?
- 12 The current state of constitutional review process in Kenya



## We all know what went wrong!

It is now over one month since Kenya turned into something that none of us had ever expected to see in their life time. Since December 30, 2007 after the announcement of the disputed Presidential results by the Electoral Commission of Kenya (ECK), the country has been aflame at almost every corner.

Apart from North Eastern, Eastern and Central provinces, the other five of Kenya's administrative regions have experienced fires you would be forgiven for mistaking with hell itself.

This editorial is not going to be about the senseless violence that has befallen innocent people. That has been done religiously by the mainstream media and we would rather not revisit our own vomit. We shall strive to dissect the symptoms that have led to our ongoing malady.

But pray, what has happened to this lovely country all of a sudden? How come that there were no tell tale signs of what transpired in this country towards the tail end of last year? Were we too blind to see or, like the proverbial ostrich, had decided to bury our heads in the sand and assume that all would be well?

The view that the reason Kenya has been burning is beyond the disputed December polls is now something beyond conjecture. Any intelligent person now knows that the controversy was simply the spark that was needed to lead this country down the road to anarchy.

And so after all has been said and done, where are we now? Are we the better after hundreds of people have needlessly lost their lives and property worth hundreds of millions of shillings gone up in smoke? Are we now happy that thousands of people are living like refugees in their own country, evicted like wild animals by the

same neighbours they ate, danced and slept with?

These are questions that have been asked since the advent of multi-party democracy in the early 1990s. Aside from the full blown scale war witnessed this time, Kenya has been a powder keg of ethnic mistrust, betrayal and imbalance. The ethnic stereotypes that we so innocently pander have come home to haunt us.

On one side of the political divide we have a group that had just seen "Canaan". To them, their choice of president was the Moses that would have delivered them from a world of desolation to one where manna was waiting to be collected from the ground.

Being the master manipulators they are, politicians preyed on the ignorance of the masses and led them to believe that the presidency was theirs for the asking and the elections were a mere irritant they had to undergo. It is, therefore, no wonder that casual labourers saw themselves having instant success, like moving overnight from Kawangware to the neighbouring Lavington estate in Nairobi.

On the other side was a group of people who believed that there was unfinished business and it was not yet time for the presidency to leave their grip. They saw their political opponents as having ill intentions and the baton was not to be passed on before the first lap was over!

The intransigence of such thinking was not expected to be a prerequisite for peace. When the dreams of one group was thwarted (rightly or wrongly), it was simply downhill all the way. I wish to rest my case.

What I would like to dwell on is the future for that is where this country rightfully belongs. In this first issue of Katiba News 2008, we have four major areas that we will analyse. After what has


happened, we first take a look at the now infamous ECK. What went wrong at the final hours of the Commission's task and at whose door does the buck stop?

Secondly, we take a look at the constitutional review process. That we need a new Constitution now more than ever before is something that need not be overemphasised? Unfortunately, will our politicians ever get their act together on this? With their cancerous selfishness, do not hold your breath. Thirdly, we take a look at ethnicity as a major factor in our politics, something that we are always in self denial about. Needless to say, ethnicity is, and continues to be the bane of Africa's socio-economic and political development.

The last article is about the possibility of getting successful petitions in our courts, including whether the Orange Democratic Movement's presidential candidate, Hon Raila Odinga, would feel vindicated by such an action. We have ensured that our writers, though little known in media circles, are experts in their fields. The aim is to avoid recycling the same old ideas of the 1990s that have never worked and usher in a burst of fresh air.

Lastly, I take this opportunity to welcome the new Kenya country representative of the Konrad Adenauer Foundation Ms Anke Christine Lerch from Germany. She replaces Mr Wolfgang Ahner-Toennis who went back to the KAF office in Berlin. Ms Lerch is not new to Kenya or indeed Africa. She is quite at home in the country. We wish her an excellent stay and request all stakeholders and partners to help her achieve her goals during her tenure.

Wishing you all a peaceful and safe 2008.

Stephen Ndegwa   
Managing Editor

# ECK'S MANDATE

## Is Kivuitu villain or victim?

By Samuel Mundia

The Electoral Commission of Kenya was created under Section 41 of the Constitution. The Commission is composed of a chairman, not less than four and not more than 21 commissioners appointed by the President. The commissioners elect the vice chairman. Currently, the Commission is made up of the chairman, vice chairman and 20 commissioners. The Commissioners have security of tenure in that they cannot be removed

from office except through a recommendation of a tribunal appointed to enquire into their inability to exercise functions of the office or for misbehaviour.

The constitutional mandate of ECK is registration of voters and maintenance and revision of the register of voters, directing and supervising Presidential, National Assembly and Local Government elections, promoting free and fair elections, promoting voter education and undertaking such other functions as may be prescribed by law. Voter education is a role that has recently been taken up by the Commission and is carried out with the help of development partners and civil society organisations. The functioning of the Commission is further clarified and defined in the National Assembly and Presidential Election Act and the Election Offences Act, among other laws.

On December 27, 2007 ECK carried out Presidential, National Assembly and local authority elections throughout the Republic of Kenya. The results announced by the Commission in the National Assembly and the local government elections were largely accepted across the board. However, a dispute arose in regard to the tallying process in the Presidential elections. This was apparent in the period after completion of the voting process up to the announcement of the winner of the Presidential election.



ECK Chairman Samuel Kivuitu

Kenya has adopted the first-past-the-post or plurality election system. Under the system, the Councillor and the MP who garners the most votes in their ward or constituency respectively, is certified as the winner of the election. The requirements for election to the office of the President are garnering the highest number of votes cast, election of the candidate as an MP and a minimum of 25 percent votes in five out of eight provinces under Section 5(3)(f) of the Constitution.

The Constitution provides that a person elected as President shall assume office as soon as he is declared elected. The power to make a declaration as to who is elected is vested in the ECK under the Constitution. A person assuming the office of the President shall take an oath before assuming the office. Under the Promissory Oaths Act (Chapter 100 of the Laws of Kenya),

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from page 3

such an oath shall be taken before the Chief Justice. Therefore, the Chief Justice was ready to administer the oath to the Presidential candidate that ECK declared the winner. If the Chief Justice declines to swear in the president-elect, the Promissory Oaths Act states that nothing will invalidate acts done by the president for failure to take the oath.

After the declaration of Hon Mwai Kibaki as the winner of the presidential election, the President was sworn in at State House, Nairobi. One argument that was proffered by the Commission on the need to announce the results on December 30, 2007 was that the term of the President was expiring on that date and, therefore, the ECK had to announce the Presidential results. If that had not been done, the country would have been plunged into a constitutional crisis. This is anchored on Section 9 of the Constitution that provides the term of the president shall run for five years from the date which he is sworn in.

The swearing in of the elected President and the announcement of results are separate processes governed by distinct but related constitutional provisions. ECK has the duty of presenting the certificate (Form 18) to the candidate it declares to have won the election. The process of swearing in is largely unregulated by law and is performed by other Government agencies and departments like the military, police, Attorney General, head of Public Service and the Judiciary.

There are no legal procedures set out on how or where the swearing in should be conducted. It is more a matter of protocol and obviously questions of security at such events are also important. The singing of or failure to sing the National Anthem and the absence of diplomatic corps are trivialities in law which cannot invalidate the legality the occasion.

### Electoral systems

The design of an electoral system has long term consequences for democratic governance. Therefore, the choice of the system is an important political decision for any country. An electoral system serves three main roles. First, it translates votes cast into legislative seats or other offices. Second, it acts as a conduit through which people can hold their elected representatives to account. Thirdly, it defines incentives for those competing for power to design their appeal for votes in distinct ways.

There are three main types of electoral systems. One is the plurality system which places more emphasis to local representation than to proportionality. This creates a winner-take-all scenario which increases competition for political offices. Two is the proportional representative system which uses larger multi-member constituencies and delivers more proportional outcomes. The third is the semi-proportional system which is a mix of the plurality and proportional systems. Countries such as Rwanda and Uganda have adopted mixed systems by

providing special quotas for marginalised groups as well as ensuring gender parity in representation.

### Success and Failures of the 2007 General Election

The success or failure of the 2007 General Election hinges on two aspects. One aspect is the actual supervision and management aspect of elections by the ECK. The Commission, as evidenced by the chairman Samuel Kivuitu's remarks, was unable to communicate, issue instructions to its officers, effectively manage and direct the Returning Officers and other officers who were assisting it in carrying out the election in the more than 27,000 polling stations in the country both during and after the elections. This was aggravated by lack of permanent staff who would be liable for any

continued page 5

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*However, delayed results coupled with the lack of a credible and transparent tallying process of the election results is the epitome of inefficiency by the Commission. The mismanagement of the elections by the Commission undermined public trust and credibility of the outcome of the election as announced by the Chairman.*

from page 4

maladministration of elections, thus leading to over-reliance on temporary staff. Consequently, it has been proposed that ECK should consider hiring Returning Officers for all constituencies and their support staff on permanent basis. This will assist in continuous voter registration as well as enhance their capacity to effectively manage an election.

Other managerial and administrative issues faced by the Commission included delays in commencement of voting in many areas due to logistical hitches, missing names in voter registers, for example in Langata, late arrival of polling clerks, misspelling of names on the voter register, multiple registration due to outdated records of the Commission, ballot mix up and lack of enough ballot papers in some polling stations and disagreements on the remuneration and terms of service for the Clerks and Presiding Officers two days to the elections. A number of civic elections were not held since there was a mix up in party symbols and names despite some Commissioners having travelled to the United Kingdom to supervise the ballot printing process. The new voting arrangement where balloting was in accordance with the alphabetical order was not communicated to the public in time and caused confusion in many polling stations.

However, delayed results coupled with the lack of a credible and transparent tallying process of the election results is the epitome of inefficiency by the Commission. The mismanagement of the elections by the Commission undermined public trust and

credibility of the outcome of the election as announced by the Chairman.

The second aspect concerns defects in the legal framework. These include the electoral system, which creates a plurality or a first-past-the-post electoral system. Kenya has a presidential system which bestows massive executive powers to the President. This centralisation of power and the resulting patronage system has increased the stakes for candidates in the presidential race as well as increased demands that the electorate place on their candidate to ensure that he or she wins by all means necessary.

The Constitution creates a poor transition mechanism whereby the election results of the Presidential elections can be announced and the winner is sworn in the same day. There is no window provided for resolution of electoral disputes before the swearing in of the President. The absence of such a window has increased suspicions levelled against the ECK.

The composition of the Commission by presidential appointees without a vetting process by Parliament or participation of other parliamentary political parties as envisaged in the Inter-Party Parliamentary Group discussions in 1997 creates suspicion of political influence and lack of independence of the commissioners in executing their constitutional mandate of supervising elections. The Commission is expected to carry out its mandate as a corporate entity and

independence of Commissioners is paramount. The comments made by a section of the Commissioners after conclusion of the elections leave doubt as to their ability to function as a team. Lack of team work can undermine the independence of the Commission where commissioners pull in different directions and issue conflicting instructions to their officers.

Conflicting signals by the ECK chairman have led to and fuelled suspicions on the accuracy of the outcome of the elections. The Commission's decisions are corporate decisions made by all the 22 commissioners. The public limelight may have focused on the chairman since he is the face of the organisation. Further, the chairman appears to have made statements that fuelled suspicions on the ability and the competence of ECK to effectively carry out its constitutional mandate. For example, Kivuitu is on record as having stated that he was not sure who won the presidential election despite the fact that he is the one who announced the results.

Indeed, he conceded that the report made by the European Union observers that ECK failed to address irregularities in tallying could be true. He also stated that ECK was consulting independent lawyers to see if it could file a case in court, when he knew that ECK had completed its functions under the law upon declaration of the winner, that it is not an aggrieved party in the dispute and that it can only be enjoined in a suit as a respondent in a petition.

If indeed he was interested in resolving the matter, ECK would have consulted with the attorney general so that he can file a petition to challenge the results. Kivuitu disowned the results which the ECK published in the Kenya Gazette and the newspapers, claiming that he had sought clarification on some of

continued page 15

# Ethnicity continues to plague African politics

By Alex Kipsang

The question of ethnicity and management of ethnic relations in African countries have been at the centre of politics since independence. The response to ethnic conflicts has been reactive rather than proactive.

The infamous one-party State was introduced in many African countries with the aim of reducing ethnic tensions and conflicts. One justification for resistance to the adoption of a multiparty system in Kenya was that the system would lead to the formation of ethnic-based parties. The majimbo Constitution at independence was intended to protect the rights of minorities. The results were not impressive as majority and minority politics dominated the main discourse in most nations in the continent.

The existing political map of Africa is a colonial construct, drawn with little regard to ethnic homelands of the subject population. These nations lack internal political cohesion necessary for survival as nations. There is a conflict between political ethnicity or tribalism and moral ethnicity. The moral core of ethnicity constitutes a requirement for states that want to create nations of citizenship with local roots through building a national consciousness or nationalism. This is complicated due to competing ethnic nationalisms. The belief of inferior

or superior group makes consensus building more difficult.

Nationalism can be defined as an ideology claiming that a given human population has a natural solidarity based on shared history and common destiny. This collective identity as a historically constituted people crucially entails the right to constitute an independent political community. The idea of nationalism takes form historically in tandem with the doctrine of popular sovereignty - that the ultimate source of authority lies in the people, not the ruler or government.

Ethnicity can be conceptualised in terms of three defining elements. Firstly, ethnicity rests upon a variable

list of shared cultural attributes. Language is a primary defining factor, although not invariably present as a marker. Other common defining properties include ancestry and kinship, ideologies, cultural practices, symbolic repertoires or modes of religious observation. Secondly, ethnicity is defined by an active consciousness of collective self hood. The group is invariably named, and its members hold self awareness of their collective affiliation; absent consciousness or shared attributes cannot constitute 'groupness'. Lastly, ethnicity is defined by boundaries. Who one is depends on whom one is not!

*continued page 7*

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## Ethnicity and politics in Africa

The political elite regard the manipulation of ethnic loyalty as the cheapest and most reliable strategy to acquire and consolidate power. Political leaders should assist in the development of more plural forms of nationalism which can incorporate ethnic variations. The appeal of ethnicity as an instrument of political mobilisation is largely seductive because of its emotional content. One of the reasons given for rejecting the multiparty State in the late 1980s in Kenya was that such a system would promote ethnic-based parties. This fear has been vindicated by the formation of more than 300 political parties in Kenya, many of them ethnic based.

Ethnic nationalism and ethnicity are important political issues as many ethnic groups are struggling to establish themselves as groups of political will and not of common culture. Ethnic groups are also striving to give expression to the inalienable sovereignty of the groups to which they belong.

*It is not ethnicity per se that is the cause of Africa's problems, but the lack of meaningful development. Conflicts are mainly responses to failed development projects within which ethnicity is entangled and used as a scapegoat.*

In Cameroon, the concept of electoral village has emerged where urbanised people cast their votes along ethnic lines. This ensures that the ethnic group is a vital variable in the political system. The voting patterns in Kenya seem to indicate a similar trend where candidates for the presidency receive most votes from the regions where they originate from and where their ethnic groups reside or are concentrated.

It is not ethnicity per se that is the cause of Africa's problems, but the lack of meaningful development. Conflicts are mainly responses to failed development projects within which ethnicity is entangled and used as a scapegoat. However, ethnic conflicts are responsible for the displacement of people and disruption of economic activities.

The territorial nationalism in Africa is inauthentic, lacking the ultimate ethnic origin around which constitutive myths of shared history and ancestry took form. De-legitimisation by the State has not erased national attachment. For example, in Congo where the country was split into four segments by the end of the Mobutu Sese Seko era, no voice was raised in support of secession. Political ethnicity or tribalism in Africa has been viewed negatively as antithesis to progress, an artefact of the traditionality in the African countryside which the modernisers wanted to confine to the peripheral social margins, and as the divisive force which posed great danger to the consolidation of new states.

Sekou Toure declared at the time of independence that "in three or four years, no one will remember the tribal, ethnic, religious rivalries which, in recent past, caused so much damage

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to our country and its population". Some scholars have noted that ethnicity failed to cooperate with many of its would-be-pall bearers. The crucial query was whether ethnic diversity would make new States ungovernable. The response was to contain and repress ethnicity through imposition of one-party systems. The three decades of single party authoritarianism drove ethnicity to the shadows, but failed to eradicate its mobilising potential. The democratisation surge in the 1990's revealed that ethnicity was alive and well, often shaping political alignments and finding public expression. The genocidal tragedies of Rwanda and Burundi demonstrated the lethal potential of ethnic polarisation in extreme cases. The ethnic consciousness rarely led to demand for separation and self determination. The ethnic politics and grievances pivot around relative shares and resource

continued page 8

distribution, not secession.

The colonial partition of Africa created the preconditions and framework for emergence of nationalism. The colonial State constituted its subjects in three ways. The African was a racialised subject. Secondly, the African was classified as a native subject of a given territorial division of colonial partition. Thirdly, the African was constituted as an ethnic subject. The African society was presumed to be divided into discrete, bounded social entities or tribes.

In Kenya, the licensing of vernacular radio stations has contributed to rising ethnic consciousness. Some of the stations have engaged in broadcasting material that can be construed as hate campaigns especially in the run up to the referendum in 2005 and the General Election in 2007. In Tanzania, no vernacular stations are licensed. Kenyan authorities need to review whether the stations are a major contributing factor to ethnic tensions which have resulted in widespread violence.

## The Kenyan context

Ethnic violence has occurred in Kenya four times since the reintroduction of multiparty democracy in 1991. The timing and pattern of the violence seems linked to the results expected in or the outcome of the elections. In some cases, the violence seems targeted to areas where there are swing voters. The violence disenfranchises huge blocks of voters. In Kenya, such violence occurred in 1991-93, 1997, 2002 and 2007. The pre-election violence seems to be designed to affect election outcomes and is carried out under the guise of land clashes. This involves destruction of property and eviction of people from other communities who have settled in the Diaspora. The clashes have essentially been concentrated in certain areas.

Kenya has not made much effort to use the educational system to stem ethnicity. This can be by ensuring that the educational system is truly national. Such a structure would include ensuring primary and secondary school pupils and students respectively are required to study with other communities and also travel throughout the country. This will reduce ethnic suspicions. Kenya must also adopt a national language and seek to promote and institutionalise its use.

There has been a proliferation of ethnic based political parties in Kenya. This is partly due to the association of political power with development and access to resources. This is evident from the calls for more devolution of resources from the centre and the enthusiasm that the Constituency Development Fund has received as a method for ensuring equitable access to resources. Ethnicity is a tool used for expression of resentment against poverty and perceived inequitable distribution of resources. A well thought out devolution strategy can serve as a tool for national integration and addressing questions of equitable distribution of resources in Kenya. Ultimately, if public resources are seen to benefit all corners of the country, it will reduce the attraction of the presidency and the ethnic appeal during elections.

An analysis of the post election violence reveals the eruption of pent up emotions on perceived 'historical injustices' by some communities. Such 'injustices' revolve around ownership of land. After the 2002 elections, there were calls for the establishment of a Truth, Justice and Reconciliation Commission to deliberate on historical injustices, past incidents of human rights abuses and marginalisation. Kenyans need to vent their anger and feelings against perceived historical human rights violations to enable them refashion their future. The formation of such a forum was recommended by a Task

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Force appointed by then Minister for Justice and Constitutional Affairs, Kiraitu Murungi, in 2003. In the wake of tensions at the conclusion of the General Election in 2007, there have been calls for establishment of the commission. Previously, the Government had formed a Commission of Inquiry on Ethnic Clashes which conducted hearings and recommended prosecution of the inciters and perpetrators of the violence, who included leading politicians and senior civil servants. However, recommendations of the Commission were not implemented.

## Conclusion

On the overall, democracy seems a feasible governance system for Africa. However, the constitutional structures adopted must give cognisance to ethnic groups that make up the nation. Such recognition could take the form of an appropriate devolution structure, which avails and distributes resources equitably among the ethnic groups. Such a devolution

*continued page 15*

# 'Tis the season of going to court

## Will petitions of the December polls see light of day?

By Peter Siriba

A group of civil society organisations and other interested groups led by the chairman of the Kenya National Commission of Human Rights, Maina Kiai, recently threatened court action against the ECK. The group has asked the Kenya Police to institute investigations against commissioners and senior staff of the Commission and possible arraignment and prosecution for criminal charges for the offences of abuse of office, making false certificates, neglect of duty, making and publishing false information by a person employed in public service, disobedience to statutory duty, forgery, coining, counterfeit and similar offences, forgery of judicial or official documents, making or uttering false documents, conspiracy to commit a felony, subverting the rule of law and misleading the public, contrary to various sections of the Penal Code and the Public Officers Ethics Act.

In Kenya, the duty to carry out investigations is vested in the Police whereas the Constitution confers the power to initiate and undertake prosecutions in the office of the Attorney General. The AG has delegated prosecutorial powers to police officers under the Criminal

Procedure Code. However, the Criminal Procedure Code creates a window for members of the public to initiate private prosecution in certain cases, especially where the police have neglected to initiate prosecution when there is overwhelming evidence of commission of an offence. Even where such private prosecution is commenced, the AG still has the power to take over and terminate such prosecution.

### Election petitions

Section 44 of the Constitution provides that the High Court has jurisdiction to hear and determine any question relating to whether a person has been validly elected as a member of the National Assembly or whether the seat in the National Assembly of a member thereof has become vacant. Such an application can be made by any person who was entitled to vote in the election, or by the AG. Section 10 of the Constitution provides that section 44 shall apply to the hearing and determination of a question whether a person was validly elected as President. Parliament has the power to prescribe the circumstances and manner in which such an application shall be made and the powers, practice and procedure of the High Court in relation to the application. However, the legal procedures relating to filing of election petitions are lengthy, complex and expensive.

An election petition can be filed by any voter, the candidates in an election or the AG. The petition is supposed to be heard by a three-judge bench. Such a bench can be mandated to sit on a daily basis and

hear the petition to its conclusion. One of the causes of the delays in determination of election petitions in the past has been the other judicial functions that judges need to carry out in addition to sitting in the elections courts.

A petition has already been filed against President Mwai Kibaki, Hon Raila Odinga and the ECK in relation to the outcome of the Presidential Election in 2007. Further, 22 petitions have been filed in relation to Parliamentary elections. The election results that have been challenged relate to Juja, Starehe, Dagoretti, Embakasi, Sirisia, Ndhiwa, Langata, Magarini, Garsen and Naivasha constituencies, among others. The filing of these petitions shows that there is still residual faith across the board on the ability and independence of the Judiciary to resolve election disputes.

The only role of the Chief Justice is administratively setting up the benches to hear election disputes. He does not hear or determine the petitions. However, there have been calls for the setting up of an Election Petitions Division in the High Court to expeditiously hear and determine all petitions filed to ensure justice is not delayed. Parties to a petition have the right to prefer an appeal to the Court of Appeal if they are dissatisfied with the decision of the High Court.

The success or otherwise of any Election Petition hinges on the

*continued page 10*



evidence available to the party filing the petition. In a petition against the results of the presidential election, the primary documentary evidence which will be used by the court is Forms 16 and 16A from all constituencies. However, oral and affidavit evidence can be adduced to prove incidents where the forms were tampered with, including:

- ◆ Cases where the results announced at the constituency tallying centres and those gazetted by the ECK vary. Oral evidence would be useful in proving this fact;
- ◆ Cases where Form 16A from the polling centres and Form 16 from the Returning Officers vary from the copies given to the agents or the candidates when the tallying was complete at the constituency level;
- ◆ Oral evidence of ECK officers who actually carried out "modifications" to the forms. This includes the tallying clerks and Returning Officers who allegedly altered the forms. Such officers would also produce valuable documentary evidence.
- ◆ Scrutiny of votes by the Election Petition Court to illustrate disparities in the completed forms and the actual votes in the ballot boxes.

The evidence of the political party and candidate agents who signed the completed Form 16A and 16 at the polling stations and constituency tallying centres will be vital. If these matters are proved and given the narrow margin in the gazetted results by ECK, then there could be a case for nullification of the results and the President shall cease to hold office.

Subsequently, a fresh election will be held. Whereas the Constitution provides that the President shall cease to hold office once the decision is

pronounced on the Election Petition, it is not clear who will act as the President in the period between the determination of the petition and the holding of the new elections.

Political parties should seek to develop their capacity to monitor elections, including the counting and tallying processes. Further, the law should be amended that no voting or counting should take place unless the agents of all the parties participating in an election are present and their security is ensured. If the agents do not sign forms 16A and 16, such results should not be accepted unless a valid reason is recorded by the Returning Officer on oath. Such mechanisms will seek to balance the powers bestowed upon the Returning Officers in the electoral process. Incidents were reported where PNU agents were chased from the tallying centres in ODM strongholds.

### Chances of a successful judicial resolution

The National Assembly and Presidential Elections Act provide that a petition to determine the question whether a person was validly elected as President shall be heard by a court made up of three judges. Petitions related to persons elected as MPs should be heard by one judge. The selection of the bench of judges that hear election petitions as well as allocation of duties to judges is performed administratively by the Chief Justice. This is because the Chief Justice holds a constitutional office and is required to be impartial in execution of his duties.

In the past, determination of election petitions has taken an inordinately long time to be concluded partly due to the complex procedures to be complied with by the parties and the backlog in our courts. The hearing and determination of some of the election petitions has taken up to four years to be concluded, whereas the term of the President and the MPs is five years. The court has power to order scrutiny of

votes. For the presidential elections, the primary sources of documentary evidence in relation to the results of the election are the forms 16A and 16. Oral evidence can be adduced to further complement the contents of the forms or to prove other electoral irregularities.

Deep seated doubts have been expressed on the independence of the Judiciary from the Executive, especially in the hearing and determination of a petition relating to election of the President. This is partly because judges are appointed by the President on advice of the Judicial Service Commission. The Commission is made up of the Chief Justice, the Attorney General, the Chairman of the Public Service Commission and two judges, who are all presidential appointees. There is fear that judges are essentially presidential appointees and may not be independent.

Furthermore, no clear time lines are prescribed by law for resolution of election disputes, especially for the Presidential elections, before the swearing-in of the successful candidate. However, more than half of the current High Court judges were appointed before 2003 when the current President assumed office. Both the Party of National Unity and Orange Democratic Movement candidates who lost in their constituencies in the parliamentary elections have lodged petitions in the courts signifying that they still believe the courts are capable of giving independent decisions.

However, even if the High Court were to find flaws in the December 27, 2007 presidential elections, certain factors would militate against the holding of an election. One, there are more than 300,000 internally displaced persons who would be disenfranchised were the election to be ordered and held at the moment. Two, large parts of the country are still insecure and it would not be possible to organise free and

fair elections in these areas in the prevailing state of widespread suspicion and acrimony.

Three, the elections would be organised by the discredited ECK which organised the 2007 general election. The Commissioners at ECK have security of tenure and cannot be removed unless for inability to perform functions of office or for misbehaviour. Fourth, the ECK would require approximately Kshs 8 billion to organise the elections. The economy may not be in a position to raise these colossal amounts of money given the economic meltdown due to the post election violence.

Consequently, It is imperative that political leaders from the two main parties seek a political settlement to ensure that a legal solution generated by the courts can be implemented. Such a settlement may include reconstitution of the ECK, resettlement of the internally displaced persons, restoration of peace and sharing of power. Currently, diplomatic efforts are underway to ensure the parties reach a peaceful resolution of the issues and, perhaps, a political settlement agreeable to all parties.

### Election dispute resolution - International best practice

International best practice demands that electoral systems establish effective mechanisms and remedies for enforcement of electoral rights both during and after elections. There are a number of mechanisms that have been devised around the world to resolve electoral disputes. These include:

- ◆ Resolution by the electoral organisation that also organises elections;
- ◆ Resolution by a designated tribunal or body that is not tasked with organising elections;

- ◆ Resolution by the Judiciary or a special branch of the Judiciary;
- ◆ Resolution by Parliament or the Executive;
- ◆ Use of international tribunals and commissions;
- ◆ Alternative dispute resolution.

Every voter, candidate or political party should have a right to lodge a complaint with the competent body when an infringement of electoral rights occurs. Such a body must render a prompt and fair decision with a right to appeal to a higher court or commission. The law should provide for a deadline for the arbitrating body to deliver a decision to the complainant. Such a resolving body must have the capacity to deal conclusively and fairly with disputes that have the capacity to seriously derail the electoral process and hear and determine disputes relating to the election results.

### Ukraine

A situation similar to that which has engulfed Kenya occurred in Ukraine in 2004. The presidential election held in November and December 2004 in Ukraine was mostly a political battle between Prime Minister, Viktor Yanukovich, and former Prime Minister and opposition leader Viktor Yushchenko. The election was held in a highly charged atmosphere, with allegations of media bias, intimidation and even a poisoning of Yushchenko that was later confirmed to be the result of the poison dioxin.

According to the results announced on November 23, 2004 the election was won by Yanukovich. But Yushchenko and his supporters, as well as many international observers, denounced the election as rigged. This led to a serious political crisis evidenced by widespread acts of civil disobedience, dubbed the "Orange Revolution", which eventually led to the Ukrainian Supreme Court annulling the results and ordering the holding of a second round. It is clear that the nullification of the results in


Ukraine was as a result of a proper determination of the issues in the Supreme Court.

The second vote was re-run on December 26, 2004. Observers reported a much fairer vote, and Viktor Yushchenko won with about 52 percent of the vote to Yanukovich's 44 percent. Yushchenko was eventually declared the winner on January 10, 2005 after the failure of a legal action brought by Yanukovich.

### Conclusion

Kenya is a rule of law State with functional pillars such as Parliament, the Executive and the Judiciary. This is complemented by independent constitutional commissions such as ECK. Therefore, it is therefore important for all protagonists to test the efficacy, efficiency, impartiality and independence of the Judiciary in seeking a settlement to the electoral disputes. Condemnation of the Judiciary as partial has not been tested. Some of the actions instigated by the protagonists undermine the rule of law and violate the rights of citizens, leading to wanton destruction of property and needless loss of life.

ODM have stated that they intend to refer the dispute, especially violations of human rights in the post election violence to the International Criminal Court (ICC) in The Hague. But such an option is only available after exhaustion of all local courts competent to deal with the alleged offences. It is only after the local courts and authorities are apparently unable or unwilling to redress the wrongs that the jurisdiction of the ICC can be invoked. Furthermore, ICC deals with disputes of a civil nature between States. Consequently, individuals have no locus standi to refer cases to this court.

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# The current state of constitutional review process in Kenya

By Florence Namwaya

## Background of the review process

There have been calls for comprehensive constitutional reform in Kenya for almost 20 years. The main argument for the reform process has been the need to strengthen institutions and reform the constitutional structure to reflect the changed circumstances and needs of the nation since independence. The Constitution of Kenya has been amended more than 30 times. The numerous amendments have completely changed the constitutional structure with no participation of the citizens, hence the calls for a total overhaul of the Constitution through an inclusive and participatory process.

It is perceived that the Constitution confers immense and unchecked powers on the President with few checks and balance mechanisms. The other arms of government, Parliament and the Judiciary, need to be strengthened so that they can play their proper role in the system.

After negotiations during the eighth Parliament, a framework for realising a new Constitution was developed. This included the convening of a National Constitutional Conference (NCC) at the Bomas of Kenya in 2004 and 2005, and the framework for a referendum which was held in November, 2005. During the NCC and the subsequent referendum, a

number of issues were identified as contentious, which contributed to the rejection of the Proposed New Constitution (PNC) during the referendum. These include the devolution structures, the powers of the Executive, provisions relating to land, role and place of religious courts, and the abolition of the Provincial administration.

In the aftermath of the referendum in which the PNC was rejected, the Minister for Justice and Constitutional Affairs published two Bills that were intended to revive the review process. One of the Bills, the Constitution of Kenya Amendment Bill, 2007, was intended to amend the Constitution to ensure smooth constitutional transition once a new Constitution was ratified in a referendum. The Constitution of Kenya Review Bill on the other hand proposed to create the necessary structures for carrying out the review process and also preserved the work that had been done in the development of the PNC, including the work of the Constitution of Kenya Review Commission and the NCC.

On the sidelines, there were deliberations for minimum or essential reforms that were necessary to ensure free and fair elections in 2007. The proposed reforms were not translated into a constitutional Bill and remained informal discussions between members of Parliament. However, a constitutional amendment Bill was published in the latter part of 2007 by the Minister for Justice and

Constitutional Affairs, Ms Martha Karua, seeking to create special seats for women in the National Assembly. The National Assembly rejected this Bill. In a nutshell, no constitutional reforms or amendments were realised in the ninth Parliament and the constitutional review process remains in legal limbo. It is, therefore, of paramount importance that the tenth Parliament seeks to unlock the stalemate and create a process for completing the review process. Such reforms can be categorised as urgent reforms intended to facilitate the implementation of a political settlement and restore faith in institutions and, comprehensive reforms intended to complete and finalise the constitutional review process.

## Urgent reforms

In view of the current stalemate in relation to the presidential elections held in December, 2007 some urgent constitutional reforms are necessary to reform the electoral process in Kenya and instil faith in the Judiciary. This will restore faith in the electoral process and ensure that there will be a dispute resolution mechanism if the results are disputed.

The Electoral Commission of Kenya (ECK) needs urgent reforms to restore faith in its ability to carry out free and fair elections. The Judiciary also needs reforms to ensure that it acts and is seen to act as a neutral arbiter in disputes of all nature, including arbitrating over disputes of

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from page 12

election outcomes. The Judiciary and the ECK are creatures of the Constitution and these reforms would enable them to undertake institutional reorganisation intended to enhance their effectiveness, efficiency, impartiality and independence.

Due to the protracted nature of the review process in light of the political crisis, it is crucial to point out these two areas that need reform in order to get the goodwill of both sides of the political divide to agree. The court has held that no comprehensive reform process can be carried out without a referendum. This means that ECK remains central to the review process as the organ that will supervise and carry out the referendum. The courts remain the sole arbiter of disputes that may emanate in relation to the process, the legality or the outcome of such referendum. Therefore, it is important that the independence of these institutions be enhanced.

### Unlocking the current stalemate - Constitutional options

The independence of the Judiciary as an arbiter in disputes of a political

nature, especially where it involves the election of the President, is in serious doubt. Indeed, the aggrieved parties have publicly indicated that they will not be filing a petition in court as required by law due to the low level of confidence they have of the Judiciary. The suspicion to refer the dispute to the court is further aggravated by the slow dispute resolution processes for election petitions in Kenya. In Uganda, for example, all petitions relating to presidential elections are concluded in less than a month from completion of the elections and are heard in the Supreme Court. This should be the main agenda for the country - to reinforce institutions through a reformed constitutional framework.

Other provisions that will require urgent consideration include:

- ◆ Mechanisms for funding of political parties;
- ◆ Structures for the formation of a Coalition government;
- ◆ Clearing of ambiguous provisions in the Constitution. For example, the Constitution is not clear on what would happen if a presidential candidate wins the presidential poll but is not elected as MP in his or her constituency. Is it the second and third candidates who would participate in the elections? What would happen if the ECK is unable to declare the winner of presidential elections before the expiry of office of the incumbent president? Would the vice president take over? Under what provisions?
- ◆ Regulation of the tenure of ministers who are often accused of using public resources to campaign;
- ◆ Creation of transitional mechanisms, including handing over power after elections, and resolution of disputes relating to presidential elections before swearing-in and assumption of office;
- ◆ Inclusion of the Inter Parties Parliamentary Group agreement

into the constitutional framework by providing for the appointment of ECK Commissioners through an inclusive and consultative process.

Some constitutional amendments may be made to provide mechanisms for power sharing which can assist in resolving the current stalemate through dialogue and mediation. Under the Constitution, the president has the power to create ministries subject to any provisions made by Parliament. This means that the president can create the office of prime minister under the general power conferred under Section 16(1) of the Constitution. The President can delegate such duties as he deems fit to that office. The two protagonist parties can reach an agreement on how the Cabinet will be structured and what policies and agenda such a Cabinet will implement. The president has indicated that he is ready to form a government of national unity. The Cabinet as of now is not fully constituted.

A different and elaborate structure can only be created through a constitutional amendment to create the various constitutional offices and to define what roles each office will carry out. Such offices could include the office of the PM and deputy PM. Such offices were proposed in the Draft Constitution produced at Bomas.

Parliament should exercise its legislative function and establish offices of Minister of Government of Kenya under section 16(1) of the Constitution. At the moment, the president can create and abolish an office of a minister at will. Establishment of such offices through a legislative process will assist in creating structures for operationalisation of a coalition government.

continued page 14

Electoral and Judicial reforms in the PNC

In the Draft Constitution created at the NCC and the PNC, the reforms required for these two institutions were largely agreed on. Below is a summary of the proposed structure of the ECK and the Judiciary in the PNC.

The PNC proposed reforms to the structure of the ECK and the electoral process in general. Article 106 provides for candidature of independent candidates in elections for membership to Parliament of district Assembly. Article 109 establishes the Electoral and Boundaries Commission whose primary functions include registration of voters, the delimitation of constituencies, efficient conduct and supervision of elections and referenda, promotion of free and fair elections and referenda, registration and supervision of political parties, management of Political Parties Fund, the settlement of minor electoral disputes during an election, promotion of voter education and culture of democracy, facilitation of the observation, monitoring and evaluation of elections, recommendation of administrative boundaries including fixing, reviewing and variation of boundaries of districts and other units. These functions are wider than those prescribed for the ECK in the Constitution.

Article 147 provides that the election of the President shall be by direct adult suffrage through secret ballot.

Article 149(4) provides that the candidate for President who receives more than 50 percent of all votes cast in the election, and who in addition receives a minimum of 25 percent of the votes cast in more than half of the districts shall be declared elected as President.

Article 149(8) provides that the chairperson of the Electoral and

*It is time to consider a mixed proportional representation which will integrate the plurality system with proportional representation. Further, the requirement of presidential candidates to receive more than 50 percent of all votes cast will ensure that contestants for that office are able to create alliances with politicians from other regions and ethnic backgrounds.*

Boundaries Commission shall deliver to the incumbent president and the Chief Justice within seven days of the election. Article 150 provides that a person may file a petition in the supreme court to challenge the election of the President-elect. Such a petition shall be filed within seven days after the date of announcement of the results of the Presidential election by the Commission. The supreme court shall within seven days of filing determine the petition. This will ensure that all disputes are resolved with speed and urgency before the assumption to office of the elected candidate.

Article 151 provides that the President elect shall assume office on the first Tuesday following the 21 days after the date of announcement of results of the presidential election, or within seven days of the determination of the election petition. This provision creates a window for resolution of election disputes and for organisation of an orderly handing-over ceremony.

Given the current crisis, the constitutional review process must consider the need to reform the electoral system. At present, Kenya adopts the first to past the post or plurality system. This is considered a winner take-all system and is partly responsible for the ethnic tensions that follow an election. Further, the system is not favourable to marginalised groups such as women and the youth.

It is time to consider a mixed proportional representation which will integrate the plurality system with proportional representation. Further, the requirement of presidential candidates to receive more than 50 percent of all votes cast will ensure that contestants for that office are able to create alliances with politicians from other regions and ethnic backgrounds. This will ensure national integration and reduce the impact of ethnicity.

In the interim, and as part of the healing process, the ECK should now be reformed or disbanded. The IPPG agreement where commissioners were nominated by parliamentary political parties should be urgently incorporated in the Constitution. The unilateral appointment of commissioners by the president and the subsequent mishandling of the General Election, especially the tallying process for presidential votes, are the principal causes of the credibility crisis of the ECK.

The PNC contained reforms intended to strengthen the independence and impartiality of the Judiciary in resolution of disputes. Article 180 states categorically that the Judiciary shall be independent and shall not to be controlled by any other person or authority. Article 181 provides a term limit for the Chief Justice to serve for a period of 10 years.



the results and was yet to receive such clarifications.

## Dispute resolution by the ECK

The Constitution vests the power to resolve disputes arising from the presidential and parliamentary election on the High Court of Kenya. The Commission has limited power to resolve electoral disputes by ordering re-tallying or recounting of votes within 72 hours prior to announcing the winner of an election.

Rule 41(6) of the Presidential and Parliamentary Regulations provides that a candidate may petition the ECK within 24 hours for a recounting or re-tallying of votes in which case ECK shall render a decision within 48 hours. The rule is meant to obviate instances where candidates rush to court with election petitions even in cases where the disputes may be based on an error of accuracy and can be resolved through simple re-tallying of the votes. ECK argues that it was not practically possible to carry out re-tallying of the votes given the "delays" in receiving the results from the constituencies.

No procedure is given for the presentation of such a petition to the ECK for purposes of re-tallying. Could


the 'scrutiny' of the forms conducted by ECK commissioners overnight on December 29 constitute such re-tallying? There has been talk of a report compiled by Commission on the complaints by both parties in relation to election irregularities in the presence of the agents of the protagonist parties and observers. However, the document has not been made public. A day after the announcement of the presidential results, five commissioners conceded that ODM's claims were weighty and called for an independent audit. To date, the results of the audit, if one was conducted, have never been released. If the Commission was committed to uncovering the truth, it would have contracted an internationally acceptable consultant to carry out a forensic audit on the vote tallying and make the results public.

## Conclusion

The election observers are agreed that the voting process was generally well organised. In fact, on December 28, 2007 after the completion of the voting process, the Kenya National Commission on Human Rights and the International Republican Institute commended the ECK for facilitating a good voting process. The campaigns were also carried out peacefully in most parts of the country. However, the tallying process for the presidential elections was contested leading to a dispute in the final

outcome. The parliamentary and civic elections have been described as free and fair in most constituencies and wards. The failure of the Commission in this election can, therefore, be described as a flawed tallying process at the presidential election tallying centres. The disputes were presented both by the PNU and ODM.

One of the reasons why the fidelity of the tallying process is important is that the poll was closely contested. The 2002 elections were a landslide victory where the winner received approximately two-thirds of the vote. The Commission had the duty to ensure that the process was beyond reproach, which they did not do. It is imperative that the Commission designs and installs a foolproof information technology system in which Presiding and Returning Officers can load the electoral results from remote locations in the presence of agents of all parties. The system will automatically tally all the results from which provisional results will be available prior to receipt of forms 16 and 16A from the constituencies. Such a system, if properly designed and managed, will be beyond reproach by all candidates and will assist in reducing unnecessary suspicions on the work of the Commission and its officers.

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structure can be coupled with creating semi-politically autonomous regions where different ethnic groups can shape their political agenda in a manner that does not undermine nationhood.

Another model would be a requirement of an absolute majority for assumption to political office. This would require politicians to create alliances across ethnic groups to ensure they win the elections. The imposition of term limits in the

presidency in African countries can assist in nurturing democracy. Countries such as Uganda have scrapped the term limits from their Constitution whereas Nigeria attempted to scrap the limits but failed.

There is need for consistent and large scale civic education programmes in African countries to promote a democratic culture. Such programmes will aim to ingrain a democratic culture among the citizens. The programmes will also lead to empowerment to make independence

and well considered decisions. Such a programme should also target political leaders so that they are politically mature and promote statesmanship. African States must also incorporate sound democratic principles in their national constitutions and ensure that their citizens fully enjoy their fundamental rights and freedoms.

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Article 183 establishes the Supreme Court made up of the Chief Justice, the Deputy Chief Justice and not less than five or not more than seven judges. The quorum of the Court is five judges. Article 184 provides that the Supreme Court shall have the jurisdiction to hear presidential election petitions and disputes arising from the process of impeaching the President.

Article 190 provides that a vacancy in the offices of Chief Justice, the Deputy Chief Justice and judges of superior courts of record shall be filled by a person appointed by the President on the recommendation of the Judicial Service Commission (JSC) with the approval of Parliament.

Article 196 establishes the JSC comprising the Chief Justice, one Supreme Court judge elected by judges of the Supreme Court, one Court of Appeal judge elected by Judges of the Court of Appeal, one judge of the High Court elected by judges of the High Court, the Attorney General, two advocates of at least 15 years experience nominated by the Law Society of Kenya and one person nominated by the Public Service Commission (PSC).

This is an improvement from the current situation where the JSC consists of the Chief Justice, the Attorney General, the Chairman of the PSC and two judges of High Court or Court of Appeal designated by the President. The JSC is viewed as composed of presidential appointees and, therefore, the persons appointed as judges on the recommendation of the Commission are sometimes viewed as capable of being influenced and non-independent.

Article 197 states that the functions of JSC are to ensure and enhance the independence and accountability of the Judiciary and efficient, effective and transparent administration of justice; recommend to the

President persons for appointment as judges; advise the President on persons to be appointed to the tribunal established to probe the conduct of a judge; appoint, discipline and remove judicial officers and paralegal staff in such manner as may be prescribed in an Act of Parliament.

*Due to the suspicions and deep divisions created by the elections, it would be important to emphasise the need of MPs to place the nation first before their own selfish interests. This is particularly important as the MPs will be required to put in place the necessary legislative framework for carrying out the review process*

### Conclusion

Parliament can utilise provisions drawn from the draft constitutions to undertake minimum reforms that will assist in unlocking the current stalemate. Such reforms will aim at solving practical dilemmas in settling the dispute. For example, if it was agreed that a presidential re-run was necessary, which Commission would carry out the elections? Under what legal framework would elections be conducted? What institution would arbitrate a dispute if one was to arise?


On the wider reform issues, constitutional reforms remain fundamentally important, especially due to the urgent need to reform the Judiciary and the ECK. However, these institutions must be placed in the appropriate constitutional framework and infrastructure. The reform process must ensure that the constitutional structure can nurture and support institutions that are necessary for a constitutional democratic society to function

effectively.

Due to the suspicions and deep divisions created by the elections, it would be important to emphasise the need of MPs to place the nation first before their own selfish interests. This is particularly important as the MPs will be required to put in place the necessary legislative framework for carrying out the review process. Neither side of the political divide commands a two-thirds majority in Parliament, which is necessary to carry out electoral reforms. Consequently, it is important that MPs exhibit political sobriety and maturity in considering the constitutional reform process while keeping the interests of Kenyans at heart. Although the review process is currently at the centre of any political settlement that may be reached, is a complex, lengthy but essential process.

There will be a delay in restarting the process due to the suspicions and hard line positions that have now crystallised across the political divide. The completion of the review process presents the best opportunity for healing the nation and setting up institutions that can be relied on to solve disputes in a State that adheres to the rule of law.

The review process presents a golden opportunity for the protagonists to negotiate the future of Kenya and provides an opportunity for statesmanship in a give-and-take manner. The points of disagreement in the constitutional documents are not fundamental as up to 80 percent of the draft is already agreed on. The reformed institutions, especially the Judiciary and the expanded and elaborate Bill of Rights in the PNC will give victims of the current violence a window to seek justice for wrongs committed against them and create redress mechanisms for such violations in future.

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