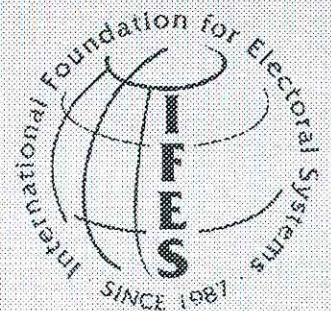


The Electoral Process in Kenya: A Review of Past Experience and Recommendations for Reform

Open Society Institute, East Africa Initiative (OSIEA)

**IFES Final Report
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Executive Summary

In this report, the International Foundation for Electoral Systems (IFES), an international, nonpartisan democracy development organization, presents its review of the Kenyan electoral process and makes recommendations for reform. The intent of this report is to have its findings presented to the Independent Review Committee (IREC) to consider in its examination of the electoral process, and the development of its recommendations for comprehensive measures to be taken to improve the conduct of future elections.

Through an overview of the political and technical problems hobbling the Kenyan electoral system, this report aims to contextualize the main challenges faced by the national community in view of future elections, without specific regard to the details of the December 2007 elections, which may never be known. Numerous technical and electoral problems have been identified by IFES during its work in providing election assistance to the Election Commission of Kenya (ECK) between 2002 and 2008.

A thorough evaluation of the Kenyan electoral process brings several issues to light. First, the process is heavily dependent on political structures that reflect particular institutional imperfections in the country. Secondly, previous attempts at reform have lacked necessary constitutional backing and have fallen short by targeting specific issues arising from individual elections, rather than addressing problems in the overall system.

IFES offers the following recommendations, which are discussed in greater detail in this report:

Electoral Management Recommendations and Reform Concepts

- Recommendation 1: Reduce the number of Commissioners.*
- Recommendation 2: Delegate greater responsibility to the Secretariat.*
- Recommendation 3: Professionalize the Commission.*
- Recommendation 4: Create a separate training unit under the elections department.*
- Recommendation 5: Codify electoral policies and procedures.*
- Recommendation 6: Improve the structure of the Secretariat.*
- Recommendation 7: Increase the integration of technology into election processes.*
- Recommendation 8: Reach the public through the media.*
- Recommendation 9: Improve internal communications.*
- Recommendation 10: Establish and maintain communications with important stakeholders.*
- Recommendation 11: Allow the Electoral Commission Kenya (ECK) to conduct referenda.*
- Recommendation 12: Allow the ECK to enact regulations.*
- Recommendation 13: Empower the ECK to resolve electoral disputes.*
- Recommendation 14: Make the ECK accountable to the National Assembly.*
- Recommendation 15: Mainstream voter education.*

Voter Registration Recommendations and Reform Concepts

- Recommendation 16: Create separate voter registers for polling stations.*

Recommendation 17: Revise the voter register.

Recommendation 18: Consider switching to an electronic voter registration system.

Boundary Delimitation and Electoral System Reform

Recommendation 19: Make constituency delimitation the clear mandate of an independent commission [either the ECK or a new entity] with an obligation to consult parliament and other stakeholders and delimit constituencies based on widely agreed-upon criteria with fixed maximum deviations for population size.

Recommendation 20: Consider provisions governing the election of MPs with provisions defining a mixed member proportional system of representation (MMPR).

I. Background and Electoral History

IFES's electoral experience spans two decades and over 100 countries and includes expertise in the fields of elections, governance, civil society development, and rule of law. Throughout the world, IFES has provided technical support for electoral processes. IFES works as partners to electoral management bodies (EMBs), offering assistance in building sustainable structures for the professional management of elections. In every instance, IFES strives to work with practitioners to ensure that the assistance provided matches the specific needs of the country.

In Kenya, IFES worked with the Electoral Commission of Kenya (ECK), the electoral management body (EMB) for Kenya, from 2002 to March 2008, with funding from USAID and CIDA, to assist the Commission in its efforts to build sustainable electoral structures. In the following report, IFES, working under a grant from the Open Society Institute of East Africa (OSIEA), responds to the call for input into the electoral review process in Kenya and provides focused recommendations for effective reform. The report does not include an inquiry into the 2007 general elections; a commission has been specifically established for this purpose. This report remains but one contribution to the overall process of electoral review process in Kenya.

The violence in Kenya following the 2007 elections prompted mediation by the African Union. Under the leadership of the group of Eminent African Personalities (EAP), which included former UN Secretary General Kofi Annan and human rights advocate Graça Machel, the two leading Kenyan political parties reached a power sharing agreement in February 2008 to end violence and restore stability through the creation of a Government of National Unity (GNU). In addition, the agreement created two commissions with mandates to examine the 2007 elections, the overall electoral process, and the causes and consequences of the violence.

This report is not aimed at duplicating the ongoing work of the Independent Review Committee (IREC), is the commission charged with an examination of the electoral process. Through an overview of the political and technical problems hobbling the Kenyan electoral system, this report aims to contextualize the main challenges faced by the national community in view of future elections, without specific regard to the details of the December 2007 elections, which may never be known.

Numerous technical and electoral problems have been identified by IFES in Kenya since its first report in 2002, which led to subsequent reports in 2004, 2005, and 2007. In this report, IFES presents these findings and recommendations once more, offering them as part of an analysis of the current state of Kenya's electoral system. One objective of this report is to present IFES's findings in a way that will help the IREC to recommend comprehensive measures to improve the conduct of future elections.

II. Kenya's Electoral History

Kenya's first direct elections for Africans to the Legislative Council took place in 1957. In 1960, 1962, and 1963, the Lancaster House Constitutional Conferences were held in London and Nairobi to negotiate the Kenyan independence constitution. In May 1963, elections were held based on the widely held principle of "one person, one vote." Despite British expectations of handing power over to moderate African factions, it was Jomo Kenyatta's Kenya African National Union (KANU) party that won the elections and formed a government in anticipation of Kenya's independence on December 12, 1963. Kenya became a republic in 1964, and Jomo Kenyatta became the first president, after KANU and the opposition party, Kenya African Democratic Union (KADU), merged to pave the way for a *de facto* single-party system. An opposition party formed in 1966, the Kenya Peoples' Union (KPU), was banned three years later and its leaders detained.

General elections were held in 1969 and 1974 and, upon the death of Kenyatta in 1978, Daniel Arap Moi became President and retained the Presidency unopposed in elections held in 1979. In 1982, a constitutional amendment made Kenya a *de jure* one-party state to prevent the registration of an opposition political party formed by Jaramogi Oginga Odinga and George Moseti Anyona. In August of the same year, an attempted military *coup d'état* was quelled, and elections were called one year early in 1983.

The 1983 and 1988 elections were held under the single-party constitution. These years were marked by a protracted attack on Mwa Kenya and other political dissidents. The 1988 election saw the advent of the *mlolongo* (queuing) system, where voters were asked to line up behind their favored candidates instead of a secret ballot. This was seen as the pinnacle of the undemocratic regime, which led to the widespread agitation for constitutional reform, particularly for repeal of the single-party clause.

In 1990, the Saba Saba demonstrations erupted; the protestors' central demand was the reestablishment of a multi-party system. The protests were violently broken up by the police, and many demonstrators were killed. In the wake of the demonstrations, KANU established a review committee to gather Kenyan opinions in preparation for reforming the party. In 1991, donors withdrew budgetary support aid so as to add pressure for the return to a multi-party system. The multi-party system was finally restored in 1991 by the repeal of section 2A of the Kenyan Constitution. In the first multiparty elections of 1992, Daniel Arap Moi won reelection, although the results were controversial.

After Kenya again became a multiparty state in 1991, it became imperative to recognize all the functions of the ECK as stipulated in the constitution. Previously, civil servants oversaw elections and provincial administration was performed under a Director of Elections. This system was open to abuse and the impulses of the executive branch. President Moi appointed nine commissioners in 1991. The number was raised to eleven in 1992, and to twelve in 1993.

On December 31, 1995, President Moi promised the public that constitutional review would begin and the National Convention Planning Committee (NCPC), the executive arm of pro-democracy forces who had been formed to agitate for constitutional change, was created. In 1997, the National Convention Assembly and its executive arm, the National Convention Executive Council (NCEC), were formed. Between May and July, widespread mass action was organized, forcing the government to concede to the minimum constitutional and legal alterations necessary to facilitate more free and fair elections. In 1997, as a consequence of the agreements reached between the parliamentary political parties during the Inter Party Parliamentary Group (IPPG) process, the opposition proposed ten additional ECK commissioners, all appointed by the President. By the time the 1997 general elections were held, the law had been changed to limit the number to no more than twenty-one commissioners plus one Chairperson.

The cross-party parliamentary reform initiative of 1997 revised a number of the oppressive laws inherited from the colonial era that had been used to limit freedom of speech and assembly. This improved public freedom and contributed to more credible national elections in general in December 1997. However, the elections again resulted in the reelection of Daniel Arap Moi, with the opposition parties divided.

The Constitution of Kenya Review Commission Act, which provided a framework for constitutional change, was also passed in 1997. In 1998, negotiations between civil society and the political class for the review of the Constitution of Kenya Review Commission Act led to a general amendment of the Act. The amended law, renamed the Constitution of Kenya Review Act, 1997, resulted in a more people-driven process of constitutional revision.

In December 2002, Kenya held democratic and open elections that were deemed generally free and fair by international observers. The 2002 elections marked an important turning point in Kenya's democratic evolution as power was transferred peacefully from KANU, the ruling party since independence, to the National Rainbow Coalition (NARC), a coalition of multiple political parties. Moi had been constitutionally barred from running, and Mwai Kibaki was elected President.

Until the unrest caused by the disputed election results of December 2007, Kenya maintained remarkable stability despite changes in its political system and crises in neighboring countries. Before the contentious 2007 elections, the general impression was that under the government of President Kibaki, the democratic space had expanded and the media was freer than before. Kenyans were generally able to associate freely and express themselves without fear of harassment by security agents, although after the Kenyan electorate resoundingly defeated a new draft constitution supported by the Government in the 2005 referendum, Kibaki's government began a subtle withdrawal from some of these gains.

The December 2007 elections marked a radical departure from these positive trends. As the initial vote count came in to the ECK, opposition candidate Raila Odinga appeared to have a substantial lead. As the count continued, however, Kibaki closed the gap and overtook his

opponent by a substantial margin to win reelection amid largely substantiated claims of rigging (most notably by European Union observers), leading to protests and riots and discrediting of the ECK for its involvement. The protests escalated into unprecedented violence, leading to over 1,000 deaths and the internal displacement of more than 350,000 people.

Former UN Secretary General Kofi Annan and the EAP were called in to broker a peaceful solution to the stalemate. On February 28, 2008, President Mwai Kibaki and Mr. Raila Odinga signed an agreement on the formation of a coalition government in which Mr. Odinga became Kenya's Prime Minister. On March 18, Kenyan lawmakers unanimously approved a power-sharing deal aimed at reclaiming peace in a country once seen as one of the most stable and prosperous in Africa.

III. Constitutional and Legal Framework of Elections in Kenya

Summary

Article 25 of the International Covenant on Civil and Political Rights, ratified by Kenya in 1976, provides for the right of citizens to take part in the conduct of public affairs, directly or through freely chosen representatives. Further, the Article endorses the right of citizens to have the opportunity to participate, on general terms of equality, in public service.¹ Citizens provide their voices through participation and thus gain a sense of ownership in the resulting policies.

In principle, in a functional democracy, genuinely competitive elections should perform a corrective and empowering function, serving as an instrument to remove corrupt, unresponsive, and ineffectual leaders. Elections should, therefore, serve as an incentive for leaders to govern more effectively in the public interest and to attend to the needs and concerns of the majority.

The Constitution of the Republic of Kenya

The democratic foundation for the Republic of Kenya is established in Section 1A of the Kenyan Constitution, which provides that *“The Republic of Kenya shall be a multiparty democratic state.”* Section 5(1) of the Constitution outlines the modalities for the election of the President; those for members of Parliament are stipulated in section 32. Also included in the Constitution are qualifications and disqualifications for registration as a voter.² The Constitution regulates all elections—presidential, parliamentary and civic—including by-elections should any seats fall vacant.

Section 5 of the Constitution lists a number of qualifications for nomination to the Presidency: a nominee must be a citizen of Kenya, at least thirty-five years of age, and registered in some constituency as a voter in elections to the National Assembly. Section 5(3) requires that presidential elections be held whenever Parliament is dissolved during the ensuing general election. The nomination of any candidate must be supported by a particular party and accompanied by not less than 1,000 signatures of persons registered as voters. If only one candidate is validly nominated and the candidate is subsequently elected to the National Assembly, section 5(3)(c) of the Constitution stipulates that that candidate shall be declared President-elect.

Where more than one candidate for President is validly nominated, the Constitution requires a poll to be taken in each constituency for the election of a President. Further, in every constituency in which a poll is required to be taken both for the election of a President and for the election of a member of the National Assembly, those polls must be taken separately.³ A

¹ Article 21 of the Universal Declaration of Human Rights contains substantially similar provisions.

² Voter registration provisions are covered in Section 43 of the Constitution.

³ Section 5(d) and (e) of the Constitution.

candidate who is elected as a member of the National Assembly and who receives a greater number of valid votes cast in the presidential election than any other candidate for President and who, in addition, receives a minimum of 25% of the valid votes cast in at least five of the eight provinces is declared President-elect.⁴

When no candidate meets these requirements, the Constitution provides for a run-off election. In such an eventuality, the run-off election is contested between the two candidates who won the highest numbers of votes. The Constitution requires new presidential elections if no candidate is validly nominated before the expiration of the time for the delivery of nominations. This may occur if a validly nominated candidate dies on or before the presidential election, where a winning candidate dies after the poll has begun in the presidential election and before he has been declared elected as President, or when no candidate is duly elected.

Section 41 of the Constitution names the ECK as the institution mandated to conduct elections. The ECK is responsible for a sizeable range of tasks, including registration of voters and maintenance of voter registers, resolution of election disputes, direction and supervision of elections, boundary delimitation and any other business instructed by law. The Constitution provides for appointments of ECK Commissioners and for its independence so as to create an impartial body. The chairman and the vice-chairman are required to be persons who have held, or are qualified to hold, the office of judge of the High Court or judge of appeal.⁵

The Constitution also gives direction to the ECK regarding the demarcation of electoral boundaries and other features of managing democratic elections, such as the appointment of returning officers and other election officials. Section 42(1) outlines the division of the country into a number of constituencies with boundaries and names prescribed by the Electoral Commission; Parliament prescribes the precise number of constituencies.⁶ All constituencies are required to contain as nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable; however, the Commission may depart from this principle to the extent that it considers expedient in order to account for:

- the density of population and in particular the need to ensure adequate representation of both dense urban and sparsely populated rural areas;
- population trends;⁷
- the means of communication;
- geographical features;
- community of interest; and
- the boundaries of existing administrative areas.

⁴ Section 5(f) of the Constitution.

⁵ Section 41(2A) of the Constitution.

⁶ Section 42(2) provides for the minimum number to be 188 and the maximum to be 210. A boundary review is required every 8–10 years and was due in 2007

⁷ For the purposes of this subsection, the number of inhabitants of any part of Kenya is ascertained by reference to the latest census of the population.

The National Assembly and Presidential Elections Act (Chapter 7 of the Laws of Kenya)

The National Assembly and Presidential Elections Act reaffirms the right to vote and outlines in detail the manner of conducting elections, registering voters, resolving disputes with regard to registration, and handling election petitions. The Act provides a timeline for conducting elections when Parliament is dissolved. The Act also contains a code of conduct, which is designed to secure conditions that are conducive to free and fair elections and campaigns and to allow voters to support any party or candidate without fear of coercion, intimidation, or reprisals. All parties, candidates, and supporters of political parties participating in an election are required to subscribe to these principles and to adhere to the code of conduct.

Section 8 of the code of conduct provides that the Commission may impose a range of sanctions for infringement on any provision of the code, including:

- A formal warning;
- A fine determined by the Commission;
- An order prohibiting the offending party, permanently or for a specified period, from accessing public media time allocated to the political parties for electoral purposes;
- An order prohibiting the political party from holding public meetings, demonstrations, or marches of any kind;
- An order prohibiting an offending political party from entering any specified electoral area to canvass for membership or for any electoral purpose;
- An order prohibiting a party from erecting placards or banners or from publishing or distributing campaign literature and electoral advertising;
- A formal warning or a fine to the leader or candidate or any party officeholder, member, or supporter.

Section 9 of the code gives the ECK power to request that the High Court move against a political party, leader, office holder, member, or supporter for:

- a) acts or omissions by the party involving violence or intimidation or a gross or systemic violation of the rights of any political party, candidate, or voter. In this case, the ECK may ask the High Court to cancel the right of the party involved to participate in an election.
- b) acts or omissions by the leader, office bearer, member, supporter, or candidate involving violence, intimidation, or a gross or systemic violation of the rights of any party, candidate, or voter. In this case, the ECK may apply to the High Court for orders to disqualify such a person as a candidate or delete the name of such person from the list of candidates.

Section 34 of the Act gives the ECK powers to make regulations that enable it to fulfil its mandate more effectively. Current regulations made and approved by Parliament include:

- The National Assembly Elections Regulations
- The Presidential and Parliamentary Elections Regulations
- The National Assembly Elections Rules
- The National Assembly and Presidential Elections Practice Rules 2002

Finally, the Presidential and Parliamentary Elections Regulations Amendment of 2002 provides guidance on campaigns, election petitions, nominations and appointment of ECK staff.

The Local Government Authority Act

The Local Government Authority Act deals with the establishment and constitution of local government areas and their powers and functions. It also provides for the role of the Minister for Local Authorities in their management. It deals with nominations and elections of Councillors to local governing councils and the qualifications for registration of voters and candidates for civic seats. Civic elections are traditionally held concurrently with National Assembly and Presidential elections and are overseen by the ECK. Consequently, the regulations relating to National Assembly and Presidential elections also apply to civic elections.

The Election Offences Act

The Election Offences Act provides for sanctions if an electoral offence is committed. While it does not specifically define what an election offence is, the Act provides in Section 3 examples of acts that would amount to an election offence. Such offences may be committed by any person or election officer and include acts that relate to voter registers and electors' cards. These may include:

- Selling or offering for sale or buying or offering to buy ballot papers;
- Being in possession of another person's voter card without the owner's or official permission;
- Selling or offering for sale or buying or offering to buy a voter's card;
- Bribing voters with money or anything else of value calculated to influence a voter's decision on how to vote;
- Soliciting or receiving bribes to cast a vote in a particular way;
- Preventing, obstructing, or barring a person from going to vote;
- Threatening, causing fear, or tricking a voter so as to influence or deter the voter;
- Preventing, obstructing, or barring a person from presenting nomination papers to returning officers;
- Putting in a ballot box anything other than a ballot paper;
- Voting in an election with no authority to vote;
- Destroying, changing, or altering a voter's card without authority to do so.

The sanctions provided in the Act include imprisonment for a term not exceeding five years. The Act provides for investigation of suspected offences by police officers and arraignment before a Court of Law.

The Public Order and Preservation of Public Security Act

The Public Order Act regulates the holding of public meetings by political parties and their candidates by requiring those who want to hold such meetings to notify the officer commanding the police station nearest to the venue of the intended meeting. The prescribed form requires the giving of a notice of not less than three days and not more than fourteen days in advance.

Since the 1997 IPPG amendments, the police no longer license meetings but only require notice for the purpose of providing and maintaining security.⁸ Such a meeting can be stopped or permission denied where the police are apprehensive that the holding of such a meeting will result in breach of public order.

The Penal Code

The Penal Code is the principal law that defines all criminal offences and penalties in Kenya. Any offences committed in the context of an election are also invariably prohibited under the Penal Code.⁹ Offences such as violence, carrying offensive weapons, bribery, or assault also fall under the Election Offences Act and can be prosecuted under it or under the Penal Code.

The Police Act

The Police Act states that the police are expected to ensure the protection of citizens' rights during elections by ensuring that law and order are maintained. Section 14 of the Police Act gives the main functions of the police as preserving the peace, protecting life and property, apprehending offenders, and enforcing all laws and regulations. Section 14(A), introduced in 1997, requires the police to be impartial and objective in political matters and not to accord different treatment to persons on the basis of their political opinions.

The Political Parties Act

The Political Parties Act was enacted in November 2007, but only came into practice as of July 2008. It provides a framework for the registration, regulation, and financing of political parties. The Act provides for the establishment of the Office of the Registrar of Political Parties with operational autonomy within the ECK. The Act creates incentives and sanctions that, if fully

⁸ However, in practice, police often act as if they are a licensing authority even while it is clear this is contravention of the law.

⁹ Section 130 of the Penal Code makes the disobedience of statutory duty a criminal offence.

implemented, could go a long way in reducing electoral violence and improving accountability of political parties to their members and to the general public.

The provisions on political party financing are particularly important for a number of reasons. Money in politics is a serious matter, since it can distort democratic institutions at every level, alter the election process, and determine the extent to which elected leaders represent their constituents. It can change parliamentary politics and the functioning of the judiciary and the executive. Electoral processes cannot operate without proper financing, but where money plays a decisive role in politics; it turns unequal economic power into unequal political advantage and undermines the principle of “one person, one vote.” This issue is not novel, but the soaring cost of elections has worsened the situation even in established democracies.

A well-functioning democracy requires well-functioning political parties who are responsive to the people and who are able to complete their traditional functions of political education, mobilization, and representation of diverse interests. All of these functions require financial support. A shortage of public funding in Kenya, coupled with limitations on fundraising, have left parties dependent on a few wealthy individuals to finance their activities and campaigns. With perks and patronage flowing from ruling parties, politicians are increasingly switching party affiliation to join the winning party. As a result, the organizational structure of parties is too often not participatory. Parties that are not open and transparent are unlikely to remain democratic in their policy commitments. Without internal democracy, political parties tend to become individual fiefdoms where party loyalty is driven more by charismatic leadership than anything else. It is therefore vital that the Political Parties Act helps to create a culture of democracy in political parties.

IV. 2007 General Elections in Context

Background

The December 2007 Presidential elections marked a significant negative shift in Kenya's democratic evolution. While Kenyans eagerly engaged in the electoral process, voting in large numbers in a peaceful and patient manner, the results were followed by rioting, excessive use of force by police in response, and ethnic fighting that led to over 1,000 deaths. Large sections of the population fled their homes, and the Kenya Red Cross Society estimated that internal displacement affected upwards of 300,000 people in various locations in the country.

The Political Environment Prior to the 2007 Elections

2007 had witnessed dramatic shifts in Kenya's political transition. Raila Odinga, the flag bearer for the Orange Democratic Movement Party of Kenya (ODM), turned the emblem of the orange fruit used during the 2005 Constitutional Referendum into a potent political symbol. Incumbent President Mwai Kibaki sported a new consortium, the Party of National Unity (PNU), which consisted of an alliance of six major political parties and a number of smaller fringe parties.

The campaign period was dominated by the unfinished business of constitution-making, and the election campaign was colored by the referendum contest between the two political sides. Ethnicity was heightened due to perceptions of ethnic bias in public appointments, while the political class on all sides continued to demonstrate their inability to build consensus whenever serious political issues arose, even as they were extremely quick to unite for selfish personal gains such as increased salaries, personal emolument, and gratuities.

As the elections approached, the debate on whether to maintain a centralized government or adopt a federal government structure (*Majimbo*) divided Kenyans down the middle. ODM argued that *Majimbo* stood for devolution while PNU was emphatic that *Majimbo* referred to ethnic enclaves or tribal Balkans, and this issue was linked with the violence after the elections.

Early Warning Signs in Electoral Management

With the benefit of hindsight, it is possible to infer that a well-orchestrated plan was implemented to ensure a predetermined election result:

- a. President Kibaki's decision to abrogate the IPPG agreement of 1997 on the formula for appointments to the Electoral Commission ensured that all of the Commissioners were appointed by him alone. The IPPG agreement had capped the maximum number of Commissioners to 22 and reserved 10 seats to be filled by persons appointed by the President after recommendations by opposition parliamentary parties.
- b. The allegations of questionable procedure in the appointment of returning officers by Commissioners.

- c. An offer from the International Foundation for Election Systems (IFES) to install a computer program that would have enabled election officials in the constituencies to submit results electronically to Nairobi and then on to a giant screen available to the public, making it virtually impossible to change results, was rejected.
- d. The use of ECK staff in the Verification and Tallying Center was abandoned in favor of casual staff recruited directly by the Commissioners.
- e. The Commission refused to ensure that election officials in areas with large predictable majorities for any of the candidates came from different areas so as to reduce the likelihood of ballot stuffing.

Since opinion polls from the 2007 elections consistently indicated a very tight contest, the neutrality of the ECK was always paramount, particularly in the event of a thin margin and a too-close-to-call election. The new appointments made by President Kibaki to the ECK early in 2007 elicited protests from the opposition that he was fortifying the ECK with his supporters despite the need for the electoral body to be perceived as fair and independent, a perception crucial to political stability in a region where many political systems are unstable. Several actors appealed to President Kibaki to consult the opposition prior to making appointments to the Electoral Commission, with no perceptible effect.

These developments exacerbated problems within the ECK. Although the ECK had improved substantially since 2002 in its ability to manage elections, the commission still clung to many questionable practices. For example, votes were counted at the polling station without transportation to a central tallying center, a process prone to abuse and manipulation by the former regime. The unilateral appointments by the President meant that the ECK was now perceived as subject to control, direction, and manipulation by the government.

The Election Campaign Period

Once Raila Odinga was announced as the nominee for the ODM, it became clear that the race between he and incumbent President Kibaki would be close, although most opinion polls showed Raila Odinga with a healthy lead over the President. However, it was also apparent that both parties were tainted with fundamental conflicts of interest. Tribal loyalties on both sides of the political divide meant that supporters saw many deeply flawed politicians, even those accused of corruption, as worthy of leadership. ODM overcame the challenge of uniting behind a single presidential candidate and outlived the chaotic parliamentary nominations, which were characterized by thuggery, violence, and other forms of manipulation. The PNU nominations were equally chaotic.

Freedom of association, expression, and assembly were generally respected throughout the campaign period, even though various actors denounced the blatant abuse of public office and misuse of state resources in favor of the PNU. But perhaps the most perilous electoral offence was the unchecked use of negative speeches from both sides marked by ethno-political divisions that contributed to the volatile situation in the run-up to the elections.

Voting Day

On Thursday, December 27, 2007, Kenyans cast their vote in Presidential, parliamentary, and civic elections in a process that was considered to be free, fair, and transparent. Tallying and the declaration of civic and parliamentary results at constituency tallying centers was deemed to be largely free and fair, with the outcome of these two elections conforming to high standards of democratic elections and, consequently, considered to reflect the will of the people.

The Presidential Results

By contrast, the counting and tallying of Presidential votes at the national tallying center in Nairobi was criticized as deeply flawed by reports from observer teams including the EU Elections Observation Mission team, the East African Community Observer Mission, the Kenya Elections Domestic Observation Forum (KEDOF) and the Commonwealth Observer Group, among others. Serious concerns were raised about the manner in which the ECK concluded the presidential election and declared a winner.

Two days of controversy followed the tallying; paramilitary troops (the General Service Police Unit [GSU]) were mustered to escort the Chairman of the ECK out of the tallying hall and disperse the contestants, observers, agents, and media. On December 30, the ECK Chairman announced a result that was not backed by the required statutory documentation. Just minutes later, Mwai Kibaki was sworn in as President in a private ceremony.

This series of events triggered serious political and civil strife in Kenya. Businesses and institutions were compelled to move their staff from ethnically hostile areas; Kenya was seen to be on the verge of ethnic Balkanization. The outcome of the elections ethnically polarized the country. Escalation of the crisis threatened the economic and political stability of the entire region and carried the potential to undermine resolution of the existing instability in the Horn and the Great Lakes region.

Role of the ECK

Several apparent changes in the political environment from 2002 to 2007 had a great impact on the performance of the ECK. The changes included the constitutional referendum (although the new constitution was not adopted), the new political alliances, economic growth, and a higher unemployment rate. Additionally, the number of political parties had increased to more than 160, and the candidates increased by over 200%, with as many as 33 parliamentary candidates in a constituency. In 2002, there were approximately 1,200 candidates, which increased to 2,700 in 2007. The number of voters had also increased dramatically, by five million, the number of polling stations by 10,000, and the polling staff by 60,000. The internal atmosphere at the ECK had also drastically changed. The majority of Commissioners were new, damaging the institutional memory and thinking. With the arrival of new commissioners, the Chairman,

who had been more central to the execution of the mandate of the ECK, yielded to the new Commissioners despite their lack of experience.

Critical procedures were not updated to account for those changes, resulting in a number of technical errors in the system, as perceived by IFES:

- **Voter register** – Law requires that the ECK declare the official political parties register; this happened later for the 2007 election than good protocol would have required. Multiple records were used as polling registers; with the result that an accurate account of turnout could not be made since there was no base upon which to derive a numerical percentage. The other fundamental weakness in terms of the voter register was the late decision to split the registers. The polling center register remained from the pre-2002 era when votes were counted at tallying centers and registers were classified by large polling stations and split into streams. Additionally, the computer program for the registry of voters was not properly designed to reflect the number of voters by polling station, creating a bottleneck in late November, when the printing of the voter registry for each polling station was done.
- **Polling personnel** – The ECK issued a Circular on December 12, just prior to the election, noting that one Presiding Officers would be required for every two polling stations. Again, this announcement was made later than was necessary to allow for proper preparation.
- **Polling station rules** – The number of voters allowed inside the polling station is an important aspect of electioneering. Voters in Kenya reported many voters allowed inside the polling station at one time, which may have affected ballot secrecy.
- **Issuance of ballots** – Voters received multiple ballots at varying times for the three elections; good practice would require ballots to be issued together at one time.
- **Communication** – A system of communication protocol between District Coordinators, Provincial Electoral Officers, and Polling Officers was not established prior to the election, resulting in poor communication during voting. Even in Cambodia's 1992/1993 elections, when the country lacked any infrastructure at all, the Provincial Electoral Officer was in communication with all the district coordinators and each polling center.
- **Election materials** – Several of the polling materials used in the 2007 election such as a second embosser to stamp the counterfoil of each ballot, were unnecessary, while other, crucial materials, such as transparent ballot boxes, were lacking. Most notably, polling stations did not have:
 - *Form 16a* – Form 16a, the Statement of the Polling Station and Declaration of Results, is deemed a critical legal document for proper reporting of results. Technical assistance was offered to the ECK to revise the form to provide for multiple layers of approval; those recommendations were not heeded. Furthermore, although amendments were made to improve the form in 2002, polling stations in the 2007 election were sent the old form. For instance, Form 16A requires candidates' agents to sign affirming the results, but has no column indicating their party or which candidates they represent. For accountability

purposes, it was also recommended that the ECK make a common booklet of forms including the result form and reconciliation forms.

- *Tamperproof bags* – International technical experts also recommended the use of tamperproof bags. The bags were ordered, but most election officers were not properly trained on their use, and they remained unused in most polling stations.
- **Recruitment of polling staff** –The recruitment policy for registration and polling staff gives ECK Commissioners final approval authority for hired personnel, which may result in the hiring of relatives or friends.
- **No framework and provisions for provisional results** – While the ECK contends that certain results following the 2007 General Elections were provisional; IFES had previously deliberated with the ECK to ensure they would not issue provisional results. According to the ECK, any results that are liable to change would be damaging to the process. A series of meetings were held on this subject and the ECK's position was consistent. Additionally, officials were not trained in the publishing of provisional results. Since the ECK adopted two positions, it misled rather than enlightened participants and stakeholders.
- **Training** – In prior years, ECK Commissioners conducted training sessions for returning officers. In 2004, policy changed to specify that trainings would be conducted by the Secretariat staff and a hired election training manager. In training for the 2007 election, the ECK trainers utilized a manual meant for returning officers, District Election Coordinators and headquarters staff. However, the ECK training program was vague and incomplete. For example, writers of this report witnessed training sessions where, rather than being offered clear instruction, officers were told to use their judgment. In a similar vein, although donor groups provided laptops for the constituencies, an ICT literacy requirement was not included in the qualifications for assistant returning officers and the operation of the nomination and results programs by computer was not included in the training program.
- **Information technology support** – Outside of the ECK's ICT department and executive assistants, computers were not used in the 2002 elections. Since then, computers had been provided for each district office and training for the 43 ECK staff members. Nevertheless, most staff members are indifferent with regard to utilizing technological support to manage elections. Many, even most of the operational tasks are still accomplished manually. In 2007, laptop computers sat unused while the tallying of results at polling stations was conducted by hand, leading to a delay in transmission to headquarters.
- **Nomination of candidates** – The ECK has the authority to determine and execute the electoral calendar, despite delays that may be caused by the parties themselves. In 2007, the ECK established deadlines, including the last date for nominations, and then subsequently revised the dates in response to the parties' requests. The ECK also failed to accept an offer for a nomination computer system, which could be utilized to generate master copies of ballot papers.

- **Language proficiency test** – Recommendations to update the language test for election workers had been made to the ECK as early as 1997. The language proficiency test was poorly and centrally administered at the ECK offices in Nairobi, creating delays for party nominees.
- **Tallying of results** – In March 2007, the ECK accepted technical assistance for the design and use of a computer program to tally results at the national and constituency levels. However, the program was not utilized to the full extent possible in the 2007 election. At the constituency level, laptops were delivered on December 20, leaving insufficient time for poll workers to be trained; as a result, the machines were not used for tallying results. This unutilized technology could have facilitated the accurate tallying of results and immediately identified mistakes, manipulation, or rigging attempts. The results published by the ECK suffered allegations of manipulation by election officials after publication of result. This could have been avoided through instantaneously communicating tabulated results. An audit of the results trail also proves difficult given that the necessary documents have been under the custody of officials who were implicated in allegations.
- **Result reporting** – Issues of electoral administration hinge on matters of manner and form. The ECK did not follow regulations as to the form of declaration of results and publication. There are instances where returning officers filled statutory forms at the tally hall in Nairobi rather than at the tally centers, where they were obligated to complete the forms. Interviews with party officials also indicated that officials did not accommodate agents to accompany results as prescribed.
- **Number of MPs and councillors to be nominated by parties** – The Constitution of Kenya states that the number of MPs and councillors allowed for nomination is determined by the number of candidates elected for each party, “according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality,”. Additionally, the proportions are to be determined by the ECK following each general election and approved by the Chairman of the Commission. The proportion of seats allocated to PNU and ODM during the 2007 election did not correspond with the allocation regulations.

Observation Account – Background from the 2002 General Election

Electoral and political violence is a common occurrence in an election year in Kenya. According to the Kenyan Human Rights Commission, over 4,000 people deaths and 600,000 IDPs between 1991 and 2001 are attributable to election-related violence.¹⁰ Even with these statistics, the Carter Center described the 2002 general election as “a milestone for democracy in Africa . . . power has changed hands through the conduct of peaceful, democratic, and multiparty

¹⁰ “Killing the vote: State-sponsored violence and flaws election in Kenya” (1998), and Patrick Mutabi, “Political violence in the elections,” in Herve Maupeu, Musambayi Katumanga, and Winnie Mitullah, eds., *The Moi Succession: Elections 2002* (Nairobi: Transafrica Press, 2005).

elections.”¹¹ However, violence did occur prior to the election, when candidates were yet to obtain their political party nominations.

Nearly 20,000 domestic observers were active in the 2002 elections and verified the peaceful succession from the Moi presidency. On the political front, President Moi’s term had come to its constitutional end, reducing the risk of an overbearing incumbent, and he peacefully conceded the defeat of the candidate he backed. A critical political factor was also the unity of the major opposition parties in the formation of the NARC. On top of this, observers also noted that the two primary Presidential candidates were of the same ethnic origin, reducing the risk of an inter-ethnic drift.

There are several explanations for the relatively peaceful election in 2002. The first is the notable gap between the winner (who received more than 60% of votes) and the loser (with 30% of the vote). The second factor was the key role played by the ECK, which implemented a strong civic education campaign prior to the election. In its final report on the 2002 elections, the Institute for Education in Democracy (IED) in Kenyan suggested a number of improvements for future elections, including the reinforcement of the EMB, upgrading of voting procedures, and various reforms to the electoral system. Despite its critiques, IED also expressed its confidence in the ECK’s ability “to safeguard the credibility of the electoral process.”¹² An additional explanation is that the two main contenders were from the same tribe. The final explanation is that the incumbent was not in the race, and therefore the police and the bureaucracy were less ardent to pursue the ambitions of the government.

In this concert of appreciations for an exemplary electoral process, IFES pointed out major technical problems facing the ECK. In a report dated March 2002, nine months prior to the elections, IFES had already recommended a comprehensive set of measures aimed at improving the administration of elections, including training electoral officers and strengthening voting, counting, and reporting procedures. IFES also recommended the introduction of a more transparent communication policy during the entire electoral process.¹³ IFES observed that the broad endorsement of the 2002 results was influenced more by the opposition’s landslide victory than by the technical conduct of elections. Those elections revealed serious flaws in the production of voter registers, the distribution of materials, the counting procedures, and other critical processes. These flaws were simply overlooked because of the outcome of voting.¹⁴

Kenya’s experience was not very different from that of countless other countries where recent electoral transitions occurred smoothly because of large margins of victory for opposition candidates and ready endorsement of the results by the major competitors (Nicaragua 1990, South Africa 1994, Mexico 2000, Senegal 2000, Taiwan 2000). It should be stated that while the confidence vested in the EMB is drawn from perceptions of its technical capacity, its

¹¹ “Observing the 2002 Kenya Elections” (Atlanta: Carter Center, 2002).

¹² *Enhancing the Electoral Process in Kenya* (Nairobi: Institute for Education in Democracy, 2002), 123.

¹³ *Report: 2002 General Elections. Electoral Commission of Kenya Capacity Assessment*. (Nairobi: IFES, 2002).

¹⁴ *Technology Assistance 2007 Final Report*. (Nairobi: IFES-USAID, 2007).

transparency, and its consensual power, such confidence is fragile as these perceptions can quickly change. To build or rebuild such an institution is a major challenge to all electoral administrators and politicians who are convinced that “one characteristic feature of democracy is that outcomes appear in a particular way uncertain to all participants.”¹⁵ Meanwhile, administrators, politicians and the public must be convinced of the fairness and technical quality of the electoral process administration in order for the election to be deemed credible.

Observation Account – 2007 General Election

In contrast to the 2002 elections, international observers—specifically the EU delegation—and domestic groups—namely the KHRC—were critical of the conduct of the 2007 elections. The EU Election Observation Mission asserted that “the 2007 General Elections in Kenya fell short of key international and regional standards for democratic elections . . . the electoral process suffered from a lack of transparency in the processing and tallying of results, which undermined the confidence in the accuracy of the final result of the presidential election.”¹⁶ The KHRC was more tempered in its evaluation, noting on one hand the peaceful conduct of the voting day, while still expressing concern about the delays in reporting the results of the presidential election, which “triggered the act of violence in some cities and towns countrywide.”¹⁷

Three main political factors in the development of events around the December 2007 elections should be noted, all of which have been developed thoroughly by Joel D. Barkan.¹⁸ First, the presidential election, which was the only controversial one, opposed an incumbent president who had been accused of using his position in pursuit of reelection. Second, his opponent showed unexpected strength and was able to build a unified front after the landslide victory of the 2005 Constitutional Referendum. In the conclusion to his April 2007 report, Barkan notes that “this is the first time since Kenya’s independence in 1963 that an incumbent president faces a genuine prospect of defeat at the polls.” In the month preceding the December elections, several major public opinion polls noted a technical deadlock between the two strongest candidates. Third, there was a high degree of polarization within a society that had benefited from a remarkable rate of economic growth.

¹⁵ Adam Przeworski, *Democracy and the Market* (Cambridge: Cambridge University Press, 1991), p.40.

¹⁶ *Kenya Final Report. General Elections, 27 December 2007*, European Union Election Observation Mission, 3 April 2008.

¹⁷ KHRC, *Violating the vote: A report on the 2007 general elections*, February 27, 2008.

¹⁸ Joel D. Barkan, “Too close to call: Why Kibaki might lose the 2007 Kenyan election,” Online Africa Policy Forum, December 4, 2007.

V. Electoral Management Recommendations and Reform Concepts

EMB Composition

In 1997, with opposition parties threatening to boycott the general elections unless a new constitution was enacted, KANU, the ruling party, invited some opposition parties to accept a compromise of “minimum constitutional reforms” under the IPPG forum. The general understanding was that the IPPG mechanism was transitional and specific to the 1997 general elections. A comprehensive constitutional reform process was to follow and would be completed in the interlude between the 1997 elections and the next elections in 2002.

To ensure the implementation of this plan, Parliament enacted the Constitution of Kenya Review Act, Chapter 3A of the Laws of Kenya, which formed the Constitution of Kenya Review Commission (CKRC). The broad objective of Chapter 3A was to “facilitate the comprehensive review of the Constitution by the People of Kenya and for connected purposes.” By November 2002, the CKRC had prepared a draft constitution that was to be subjected to a final national conference before facing parliamentary and presidential approval.

Because the new constitution was not ready in time, the 2002 general elections were conducted under the old constitution’s minimal and outdated provisions, which had been tailored to the 1997 general elections. Following the 2002 elections, the constitutional crisis worsened; the comprehensive constitutional reform process collapsed in 2004, and the alternative process contrived under the Constitution of Kenya Review Act failed after a 2005 referendum. Attempts at enacting minimum reforms targeted at electoral framework in 2007 also failed. These failed processes recount the lost opportunities, which would have strengthened the constitutional foundation from which the ECK takes its authority and practice.

Because the IPPG arrangement, already outdated in 1997, was still in place for the 2007 elections, the ECK was forced to run these elections using an antiquated structure that did not suit its current needs. One of the most serious structural problems concerned the relationship between the Secretariat and the Commission. The Secretariat was established in 1998; headed by the commission secretary and comprised of the commission’s department heads, who also acted as secretaries to the ECK’s various committees, the Secretariat should have fundamentally changed the way in which the ECK operated by removing the burden of day-to-day administration and allowing the ECK to operate more effectively. That did not happen. Operating within a structure that predated its existence, the Secretariat, although large and professional, found itself in an ambiguous role. The division of roles, responsibilities, authority, and accountability between commissioners and staff remained unclear. As a result, where the Commission Secretary should have been responsible for administering departments and committees, the commissioners continued to play a domineering and authoritative role, often intervening in operational aspects of the Commission’s work, such as human resources management and procurement practices. This pervasive ambiguity in the relationship between Commissioners and Secretariat staff has greatly impeded the ECK’s operations. Two important changes would significantly expedite the functioning of Kenya’s electoral management body.

Recommendation 1: Reduce the number of commissioners.

First, the composition of the Commission should be changed. There are currently 22 commissioners, all of whom are full-time employees. This large number of commissioners increases bureaucratic hurdles and interferes with organizational effectiveness and efficiency. The number of commissioners should be reduced to nine, only two of whom (the Chairman and Vice-Chairman) should be full-time ECK employees. Reducing the number and involvement of commissioners would force the ECK to reduce its role in day-to-day managerial activities and allow the Secretariat to fill the role it was designed for.

Recommendation 2: Delegate greater responsibility to the Secretariat.

Second, in conjunction with a more limited role for the Commission, the Secretariat should take on a greater role. Although the ECK has recruited professional staff in many departments, those employees are often not encouraged to discharge their duties professionally; their capabilities are underutilized, and department heads sometimes act more or less as senior assistants to the many committees. Frequent committee meetings that require commissioner attendance often include as agenda items routine matters that the staff could easily resolve themselves if delegated adequate authority. With such authority, departments and committees would be able to work more efficiently with less interference from commissioners.

Internal ECK Reform

While the election management reforms recommended above would be more effective if they were statutorily grounded, others require only internal reform within the ECK. These simple reforms could greatly increase the Commission's effectiveness and efficiency.

Recommendation 3: Professionalize the Commission.

The effective management of an open, free, and fair election process requires knowledge beyond the mere reproduction of required protocols during election operations. Election management officials must have in-depth knowledge of the election principles that ground procedural and practical elements. Commissioners, management and senior officials should receive tailored training on election administration using the Basic Election Administration Training (BEAT) and Building Resources in Democracy, Governance, and Elections (BRIDGE) methodologies. Training on corporate governance and management to Commissioners and senior staff should follow.

Recommendation 4: Create a separate training unit under the elections department.

The elections training unit is currently classified with the voter education department. The result is that training materials and execution of training is frequently carried out with less involvement of core election officers. However, the education needs of election officials and voters are quite different, resulting in a department with a diverse set of goals and

responsibilities. The training department should instead be made a unit within the elections operations department, where the training required will fit with the focus of the unit. This will achieve greater harmony of roles and ensure core election officials are accountable for operational training.

Recommendation 5: Codify policies and procedures.

The codification of policies and procedures is particularly important because, while the electoral management body has the authority to manage elections, many electoral operations, such as the running of polling stations, are handled by temporary staff after minimal training; without detailed knowledge of policies and procedures, these temporary staff cannot conduct elections uniformly throughout a country. Because of the ECK's failure to fully codify policies and procedures, election management in Kenya has always suffered from such a lack of uniformity. Further problems were created during the 2007 elections when the Commission changed procedures shortly before the elections with little notice, preventing the changes from reaching many polling staff. The ECK must provide for the uniform conduct of elections throughout the country and more efficient internal operations by developing manuals to codify and detail its policies and procedures.

Recommendation 6: Improve the structure of the Secretariat.

In addition to assuming greater responsibility, the Secretariat should develop an improved organizational structure to increase efficiency and accountability. First, this structure should hold commissioners and staff accountable for results in specific areas of responsibility (nine of which have been laid out in the ECK's Strategic Plan), with delegated authorities to oversee each area at the Secretariat level. Second, the Secretariat should reduce the number of committees and clarify committee procedures; many committees currently operate under unclear terms of reference and have no documented agenda or minutes. Consolidating or eliminating ineffective committees will clarify lines of authority and focus resources.

Recommendation 7: Increase the integration of technology into election processes.

While electoral technology requires a pragmatic balance and account of the specific environment subsisting in a country, the ECK's technological capacity is severely lacking, inhibiting its ability to administer elections. Greater technological capacity would be particularly beneficial in improving the candidate nomination and voter registration processes and in reporting election results. Several steps would greatly enhance the ECK's ability to take advantage of information and communication technologies (ICT) to administer elections more effectively. First, ICT must be better integrated into all of the ECK's departments and staff members and Commissioners must develop a greater capacity to use the technology that is available. Second, the ICT department must research newer technologies and develop a greater capacity to respond to the Commission's needs. The successful integration of technology into both administrative processes and election-day procedures will enhance both the credibility of elections and the efficiency of ECK internal operations. To advance these recommendations,

the ICT department must be properly structured. The ECK has recruited a Manager and Deputy – two offices that previously remained vacant for some time. The next step is to enhance technical staff and define the structure to answer the ECK needs.

Between 2005 and 2006, IFES and ECK staff developed integrated software for automating procurement, stock control, supplies, warehouse logistics and fleet management. This software should be rolled out.

ECK Communications

Another effective way to improve the transparency and credibility of the ECK is through the development of a communications strategy. Internal and external communications that provide the media and the public with trustworthy information would greatly improve the ECK's capacity to deal with possible conflicts and play a greater role in the public's eye. Recommendations for a comprehensive strategy addressing internal and external communications have not been adopted since 2002. Currently the ECK communication is ad hoc and casual.

Recommendation 8: Reach out to the public through the media.

A good relationship with the media is essential to the establishment of a positive image and to build credibility with voters. There are many challenges in the implementation of new rules and regulations for the ECK, but when challenges are overcome, they become good opportunities for interacting with the media and defining the Commission's role in ensuring free, fair, and open elections. The ECK should be proactive in providing a regular flow of information, especially in the context of potential conflicts. The public should feel informed about the election and campaign process, and problems should be discussed and analyzed publicly in the early stages to avoid misinformation and misunderstandings that can ignite a violent response.

Recommendation 9: Improve internal communications.

Another crucial element is the establishment of open communications and a free flow of information within the ECK to ensure staff's ownership of the election process. The inclusion of all levels of staff in understanding the electoral body's mission and role in the promotion and implementation of elections makes the ECK more efficient and transparent.

Recommendation 10: Establish and maintain regular communication with important stakeholders.

One of the lessons learned from IFES's experience has been the importance of establishing communication channels with stakeholders early in the electoral cycle and, most importantly, continuing this communication during and after the election. When the situation is on the verge of conflict, even the most trivial event can result in a violent response and in the validation of this type of response to other similarly inconsequential developments. While the ECK has

generally improved on this count, communication remains ad hoc without policy guidance and dependent on the particular commissioner or staff.

ECK Mandate

Section 42A of the Constitution specifies the mandate of the ECK. While this section includes a catch-all provision providing for “such other functions as may be prescribed by law,” an electoral law should be enacted to provide a comprehensive scope of ECK’s mandate. Therefore, laws expanding the mandate of the ECK to empower the Commission to conduct referenda, enact regulations, and resolve electoral disputes should be considered.

Recommendation 11: Allow the ECK to conduct referenda.

Conducting referenda falls solidly within the scope of most EMB mandates, but the Constitution of Kenya fails to accord the ECK that power in Section 42A. The ECK’s authority to conduct referenda should be made official in the Constitution or in an Elections and Referenda Act. Specific provisions should also be provided in the governing statute similar to those provided in the National Assembly and Presidential Elections Act.

Recommendation 12: Allow the ECK to enact regulations.

Section 34 of the National Assembly and Presidential Elections Act empowers the ECK to enact regulations for the purpose of enforcing the act. This section also, however, subjects this power to approval by the National Assembly; ECK resolutions must be approved by a parliamentary resolution. While this provision vindicates the general legislative authority of the Assembly, the ECK should be reserved some power to enact regulations without legislative involvement. The Chairman of the ECK should be given the same power accorded ministers to publish regulations on specific areas, provided such regulations are consistent with the parent statute. Such authority would enhance the ECK’s capacity to run elections efficiently. Supervisory authority of parliament is secured in section 41 (10) and is sufficient to countercheck any attempt by the ECK to overstep its mandate.

Recommendation 13: Empower the ECK to resolve electoral disputes.

The ECK has repeatedly lamented that it lacks the power to address electoral conflict. Election conflicts are handled by the courts, leaving the ECK with no dispute resolution powers of its own; as a result, the court is overburdened and the ECK has no authority to take initiative in dispute resolution. According to the ECK its dispute resolution powers in the code of conduct is feeble and ineffective. This system should be replaced by a two-tiered dispute resolution mechanism affording clear powers to the ECK. The first tier of dispute resolution would involve a tribunal constituted by a committee of the ECK. This tribunal would have clear, published procedures allowing it to address conflicts that arise before and after elections. The second tier of resolution would involve the review of resolution of petitions, review of ECK rulings and appeal of specific cases; this tier would solely involve the judiciary. With such a two-tier system,

electoral disputes could be better handled, as the ECK would be able to take greater initiative in addressing disputes early on, and the courts would be less overburdened. In addition, and perhaps most importantly, public confidence may be restored in the Kenyan electoral dispute resolution system.

ECK Accountability

The Constitution of Kenya provides for dual oversight of the ECK by both the executive and legislative branches. The President is empowered to constitute a tribunal to investigate the conduct of Commissioners for misbehavior or the inability or failure to execute their duties, while the National Assembly is charged with ensuring the orderly and effective conduct of operations and overseeing the Commission's powers to appoint staff, establish committees, and regulate procedures. The accountability to the national assembly is largely undischarged.

Recommendation 14: Make the ECK accountable to the National Assembly.

The ECK should report to the national assembly its annual programs. This would give parliament effective means in interrogation of the ECK, in light of audit reports by the Auditor General.

ECK Role in Voter Education

The ECK's voter education strategy drafted in 2005 considered Kenya's vibrant civil society and the capacity of the ECK to partner with other organizations in the delivery of competent voter education. The Commission had the responsibility to structure this partnership and develop curriculum, quality assurance and materials. The ECK worked well with the Project Management Unit in the development of training, standards, and quality control procedures and in resource mobilization. This should be outlined in a comprehensive policy and strategy.

Recommendation 15: Mainstream voter education.

The ECK should have an active role in the mainstreaming of civic and voter education. For example, such a program in secondary schools can inculcate democratic principles and underlying justifications at an early age. In 2008, in response to the post-election violence, IFES included in its civic education school kits developed for Kenyan secondary and primary schools, a module on nation building. This module seeks to raise awareness and understanding of nationhood and state structures. This awareness, the missing link in previous public orientations, is the first steps in making young students think of themselves as Kenyans, rather than members of opposing ethnic groups, and the ECK has a role to play in getting this message across to all Kenyans.

VI. Voter Registration Recommendations and Reform Concepts

Background

In 2002, Kenya reformed its electoral regulations to introduce vote counting at polling stations. Because results had been counted at polling centers rather than polling stations, registration also occurred at polling centers, and voters, who could register at any polling station within the area covered by their polling center, would sometimes register and vote, undetected and undetectable, at more than one polling station. The change to voting and registering at polling and registration stations rather than at more-distant centers represented a positive development intended to increase the integrity of elections in Kenya by eliminating this possibility.

This change also prompted a necessary review of polling station infrastructure. The ECK renamed existing polling stations polling centers and divided the areas they had covered among smaller polling stations, each covering no more than 1,000 registered voters. While a convenient way to implement the new regulations, this breakup of polling stations created a serious problem and did not address the pre-200 legacy of having registers classified by polling centers. Additionally, the question was raised of how could new polling stations develop their own voter registers. There were two primary solutions to this problem: registering voters in distinct polling stations or somehow splitting the register and conducting registration inspections and audits. At the same time, the ECK had to address the problem posed by existing inaccuracies in the register; for example, dead voters often remained undeleted, and much of the information on voter particulars was inaccurate.

In 2007, to address the problem posed by the polling station–polling center relationship, the ECK made a last-minute decision to split the polling center registers into smaller registers for each polling station. This was a welcome measure, the only limit to its efficacy being the decision’s lateness and the consequent lack of proper training for presiding officers to put visible signage in the polling centers. To address the problem of inaccuracies, the ECK established district registration committees in 2004 to work in concert with registration bureaus to obtain proper records and publicize an inspection exercise.

In another effort to improve the voter registry, the ECK and other government departments managing disparate registration regimes have been engaged since 2003 in a long-term effort to integrate voter registration into a civil registry that would include the entire Kenyan population. This would be a timely measure, particularly in view of the national population census due in 2009. An integrated registration system would make it easier to update the register, clean the voter rolls, and audit the system.

Despite efforts at reform, the 2007 elections saw numerous problems relating to the voter registers. Many voters were turned away from the polls because their names had not been recorded in the register, and others voted more than once because their names were recorded

multiple times. Several key changes would help ensure greater integrity in the voter registers and more legitimate future elections.

Recommendation 16: Create separate voter registers for polling stations.

In order to accommodate the new polling station–based vote counting, new polling station–based voter registers should be created. Voters should register, and voter registers be created, at registration centers. Each voter who registers at the center will be assigned to a specific registration station, and each station will have up to a predetermined number of registered voters (for example, 500). Additional registration stations will be created as the number of voters at the registration center grows. The registration centers and registration stations will become polling centers and polling stations, respectively, during an election.

Registration centers and registration stations should be given code numbers and names independent of the provincial administration and electoral boundaries, both of which are subject to occasional changes. One way to achieve this goal is to assign to registration centers code numbers that run serially for the entire country (for example, from 00001 to 99999). The names assigned could be those of public institutions or facilities where the registration center is located. The registration stations will be assigned a serially running alphabetic, numeric, or alphanumeric code (for example A to Z, 01 to 99, or A0 to Z9), which will be appended to the name of the registration center in order to identify it. The complete registration station code number will be formed by combining the registration center code number and the registration station serial code (for example, 00001/A or 00001/01, indicating the first Polling Station (A or 01) at the first registration center (00001)).

Recommendation 17: Revise the voter register.

Although creating separate voter registers for polling stations is a necessary first step, additional revision of voter registers may be necessary. To determine whether such revision should be undertaken, an audit of the existing voter registers should be conducted. If this audit finds repeated problems with the registers, such as voters being registered multiple times, the registers should be fundamentally revised. Such a revision would require an entirely new voter registration process and, as a result, would also require an extensive voter education program to inform voters when and how to register according to the new system. If the registers are revised in this way, the following information should be recorded for each registering voter:

1. **Index Number:** Each voter should be assigned a unique index number composed of a combination of the polling station code number and a serially running code number that identifies the voter at the registration station (for example, 00001/A/001 or 00001/01/001, standing for the first voter (001) of the first registration station (A or 01) at the first registration center (00001)). Once an index number has been assigned to a voter, it should be retained for all future references and may not be assigned to another voter at the same registration station.
2. **Voter's Name:** This is the name of the voter as it appears on the identification document. It

- should distinguish the surname, first name, and, optionally, the middle name(s).
3. Sex: This will indicate whether the voter is male or female.
 4. Date of Birth or Year of Birth: Where the full date of birth of the voter is known, then it should be recorded. Where the full date of birth is not known, but the year is, then this will be used instead.
 5. National Identification or Passport Number: The national identification number as shown on the national ID card or the passport number as shown on the passport should be entered, depending on which identification document is used during registration.
 6. Photograph: A passport-size photograph (colored or black and white) of the voter taken with the head and face uncovered will be used to provide positive identification.
 7. Thumbprint: A thumbprint of the voter will be marked on the application form and elector's card. It will be stored in the database but not printed in the register.
 8. Serial Number of Elector's Card/Application Form: Each application form will have an elector's card attached as a tear-off slip. The serial number that appears on the application form will also be printed on the elector's card. The number shall consist of ten digits, the last two of which will be check digits.
 9. Date of Registration: This is the date when the voter was registered and issued an elector's card. This will usually be the same as the date the application for registration was submitted.
 10. Place of Registration: This is the place at which the application for registration was received and elector's card issued. This will usually be the registration center but may also be the district election offices or any other designated offices.
 11. Postal Address or Provincial Administration Office: This will be the postal address at which the applicant usually receives mail. Where the postal address is not available, the office of the local provincial administration office may be provided.
 12. Residential Address – Estate/Street/House or Plot Number, or Village: This is the applicant's place of residence. In urban areas, this will usually include the estate, street, and house or plot number of the residence. In rural areas, this will usually be the sublocation or village.
 13. Voter's Literacy or Education Level: This will indicate whether or not the voter is literate and the highest education level attained by the voter (primary school, secondary school, middle-level college, or university).
 14. Nature of Voter's Disability (if any): This will indicate the type(s) of any physical disability, including problems with limbs, vision, speech or hearing, that may affect an applicant's ability to vote or make them require assistance.
 15. Registration Center Code Number: This is the code number for the registration center at which the voter is registered, which is usually the polling center at which the voter will cast the ballot on voting day.
 16. Registration Center Name: This is the name of the registration center at which the voter is registered.
 17. Registration Station Code Number: This is the code number of the registration station at the registration center in whose register the voter's name will appear. The registration station will usually serve as the polling station on voting day.
 18. Registration Station Name: This is the name of the registration station at the registration center in whose register the voter's name will appear.

The names of voters will be printed in the register in the order of the index number. This will ensure that the order of names in the register remains the same and that it is easy to predict the page in the register on which a voter's name will appear in order to facilitate inspection and voting.

In addition to the voter register, a delimitation database should also be created. This database will hold details of electoral and administrative units with which the registration centers will be associated at any given time. Electoral units will include the constituencies, local authorities, and electoral areas. Administrative units will include the provinces, districts, divisions, locations, and sub locations. The delimitation database will be indirectly linked to the voter register through the registration center in order to ensure that any changes in the electoral or administrative units do not affect the register to the extent of requiring that new elector's cards be issued.

The voter registers, whether revised or not, will have to be regularly updated, controlled for quality, and audited to ensure they remain credible. Regulations currently provide for specific inspection of the registers. This can be enhanced by providing technology for quality control during reviews. IFES proposes using a cyclic redundancy checksum (CRC) for transparency and quality control in the voter registration database. According to this methodology, a standard procedure would be adopted for computing a CRC checksum for every row of data in every table in the voter registration database. This procedure would be followed by a second procedure that compares the CRC checksums with a benchmark calculated from an earlier version of the database. It is recommended that the following steps be followed before and after any period of updating the voter registration database:

1. BEFORE UPDATE: CRC procedure is run, with results to be distributed to all stakeholders, allowing them to do their own comparison with a benchmark. Comparison procedure is run. The results of the comparison are documented and verified.
2. AFTER UPDATE: CRC procedure is run. The output of the procedure is distributed to all stakeholders. This output will include a CRC checksum for every row of data in every table in the database. This benchmark can subsequently be used by stakeholders at any time when the database is reopened for changes to determine if any variations have been made, and if so, what rows of data have been altered.

Recommendation 18: Consider switching to an electronic voter registration system.

The current voter registration system in Kenya is manual; voters manually complete registration forms, which are subsequently scanned using optical mark readers. The ECK should consider whether it would be desirable or feasible for Kenya to switch to an electronic voter registration system. With such a system, voter registration forms would be scanned using image scanners. The forms would then be processed to capture the data and stored in an image library, which would also hold images of voters' thumbprints and photographs. This image library would employ a biometric identification system that could compare these thumbprints and photographs with others in the register to check for duplicate registrations. This electronic

system would considerably enhance the integrity of the voter register. However, the ECK would need to ensure that it could sustainably invest in such a system, as the procurement, setup, and maintenance costs vastly exceed the cost of maintaining the current manual system.

VII. Boundary Delimitation and Electoral System Reform

The electoral process is generally divided into two broad categories—system and management. The *electoral system* is the broad overarching design and legislation of elections, and *electoral management* encompasses the practical and administrative aspects of functioning within the system. Previous recommendations focused on reforms to electoral management practices, but changes are required in the system itself, including reforms to the process of delimiting constituency boundaries. In fact, IFES recommends substantial reforms to Kenya's electoral system as a whole as well as to the boundary delimitation process.

The current constituency set-up indicates wide variances in population density in different regions. Reasons for the disparities in constituencies are partially derived from the manipulation of constituency boundaries with the intention of keeping senate members in power when the two houses were merged in 1966 and other historical reasons. While these issues pose serious challenges, the constitution mandates the commission and parliament may correct or update the status of the boundaries based on current realities.

A definite set of criteria for the delimitation of constituencies has been discussed on at least three ECK special events: at the Naivasha and Safari Park retreats and during the strategic planning exercise. At the Naivasha retreat, the ECK proposed delimitation reforms that would segregate the regions by geographic and population density factors (urban, city, semi-urban, rural, arid, and semi-arid) and set different population magnitude quotas for each district. While these divisions would be helpful in terms of management, the assignment of different quotas based on demographics violates the “one person, one vote” principle by diluting votes in more populous regions. Between 2005 and 2006, the ECK conducted district hearings aimed at recommending boundary review. The recommendations failed at the adoption stage in parliament in 2007.

Recommendation 19: Make constituency delimitation the clear mandate of an independent commission (either the ECK or a new entity) with an obligation to consult the National Assembly and other stakeholders and delimit constituencies based on widely agreed-upon principles and criteria with fixed maximum deviations for population size while maintaining the ECK's technical roles in developing and maintaining the database.

There is currently confusion about who has authority to draw constituency boundaries, the ECK or the National Assembly. Section 42(1) of the constitution specifies that “Kenya shall be divided into such number of constituencies as the electoral commission may prescribe.” However, subsection 2 empowers the National Assembly to prescribe the minimum and the maximum number of constituencies into which Kenya shall be divided and specifies that, until the Assembly exercises this power, the minimum number of constituencies shall be 188 and the maximum 210. This second limb of subsection 2 gives mandatory provisions by the use of the word “shall” but it is expressly contingent on the first limb's statement that the National Assembly may determine the ruling floor and ceiling. The controversy surrounding this section revolves around whether the Commission must refer to the Assembly in exercising its section

42(1) mandate or whether the Assembly can exercise its power in the first limb of section 42(2) by simple majority. These ambiguities in the overlapping mandate have so far been settled in the benefit of efficacy by the Commission waiting for Parliament to lift the lid on the maximum number of constituencies before it may review boundaries.

A related controversy concerns population equity. The constituencies as currently drawn are wildly disproportional according to the latest available population census, to the extent that they may be in violation of the Constitutional criteria for representation and are certainly not in accord with the “one person, one vote” principle. According to 2007 data, for instance, Lamu East Constituency had 12,866 registered voters while the largest constituency, Embakasi, had 249,903. Thus one vote of a Lamu East resident is worth approximately 19 Embakasi votes. The constitution provides that “all constituencies shall contain as nearly equal number of inhabitants” as appear to be reasonably practicable, but moderates this provision by permitting the Commission to depart from the mandate with regards to a number of factors: geographical features, community interest, population trends, means of communication, and boundaries of existing administrative districts. This level of variance, however, is hardly consistent with the Constitutional intent.

The Electoral System Background

One of the greatest challenges to the future of democracy is the issue of ensuring fair representation, and no electoral issue poses a more complicated problem. Exact representation is impossible to achieve in the literal sense of the word. Every man and woman has a host of conflicting desires, fears, hopes, and expectations, and no government can represent them all. The pertinent question is: How best can we ensure representation of the people without neglecting significant segments of the population?

The Kenyan Electoral System: First Past The Post (FPTP)

Kenya inherited the FPTP electoral system from the British and still uses it as the governing model for achieving representation. Also known as the “winner takes all” system, FPTP is often commended for its simplicity and ease of implementation. It operates in single-member districts (SMDs) on the premise that only one candidate is elected to represent a given district in its entirety. The winner is the candidate who receives a plurality of the vote (more votes than any other opponent); an absolute majority (50 percent plus one) is not required.

FPTP is most credited for its ability to yield strong legislative majorities and produce effective governing capacity. Further, the fact that one member bears responsibility for a single district translates into strong geographic representation and a tangible link between constituents and their representatives. Thus, it is thought that parties can better be held accountable for their actions.

Critics of plurality-majority systems, however, often charge that these same advantages lead to a number of critical disadvantages. Most notably, these systems intrinsically exclude smaller

parties from entry into the electoral process and thus lead to the election of officials who may not constitute a “fair” representation of their constituents. This disproportionality is thought to be particularly detrimental in divided societies, as it excludes minority ethnic groups from participation in government and enables parties to coalesce along ethnic lines. This dynamic can have destabilizing effects and lead to the further consolidation of power by ethnic majorities. Additionally, the system yields a great number of wasted votes and thus creates potentially dangerous feelings of alienation by minority parties or ethnic groups. Finally, plurality-majority systems are often criticized for their exclusion of women.

A look at Kenya’s 1997 elections results reveals the representative imbalances that have been institutionalized by the FPTP model. In this case, highly populated areas were accorded the same single-member representation as areas with sparse populations. Huge populations of electors are in essence underrepresented, while other areas are overrepresented. As a result, in the 1997 elections, KANU received 51% of the seats but only 38% of the parliamentary votes.¹⁹

Proportional Representation (PR)

PR arose as a response to the shortcomings associated with the FPTP electoral system. PR is the name given to a family of election systems intended to realize a simple basic principle: although the majority has the right of decision, everyone has the right to representation. As British philosopher John Stuart Mill,²⁰ writing on proportional representation, avers, in a truly equal democracy, any and every section would be represented, not disproportionately but proportionately.

PR operates in multi-member districts where parties campaign for a predetermined number of seats. Such systems are implemented on the rationale that a party’s share of elected officials should be based on the proportion of votes it receives. PR systems are thus not employed in single-member districts or Presidential elections because of the inherent impossibility of dividing a single seat. With PR, parties typically field a list of candidates, and the number of candidates from a particular party’s list that are elected should, as closely as possible, correspond to the percentage of votes the party receives. Thus, in a district with 10 seats, a party with 70% of the vote would receive 7 seats, while a minority party with as little as 10% of the vote would still receive 1 seat. PR is capable of being applied in a way that is not limited to geographic constituencies, so that non-geographic interests such as gender, age, and religion may be considered with the assumption that these aggregate other interests, including geographic ones. PR seeks to ensure that voters in the majority will earn a majority of seats, but that voters in the minority will also earn their fair share of representation.²¹ Thus, PR allows a legislature to reflect the full range of interests of those who voted for it. Applied in Kenya, it

¹⁹ Source, *A New Electoral System Based on Proportional Representation or “List PR” in A:\semi-PR.htm*

²⁰ John Stuart Mill, Chapter VII, “of True and False Democracy; Representation of all and representation of the majority only.” *Representative Government*, 2nd ed. (London: Park, Son and Bourn, 1861).

²¹ Rob Richard and Steven Hill “A case for proportional representation,” *Social Policy*, vol. 26, no. 4 (Summer 1996).

would require a shift from the current constituency-based elections, in which candidates campaign for a single seat, to elections where party lists vie for multiple seats.

PR systems have a number of advantages over FPTP. First, they facilitate the inclusion of minority political groups and thus engender results which are more fully representative of constituents. This faithful translation of votes cast into seats won is thought to yield a type of government that operates on the premise of compromise and avoids the destabilizing effects of adversarial politics. Because PR incorporates the use of party lists, it is thought to foster inclusive parties that attempt to appeal to a wide range of individuals across differences of region, ethnicity, or gender to maximize their share of the national vote.

However, despite PR's relative appeal, it has a number of drawbacks. First, the inclusion of minority parties is thought to produce weak, unstable coalition governments and a fragmented party system, leading to an increased potential for legislative gridlock and weakened legislative-executive relations, a dynamic that results in reduced governing capacity. Second, because PR does not require the delimitation of constituencies, both geographic representation and the linkage between voters and representatives are thought to be compromised. Third, the ability to hold a single party accountable for its actions and remove it from power proves difficult under the coalition governments typically produced by PR. Fourth, PR may enable extremist parties with radical agendas to gain destructive representation in government. Finally, PR is a relatively complex system when compared to FPTP and is thought to be more costly and difficult with regards to voter education, especially in developing countries. As a result of these drawbacks, PR has not been universally embraced.

Mixed Member Proportional Representation (MMPR)

It is against this background that the MMPR system has been proposed. MMPR systems, also known as "additional member" systems, "compensatory PR," "two-vote" systems, and "German systems," attempt to combine a single-member constituency system with a proportional voting system. MMPR features two systems working at once, with the use of PR contingent on the results of the constituency-based FPTP system. The aim is to allow voters to choose an individual local representative while at the same time ensuring that all parties get their fair share of legislative seats.

Proponents claim that MMPR voting provides the best of both worlds. Mainwaring and Shugart, for instance, write that the underlying rationale of MMPR is to design an electoral system which combines the virtues of majority rule and PR.²² Generally, it is thought that the high degree of representativeness characteristic of PR systems is balanced with the governing capacity, geographic representation, and level of accountability characteristic of plurality-majority systems.

²² Scott Mainwaring and Matthew Shugart, eds. *Mixed member electoral systems: The best of both worlds* (Oxford: Oxford University Press, 2001).

Mixed systems, however, also have a number of shortcomings that warrant consideration. Most importantly, they have the potential to create two classes of representatives –, with the plurality-majority group beholden to constituents and the PR group beholden to the party. Also, mixed systems can lead to “strategic voting” and generally require a higher degree of voter education than do FPTP or PR systems.

Despite these disadvantages, MMPR has been proven to be an effective electoral system for countries such as Kenya striving to deal with the delicate balancing of varied population densities. MMPR has the potential to combine proportional results with the geographic representation currently existing in Kenya. Hence, MMPR guarantees representation of communities of interest defined not by geography but rather by how voters think, choose to organize themselves, and choose to vote.

The Constitution of Kenya Review Commission, in its report *The People’s Choice*, proposed the adoption of the MMPR electoral system in Kenya, based on the recommendations given to the commission and the displeasure that Kenyans expressed with the current electoral system. It is noteworthy that the Commission further proposed a 300-member assembly in which 90 members would be elected through the pure PR system and the remaining 210 seats would be filled through single-member constituency elections under the FPTP system.

Recommendation 20: Consider provisions on election of legislators with provisions defining an MMPR system with key parameters explicitly stated:

- a. a. A threshold of at least 5% that political parties must achieve before they qualify for seat allocation under the PR system.*
- b. The number of seats to be allocated under PR and those to be allocated under single-member constituency plurality contests.*

Prospect of Reform

The Independent Review Commission is mandated to recommend reforms in the electoral process. While one argument is that far reaching reforms should be required in the wider constitutional reforms, it is also necessary to put forth the argument for urgent electoral reforms. This is due to the centrality of the ECK in the constitutional review process and in administering the referendum. Two alternative proposals are appropriate in the interim:

- 1.** Parliament may enact a constitutional reform package aimed at the electoral process, and including constitutional, statutory and regulatory elements.
- 2.** Alternatively, parliament could instead exercise its supervisory power in section 41(10) of the Constitution to provide for a comprehensive code of conduct for the commission regulating the framework. Within this authority, Parliament may recommend that the ECK commissioners – perhaps with the exception of the Chair – be part-time. This recommendation also includes the appointment of a Director of Elections / Chief Election Officer, as well as a streamlined electoral oriented Secretariat.

Acronym List

BEAT	Basic Election Administration Training
BRIDGE	Building Resources in Democracy, Governance, and Elections
CKRC	Constitution of Kenya Review Commission
CRC	Cyclic Redundancy Checksum
EAP	Eminent African Persons group
ECK	Electoral Commission of Kenya
EMB	Electoral Management Body
EU	European Union
FPTP	First-Past-the-Post
GNU	Government of National Unity
GSU	General Service (Police) Unit
ICT	Information and Communication Technology
IDP	Internally Displaced Person
IFES	International Foundation for Electoral Systems
IPPG	Inter Party Parliamentary Group
IREC	Independent Review Committee
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KEDOF	Kenya Election Domestic Observer Forum
KPU	Kenya People's Union
MMPR	Mixed Member Proportional Representation
MP	Member of Parliament
NARC	National Rainbow Coalition
NCEC	National Convention Executive Council
NCPC	National Convention Planning Committee
ODM	Orange Democratic Movement
OSIEA	Open Society Institute – East Africa
PNU	Party of National Unity
PR	Proportional Representation
SMD	Single-Member District
UN	United Nations