

**THE CONTRIBUTION OF POST ELECTION CRISES TO THE GROWTH OF
ELECTORAL DEMOCRACY IN AFRICA;
A CASE STUDY OF THE 2008 POST ELECTION VIOLENCE IN KENYA**

BY

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DECLARATION

I **Lucas Ongeri Manwa** do declare that this work is as a result of an original study, and has not been published and/ or submitted for any other degree award to any other University before.

Signed..........

Date.....25/09/2011.....

Researcher

I..... do declare that this study has been conducted under my watchful supervision and guidance till the end.

Signed.....

Date.....

Supervisor

DEDICATION

This research report is dedicated to my loving father, Mr. Peter Ongeru for giving me an opportunity to study; to my adorable mother, Mrs. Clare Kemuma for her support; to my brothers Edwin Maronda and Antony Manwa ; and to all the people of Kenya who were adversely affected by the post-election violence. This one is for you all.

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I am in all ways indebted to a number of people.

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ACRONYMS

ECK	Electoral Commission of Kenya
CIPEV	Commission of Inquiry into Post Election Violence
IREC	Independent Review Commission
UDHR	Universal Declaration on Human Rights
ICCPR	International Covenant on Civil and Political Rights
CRPWD	Convention on the Rights of Persons with Disabilities
ACHPR	African Charter on Human and People's Rights
AU	African Union
IPPG	Inter-Parties Parliamentary Group
UN	United Nations
KANU	Kenya African National Union
KAMATUSA	Kalenjin, Maasai, Turkana, Samburu
NGOs	Non-Governmental Organizations
GSU	General Service Unit
ICESCR	International Covenant on Economic, Social and Cultural Rights
CSOs	Civil Society Organizations
TJRC	Truth, Justice and Reconciliation Commission
MDC	Movement for Democratic Change
ODM	Orange Democratic Movement
PNU	Party of National Unity
ICC	International Criminal Court
IIEC	Interim Independent Electoral Commission
IEBR	Independent Elections and Boundaries Commission
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
ICERD	International Convention on the Elimination of all forms of Racial Discrimination

ABSTRACT

On 30th December 2007, following the announcement of the presidential election results in Kenya; violence broke out in several places across the country amidst claims that the electoral commission of Kenya (ECK) had rigged the presidential election. Sporadic eruptions continued for many weeks, bringing death and destruction to thousands of Kenyans. The general purpose of the study was to examine the contribution of the post-election violence to the growth of electoral democracy in Kenya and relate it to the rest of Africa.

The objective of the study is to establish how the violence affected the growth of electoral democracy in Kenya, examine the constitutional and legal framework and identifies any weaknesses or inconsistencies in the electoral process, establish reformative areas of the electoral system to enhance democratic elections and to establish measures to eradicate impunity and promote electoral democracy in Kenya.

In conformity with scope of the study, the report examines the causes of post-election crisis in Kenya from independence to date and presents its findings and recommendations.

The study establishes that violence has been a recurring feature in Kenyan elections since independence and that violence had previously been confined within tribal lines. The 2008 post-election violence in Kenya intimidated the right to vote, and be voted in any political office and the concept of free and fair elections was greatly impaired. The study also found out that majority of the electorate think that even if they participate in democratic elections, the outcome will be compromised as it was in the 2007 elections thus voter apathy is prevalent among the people especially those in the violence-stricken areas.

The study recommends that since democracy is a practice, there is a need to implement the findings and recommendations addressed in the Commission of Inquiry into Post Election Violence in Kenya (CIPEV) and the Independent Review Commission (IREC).

debated political transition in Kenya and succeeded in substituting British colonial rule with elected African leaders.

In pre-colonial times, there was no centralized political system resembling states in the modern sense. Communities comprised small units' bound together by kinship and other forms of affinity. They planned and pursued common activities guided by well established norms and customs. The clan was the central unit in most of these societies and was repository of community management and of conflict management and of conflict prevention and resolution. Leadership was based either on age and gender, with male elders forming local councils, or on hereditary, such as the Laibon system of the Maasai community.¹

From the time the ban on African political parties was lifted in 1960, Kenya has seen-sawed between single –partysim and multi-partysim until the triumph- so – far of de jure multi-partysim in 1991.

At the time of the elections in 2007, Kenya had undergone three other general elections since the restoration of multi party democracy in 1991. In addition to this, in 2005, Kenya saw a successful constitutional referendum that left the international community hailing Kenya as a country where electoral democracy had taken root and had been successfully established. The country became an African example where a president-backed draft constitution was defeated at the referendum by an opposition backed faction. As a result, the Electoral Commission of Kenya (ECK) as it then was declared the most effective electoral body in Sub-Saharan Africa.

After the violence that rocked the country on 30th December, 2007, following the announcement of the presidential election results an African Union-sponsored Panel of Eminent Personalities led by former United Nations Secretary General Koffi Annan brokered a settlement which heralded a government of national unity between the main

¹ Kenya Election 1997: Free and Fair? International Commission of Jurists (Kenya section), November 1997, p.6

Political parties and a common commitment to urgent constitutional reform. The settlement included the appointment of two commissions, one to examine the violence and the other to examine the December 2007 Kenyan elections from various perspectives.

These two commissions were: The Commission of Inquiry into Post-election Violence² (CIPEV) chaired by Justice Philip Waki and the Independent Review Commission³ (IREC) chaired by Judge Johann Kriegler, a retired South African Judge.

CIPEV, famously known as **the Waki Commission** was mandated⁴ to investigate the post-election violence in Kenya and the surrounding events in the country as part of efforts aimed at averting and preventing further wide scale conflicts in the country. The Commission was asked to establish the facts about how such grievous violence was conceived, planned and executed, to consider the failure to enforce existing mechanisms to prevent the violence and, recommend measures aimed at redressing the consequences of the violence and at preventing possible recurrence of such violence.

The Commission was asked specifically to investigate the events after the introduction of multi party democracy in the country and the subsequent tribal clashes that preceded the 1992 and 1997 general elections and the events after the 2005 referendum. It was also directed to investigate the role, before, during and after the violence, of the Kenyan government and its agencies, individual persons and non-governmental organizations. The commission was also mandated to investigate what politicians and the government individually or collectively could have done to avert the violence.

The IREC, famously known as **the Kriegler Commission**, on the other hand was mandated to present, in conformity with the terms and reference,⁵ its findings and recommendations, based on its analysis of the legal framework for the conduct of

² The Kenya Gazette, Vol. CX-No. 41, Gazette Notice No. 4473, Nairobi, 23rd May, 2008

³ The Kenya Gazette, Vol. CX-No.23, Gazette Notice No.1982, Nairobi, 14th March, 2008

⁴ The Kenya Gazette, Vol. CX-No 41, Gazette Notice No. 4474, Nairobi, 23rd May, 2008

⁵ The Kenya Gazette, Vol. CX-No 23, Gazette Notice No. 1983, Nairobi, 14th March, 2008

elections in Kenya, the structure, composition and management system of the Electoral commission of Kenya and its organization and conduct of the 2007 electoral operations.

Therefore looking at the violence that followed the 2007 presidential elections, we can arrive at a conclusion that such violence could have been averted if only measures had been taken to implement the legal framework on elections and punish previous perpetrators of this violence. It is possible to identify the key steps that led from the late pre-multiparty period to the violence a decade and a half later. There was nothing inexorable about this process. At its heart was the deliberate choice of successive elites to deepen the cleavages the country's main ethnic-backed political groups to dehumanize the others out of power, and to legitimize the use of violence to settle electoral disputes. In the process a culture of impunity gradually became entrenched.

1.2 STATEMENT OF THE PROBLEM

In the recent past electoral democracy in Africa has been hit hard by problems associated with **transition of political power**. Following the aftermath of the 2007 presidential elections in Kenya huge concern was raised as to the viability of electoral institutions in the country. The post election crisis that followed baffled a number of researchers and humanity as a whole. Close to two thousand innocent people were barbarously butchered, over three hundred thousand others rendered homeless, countless women were raped and property worth millions was looted and destroyed.

These acts were willingly and publicly perpetrated by other Kenyans sharing the same country, the same language and the same history with their victims. Faced by this reality, one may wonder how this could happen in the 21st century, in a country combining all features of a state claiming to be governed by the rule of law and endowed with effective government. How could a country which had enjoyed a relatively smooth power transition in the past wake up to such politically instigated violence?

In a bid to answer this question, there was a dire need to examine the contribution of the violence to the growth of electoral democracy in Kenya and parts of Africa; and the lessons if any that Africa had to learn from the bloodshed that befell Kenya.

1.3 PURPOSE OF THE STUDY

The general purpose of the study was to examine the contribution of post election violence to the growth of electoral democracy in Kenya, and relate it to the rest of Africa.

1.4 OBJECTIVES OF THE STUDY

1. To establish how post election violence affected the growth of electoral democracy in Africa.
2. To examine constitutional and legal framework and identify any weaknesses or inconsistencies in electoral process/legislation.
3. To establish reformative areas of electoral system to enhance democratic elections.
4. To establish measures to eradicate impunity and enhance electoral democracy in Kenya.

1.5 RESEARCH QUESTIONS

1. What are the factors that have heightened post election violence in Kenya?
2. Does the Kenya legal framework provide ways in which to sustain electoral democracy in Kenya?
3. How do the Kenyan institutions promote electoral democracy?
4. Are there any legal and policies reforms that can be established to promote electoral democracy in Kenya?
5. What role do leaders and politicians play in the growth of electoral democracy?

1.6 SCOPE OF THE STUDY

Since electoral democracy entails the effectiveness and viability of electoral structures such as the electoral body, the electorate (voters) and politicians, this study was mainly confined to the effectiveness of these structures in relation to violence that culminates

after such elections. The researcher examined the causes of post election crisis in Kenya from independence to date and suggested solutions to the problem and its effect to electoral democracy and made recommendations on how to curb such violence and enhance electoral democracy.

1.7 SIGNIFICANCE OF THE STUDY

1. The study is being made as a partial fulfillment of the requirements for the award of a Bachelor of Laws degree of Kampala International University.
2. The study may also be used as a reference material subject to publication and copyright.

CHAPTER TWO

LITERATURE REVIEW

2.0 INTRODUCTION

This chapter examines the literature produced by different authors related to the conduct of elections and statute law legislated by parliament. The researcher has also analyzed the various reports produced by different agencies and commissions of inquiry, both local and international related to post election violence crisis in Kenya.

2.1 CONSTITUTIONAL AND LEGAL FRAMEWORKS

The international standards relating to elections and electoral processes are derived from a number of international instruments that describe the various components of civil and political rights and freedoms. They are the key principles universally accepted by the family of nations which believe in electoral democracy as the basis of good governance in each state. The standards are mostly at two levels, global (or universal) and regional.

The universal standards are found in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPWD).

For Kenya, the regional instruments include the African Charter on Human and People's Rights (ACHPR) (although the relevant **Article 13(1)** is not explicit in its definition of the right to participate in free and fair elections), the African Union (AU) Declaration on the Principles Governing Democratic Elections in Africa (2002) and most recently the African Charter on Democracy, Elections and Governance (2007).

Kenya is a party to all treaties cited above except to the African instruments of 2002 and 2007, but she is a member of the AU which adopted these two instruments to which she is a party.

The international standards describe the rights associated with voting and participation in governance. Article 2 of the UDHR states that;

1. Everyone has a right to take part in government of his country, directly or through freely chosen representatives

3. The will of the people shall be the basis of the authority of government; this shall be expressed by periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The ICCPR is more descriptive and states as follows at Article 25;

‘Every citizen shall have the right and opportunity without any of the distinctions mentioned in Article 2 (this is the non-discrimination clause that prohibits discrimination on the basis of race, religion, political etc) and without unreasonable restrictions;

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives.

(b) To vote and be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the expression of the will of the electors.

(c) To have access, on general terms of equality, to public service in his country.”

Other electoral rights and freedoms stipulated in the UDHR and the ICCPR include the right to freedoms of expression, to hold opinions, to receive and impart information and ideas through media and to freedom of peaceful assembly and association. Article 20 of the ICCPR provides for prohibition of “any advocacy of national, racial (include ethnic) or religious hatred that constitutes incitement to discrimination, hostility or violence.”

2.2 AN OVERVIEW OF THE CONSTITUTIONAL AND LEGAL FRAMEWORK OF THE ELECTORAL PROCESS IN KENYA

One of the objectives of this study was to examine the constitutional and legal framework to identify any weaknesses or inconsistencies in the electoral process in Kenya.

The Kenyan laws that have relevance to elections include;

? The Constitution of Kenya⁶

The constitution entrenches the protection of a number of fundamental rights and freedoms in **Chapter IV**. A number of these rights are associated with elections and they include the right to liberty⁷, right to secure protection of the law or access to justice⁸, the freedom of conscience⁹, expression¹⁰, assembly¹¹ and association¹² and movement¹³.

The Constitution provides for the political and government system in Kenya¹⁴.

Chapter VII also establishes the yet to be constituted Independent Electoral and Boundaries Commission of Kenya (currently known as the Interim Independent Electoral Commission) and stipulates its functions.

Chapter VIII provides for Parliament and **Part 2** of it describes matters relating to elections of members of the National Assembly. **Chapter IX** describes the executive arm of government and provides for procedures relating to election of the President.

Kenya is a multi party state with a mixed Parliamentary and Presidential system. The President is both the Head of state and Head of Government.¹⁵ The political system in Kenya has been and is still one of the big political debates in Kenya.

⁶ As promulgated on 27th August 2010

⁷ Art 29, The 2010 Constitution of Kenya

⁸ Art 48, above.

⁹ Art 32, above.

¹⁰ Art 33, above.

¹¹ Art 37, above.

¹² Art 36, above.

¹³ Art 39, above.

¹⁴ Chapters VIII, IX and XIII above.

¹⁵ Art 131 (1) (a), above.

? **The National Assembly and Presidential Elections Act.**¹⁶

The National Assembly and Presidential Elections Act is the operational statute that governs the electoral process for presidential and parliamentary elections. The Act elaborates the functions of the electoral commission provided under section 42A of the constitution.

? **The Kenya Broadcasting Act**¹⁷

This is an Act of Parliament important to the electoral process as it covers the public medium of communication that reaches most Kenyans. The Act defines the 'campaign period', as the period between the initiation of an election under the relevant law and the eve of Election Day. It then provides that the public media shall, during the campaign period, maintain a fair balance in the allocation of broadcasting hours as between different political view points. In undertaking this responsibility, the corporation is to consult with the electoral commission. The allocation of free airtime is to registered political parties participating in an election.

? **The Election Offences Act.**¹⁸

The Act deals with various electoral offences and provides for penalties with respect to the electoral process. The offences include:

- a. Election offences in part II of the Act; including falsification of information with respect to registration of electors, fraudulent acts with respect to nomination papers; the sale and purchase and supply of the ballot and voters cards, manufacturing/importation of fake ballots; unauthorized printing of electors register; falsification by election officials of records during polling; abetting of the abuse of the process of assisting voters by electoral officers; deliberate miscount of ballots with an intent of influencing the final result; and allowing malpractices that breach the secrecy of the vote. The offences are punishable by a maximum of five years imprisonment.

¹⁶ Cap 7 laws of Kenya.

¹⁷ Cap 221 laws of Kenya.

¹⁸ Cap 66 laws of Kenya

- b. Corrupt practices in part III; the offences here include attempts to vote more than once or in the name of other registered electors; employment of acts of undue influence (including threats, force, violence, spiritual injury, damage, tricks etc) to get others to vote a particular way or not to vote; compelling a person to refrain from running for a particular office or to step down as a candidate; bribery of voters with money or anything else to influence their decision on who to vote for; facilitating campaign propaganda at polling stations on polling day; printing, publishing or distributing advertisements, placards or posters which refer to any election and do not bear on the face the names and addresses of the printer and publisher; and prohibits the transportation of electors. These offences are punishable by a maximum of five years imprisonment.

? **The Public Order Act**¹⁹

This Act was amended as a result of the Inter-Parties Parliamentary Group (IPPG) negotiations in 1997. The amendment to the Public Order Act removed the need for licenses and permits with respect to the holding of public meetings. The only current requirement for persons intending to hold campaign meetings is to notify the officer commanding the police station nearest to the area of campaign. The notice must be given not less than three and not more than fourteen days before the meeting. The police can refuse permission if they have a good reason to believe that there will be a breach of the law or disperse the meeting if a breach of law takes place during it. The Act also provides that no person shall be restricted from holding public meeting on account of political beliefs or opinions.

? **The Penal Code Act**²⁰

Most election malpractices related to campaigns are also prohibited under the Penal Code. Offenders could be prosecuted under any of these laws. Violence, assault, carrying

¹⁹ Cap 56 laws of Kenya.

²⁰ Cap 63 laws of Kenya.

of offensive weapons in public places, bribery among other offences falls under the Penal Code.

Under the National Assembly and Presidential Elections Act²¹ the electoral commission has powers to designate, “any of the officers to conduct any prosecution for an offence under this section and the electoral code of conduct and such officer shall for that purpose have all the powers conferred upon a public prosecutor by the Criminal Procedure code”.

2.3 REPORT OF THE INDEPENDENT REVIEW COMMISSION (IREC)²²

The Independent Review Commission was appointed to examine the December 2007 Kenyan elections from various perspectives.²³

In conformity with the terms of reference²⁴ IREC presented its findings and recommendations, based on its analysis of the legal framework for the conduct of elections in Kenya²⁵, the structure, composition and management system of the Electoral Commission²⁶ and its organization and conduct of the 2007 electoral operations.²⁷ The report specifically examines the integrity of the whole electoral process, from voter registration and nomination of candidates through voting, counting, transmission and tallying²⁸ to dispute resolution and post-election procedures²⁹, deals with the role of political parties, observers, the media, civil society and the public at large, and comments on the independence, capacity and functional efficiency of the Electoral Commission³⁰.

²¹ Section 34A(5) Penal Code Act, cap 63 laws of Kenya.

²² Report of the Independent Review Commission on the General elections held in Kenya on 27th December, 2007. Presented to His Excellency Hon Mwai Kibaki, president of the Republic of Kenya on 17th September 2008.

²³ The Kenya Gazette, Vol CX-No 23, Gazette Notice No. 1982, Nairobi, 14th March, 2008.

²⁴ The Kenya Gazette, Vol CX- No 23, Gazette Notice No.1983, Nairobi, 14th March, 2008.

²⁵ Chapter 2 of the Report pages 11-22

²⁶ Ibid, Chapter 3 , pages 25-49

²⁷ Ibid, Chapter 5, pages 75-105

²⁸ Ibid, Chapter 6, pages 115-138

²⁹ Ibid, Chapter 7, pages 139- 150

³⁰ Ibid, Chapter 4, pages 53-72

The Commission found out that Kenya's constitutional and legal framework relating to elections contains a number of weaknesses and inconsistencies that weaken the effectiveness. This legislation needs urgent and radical revision, including consolidation.

The Commission recommended that all political role-players in Kenya should recognize that materially defective elections accompanied by public violence will remain a feature of life in their country absent of a concerted and sustained commitment to electoral integrity by all Kenyans.³¹

2.4 REPORT OF THE COMMISSION OF INQUIRY INTO POST-ELECTION VIOLENCE (CIPEV)³²

The mandate of the Commission of Inquiry into post-Election Violence (CIPEV) in Kenya was to investigate the facts surrounding the violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters³³.

The Commission found that violence has been part of Kenya's electoral process since the restoration of multi-party politics in 1991. However the 2007-2008 post-election violence was more widespread than in the past. It affected all but two provinces and was felt in both urban and rural parts of the country.

The report concluded that the post-election violence was more than a mere juxtaposition of citizen-citizens opportunistic assaults. These were systematic attacks on Kenyans based on their ethnicity and their political leanings. This free-for-all was made possible by the lawlessness stemming from an apparent collapse of state institutions and security forces³⁴.

³¹ See chapter 8, above, page 153.

³² The commission, famously referred to 'the Waki Commission', was chaired by Justice Philip Waki, an appellate Judge of Kenya. It was appointed vide Gazette Notice No. 4473 on 23rd May, 2008 and presented its report to His Excellency Hon Mwai Kibaki, the President of the Republic of Kenya on 16th October 2008.

³³ The Kenya Gazette, Vol. CX-41, Gazette Notice No. 4474, Nairobi, 23rd May, 2008

³⁴ Findings in relation to the causes and patterns of the Post Election violence; Chapter 10, pg 347-9 of the Report of the Commission of Inquiry into Post Election Violence in Kenya.

The report recommended concrete measures to improve performance and accountability of state security agencies and coordination within the state security mechanisms, including strengthening joint operational review processes; merging the two police agencies; and establishing an independent Police Complaints Authority³⁵.

To break the cycle of impunity which is at the heart of the post-election violence, the report recommends the creation of a special tribunal with the mandate to prosecute crimes committed as a result of post-election violence. The tribunal will have an international component in the form of presence of non-Kenyan on the senior investigations and prosecution staff.³⁶

2.5 STRENGTHS OF THE LITERATURE

Electoral systems are those procedural rules and regulations, which govern the transformation of votes to seats in the National Assembly, so one cannot conduct elections without having some sort of electoral system. The literature appreciates and acknowledges the provisions of various legal instruments relating to electoral management in Kenya. They all adequately provide for democratic principles of universal suffrage, equal suffrage, free and fair elections, secret vote and direct suffrage.

More importantly the legal framework provides for equal participation by special groups by providing for affirmative action measures to breach inequality gaps where necessary. . The Constitution of Kenya also touches on the question of fair participation in all electoral processes of persons with disabilities.³⁷ It also provides for the establishment of the Independent Electoral and Boundaries Commission (IEBC) to conduct and manage elections.³⁸

³⁵ Rationale for Recommended Action Regarding the Police, pg 431-444 of the Waki Report (CIPEV report), see also Chapter 13 of the Report, pg 481-484.

³⁶ Chapter 13 of the Report; Recommendations that relate to issues of impunity, pg 475-480

³⁷ Art 81 (c), The 2010 Constitution of Kenya

³⁸ Art 88, above.

2.6 WEAKNESSES OF THE LITERATURE

Kenya's electoral legislation provides the basic framework for conducting elections and did so for the 2007 elections. However, it has a number of gaps and weaknesses that warrant some radical review if it is to provide a solid foundation for the conduct of free and fair elections. The review should consider taking into account the need to consolidate the electoral provisions scattered among various statutes, the importance of independent but inter-related activities such as political party election-related activities and the need to have effective enforcement mechanisms for any laws put in place.

Additionally, certain important institutional matters of design and management of the Electoral Commission are not covered in the Constitution and the National Assembly and Presidential Elections Act, and cannot be properly managed merely with the aid of operational manuals and common sense. They will require more ample legal provisions, following the practice of public institutional design in Kenya as well as best practice elsewhere.

In trying to meet the purpose of this study, the researcher commissioned an analysis of the constitutional and legal frame work for elections in Kenya and sought to measure how adequately this framework meets the standards of the key electoral and democratic principles of universal suffrage, equal suffrage, free and fair elections, secret ballot and direct suffrage.

CHAPTER THREE

METHODOLOGY

3.0 INTRODUCTION

The researcher majorly derived his data using standard disciplinary customs of the area of study. Documentary analysis of the research problem was mainly used and direct interviews conducted with those who were immensely affected by the problem.

These findings were complemented with other relevant authorities especially statutes together with other relevant legal instruments, and reports by commissions of inquiry

3.1 RESEARCH DESIGN

A research study which was qualitative in nature and cross-sectional was adopted as well as elaborate interviews being held on the Kenyan electorate. The main reason for the design adopted being the type of results wanted and the knowledge of information on the concept of post-election crises.

This research was a case study based in Kenya with reference partly to Zimbabwe and other African countries. This study was preferred since the researcher is a Kenyan and found Kenya to be an area of interest. The state of electoral democracy in African countries was also sought to be appreciated.

3.2 AREA OF STUDY

The area of study was in Kenya; Eldoret, Nakuru, Kisii, and Nairobi as the main areas of focus. This is because the research problem mainly affected the mentioned areas and the targeted respondents had verse knowledge of the research topic.

Additionally, the researcher is a Kenyan, born and brought up in Kenya, and with verse knowledge of the political and constitutional development of the country and hence was in a position to establish the relevant areas of study.

3.3 POPULATION AND SAMPLING

The researcher aimed at examining the occurrence of post-election crises in Kenya and its contribution to the growth of electoral democracy. The study was based on inter-viewing members of the Kalenjin, Kikuyu and the Kisii communities who were affected by the violence in 2008, a section of politicians and non- governmental organizations. Further information was sought from professionals like Advocates and Security officers on their take on the consequences of the 2008 post-election violence.

A purposive sampling technique was adopted. This is because the researcher, by his own judgment, targeted specific subjects' i.e. voters and politicians to participate in the study.

3.4 DATA COLLECTION METHODS

This research study mainly utilized both primary and secondary data sources. In this vein, data was collected and gathered by means of interviews, observations, discussions with targeted groups and documentary review of legal instruments on the research topic.

Interviews were conducted with people who had key information on the research topic such as advocates, paralegals, security officers and members of the communities in the areas worst hit by the violence. A cross-section of community members particularly in Eldoret and Nakuru were also interviewed to establish their views on the growth of electoral democracy after the violence and how such violence affected electoral democracy.

Literature from the internet, libraries, and commissions of inquiry on post-election violence and other relevant texts or legal instruments was reviewed for this purpose. Journals were also relevant in this study. All findings have been enhanced and enriched with data obtained through interviews from the informants already mentioned.

3.5 DATA PROCESSING AND ANALYSIS

The information gathered was subjected to descriptive analysis through coding basing on the nature of the research. The information or data was then edited for proper record

keeping, legibility, comprehensibility, uniformity and accuracy. Primary data on the other hand was tabulated according to responses made by the target groups.

3.6 DATA QUALITY CONTROL

The researcher took measures to ensure that the quality of the research was not compromised. These include triangulation methods, pre-testing the instruments, and validity and reliability tests.

3.7 ETHICAL CONSIDERATIONS

The researcher intended to morally justify investigations or interventions. The protection of the confidentiality of information, the safety, social and psychological well-being of the subjects and/ or community was sought. Consent was also asked from the respondents and avoided any abuse of such process.

Introductory letters were also sought from the university and where possible from the Provincial Administration.

3.8 LIMITATIONS

Several constraints were anticipated before the research was completed. These included;

- (i) Time; the time allowed to conduct the research was not enough since the researcher was engaged in academic work thus lacked enough duration to conduct a comprehensive and continuous study.
- (ii) Financial constraints; these greatly hindered the success of the study owing to the fact that the researcher mainly depended on individual funds. The final analysis of the study was also very expensive and costly.
- (iii) There were difficulties in interviewing key respondents such as politicians and judicial officers due to their tight schedule.
- (iv) The literature available was not adequate enough to compliment the research study.

- (v) Other respondents and informants especially those from areas affected by the violence were not willing to divulge much information on the area of study for fear of reprisals.

3.9 DELIMITATIONS

Despite the anticipated constraints, the researcher endeavored to find solutions to them.

The researcher dedicated and sacrificed most of his free time to conduct the study and ensured non-interference with academic work.

Sponsorship was sought from parents, friends, and interested parties to address the problem of inadequate finances.

To ensure adequate interviews were achieved, prior appointments were made and permission from such informants like politicians and judicial officers to have an interview with them.

The researcher ensured that available literature was used maximally in aiding the research comprehensively.

Most appropriate methods were employed to ensure that at least some information was obtained from communities adversely affected by the violence. Preferably, the researcher sought to integrate himself with the communities and sought the aid of an interpreter where necessary to achieve this end.

CHAPTER FOUR

ANALYSIS ON THE CAUSES OF POST ELECTION VIOLENCE IN KENYA

4.0 INTRODUCTION

This chapter presents the roots of post-2007 elections violence in Kenya, while the following chapter contains the summary, discussions and recommendations. This chapter draws the views expressed at a consultative meeting which the researcher held with a group of Kenyan experts and also from other studies and reports on the subject. Specifically, it tries to identify factors that explain the causes of the violence and why it escalated as it did. These factors explain why violence has become a main feature in Kenya's electoral process.

The main factor is the growing politicisation and proliferation of violence in Kenya over the years, specifically the institutionalisation of violence following the legalization of multi party democracy in 1991. Over time, this deliberate use of violence by politicians to obtain power since the early 1990s plus the decision not to punish perpetrators has led to a culture of impunity and a constant escalation of violence. This, in turn, has caused a further diffusion of violence in the country, which is now largely outside the control of the state and its security agencies.

4.1 THE USE OF POLITICAL VIOLENCE IN KENYA

4.1.1 Institutionalization of violence

The researcher reviewed documents among them by the Human Rights Watch, a US based human rights group, and established that violence was part and parcel of the colonial state, which used it to ensure control. After independence, subsequent governments used the carrot and stick approach to maintain power, with the use of violence mainly concentrated in the hands of the state. For instance, during President Kenyatta's tenure, opposition parties were subjected to political harassment and those individuals who refused to support the status quo experienced various types of repression and even detention without trial. Rallies, by students and others, were dispersed by the General Service Unit (GSU) using brute force. The government is believed even to have

been responsible for the murder of key political figures that were perceived as threats to the then regime and potential contenders for political power. At the same time, individual members of the opposition were weaned back to the fold through appointments to government positions, and allocations of land as well as provisions of other perks.

According to the Waki Report, as the opposition grew over the years, civil society became increasingly vocal and donors increased pressure on the then President Moi's government, including through the use of financial sanctions, to democratize. In the end, President Moi very reluctantly agreed to allow multi party democracy in 1991 and he presided over two multi-party elections during his rule, one in 1992 and the other in 1997. Although he agreed to multi party democracy, President Moi did not accept the idea that through this he might lose the presidency.

Thus, it was in this period in the 1990's that violence became institutionalized during presidential and parliamentary elections. Under the amended constitution, to win the presidency, President Moi needed to win his parliamentary seat, obtain a majority of votes cast in the country, and receive 25% of the votes cast in five provinces. In both presidential and parliamentary elections, the opposition to President Moi and to the then ruling party, Kenya African National Union (KANU) consisted mainly of non-KAMATUSA (Kalenjin, Maasai, Turkana and Samburu) voters.

It was concluded from various reports covering elections held during this period allegations that, high ranking political figures, civil servants, and others close to the heart of the government organized and used violent gangs to intimidate people in areas of potential opposition support. Most of these people were Kikuyu, Luo, Luhya, Kamba, and other tribal groups.³⁹ It was established that, the strategy was to keep opposition supporters from voting. The means used was, to hire gangs in the Rift Valley and elsewhere to kill people and displace individuals from their home areas. The aim was that

³⁹ See NCKK, The Cursed Arrow: Organized Violence Against Democracy in Kenya, April, 1992; Republic of Kenya, Report of the Parliamentary Select Committee to investigate Ethnic Clashes in Western and other Parts of Kenya (The Kiliku Report), September 1992, see pp 19, 30-3, 39-40, 52-3, 61-2, 74-6; Human Rights Watch, Divide and Rule: State sponsored Ethnic Violence in Kenya, 1993, pp 28-32

KAMATUSA candidates could win. Also, President Moi could be assured of obtaining 25% of the majority of the votes cast for President, and the majority of elected Members of Parliament. In short, violence became a means of securing political power and winning elections.

An observation was made from the Kenyan election history that elections related violence occurred not just in 1992, but also in 1997. In spite of the death and destruction that these methods caused and reports from Non-Governmental Organisations (NGOs) such as the Kenya Human Rights Commission (KHRC), Human Rights Watch, and two Government inquiries - the Kiliku Parliamentary Committee and Akiwumi Commission - no one was ever punished to this wanton killing and destruction even though names of perpetrators to be investigated and those adversely mentioned were contained in the reports of both commissions. The Akiwumi Commission Report⁴⁰ was not made public until 2002, even though it was published in 1999.

This led to a culture of impunity whereby those who maimed and killed for political ends were never brought to justice. This changed Kenya's political landscape with regard to elections, a point noted by Human Rights Watch. Each of these reports implicated politicians as the organizers of the violence and killing for political ends, and noted that warriors and gangs of youths were sometimes promised land and jobs after evicting upcountry dwellers. As a result, a pattern had been established of forming groups and using extra-state violence to obtain political power and of not being punished for it.

It was established from KHRC that some of the displaced individuals including the youth became members of outlawed gangs which were sprouting up across the country (e.g. Mungiki, Baghdad Boys, Taliban, Chinkororo, Jeshi la Mzee and many others) which grew and multiplied within the context of a political culture that both used and tolerated extra-state violence both during and after elections, a pattern that continued up through

⁴⁰ Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya, 1999, was chaired by Justice Akilano Akiwumi. Pp 286-90 contained a list of individuals recommended to be investigated further as well as a discussion of their role in the ethnic clashes of the 1990's in various parts of the report.

the 2007 elections. These political gangs continued to sell their services of violence on a willing buyer-willing seller basis, up through to the 2007 elections.

As extra state violent gangs began to proliferate and continued to be used by politicians, the political terrain was transformed. Violence trickled down into daily life and the state no longer commanded the monopoly of force it once had in a previous era. As such, diffused extra-state violence existed all over the country, where it could be called up and tapped at any time, including being used to arbitrate over elections as it has been doing since the early 1990's. Once the government itself used both its own and extra-state violence for partisan political ends, it lost its legitimacy. Furthermore, it was not seen as dispassionate, and consequently has been unable either to maintain peace and security or reform itself.

4.1.2 Personalization of Presidential power

It was established that the use of political violence has also emanated from the personalization of Presidential power and the deliberate weakening of public institutions. As noted in the Akiwumi report and in a number of articles on Kenya politics, the checks and balances normally associated with democracies are very weak in Kenya and are deliberately so. Individuals in various parts of government whether in the civil service, the Judiciary, and even in Parliament, understand that, irrespective of the laws, the Executive arm of Government determines what happens. Hence, the state is not seen as neutral but as the preserve of those in power.

It was established from various political analysts that the above syndrome has had various consequences;

Firstly, the sense of lawlessness that has led to government institutions and officials being seen as lacking in integrity and autonomy. One result of this in the 2007 election, was the perception by sections of the public that government institutions such as the electoral commission, and officials, including the Judiciary, were not independent of the Presidency, were not impartial and lacked integrity. Hence, they were perceived as not

able to conduct the election fairly or dispense justice in case of a Presidential election petition. That public sector institutions were seen as biased and unlikely to follow the rules, increased the tendency to violence among members of the public.

Secondly, is the perception on the part of the public, that given the power of the President and the political class, everything flows not from laws but from the President's power and personal decisions. This also has led the public to believe a person from their own tribe must be in power, both to secure for them benefits and a defensive strategy to keep other ethnic groups, should those take over power, from taking jobs, land and other entitlements. Hence, there is tendency on the part of a variety of political actors to do anything, including engaging in violence to obtain or retain political power. This has created a climate of fear and suspicions which politicians easily exploit and use to mobilize violence.

4.1.3 Land distribution

In discussions concerning post-election violence with Kalenjins, it was noted that many of them argued that it was a product of longstanding anger over land distribution following independence. They state that land was alienated by the colonial government and then unfairly parceled out to Kikuyus and other groups whom they view as outsiders. Many Kalenjins believe that issues relating to land were the reason for both the pre-electoral violence in the 1990's and the post election violence after the December 2007 elections.

Others, including the Akiwumi Report, dismiss this explanation pointing out that individuals from different groups lived side by side for many years until the advent of multi-party democracy when violence was used to kill and displace voters to keep them from voting. Hence, the report argues that even though the promise of getting land from those who were displaced was used to entice youth into violence, the desire for political power and not land hunger was the major causal factor.

4.1.4 Causes of the 2007 post-election violence

All the above factors have dovetailed to make violence the method of choice to resolve a range of political differences and to obtain political power. Furthermore, because the violence surrounding elections has been ethnically directed, this has increased distrust among different groups and vastly eroded any sense of national identity. Indeed when history is finally settled and written, as Prof. Lumumba⁴¹ asserts, some historians will attribute the post-election violence to underlying issues such as Land problems, political marginalization *et al.*

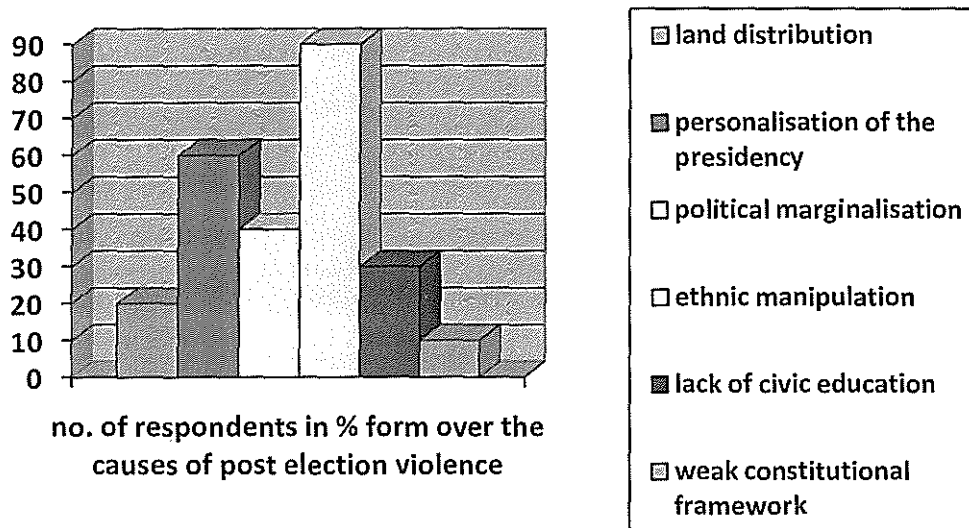
Other historians will cite lack of, or poor civic awareness among the voting population, ethnic manipulation by opportunistic neo-Machiavellian politicians, corruption and weak constitutional and legal framework as the culprits⁴²

It was established that different people held different views as to what really caused the 2008 post-election violence. Some of the responses from a wide section of respondents who included members of the civil society organizations, Human rights activists, religious leaders and the ordinary voters are tabulated in Fig 1 below;

⁴¹ Lumumba, PLO, Free and fair elections for a credible democratic dispensation: Lessons from the 2007 Kenya presidential elections, a paper presented at a Uganda Law Society Pre-AGM Conference held on Friday, 30th April, 2010 at Mbale Resort Beach Hotel, Uganda.

⁴² Ibid

Fig 1: Causes of the 2008 post-election violence



The result above was obtained after random respondents were picked to answer questions to determine the causes of post-election violence in Kenya. It was established that the majority (9 out of 10 respondents interviewed in Eldoret, Nakuru and Nairobi) thought that ethnicity and ethnic manipulation was the major cause of the violence. This was attributable to the fact that Kenya's politics have been infiltrated by tribal alliances.

60% of the respondents (6 out of 10 interviewed) held the view that personalisation of the presidency mainly led to the violence since the major tribes in Kenya wanted a share of the presidency and the goodies that come with it.

It was also established that 40% of the respondents thought that political marginalization was also a cause of the violence. Those, whom the researcher interacted with, felt that they had been marginalized politically since independence.

30% of the targeted population in Nairobi, Eldoret and Nakuru felt that lack of or poor civic awareness among the voting population was a factor in causing the violence. The population, out of ignorance, allowed itself to be used and manipulated by politicians for their own political ends.

Though land had previously been cited as a cause of political violence in Kenya, it was established that, only 2 out of 10 interviewed thought it was a causation factor of the 2008 post-election violence.

Only 10% of the respondents felt that the violence was caused by weak constitutional framework in Kenya. In fact, it was gathered that it was only those respondents with legal knowledge that were of this opinion. The rest of the population thought otherwise.

Furthermore, the main perpetrators of systematic violence have never been prosecuted. It was found out from KHRC that currently Kenya is at a critical juncture. Violence is endemic, out of control, is used routinely to resolve political differences, and threatens the future of the nation. Because of the ethnic nature of the post-election violence, ethnic fears and hatred have been elevated in importance and could turn violent again even more easily than has happened in the past. What is required to address the points discussed above is political and some basic decisions to change the way politics are conducted, as well as inequality, and the youth. Short of that, violence, including that related to elections will continue to appear and will be ignited ever more readily.

4.2 ANALYSIS OF THE FRAMEWORK FOR THE REGULATION OF THE ELECTORAL PROCESS

In this section, the researcher summarizes the international and regional standards for electoral regulation and practiced as discussed in chapter two of this report and then discusses a number of issues by way of a critique of the constitutional and legislative framework for elections.

A number of international and regional instruments⁴³ were reviewed. These provide for certain standards which national regulatory frameworks for elections are expected to

⁴³ For a summary of the content of these instruments, see the European Commission (2007): Compendium of International Standards for Elections; European Commission, Brussels; International Institute for Democracy and Electoral Assistance (IDEA) (2002): International Electoral Standards; Guidelines for Reviewing the Legal Framework for Elections, IDEA (1997) : Code of Conduct for Ethical and Professional Administration of elections, IDEA, Stockholm.

measure up to. A general overview of the Kenyan legal framework on elections is given in chapter two.

It was established as a matter of fact that Kenya, having just passed its Constitution in 2010, is in the process of reviewing its laws to make them consistent with each other. The legal reform content which is part of the Kenya National Dialogue and Reconciliation under the auspices of Agenda Item 4 is likely to have significant impact on the election process.

In summary, the Constitution of Kenya⁴⁴ establishes the Independent Electoral and Boundaries Commission, (IEBC) and stipulates its functions.⁴⁵ It also provides for the election of the President, members of the National assembly, the Senate, the County assembly.⁴⁶ It also provides for citizenship, which acts as the basis for recognition as an elector.⁴⁷

The National Assembly and Presidential Elections Act⁴⁸ provides for registration of electors, declaration of vacant seats, elections and election petitions and expenses.

The Local Government Act⁴⁹ provides for establishment of Local Authorities, defines their functions and provides for matters connected and related to those functions. It gives power to the Electoral Commission to divide local authorities into various electoral areas and prescribe the boundaries and names. It also provides for procedures for local government elections.

⁴⁴ Promulgated on 27th August 2010

⁴⁵ Art 88, above.

⁴⁶ Part 3 of the Transitional and Consequential Provision clause of the Sixth Schedule, the 2010 Constitution of Kenya

⁴⁷ Ibid, Chapter 3

⁴⁸ Supra 14

⁴⁹ Chapter 265, laws of Kenya

The Registration of Persons Act⁵⁰ provides for the registration of and provision of a national identity card to Kenyans who have attained the age of eighteen years. The cards are used during registration of voters as evidence of age and nationality.

The Political Parties Act, 2007 provides for the registration, regulation and financing of political parties. It replaced the Societies Act under which political parties were previously registered.

This legislation has its shortcoming, in that, the Registrar of Political parties hasn't been able to use the power of de-registration of political parties that flout the law due to pressure from influential individuals. This has greatly hampered the effectiveness of the law.

The Election Offences Act⁵¹ creates a variety of offences relating to registration of voters and elections, and provides penalties for offenders. Also important in this regard is the Penal Code, the main penal statute in Kenya, under which most illegal acts committed during elections are also prohibited. The offenders could be prosecuted under either of the Acts.

The Kenya Broadcasting Corporation Act⁵² is important in the electoral process because it establishes and regulates the public electronic media. It requires that the media treat political parties equally during elections. It forbids discriminatory broadcasting. If political parties so request, it, in consultation with the electoral commission, prepares a schedule for the use of the facility free of charge by political parties. During campaign periods, the public media are expected to maintain a fair balance in the allocation of broadcasting hours as between different political viewpoints.

It was however established from various political parties, that the provisions of the said Act were not practically employed during the 2007 elections. The Kenya Broadcasting Corporation (KBC), a state corporation established during one-party rule, existed as a

⁵⁰ Cap 107, laws of Kenya

⁵¹ Cap 66, laws of Kenya

⁵² Cap 221, laws of Kenya

broadcasting monopoly and was widely viewed as a propaganda arm of the government. It was therefore hardly surprising that KBC came under serious criticism over the way it covered the 2007 general elections. The station was specifically accused of favoring the Party of National Unity (PNU). Aggrieved political parties raised their concerns with the ECK but it had neither the power nor the resolve to force KBC to change and merely issued statements agreeing with the complaint of the opposition parties.

Equally controversial was the official announcement of the presidential results via KBC. The swearing-in of the president, also carried live by KBC was unacceptable to some Kenyans. Much of the criticism of KBC has not just risen from its former monopoly status but also because of its strategic position as the only broadcasting covering virtually the entire country and its failure to make a clean break with the past.

Most political analysts pointed out that the station has been reluctant to act independently and, since it is a creature of political establishment, its management, operations and funding have been at the mercy of the government. Its board of directors is chaired by a presidential appointee, board members are appointed by the minister in charge of information and its managing director is also appointed by the minister in consultation with the board.

Fairness in electoral competition requires that candidates be given reasonable access to those media channels that are more likely to be the most effective in delivering their arguments to the voters, and particularly when that channel happens to be public.

The Public Order Act⁵³ originally required any person intending hold a political rally to obtain a license. However, in 1997, arising from the Inter-Parties Parliamentary Group's reform package, this requirement was removed. It was replaced by a provision which requires only that the person intending to hold a rally notify the Officer Commanding a Police Station nearest to the place of the rally. The period of notice required is not less than three and not more than fourteen days prior to the meeting.

⁵³ Cap 56, laws of Kenya

However, a loophole exists in this law in that the Police may cancel any rally on security grounds. This is even when the said rally was okayed by the same Police.⁵⁴

Despite this, in some cases, the Police are justified in their cancellation of a said rally. This is in the event that public peace may be disrupted or where there is fear of incitement of the citizens.

The Elections Bill, 2011, is largely a consolidation of the provisions of the National Assembly and Presidential Elections Act, the Local Government's Act and the Elections Offences Act. The Elections Bill is expected to guide parliamentary, gubernatorial and senatorial elections, registration of voters and campaign financing.

It also provides for the settlement of electoral disputes arising from nominations, the conduct and supervision of elections and the development of a modern system of collection, collation, transmission and tallying of electoral data.

Based on the findings in the IREC report, it was established that although Kenya has a legal framework for the conduct of elections; material defects in the framework combined with a culture of lawlessness at election time bring into question the capacity of the law to provide a sufficient framework for political competition.

4.3 POLITICAL VIOLENCE AND ELECTORAL DEMOCRACY IN KENYA

A cross section of members of the Civil Society was interviewed about social movements and the civil society. It was found that a number of these movements have struggled to change the status quo. Others, have a distinct objective to capturing political power. Yet others, struggle for broad changes in society and convert themselves into political parties on the eve of elections.

⁵⁴ Prime Minister Raila Odinga, who would have shared a political limelight with some of his rivals in Western Province this weekend, will now have a free reign after police cancelled a rival rally in Bungoma. The much-publicised Simama Kenya meeting, scheduled for this Sunday, was called off after the government withdrew its licence, citing security concerns.

There's another category of social movement that does not convert itself into a political party, but allows such party to have a base in the movement; which movement does not disband and continues to direct the political party so formed. This has become the subject of some debate in Kenya. A related point is that, Kenya lacks a clear distinction between political violence and civil disobedience, which has been in use in most African countries.

Indeed, as Dr Mutunga⁵⁵ asserts, the right to rebel and to change or overthrow a dictatorship are both constitutional and legal. Whereas political violence has been criminalized in the Penal Code, the constitutionality and legality of peaceful mass action means that, the civil society becomes an arena of contesting political power, with the capacity of capturing the state. Many civil society activists have argued that such a capture of the state by the forces of civil society must be interim.

However, this need not be the case because political parties may emerge from such social movements (without divorcing themselves from them) and continue holding political power. What the social movement in civil society must establish in the politics of each African state is the role of effective checks and balances and readiness to contest for and secure political power.

From the discussions with Civil Society Organizations (CSOs), it was established that, the civil society played a crucial role in the run up to the multi-party democracy in 1992 and that in the period after the 2007 elections. It's prudent to note that the mass actions were not agitated for by the civil society. They were purely partisan mass action called by a political party that was contesting the outcome of the election.

Thus, was the political strife in Kenya legitimate according to Dr. Mutunga? To answer this, the researcher divorced the role of the civil society from that of political movements. It was concluded that, the civil society must re-examine its position on the principle of non-partisanship that has been invoked to de-legitimize political action and the contest

⁵⁵ Mutunga, Willy: *Constitutions, Law and Civil Society; Discourses on the legitimacy of people's power*, Oloka J, ed, *Constitutionalism in Africa*, Kampala, 2001

for political power. In this vein, civil society must furthermore perceive their alliance between opposition political parties as necessary for their political expression and contestation of political power. The debate whether opposition political parties are part of civil society is irrelevant for this alliances to occur. Indeed, such alliances between opposition political parties and the various sectors of civil society against African dictatorship are becoming common.

A critical study of Kenya's political history revealed that, the civil society played a crucial role in the promotion of electoral democracy. A vibrant civil society, it was noted, is a vital player in checking the excesses of the state through advocacy and lobbying. It was established that Kenya has enjoyed an energized civil society particularly from the early 1990's, when this segment of the society contributed immensely to the interventions that led to the restoration of multi-party democracy.

CSOs have since continued to play an invaluable role in sustaining a growing democratic culture. They have also contributed immensely in the promotion of voter registration and voter education. There is nothing more dangerous to a nascent democracy than ignorance. Education of voters is key, not just in terms of the process alone, but also in order to make them aware of their rights to choose leaders. Civic education, properly conducted should also empower the electorate from the manipulative tendencies of some politicians.⁵⁶

They have also participated in the election observation process. The visibility of civil society in an electoral observation process is critical in ensuring compliance and respect for the rule of law and deterring irregularities. A consistent and effective observation program is one of the key components in measuring electoral performance and enhancement of frameworks, monitoring use of public resources for private benefits assessing media coverage; checking electoral violence and observing party behavior and voter attitudes which are key components of electoral democracy.

⁵⁶ Supra 37

It was observed that the concept of popular sovereignty was invoked by political players to justify political violence. The essence of this concept is that all sovereignty comes from the people, not the state, or an elite class of privileged social groups. The state must serve peoples interests and not the reverse. In the process of political participation, the UDHR and the ICCPR assume the sovereignty belongs to the people. Common Article of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) on self determination are also based on his concept. Democracy would not be possible without it. Hiding behind this veil of popular sovereignty, key politicians called their supporters for public mass actions to reject the presidential election results. The mass actions turned into looting of public property, burning both individual and public property, barricading major roads and highways. By so doing, these actions fell outside the precincts of the legitimate exercise of people's power.

The success of the civil strife in Kenya was closely followed by a similar occurrence in Zimbabwe which resulted into a power sharing deal akin to that of Kenya. The incumbent president agreed to share power with the election loser. It was established, sadly though, that whatever the wishes of the electorate, all that a determined and power hungry politician has to do is remain long enough in the streets, destroy enough of the country, and be rewarded with a power sharing deal that will give him (and so far it is only he) a big political post (a Prime Minister) as a reward and consolation, if he happens to have lost in an election he should have won as the case was in Zimbabwe. Where is the incentive to use constitutional means to obtain legitimate power? It was established, through personal observation that the challenge here is how to achieve a peaceful resolution of political violence without appearing to reward impunity and unconstitutional practice.

4.4 THE 2007 GENERAL ELECTIONS IN KENYA

Basing on the findings and recommendations contained in both the Waki and Kreigler reports, the researcher found out that it is important that Kenyans assess all the activities relating to the 2007 general elections so as to distinguish those that can be attributed to anomalies, failures and malpractices traceable to gaps or provisions in the constitution

and laws of Kenya from those that can be attributed to a bad culture encompassing impunity, disrespect for the rule of law and institutional incompetence.

It is important to note that change for the sake of change is folly. Change without having established the ill is worse. Unless and until one has made a proper diagnosis, the prescription is unlikely to be efficacious and might well prove fatal. The diagnosis in this instance is extremely complex and it is important that it not be oversimplified. The weaknesses on the Kenyan body politic are complex, caused by the insidious developmental ills of decades of misrule.

At public hearings and the technical workshops IREC heard, time after time, cries for societal change by means of statutory amendment. "Change the Constitution to cut down the powers of the Presidency." "Change the Constitution to do away with the pernicious winner-take-all system" "Change the Constitution to promote devolution of power" "Consolidate the diverse body of laws governing Kenyan elections." "Confirm the IPPG arrangement statutorily." "Have the Electoral Commissioners appointed by Parliament"-no, "by a multidisciplinary body, not by the President alone."

It was established from the above that, nearly two decades after nominal disavowal of one-party rule (in fact one-man rule), the day-to-day running of the country was until recently left essentially undisturbed. That is still the system of administration that IREC witnessed everywhere, with the image, name and influence of the all-powerful President extending down to the grassroots, where the District Commissioner and the galaxy of uniformed and plainclothes agents of the Commander-in-Chief hold unquestioned sway.

It is from this phenomena and various electoral observation reports on previous Kenyan elections, that the researcher was able to establish that elections still bear many of the scars of the former dictatorship. It was observed that elections under President Moi were not supposed to be free and fair. They were not supposed to be genuine expression of the choice of free men and women as to their governance. That had been decided for them. Elections were a charade, a form of natural grand opera where everybody had to express

their support for the man. Stuffing of the ballot box was not a sin. On the contrary, it was good to show how enthusiastic the people of a particular district were in their endorsement of the party and its leader. Nominally, that has changed. Nominally, elections are now fundamentally different.

Elections in modern day Kenya are supposed to be not only free and fair, as befits the model democracy of East Africa, but also smooth and slick, befitting one of the most technically advanced countries in sub-Saharan Africa. Sadly, this was very far from what happened in December 2007; the 2007 general elections in Kenya were a resounding failure.

What the IREC sadly found out was that the ECK and the elections it delivered in December 2007 are no more and no less than the people of Kenya deserved. Whereas Kenyans and their leaders were content to go through the motions of democratic election, they knew in their heart of hearts that they did not care to guard this democracy. They together with their leaders engaged in unacceptable practices;

- ? Vote-buying and selling
- ? Unapologetic use of public resources for campaigns
- ? Participation by public servants in campaign activities of certain camps
- ? Ballot stuffing
- ? Organization marauding gangs and bully boys to “zone” regions and electoral areas and intimidate opponents
- ? Using and cheering and unloading hate speech and ethnic sentiments
- ? Demonizing opponents and presidential candidates of opponent camps
- ? Using sexist tactics and violence to keep women out of the race

Was this happening because there is no legal framework in place to govern such conduct? Of course not, an analysis of the laws indicates that there is a legal framework to curb all the above itemized offenses. The true reason for the bungled 2007 elections was the failure to protect the electoral process from these unacceptable deeds.

It was concluded that nobody would have dreamt of seriously acting against people in high places. The Attorney-General certainly didn't lie awake at night worrying about all those crimes being committed without a finger being lifted to stop them. If the police were concerned about this state of affairs, they were certainly very patient. The ECK with its powers under the National Assembly and Presidential Elections Act, the Code of Conduct thereto and the Election Offences Act which include powers to prosecute never really bit anybody. Public opinion cheered the impunity on, so long as it seemed to benefit the side they supported.

A general observation was made that, in order to start trying to prevent a recurrence of the tragic aftermath of the 2007 general elections, Kenyans, from the President to the peasant, will have to do an agonizing stock take of where their country stands. They will have to show their commitment to the rule of law, and its equal applicability to all citizens irrespective of economic, social and political or any other belief.

It is an established fact that the solution does not merely lie in constitutional and legislative changes. The culture of impunity in Kenya needs a fix too. The relevant law-enforcement institutions also need to do their jobs properly.

4.5 HOW VIOLENCE CONTRIBUTED TO THE GROWTH OF ELECTORAL DEMOCRACY IN KENYA

Independent observations on the seizure of political power and the resultant capture of state in Africa were conducted. A conclusion was drawn that, this has largely been accomplished through elections, successful votes of no confidence, peaceful sharing of political power, military take-over and revolutionary armed struggles (which have recently turned into post-election violence).

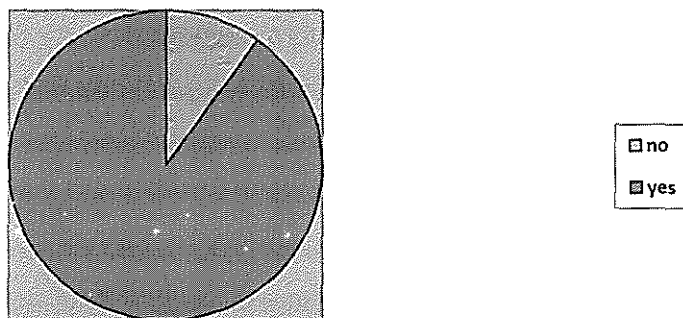
As it has already been established in the preceding discussion, violence is part and parcel of the electoral process in Kenya. The 2008 post-election violence greatly contributed towards the growth of electoral democracy not only in Kenya but in Africa as a whole.

The respondents were classified in four categories with an aim of getting different views from different angles. These categories were;

1. Lawyers
2. Politicians
3. NGOs and CSOs
4. Ordinary Voters (those without expert knowledge on the subject)

A question was posed whether the 2008 post-election violence did in any way contribute to the growth of electoral democracy in Kenya. Their responses are tabulated in Fig 2.1 below;

Fig 2.1; Did the 2008 post-election violence contribute in any way to the growth of electoral democracy in Kenya?



The figure above represents the views of a cross sectional of respondents picked randomly to answer the question above. Majority of the respondents who were asked this question answered in the affirmative. 9 out of 10 of the respondents who represent 90% of those interviewed felt that the violence did contribute in one way or the other to the growth of electoral democracy in Kenya.

A small percentage, however, did form the opinion that either way, the violence was anticipated since it had been a common feature in the previous elections. Thus, it did not

only a small percentage that felt that the violence had affected the growth of electoral democracy in Kenya.

Politicians on the other hand felt that the violence had equally contributed both positively and negatively. 5 out of 10 interviewed observed that the violence left a positive mark in Kenya's electoral field by laying the foundation of formation of a grand coalition government which incorporated the opposition and thus respected the will of the electorate. However, the remaining 5 felt that the violence had set a bad precedent in giving way to power sharing with the opposition. This effectively killed opposition democracy in the country and rendered the choice of the majority useless.

Lastly, the CSOs and NGOs felt that the violence impaired democratic principles of elections and the right to choose one's leaders. However a section of others observed that the violence had propelled the country to reforms. These findings are analyzed hereunder.

Most human rights groups, especially the KHRC, observed that the violence was a wake-up call on reforms in Kenya. It formed a major recipe on electoral democracy. This was so because previously, the consequences of political violence had been watered down by the culture of impunity which had taken root in the country. However, the magnitude of the 2008 violence was so great and compelled Kenyans to embark on electoral reforms to salvage the country from political anarchy.

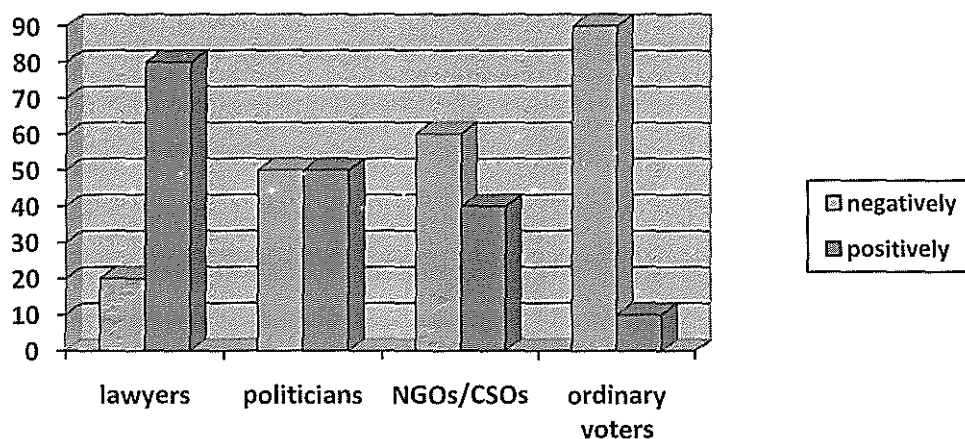
It was established from the staff at the Ministry of Justice and National Cohesion that for the very first time in the Kenyan political history, recommendations by public commissions of inquiries were implemented. The IREC had recommended in its report a radical reform of the ECK, or a creation of a new electoral management body with a new name, image and ethos, committed to administrative excellence in the service of electoral integrity, composed of a lean policy-making and supervisory board, selected in a transparent and inclusive process, interacting with properly structured professional secretariat.

contribute anything to Kenya's democracy because the violence itself is an ingredient of the Kenyan electoral system.

From interrogations conducted with different class of people, it was established that, every one held a different opinion on the role of the violence to Kenya's political set-up. Hence, it was concluded that the violence contributed both positively and negatively to the growth of electoral democracy in the country.

The figure below represents the responses from the four classes of people above on whether the violence contributed positively or negatively to the growth of electoral democracy in the country.

Fig 2.2; How the 2008 violence contributed to the growth of electoral democracy in Kenya.



The figure above shows that most ordinary voters felt that the 2008 post-election violence negatively contributed to the growth of electoral democracy as will be analyzed later. 9 out of 10 interviewed felt that the happenings of 2008 rendered the electoral process useless.

On the other hand, lawyers, paralegals and human rights groups largely felt that the violence was a positive mark towards achieving a sustainable electoral democracy. It is

It was observed that all the above has been implemented. The ECK was disbanded following IREC's recommendations and a new electoral body, the Interim Independent Electoral Commission (IIEC) was created by a constitutional amendment and empowered to conduct and supervise electoral process in Kenya.

The IREC had in its report recommended the establishment of a new voter registration system in Kenya. It was found out from the IIEC that a new electronic voter registration system was adopted in Kenya, which lays down an electronic voting system to prevent rigging in future.

From the Parliamentary Hansard of May 2008, it was established from the parliamentary debate that, the post-election violence contributed to the enactment of the Political Parties Act which came into force in 1st July 2009. From the sentiments raised by members debating the Bill, it was evident that the 2008 experience had exposed Kenya to the need of having a political system that regulates the operation of political parties. The pains of 2008 compelled our politicians to pass this piece of legislation which establishes a political system in Kenya.

The 2008 experience in Kenya played a crucial role in the establishment of the Interim Independent Boundary Review Commission (IIBRC) which was mandated to review the existing district and constituency boundaries with the aim of curbing ethnicity. It was established that the Government of Kenya through Agenda 4 founded the Truth, Justice and Reconciliation Commission (TJRC) to address the past injustices in Kenya, foster reconciliation and chart a remedy in bid to create unity and national cohesion.

However, it was established from some electorates in Rift Valley province that the 2008 violence also had a negative impact on the Kenyan electoral democracy. The post-election violence intimidated the right to vote, and be voted in any public office. The concept of free and fair elections was greatly impaired. Additionally, great voter apathy is prevalent in the country as a result of the violence. The electorates have developed a feeling that even if they participate in democratic elections, the final outcome would be

compromised as it was in 2007 elections. It was further sadly established from these electorates that, Kenyans have lost confidence in their own electoral system. As a result, many shied away from the recent voter registration exercise arguing that by undertaking to vote, they were purchasing poverty, violence and displacement. They argued that by voting, they lost everything and most are not willing to go back to the situation of 2008. It was concluded that this will change the voting trend in future elections thus greatly impairing electoral democracy.

A personal observation was made that the debacle in Kenya attracted keen international attention including the active participation of former UN Secretary General Koffi Annan who brokered a power sharing deal between Mr Raila Odinga and Mr Mwai Kibaki. The Kenyan model entrenched the extremely dangerous precedent in not only Kenya but Africa's transitional politics in which the incumbent, having rigged an election (as it was claimed from the opposition) sits across the table with the opposition, the real winners (as they claimed) and share power. In essence therefore, the voters' choice is made irrelevant. It is this precedent that could have emboldened Mr. Robert Mugabe to try the power sharing jig in Harare, and also encouraged the opposition, the Movement for Democratic Change (MDC) to enter negotiations with the ruling party (ZANU-PF).

CHAPTER FIVE

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

5.0 INTRODUCTION

This chapter presents the summary of the major findings, the conclusions derived from such findings in chapter four of this report and the appropriate recommendations and the way forward.

5.1 SUMMARY

It was established that, violence has been part of Kenya's electoral process since the restoration of multi-party politics in 1991. However, the violence that shook Kenya after the 2007 general elections was unprecedented. It was by far the most deadly and the most destructive violence ever experienced in Kenya. Also, unlike in previous cycles of elections related violence, much of it followed, rather than preceded elections. The 2007-2008 post-election violence was also more widespread than in the past. It affected all, but 2 provinces and was felt in both urban and rural parts of the country. Previously violence around election periods concentrated in a smaller number of districts mainly in Rift Valley, Western and Coast provinces.

In some ways the post election violence resembled the ethnic clashes of the 1990's and was but an episode in a trend of institutionalisation of violence in Kenya over the years. The fact that armed militias, most of who developed as a result of the 1990's ethnic clashes, were never de-mobilized led to the ease with which political and business leaders reactivated them for the 2007 post-election violence. Secondly, the increasing personalization of power around the presidency continues to be a factor in facilitating election related violence.

The widespread belief that Presidency brings advantages for the President's ethnic group make communities willing to exert violence to attain and keep power.

One of the main findings of this report is that Kenya's constitutional and legal framework relating to elections contains a number of weaknesses and inconsistencies that weaken its effectiveness during the 2007 general election, and that this legislation needs urgent and radical consolidation.

During the preparation and conduct of the 2007 elections, the ECK lacked the necessary independence, capacity and function ability because of the weaknesses in its organizational structure, composition, and management systems.

The conduct of the electoral process in Africa has been hampered and the electoral environment polluted by the conduct of many public participants, especially political parties and the media. The serious defects in voters register have impaired the integrity of elections not only in Kenya but in Africa as a whole.

There was generalized abuse of polling, characterized by widespread bribery, vote-buying, intimidation and ballot stuffing. This was followed by grossly defective data collection and ultimately the election process failed.

The events in Kenya brought to the fore a new African transition model. Since the Kenyan elections debacle in December 2007, political pundits have been eager to draw lessons for other African countries in transition. Another model that hotly followed suit was the Zimbabwe model, in which the opposition Movement for Democratic Change (MDC) won the parliamentary elections in 2008. They were forced into a second round of Presidential elections, but denied the chance to participate in it due to intimidation and state inspired violence, resulting in the sole candidature of President Robert Mugabe.

Another example occurred in Ivory Coast. After four months of post-election turmoil, Ivory Coast's elected leader Alassane Ouattara has finally took office in May 2011. The dispute was between Mr Laurent Gbagbo, who was declared winner by the Constitutional Court, and Mr Ouattara, who was declared winner by the United Nations (UN), which carried out the elections.

Over the past decade the tradition has been for power-sharing governments to resolve post-electoral disputes - as seen in Zimbabwe and Kenya.

The Ivory Coast model is a step change in Africa's support for electoral democracy and democratic transitions. This is because, Ivory Coast marks a shift away from the power-sharing default setting, and back to the tradition of the electoral winner becoming the national leader and forming a government of their choice - either inclusive or single party government.⁵⁷

5.2 RECOMMENDATIONS

Constitutional reforms were at the core of implementing some of the aspects recommended in the IREC report. Kenya promulgated a new constitution in August 2010, however many key institutional reforms are yet to be undertaken and the violence of 2008 may recur at a future date if the status quo prevails. The National Accord recognizes that the crisis triggered by the disputed 2007 presidential election results brought to the surface deep-seated and long-standing divisions within the Kenyan society, which if left unaddressed, threaten the very existence of Kenya as a unified country. Agenda item 4 of the Kenya National Dialogue and Reconciliation process set out a coherent and far reaching reform agenda to address the root causes of recurrent conflict and create a better, more secure and prosperous Kenya for all. The long-standing issues identified under Agenda Item 4 need to be implemented first to put Kenya back on the course of electoral democracy.

Democracy is a process and there is a need to implement all previous findings and recommendations especially those addressed in the CIPEV and the IREC reports. These commissions have elaborate findings on the factors that caused election violence and examine the integrity of the electoral bodies in Kenya to conduct elections.

Ethnic politics have been found to greatly impair electoral democracy and as a cause of post-election conflicts. The quest for de-tribalisation treats ethnicity as a political

⁵⁷ <http://www.bbc.co.uk/news/world-africa-13092437>

pathology to the democratic process. Indeed, it can be achieved by adopting electoral systems that promote merit as opposed to ethnic patronage.

Re-examination of electoral systems may be one way of beginning to de-ethnicise politics, for example, proportional representation based on party lists or any of its variants which emphasizes National outlook as opposed to ethnic blocs and clanism⁵⁸.

Therefore, Kenya needs to establish and adopt a systematic political system that addresses national values. The Political Parties Act should be amended to disband political affiliations that stem up from tribal notions and policies. Also, the Registrar of Political parties should be given independence in the exercise of his powers which include the de-registration of political parties which don't abide by the law.

All political role players in Kenya should recognize that materially defective elections accompanied by public violence will remain a feature of life in their country absent a concerned and sustained commitment to electoral integrity by all Kenyans.

Devise, implement and maintain appropriate executive, legislative and political measures to enable the reconstituted electoral commission to initiate, popularize and sustain a national commitment to electoral integrity and respect for the inalienable franchise rights of Kenyan citizens.

The Human resources and Commission structure. The current IIEC structure is based on 210 constituencies, 8 provinces divided into 17 administrative regions and 3 sets of elections. The new constitution provides for 47 counties, 290 constituencies and 6 ballots. IIEC should start the process of reviewing the structure so as to develop one that reflects the new system. This should be in place before the formation of the Independent Electoral and Boundaries Commission (IEBC)

⁵⁸ Lumumba, PLO; Negative Ethnicity: The Bane of Democracy in Africa. A paper presented at a conference titled "One Kenya, One Dream: The Kenya We Want" organized by the office of the Prime Minister held at the Kenyatta International Conference Centre on 4th-6th February, 2009

To break the cycle of impunity, which is at the heart of the post-election violence, it is recommended that Kenya fully co-operate with the ICC in its prosecutions of those named in the Waki Report as the perpetrators of the 2007 post-violence and hand them over to the ICC prosecutor for trial. By so doing, Kenyans would have attained justice and impunity would have been defeated.

There need to be a revision of the existing administrative boundaries and where necessary creation of new boundaries to curb ethnicity which has previously led to ethnic tensions and clashes.

Civic awareness must also be institutionalized as a means of immunising the populace from the manipulative ways of ethnic propagandists and opportunistic politicians whose ethos is to keep the masses in profound ignorance to make them perfect for manipulation and cannon fodder for political warfare and as collateral in the political mortgage market.

5.3 CONCLUSIONS

The 2008 post-election violence was a wake-up call to Kenya. It exposed the weaknesses in its electoral legislation and brought out the level of the democratisation process. The reforms that followed the violence had been long overdue. In short, the violence was a catalyst to her reforms. By putting the country on the reformatory path, the violence greatly contributed to the growth of electoral democracy as witnessed in the implementation of the Kenya National Dialogue and Reconciliation Agreement under the auspices of the four Agenda items i.e. the establishment of the Commission of Inquiry into Post-Election Violence in Kenya (CIPEV), the Independent Review Commission (IREC), the Boundary Review Commission and the Truth, Justice and Reconciliation Commission (TJRC)

The effects of the violence also contributed a step towards the end of impunity in the country. The 2008 violence brought the perpetrators of the violence to the attention of the International Criminal Court (ICC). Most interestingly is that these suspects may be the same persons who were at the helm of previous election related violence in 1992 and

1997, thus the people of Kenya will ultimately get justice through the ICC. This will greatly hinder the recurrence of such violence in future.

The research concluded that the post-election violence was more than a mere juxtaposition of citizens-to-citizens opportunistic assaults. These were systematic attacks on Kenyans based on their ethnicity and their political leanings. Attackers organized along ethnic lines, assembled considerable logistical means and traveled long distances to burn houses, maim, kill and sexually assault their occupants because these were of particular ethnic groups and political persuasion.

The 2008 post-election violence greatly impaired the growth of electoral democracy in Kenya. It intimidated the right to vote and be voted in any political office and overshadowed the concept of free and fair elections and as a result created a wave of voter apathy in the country. This has greatly hampered the people's participation in the electoral process. Attempts to register new voters in the country have been affected by this.

A conclusion was drawn that Africa is experiencing a new political cycle. Re-colonization is fast becoming a new reality. African presidents never lose elections because such elections are neither peaceful, free nor fair. Civil interventions are unacceptable, and yet democratization will not come from periodic elections which political parties viewed as their exclusive domain of operation.

Throughout its post-colonial history, the Kenyan state has not been a fully functioning democratic state in line with western conceptualisation of democracy. Yet, its citizens, irrespective of their ethnic affiliation, have not contested its firmness on sovereignty instead the instability reflects contested claims for enrichment, representation and political exclusion from the center. The 2008 political violence is attributed to increasingly factional politics, based on the multiple cleavages in Kenyan society, who mobilise ethnic groups to benefit from the state spoils (power sharing). The ongoing reforms of the institutions of governance are unlikely to resolve the political crisis as they

fail to move beyond a methodological pre-occupation with ethnic identities and address the complex social reality of Kenyan society and to include people of Kenya as part of a broader non-ethnicised political community, a pre-requisite for a stable pluralistic democracy.

Political exclusion is more than simply denying basic citizenship rights, such as the right to vote and associate. When imposed on such a large scale, as it did in 2007, it prevents groups and categories of people from participating in political life, and inhibits democratization of elections. Government response to citizen complaints has been haphazard and misdirected thereby creating a society that is perpetually in crisis. The politics of exclusion has contributed to the near destruction of Kenya.

Whereas ethnicity is endemic, the challenge is how to overcome the inevitable problems of exclusion and inclusion in a political process that is ethnically based. The perception has been that when political parties win an election they are usually compelled to deliver to an ethnic constituency that obviously define the winners and losers in ethnic terms. The common perception in Kenya is that the Government primarily helps its cronies not the population. To address social-economic inequality, Kenya needs to change its laws in order to make them to be in tandem with its new Constitution. This will aid in introducing systems that entrench the politics of inclusion.

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APPENDICES

Appendix A.

Interview Guide

To Lawyers, NGOs/CSOs and Politicians

My name is Lucas Ongeru Manwa, a final year student at Kampala International University pursuing a Bachelors Degree in Law and currently carrying out my research study in partial fulfillment for the award of a Bachelors Degree of Law.

I hereby have this set of questions designed as part of research project to acquire information on the Contribution of Post-Election Violence to the Growth of Electoral Democracy in Africa, the 2008 Post-Election Violence in Kenya as a case study.

Having been identified as one of the respondents in this study, you are kindly requested to provide relevant information. I assure you that this information is purely for academic purposes.

- 1 What are the factors that have heightened post election violence in Kenya?
- 2 Did the 2008 post-election violence in any way contribute to the growth of electoral democracy in Kenya? If yes, how?
- 3 Does the Kenya legal framework provide ways in which to sustain electoral democracy in Kenya?
- 4 How do the Kenyan institutions promote electoral democracy?
- 5 Are there any legal and policies reforms that can be established to promote electoral democracy in Kenya?
- 6 What role do leaders and politicians play in the growth of electoral democracy?
- 7 What lessons can Kenya draw from the 2008 post election violence?
- 8 What do you think should be done to avoid a similar occurrence in future?