

**THE EFFECTIVENESS OF THE NEW ELECTORAL LAWS IN  
CURBING POST ELECTION VIOLENCE IN KENYA**

**BY**

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OF THE REQUIREMENTS FOR THE AWARD OF THE  
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## CERTIFICATION

The undersigned certifies that, I have read and hereby recommend for acceptance by Kampala International University a dissertation titled, "The Effectiveness of the New Electoral Laws in Curbing Post Election Violence in Kenya", in partial fulfillment of the requirement for the Degree of Bachelor's of Laws.

SIGNED



MR. JOSEPH KYAZZE (SUPERVISOR)

DATE

## DECLARATION

I, Kimathi N Bridah, hereby declare that the work presented in this dissertation is my own and that it has never been submitted in any university whatsoever for the award of degree.

SIGNED



KIMATHI N. BRIDAH

DATE 13<sup>th</sup> May 2013

## **DEDICATION**

I dedicate this research to my beloved parents Mr. & Mrs. KIMATHI, my sister Milchah and brother Dennis who have been very instrumental towards completion of this dissertation. I equally dedicate this research to the victims of election and post-election violence and it is my wish that this research will be instrumental in combating the problem.

## ACKNOWLEDGEMENTS

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Lastly, I am immensely grateful to Hamis K. Pius for the support and to my friends Jeremy Maina and Alliy Sumri

I hope the report will be helpful in preventing and curbing election and post-election violence.

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## ACRONYMS

<b>CIC</b>	-	Constitution Implementation Commission
<b>CORD</b>	-	Coalition for Reform and Democracy
<b>CSO</b>	-	Civil society organizations
<b>ECK</b>	-	Electoral Commission of Kenya
<b>FM</b>	-	Frequency Modulated
<b>IDP</b>	-	Internally Displaced Person
<b>IEBC</b>	-	Independent Electoral Boundaries Commission
<b>KBC</b>	-	Kenya Broadcasting Corporation
<b>KHRC</b>	-	Kenya Human Rights Commission
<b>KNCHR</b>	-	Kenya National Commission for Human Rights
<b>KNDR</b>	-	Kenya National Dialogue and Reconciliation
<b>NCI</b>	-	National Integration Commission
<b>NCIC</b>	-	National Cohesion and Integration Commission
<b>ODM</b>	-	Orange Democratic Movement
<b>PBO</b>	-	Faith Based Organizations
<b>PEV</b>	-	Post Election Violence
<b>PNU</b>	-	Party for National Unity
<b>TNA</b>	-	The National Alliance

## ABSTRACT

This research was undertaken to collect data on the new legal order in Kenya with the ultimate goal of establishing their efficacy in preventing and curbing election and post-election violence in Kenya. The research covered the whole country with emphasis on the areas most affected by the 2007-2008 election violence. It unraveled a number of loopholes that hinder the complete efficacy of the new legal order as well as those that were in the repealed legal order but corrected by the new legal order.

The repealed legal order was in many ways lacking in laws that protected the public against the perpetrators of post-election violence for their own selfish needs. The research established that the various election and post-election violence outbreaks that culminated to the 2007-2008 violence were mainly instigated by hate speech and tribalism. From these two land issues emerged. The old legal order as established by the research, had lax or no laws that effectively protected the public against these causes of violence while the new legal order has extensively provided for them.

Although there still exists various loopholes in addressing these issues, mechanisms have been set in motion to effectively put into use the new legal order. These include various reforms in the judiciary, the police and the legislation and most of all the implementation of the new constitution.

In addition there is need for stakeholders to work together through a coordinated approach because the problems and needs presented by election violence are multifaceted and thus need a multi-sectoral and participatory approach involving the government, civil society and the citizens.

## CHAPTER ONE

### 1.0 Background

The gravity of the post election violence in Kenya is now in the history books not only in Kenya but world over. Like in other countries on the African continent, post election violence has over time become very common. In Kenya it was so astounding and widespread that it attracted international condemnation and that has even culminated into the indictment of some of those alleged to have orchestrated the violence before the International Criminal Court<sup>1</sup>.

December 27<sup>th</sup> 2007 is to be remembered in Kenya as the day general elections were held and the after which Kenya underwent widespread violence that was unprecedented since the Mau Mau independence struggles. The main cause of the electoral and post electoral violence was the disputed results declared by the Electoral Commission of Kenya for the position of president. whereof the then incumbent President Mwai Kibaki was declared the winner<sup>2</sup>

The reaction to Kibaki's swearing in was a violent rampage in parts of the country most noticeably in Raila's home town in Nyanza and in Nairobi slums which are a part of his Langata

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<sup>1</sup> Uhuru Kenyatta , then deputy PM and finance minister, Francis Kirimi Muthaura, then secretary to the cabinet, Mohammed Hussein Ali, former police chief, Henry Kosgey, then minister for industrialization, William Ruto, then suspended education minister and Joshua Arap Sang, radio executive.

<sup>2</sup> "I do not know whether Kibaki won the election," Samuel Kivuitu told *The Standard*, Kenya's oldest newspaper, ahead of a critical rally by the opposition's presidential candidate, Raila Odinga, due in Nairobi today. "If this matter is finally taken to court, the ruling should be made urgently so that if it were decided that Raila is the president, so be it. If it is Kibaki, so be it," said Mr Kivuitu. (Kenya's poll chief does not know if Kibaki won, By Sebastien Berger in Nairobi. The Telegraph)

constituency. Apart from the disputed election results, the violence stemmed from other motives such as the fact that voting in elections has widely been along ethnic lines in most of Kenya's communities and there was a widespread perception that the count of the presidential election was modified in favor of Kibaki. Moreover, during colonial times Kikuyu people were displaced from their fertile highlands and after independence they were settled outside their traditional areas especially in the Rift Valley, where the ethnic Maasai had populated originally before Kenya's colonization by the British<sup>3</sup>. There also is a belief among other tribes that the Kikuyu community in Kenya has dominated the country since independence.

There were three distinct but sometimes concurrent patterns of violence – spontaneous, organized and retaliatory. The first phase began immediately after the announcement of the contested election results, when opposition supporters took to the streets in protest, especially in Kisumu and the Nairobi slum areas; the second wave consisted of organized attacks in the Rift Valley which appear to have targeted non-Kalenjin communities and those perceived as opponents of the opposition ODM party, including the Kikuyu, Kisii and Luyha communities. In retaliation, gangs of Kikuyu youths subsequently attacked non-Kikuyu groups in Naivasha, Nakuru and Mathare.<sup>4</sup>

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<sup>3</sup> European and Arab presence in Mombasa dates to the Early Modern period, but European exploration of the interior began only in the 19th century. The British Empire established the East Africa Protectorate in 1895, from 1920 known as the Kenya Colony, Wikipedia

<sup>4</sup> Report on Post-election Violence in Kenya – UN Human Rights Team, March 20 2008

According to most of the victims and witnesses interviewed, the police were often present but were either overwhelmed or passive during the attacks. However, in various places, most notably in the Kibera slum area of Nairobi, Eldoret and Kisumu, the policing of demonstrations and crowds was conducted with excessive use of force resulting in death and injuries of many, including children. According to the Government's figures, 123 people were killed by the police, although an analysis of hospital reports suggests the actual number may be higher. In all, more than 1,200 Kenyans were reported killed, thousands more injured, over 300,000 people displaced and around 42,000 houses and many businesses were looted or destroyed. A significant number of cases of sexual violence were also reported.<sup>5</sup>

Kenya has been at a political cross road ever since the close of the 2007 general elections. While there has been relative peace, general calmness and a running government, the situation has remained fairly fragile and uncertain. The brokered settlement or the National Accord process laid out a series of 'must dos' through its agenda resolutions and gave time lines if the national healing and reconstruction were to be realized. The 'must dos' included the setting up of commissions to investigate, examine and recommend on circumstances that surrounded the post election violence and to further scrutinize the country's electoral process with a view of initiating and guiding electoral reforms to avoid future electoral chaos<sup>6</sup>. It is against this background that a new electoral legal order was put in place to regulate future elections and control the possibility of recurrence of the election and post election violence. This research therefore examines the

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<sup>5</sup> Report on Post-election Violence in Kenya -- UN Human Rights Team. March 20 2008

<sup>6</sup> Kreigler Report on Post-election violence 2009

efficacy of the new legal regime, the challenges and prospects in so far as the conduct and conclusion of peaceful elections is concerned.

## **1.1 Statement of the problem**

Since the 2007-08, crisis the country has been resting on ethnic clash pedestal with widespread fears of it toppling to subsequent post election violence. With some internally displaced persons still languishing in IDP camps in the country coupled with the lack of any visible solution to remedy the displacement of the victims from their land, it is feared that a retaliatory violence may erupt come the next elections. Consistent failure to act on the findings and recommendations of various state-commissioned inquiries and studies has distanced the citizens from state institutions. Most of those interviewed identified the failure to prosecute perpetrators (including planners and organizers) of past violence and human rights violations and the consequent message this gives to perpetrators that they are able to act in total impunity as major contributing factors to the violence.<sup>7</sup> The Constitution of Kenya 2010, The Elections Act 2011, the Assumption of Office of the President Act 2012 and the Leadership and Integrity Act 2012 were passed into law by the parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assemblies; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes. This is with the intent to find a possible solution to not only prevent the repeat of post

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<sup>7</sup> Human Rights Watch, *Kenya: Prosecute Perpetrators of Post-Election Violence ;Create Special Judicial Mechanism to Deliver Justice for Victims*, 9 December 2011



election violence but to also remedy the damage done in 2008. The question for investigation and worth extensive consideration in this research is whether the new legal order is capable of averting possible future election and post election violence.

## **1.2 Main Objective of study**

The crux of the study is a critical analysis of the efficacy of the new electoral laws in curbing post-election violence in Kenya, the challenges and viable recommendations proposed with a view of effective implementation and enforceability of the law.

## **1.3 Specific Objectives of the study**

- (i) To examine the electoral process under the now repealed electoral legal order, the causes of post election violence and the lacunae therein that partly continued to the failure to effectively curb post election violence.
- (ii) To examine the process to review, overhaul and enactment of new legislation for the conduct of elections in Kenya, and discuss the efficacy of the new legal regime in curbing or controlling post election violence.
- (iii) To make a comparative analysis of the relationship between the new legal order and other mechanisms and polices put in place for the effective control of post election violence.
- (iv) To analyse the legal and practical challenges that may impact on the effective implementation of the new legal order and propose viable recommendations.

## **1.4 Research Hypothesis**

- (i) The incomprehensive nature of the now repealed election legal order contributed massively to post election violence in Kenya.
- (ii) The absence of effective implementation organs and agencies for curbing election violence in the now repealed legal order was a significant factor in the wide spread post election violence in Kenya.
- (iii) Notwithstanding the weaknesses in the then existing legal order, Kenya was and is faced with practical challenges stemming from ethnicity which continues to play an important role in election and post election violence.
- (iv) The new electoral legal order in Kenya was necessary and indeed accommodates effective controls and measures for curbing election and post election violence
- (v) Notwithstanding the new legal order, there is need for enhancing and facilitating the enforcement agencies mandated to curb and control election and post election violence

## **1.5 Scope of the Study**

In terms of subject content, the study focuses on the comparative analysis of the repealed legal order and the new legal order and its efficacy in remedying the defects in the old legal regime and the extent of its comprehensiveness in curbing post election violence.

In so far as geographical scope is concerned, it is common knowledge that there was post election violence in most parts of Kenya but it is not the intention of this research to cover the entire country given the limited time and resources. Focus is therefore had to the Nairobi slums, Eldoret, Nakuru, Kisumu, Naivasha and parts of the coast that were worst hit by the 2007 post election violence. These are used as samples to reflect the wider picture of post electoral violence. In terms of time, the research centers on the period between 2007 to date.

The government and the Electoral bodies seem to be fighting a losing battle in reconciliation of different tribes in these areas due to bitterness over the atrocities committed to them by their co-existing tribes. They have tried to resolve the ethnicity problem, the major cause of post election violence, which emanates from different faces such as land struggle, political, social and economical resource craving which kept recurring due to economical friction and lack of law to tame politicians who at times may have aroused ethnicity for selfish gains leading to post-election violence in 2007-2008.

### **1.6 Significance of the Study**

After thoroughly carrying out the research, the researcher is be able to come up with recommendations on the most effective way use the new law to create a harmonious relationship between people of different tribes and ethnicity and find a lasting solution to post election violence. The research is capable of aiding in providing up to date factual information for academic, research and policy makers.

The administration ministries, institutions and groups concerned benefit from the research in so far as interpretation of the new laws without bias when addressing election issues in regard to different ethnic groups and political parties and this will reduce bloodshed, loss of life, property and engraved hatred among the 42 tribes in Kenya.

The research is vital in the re-examination of the role of the government, the police, the media and the people in promoting and monitoring successful violent-free elections in Kenya. Further their role in protecting the common person against the violation of their rights by post-election violence will be examined.

## **1.7 LITERATURE REVIEW**

### **1.7.1 Introduction**

In this chapter the researcher attempts to review previous studies which have contributed to knowledge of issues which led to the post election violence. Further, this chapter attempts to review the previous law regime on its provisions on election dispute resolution and for connected purposes.

### **1.7.2 Provisions of the old law regime on post-election violence**

The Kenyan laws that are relevant to the elections are about 13 including the constitution, Acts of Parliament, regulations and codes of conduct. The national laws are expected to be in harmony with international conventions and internationally recognized best practices.<sup>8</sup> The old Constitution of Kenya and other laws in relation to election laws in so many ways have loopholes in putting in place measures that would possibly prevent post-election violence. The old Constitution for instance failed to recognize the supremacy of the people. Rather it placed the institution of the Presidency above all else through direct and indirect interpretation. The major weaknesses of the old Constitution according to Kreigler Report 2009 are; the right to vote and stand for elections is not expressly provided for in the laws. It is only assumed in the constitutional provisions that provides for rights and association, expression, assembly, etc. It is noted that it is erroneously thought to be the same as having an entitlement to register as a voter.

While the laws are fairly liberal on the participation of persons with disability, it is expressly discriminates and bars anyone who is not able to speak Swahili Language well enough to take an

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<sup>8</sup> Kreigler Report on Post-election Violence 2009

active part in the proceedings.<sup>9</sup> The number of pieces of law relating to elections is too many and process of enforcement of the laws is cumbersome and gives space for scapegoats.

The elections witnessed: Vote-buying and selling, unapologetic use of public resources for campaign, participation of public servants in campaign activities of certain camps, ballot-stuffing, organizing, marauding gangs and bully-boys to “zone” regions and electoral areas and intimidate opponents, using and cheering and uploading hate speech and ethnic sentiments, demolishing opponents and presidential candidates of opponent camps and using sexist tactics and violence to keep women out of the race.

### **1.7.3 Provisions of the Repealed Legal Framework on ethnicity as a root cause of post-election violence.**

The repealed legal order provides for a minimalist Bill of rights. It recognizes rights which it quickly takes away.<sup>10</sup> The government has historically implemented the law by the exceptions rather than the actual rights and thus it is retrogressive.

Ethnicity is “an aspect of collectivity’s self-recognition as well as an aspect of its recognition in the eyes of outsiders.”<sup>11</sup> In modern days ethnicity tends to be recognized as a means of interaction between different cultural groups and strategic positions of power within the structure of the society. As a result of this, they search for ways in which they can organize themselves

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<sup>9</sup> Constitution article 34

<sup>10</sup> Chapter V of the old Constitution

<sup>11</sup> Fishman

politically; a special emphasis is put on traditional cultures and all an array of symbolic strategies which provide them with proper mechanisms for distinctiveness and political alignment.

The key to post-election violence in Kenya lies in the changing role of the post colonial state in relation to the country's ethnic terms of political trade. The extensive commentary on Kenya's troubles has tended to blame ancient tribal rivalry, cynical political calculation, or a combination of the two; with the corrupted electoral process seen as providing the unintended catalyst or worse.<sup>12</sup>

Kenya has 42 tribes. The five major ones are; Kikuyu, Luo, Kamba, Kalenjin and Luhya. The smaller tribes are Ogiek and Njemps, among others. Although ethnicity has its roots in the colonial era it is largely as a result of the desire of a group to dominate another. Leaders are elected based on what language they speak but not their merit though the playing of ethnic cards is not a new phenomenon in Africa.<sup>13</sup>

The extensive commentary on Kenya's troubles has tended to blame ancient tribal rivalry, cynical political calculation, or a combination of the two; with the corrupted electoral process seen as providing the unintended catalyst- or worse, the deliberate instigator that awakens latent

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<sup>12</sup> John Lonsdale, *Kenya: ethnicity, tribe, and state*, Open Democracy, 17 January 2008

<sup>13</sup> The Africa Executive, *Liberating Kenyans from the Yoke of Ethnicity*, 22 November 2006

tribal hostility. British imperialism has also received its expected share of criticism, for inventing the now indigenous Kenyan practice of divide and rule.<sup>14</sup>

#### **1.7.4 Provisions on Hate Speech as a Cause of Post Election Violence**

Until recently, hate speech in Kenya was a mere wording relating to an impediment to free speech and expression. The position currently can be described as nascent and facing superfluous challenges. The most noticeable challenge was the criminalization and implementation process that sought to conceptualize prosecution of hate speech under a political attitude cuddled with impunity. Kenya learned the hard way following the 2007 post-election violence that necessitated criminalization of hate speech.

The 1992 ethnic clashes were motivated by multi-party politics cuddled with a negative verbal exchange. Kiai acknowledges that hate speech was recorded during that period. For instance, calling for the chopping off of the finger of anyone seen flashing the two finger salute that was the sign of multi-party and calling of Kikuyu to 'lie low like envelopes' to avoid destruction.<sup>15</sup>

Ultimately, specific ethnic groups turned against each other especially in the Rift Valley province where some people lost their lives. Apparently, no action was ever taken, nor any accountability mechanisms initiated. The ethnic clashes were also experienced in 1997 before another election in the Rift Valley and the Coast provinces. These were ethnically motivated stirring tension between the Luo, Kikuyu and Kalenjin speaking populace. Kiai furthers that the president (as was then) could be heard directly hating on the opposing Luo tribe. For instance,

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<sup>14</sup>Caroline Elkins, *"what's tearing Kenya apart? History, for one thing"*, Washington Post, 6 January 2008

<sup>15</sup> Maina Kiai, *Speech, Power and Violence: Hate Speech and The Political Crisis in Kenya*

that the Luo were so cheap that they could be bought for only Ksh. 5 and that the Kikuyu people were ugly, with brown teeth and jigger-infested feet and could therefore not be entrusted with leadership.<sup>16</sup> The climax of hate speech came during the PEV of 2007-2008 and its aftermath that involved an array of serious human rights violations as highlighted by domestic, international and non-state actor's reports.<sup>17</sup>

Similarly, the Waki Commission Report found that politicians, local elites as well as the media contributed to the building up of tensions in the lead up to the elections through 'inciteful utterances' and the 'incitement to the organization of violence.' Such statements range from malicious cell-phone text messages circulation, denigration of individual political actors.<sup>18</sup>

### **1.7.5 Provisions on Land Issue as a Cause of Post Election Violence**

Since 1991 ethnic violence has erupted with a ferocity and mind numbing regularity the core of the conflict being the issue of land. The old Kenyan Constitution does not provide for means of equitable distribution of resources .Land is seen in the same way as any other property thus has been abused.<sup>19</sup> No proper regulation has been in place. The commissioner of lands and the president have been to be the ones granting title thus abuse of the common heritage, the deliberate instigator that awakens latent tribal hostility. The first acts of violence erupted in 1991 October at a settlement farm on the border of the rift valley, Nyanza and western provinces

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<sup>16</sup> National Cohesion and Integration Commission, Guidelines for Monitoring Hate Speech, August 2010, 4.

<sup>17</sup> These include the Commission of Inquiry into Post-Election Violence (CIPEV/The Waki Report), the Kenya National Commission of Human Rights (KNCHR), international authorities and prominent international human rights non-governmental organizations, such as, Human Rights Watch.

<sup>18</sup> (Commission of Inquiry into Post-Election Violence – CIPEV (Waki Report), p 68-71)

<sup>19</sup> Chapter 4 Constitution 1964



escalating and taking on an ethnic dimension and spreading to several districts in the regions in an area with about 51% of Kenyan population.<sup>20</sup>

The motive of the violence was to prove the government assertions that the political pluralism was synonymous with ethnic chaos, to punish ethnic groups allegedly supporting the political opposition, to terrorize and intimidate non- indigenous people to vacate the rift valley province, Kenya's most fertile region and to allow the Kalenjin to possess and occupy the land through intimidation and violence. Since '92 this ethnic division and tension has been building up and finally blew up in 2007.<sup>21</sup>

1.7.6 The electoral system and its parties

The overall mandate in operationalizing elections in Kenya had prior to the new legal order, been placed on the ECK which was invested with powers to: divide Kenya into such numbers of constituencies having such boundaries and names as it may prescribe, register voters and maintain and revise the register of votes, direct and supervise the presidential, parliamentary and civic elections, promote free and fair elections, promote voter education throughout Kenya, determine the proportion of nominated members of parliament and councilors that each party should nominate and to ensure the observance of the principle of gender equality in such nominations and to supervise party nominations on request.<sup>22</sup>

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<sup>20</sup> Human Rights Commission, *Lest we forget: the faces of impunity in Kenya* August 2011

<sup>21</sup> Africa Watch 1993,

<sup>22</sup> Kriegler and Waki Reports on 2007 Elections.

The ECK was accorded the powers to see to the “overall conduct of elections” and the power to “give general directions and exercise supervision and control thereof and take the necessary measure to ensure that the elections are transparent, free and fair”.<sup>23</sup>

Beyond the Constitution and section 3-3B of the National Assembly and Presidential Elections Act, there is no law governing many of the ECK’s institutional and operational aspects. This is in stark contrast to the situation in some countries in Africa (such as Malawi and Ghana) and elsewhere where this is provided for in a dedicated law to back up constitutional provisions on, for instance, establishment and security of tenure. It is also in contrast to the position of a number of Kenya’s own constitutional bodies, such as Judiciary and Parliamentary Service Commission.

In the old constitution, the electoral system was not elaborate. No gender equity. Political parties were fiefdom cases though recognized by the law just as vehicles for election. Electoral malpractices were not forbidden out rightly in the old one. Systems and structures promote nepotism.

The old constitution vested all executive authority on the President (and in a limited way through the National Accord) with the Prime Minister. The executive authority was authoritarian and did not account to the people other than in a very limited way to parliament which was itself not effectively independent or checked. It lacked clarity regarding the presidential election disputes resulting to legitimate disputes being obfuscated. It concentrated all power and authority on the

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<sup>23</sup> Section 17(a) of the National Assembly and Presidential Elections Act

president with little or no citizen participation other than the periodic ritualistic elections. In 2002 a new president Mwai Kibaki was elected but he disappointed all but kikuyu cronies. In December 27 2007 he appeared to have broken too many tactic rules of national competition -- the last straw. That the opposition was, it seems, and merely less successful in rigging the ballot will not make reconciliation any easier.<sup>24</sup>

Political parties are an essential component of Kenya's electoral system. The Constitution the national assembly and & a presidential election Act Cap 7 provides that party sponsorship is a prerequisite in presidential, parliamentary and civic elections: independent candidates are not recognized. Political parties represented in parliament nominate candidates to the National Assembly in proportion to the seats won at elections. Political parties, therefore, are the only vehicles for political representation. Indeed, under section 40 of the Constitution, members who resign from their parties lose their parliamentary seats. During the electoral period, parties consistently lack respect for laws or regulations and the Electoral Code of Conduct is blatantly violated.<sup>25</sup>

The 2007 elections were held amid unprecedented media attention. The elections came at a time when the media arena had been fully liberalized. The consequence was the entry of exciting new players, mainly in the form of frequency modulated (FM) radio stations. ECK accredited 2.964 local and international journalists to cover the 2007 elections. The Kenya Broadcasting Corporation (KBC), a State corporation established during one party rule, existed as a

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<sup>24</sup> John Lonsdale, *Kenya: ethnicity, tribe, and state*, Open Democracy, 17 January 2008

<sup>25</sup> Waki Report On 2007 Elections 2009

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 PNU. Aggrieved political parties raised their concerns with ECK but it had neither the power nor the resolve to force KBC to change its editorial line. 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. Most media houses avoided hate speech but several FM stations incited ethnic animosity, particularly during call-in programs.<sup>26</sup>

The impact of opinion polls on the outcome of the 2007 presidential elections was controversial. While politicians sought to downplay the significance of opinion polls on the outcome of the presidential race, it was obvious that the polls were being taken seriously by political campaign strategists, voters and even the presidential contestants.

Civil society organizations (CSOs) have since continued to play an invaluable role in sustaining a growing democratic culture. CSOs, including Faith Based Organizations (FBOs), contributed immensely in the promotion of voter registration. They 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. Lastly the election observers are key components in measuring electoral performance and enhancement of frameworks, monitoring use of public resources for private benefit, assessing media coverage:

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<sup>26</sup> (KREIGLER 2009)

checking electoral violence and observing party behavior and voter attitudes. The ECK accredited 24,063 election observers.

## **1.8 RESEARCH METHODOLOGY**

### **1.8.1 Introduction**

Methodology comes from a Greek word “meter Odos.” Meter means along, while Odos means a way.<sup>27</sup> In general, this chapter presents how data will be collected from the field, processed and analyzed. The researcher specifically looks at research design, area and population of study, sample size and sampling techniques, research instruments, procedure for data collection and finally data quality control.

### **1.8.2 Research Design**

The researcher will use case study; because it depicts of either a phase or totally of relevant experience of sample selected dactum. The researcher chose case study because of its intensity and depth of the investigation. Case study offers thorough examination of specific social setting and at the same time it’s flexible in respect to data collection that will be used in this case.

### **1.8.3 Study population**

The population of study concerned five majorly affected areas that is, Nairobi, Kisumu, Eldoret, Naivasha and coast region as representative of the population in general. The eventual findings of the study will be applicable to the general population of Kenya.

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<sup>27</sup> Mike Harry (1994)

**Table 1.8.4 Choice of respondent for the study**

Category	Sampling technique	No of respondents
Local councilors	Specific	20
Chiefs	Purposive	30
Members of parliament	Purposive	3
NGOs	Purposive	5
Local leaders	Systematic	11
Pastors from different religions	Purposive	10
Observers	Snow ball	20
IDPs	Purposive	40
Pupils and students	Purposive	30
Total		169

### 1.8.5 Instruments

A self administered questionnaire will be used to collect primary data. The researcher will design the questionnaire in such format where it will have closed and open-ended questions. The researcher will consider clarity, use generally acceptable language and set objective oriented questions.

Documentary analysis will be used to help the researcher to compare the information in records in comparison what will prevail in the field. Among these will be magazine, tracks, field reports, journals and outs, newspaper and brochures.

### **1.8.6 Procedure**

The researcher will secure a letter of introduction from the office the Law Faculty to present to the administrators of the two divisions for security of the researcher and admission to carry research in that division and concerned parties. The researcher will give and collect the completed questionnaire as soon it is filled to avoid loss or misplacement.

### **1.8.7 Data analysis**

Data will be continuously analysed during data collection. Data categories will be identified and edited with a view of checking for competences and accuracy. The analysis of quantitative data will involve use of attributes numerical taken as reference for some years. To establish the correlation of data, test, retesting will be conducted in the areas that were most affected by the post-election violence. Thus the researcher will be able to determine the rate of ethnic conflict in relation to post election violence.

## **CHAPTER TWO**

### **2.1 Discussion of the Provisions of the New Electoral Laws in Kenya**

This chapter considers the nature and gist of the various pieces of legislations that have been passed to regulate the conduct, conclusion of the electoral process and to control or otherwise curb electoral and post election violence in Kenya

### **2.2 The Constitution of Kenya 2010**

Kenya entered a new political era in August 2010, following voters' overwhelming approval of a hindered in the enjoyment radically revised constitution. The new constitution enhances protection of basic rights, significantly constrains executive power, and provides limited devolution of powers across 47 newly created county governments as compared to the old constitution.

#### **2.2.1 The Repealed Constitution of Kenya 1964**

The 1964 Kenyan Constitution was officially repealed on 27<sup>th</sup> August, 2010. As pertaining hate speech, one of the key causes of post election violence, no provisions were made in this social contract against hate speech. This is important in formulating the previous position as regards prosecution of hate speech. Prior to its repeal, hate speech was perhaps as of right and not wrong. People therefore performed acts of hate speech in the ordinary cause of business. Section 79(1) of this Constitution specifically provided that, no person shall be hindered in the enjoyment of his freedom of expression. This freedom was to include, freedom to hold opinions without interference, freedom to communicate ideas and information without interferences whether the



communication be to the public generally or to any person or class of persons and freedom from interference with his correspondence.

The section provided for exceptions in only three instances, that is, where it is reasonably required in the interest of defense, public safety, public order, public morality or public health, or where it is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television, and where it imposes restrictions upon public officers or upon persons in service of local government authority, and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. On the other hand, section 82 made provisions against discrimination on grounds of race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex. The provisions further this restriction to persons with public authority or sitting in public office acting on their subordinates.<sup>28</sup>

Discrimination in this context was defined as affording different treatment to different persons attributable partly or wholly to the grounds above.<sup>29</sup>

As it can be seen, there is no express provisions as regards prohibition of hate speech or any duty to the state to prohibit the precursor and effects harmful speech. The freedom of expression

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<sup>28</sup> See Section 82(2) of the Kenyan Constitution of 1963.

<sup>29</sup> See Section 82(3) of the Kenyan Constitution of 1963.

is also not clearly and fully protected in this social contract. Arguments have been forwarded that this provisions went above the minimum threshold set by the international instruments.<sup>30</sup>

### **2.2.2 The Constitution of Kenya 2010**

The new constitution has been commended as regards the bill of rights and the restrictions thereof. However, it doesn't fall short of critics who opinion specifically that protection of freedom of expression has not been fully addressed. Hate speech is premised on the freedom of expression, limitations should therefore be spelt out in the Constitution. Article 24 (1) provide that, a right or a fundamental freedom shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In limiting a right, some factors need to be put into consideration. These include; -

*(a)The nature of the right or fundamental freedom;*

*(b)The importance of the purpose of limitation;*

*(c)The nature and extent of the limitation;*

*(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others;*

*and*

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<sup>30</sup> Commentary on the Regulation of "Hate Speech" in Kenya, (as of June 2010), <[www.article19.org/.../kenya-commentary-on-the-regulation-of-hate-s...](http://www.article19.org/.../kenya-commentary-on-the-regulation-of-hate-s...)> at 2 June 2012.

*(e)The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*

Despite the sentiments in sub article 1, sub article 2 further warns and limits that. a provision in legislation limiting a right or fundamental freedom;-

*(a) In the case of provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;*

*(b) Shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*

*(c) Shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.<sup>31</sup>*

In respect to this research, Article 33(1) that provides that every person has a right to freedom of expression which includes freedom to seek, receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. However, article 33(2) provides that the right to expression does not extend to propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm or is based on any ground of discrimination specified or contemplated in Article 27(4).<sup>32</sup>

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<sup>32</sup> Article 27 (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.

Article 33(3) further makes it mandatory for a person exercising the right of freedom of expression to respect the rights and reputation of others. This social contract has a number of differences from the previous Constitution. For instance, the divergence between section 79 of the previous Constitution and Article 33 of the current Constitution that makes the relevant provisions on freedom of expression and its limitations.

### **2.3 The National Cohesion and Integration Act, 2008**

This National Cohesion and Integration Act, 2008 was enacted inter alia to encourage national cohesion and integration by outlawing discrimination on ethnic ground. Most importantly, it is the Act that criminalizes hate speech in Kenya.<sup>33</sup> Section 13(1) of the NCI Act states that, a person who:-

- a) *Uses threatening, abusive or insulting words or behavior, or displays any written material;*
- b) *Publishes or distributes written material*
- c) *Presents or directs the public performance of a play;*
- d) *Distributes, show or plays, a recording of visual images; or*
- e) *Provides, produces or directs a programme; which is threatening, abusive or insulting or involves the use of threatening, abusive or insulting words or behavior commits an offence if such person intends thereby to stir up ethnic*

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<sup>33</sup> Hate speech is adequately provided for under the NCI Act at sections 13 and 62. These sections form the basis for the prosecution of hate speech.

*hatred, or having regard to all the circumstances, ethnic hatred is likely to be stirred up.'*

Section 13(2) provides that the penalty for a person who commits an offence under this section shall be a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or both. Section 13 (3) defines ethnic hatred as hatred against a group of persons defined by reference to colour, race, nationality or ethnic or national origins.<sup>34</sup>

Section 62(1) makes further provision that any person who utters words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or both. Section 62(2) provides that a newspaper, radio station or media enterprise that publishes the utterances referred to in subsection (1) commits an offence and shall be liable to a fine not exceeding one million shillings.

## **2.4 The Assumption of the Office of President Act 2012**

This is an Act of Parliament to provide for the procedure and ceremony for the assumption of the Office of President by the President-elect, in accordance with Article 141 of the Constitution and for connected purposes. The Act provides for the establishment of the Assumption of Office of the President committee which is charged with the responsibility of overseeing the handing over process of the presidency from the out-going president to the president-elect. The Act imposes an

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<sup>34</sup> See, OSCE, Final Report, Hate Crimes – Effective Implementation of Legislation, (OSCE Supplementary Human Dimension Meeting) (as of 4 May 2009) 4.

obligation on the Committee to ensure that the incumbent president has adequate security and receives the necessary security briefings. It also provides for the manner in which the swearing in ceremony shall be conducted and the handing over of the instruments of power and authority to the president elect.

The repealed legal order provided that the person elected as President shall assume office as President as soon as he is declared to be elected.<sup>35</sup> This is as opposed to the new legal order that establishes a committee to be known as the Assumption of the Office of President Committee<sup>36</sup> to ensure that the President-elect and Deputy President-elect are accorded adequate security, upon the declaration of the final results of a presidential election by the Commission under Article 138 of the Constitution and section 39 of the Elections Act.<sup>37</sup>

## **2.5 The Leadership and Integrity Act, 2012**

The Leadership and Integrity Act, 2012 establishes procedures and mechanisms for the effective administration of Chapter Six of the Constitution. It sets out a General Leadership and Integrity Code to provide a guide to State officers in the performance of duties and in the conduct of private affairs. It extends the application of certain provisions to public officers. In addition, it also requires public entities to establish Specific Leadership and Integrity Codes, which may provide for the issues that are unique to those public entities. Further, it contains provisions on how a breach of the Act and Chapter Six of the Constitution, by a State officer, should be dealt

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<sup>35</sup> Article 7 Con [As amended by Act 6 of 1992, s. 4]

<sup>36</sup> S 9 The Assumption of the Office of the President Act

<sup>37</sup> Article 138(10) (a) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall declare the result of the election. Section 39 (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling

with by the Commission or the relevant public entity and creates offences and penalties for breach.

## **2.6 The Elections Act 2011**

The Election Act of 2011 is among the recent laws that seek to define the general conduct expected to persons running for various state offices. This was as a result of the December 2007 elections and how below par election candidates behaved. This necessitated setting a code that regulates the campaign and election process.

Section 65 makes it an offence to use violence during the election period to induce a person to or not to vote for a particular candidate or political party. This offence attracts a fine not exceeding one million shillings or an imprisonment term not exceeding six years or to both. Further, rule 6(a) of the Elections Act under the electoral code of conduct provides that, 'All those bound by this code shall, throughout an election period publicly and repeatedly condemn violence and intimidation and avoid the use of hate speech, language or any kind of action which may lead to violence or intimidation, whether to demonstrate party strength, gain any advantage, or for any other reason; and refrain from any action involving violence or intimidation.'

Considering the intertwined relationship between elections and media, section 41 provides absolute access to state owned media. However, the media shall strictly adhere to the Code of Conduct for the practice of journalism, the Constitution and the provisions of this Act. The Commission is given powers to prohibit a media house that contravenes the above code of conduct.

The code provides penalties or sanctions against any political party, referendum committee, office bearer, member of a political party, a person supporting and any candidate for breach of the code. In this regard, rule 7 provides that the commission may impose a formal warning, a fine, an order partly or absolutely barring utility of any media, an order prohibiting holding of particular meeting or entering any specified electorate area inter alia. Failure to comply with the orders may result to dire consequences including but not limited to being banned from participating in ongoing and future elections and cancelling a political party. In discharging its duties, the Commission shall in other instances where there is gross misconduct liaise with the High Court to prosecute an individual or a political party.

## **2.7 Political Parties Act, 2011**

This is an Act of parliament that regulates the formation, legislation and conduct of political parties in Kenya. Kenya has about 160 registered political parties currently. It aims at curbing party hopping and preventing ethnic parties that may incite the public into election violence. It also regulates the funding of the parties.

In line with the foregoing constitutional demand of parliament, the Political Parties Act

2011 makes provision for a number of issues, including the following;

- *Registration and regulation of political parties.*
- *Funding and accounts of political parties.*
- *The office of the Registrar of Political parties.*
- *The political parties' disputes tribunal.*
- *The Code of Conduct for political parties.*
- *Contents of the constitutions or rules of a political party.*
- *Basic requirements for a coalition agreement*



The Political Parties Act 2011 on the other hand aims at providing a regulatory framework through which the general constitutional provisions on political parties are to be applied. The Act sets out detailed provisions on party management and regulation of political parties in the spirit that the constitutional provisions envisage party management and regulation to be pursued.

The Act sets out minimum requirements political parties seeking full registration must achieve before they can be granted full registration. Amongst the identified requirements are:

- i) *The party must have at least one thousand members who are registered voters in at least 24 counties;*
- ii) *The membership of the party should reflect regional and ethnic diversity, gender balance and representation of minorities and marginalized groups;*
- iii) *The composition of the party's governing body must reflect the regional, ethnic diversity, gender balance and representation of minorities and marginalized groups;*
- iv) *Not more than two thirds of members of the party's governing body should be of the same gender.*
- v) *The party has to demonstrate that the members of its governing body meet the requirements of chapter six of the constitution on leadership and integrity and the laws relating to ethics and integrity;*
- vi) *The party has to submit a list of the names, addresses and identification particulars of all its members, the location and address of its head office, the location and address of its branch offices.*

## **2.8 The Media Act, 2007**

This is an Act of Parliament to provide for the establishment of the Media Council of Kenya, which is a body to guide the conduct and discipline of journalists and the media, for the self-regulation of the media and connected purposes. Newspapers, radio stations or media stations are among parties that perpetrate hate speech.

Nevertheless, the media plays an important role in informing and disseminating views which is a safeguarded right and furthers democracy. The media has an impact over a large portion of the populace hence negative messages can exacerbate any existing conflicts. Regulation of such mediums is therefore vital to enhance peaceful co-existence between people. However it's critical that regulation is carried by a private institution rather than the state to avoid the negative potential of taking the country back to the draconian days of a state controlled media. The Media Council of Kenya should therefore oversee the conduct of media and enforce its Code of Conduct.<sup>38</sup>

## **2.9 The Penal Code Cap 63, Laws of Kenya, Revised Edition 2009 (2008)**

The Penal Code does not expressly discourse hate speech as a cause of election and post election violence. However some aspects of hate speech emerge and are captured under this code. For instance, subversive activities and incitement to violence. Section 77(1) provides that, any person who does or attempts to do, or makes any preparation to do, or conspires with any person to do any act with subversive intention, or utters any words with a subversive intention, is guilty

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<sup>38</sup> Regulation 25 of the Media Act under the Code of Conduct for the Practice of Journalism in Kenya limits hate speech.

of an offence and is liable to imprisonment for a term not exceeding seven years.' Section 77 (3)

defines subversion to include any of the following:-

- a) *supporting, propagating, or advocating any act or thing prejudicial to public order, the security of Kenya or the administration of justice;*
- b) *incitement to violence and or other disorder or crime, or counseling defiance of or disobedience to the law or lawful authority;*
- c) *supporting or intending to support persons who have acted in a manner prejudicial to public order or disobedience to the law or public order;*
- d) *Indicating support, connection or association or affiliation with any unlawful society, other expressly or by implication;*
- e) *Acts intended or calculated to promote feelings of hatred or enmity between different races or communities in Kenya*
- f) *Acts intended to bring into hatred or co contempt or to excite disaffection against any public officer, or any class of public officers, in the execution of their duties.*

Where freedom of expression is used unlawfully and intentionally to impair the dignity of others, the need to protect the rest precedes an individual need. In Kenya, hate speech has been used to incite violence and further, reports show that such acts are prone to rise again. Nevertheless, though the government is perceived as a threat to the bill of rights, it has no chance but to force its way in to intervene. Otherwise, what role does the government play if it cannot protect the people? It is however discreet to ensure that measures installed to handle hate speech do not impede on the people's rights to freely express themselves. Failure to follow the guiding principles provided

under the international law may result to *carte blanche* attempts to contain hate speech crime. The result may be a gross violation by the government where it acts *ultra vires*.

Conclusively, As it can be seen, there is no express provisions as regards prohibition of hate speech or any duty to the state to prohibit the precursor and effects harmful speech. The freedom of expression is also not clearly and fully protected in the repealed legal order. Arguments have been forwarded that this provisions went above the minimum threshold set by the international instruments. The new legal order has a number of differences from the previous one. For instance, the divergence between section 79 of the previous Constitution and Article 33 of the current Constitution that makes the relevant provisions on freedom of expression and its limitations. The assumption into office of the president is also difference in the old legal order as compared to the present legal order. There has been immense amendments and provision of the causes of election violence in the new legal order as compared to the repealed legal order.

## CHAPTER THREE

### **3.1 The Analysis of the Provisions of the New and Relevant Electoral Laws relating to Electoral Process and Post Election Violence in Kenya.**

#### **3.2 Introduction**

In this chapter the researcher analyses the provisions of the new laws in regard to some of the factors that are seen as the major causes of post-election violence in 2007-2008. Many considered the finalization of the vote count and tabulation and the subsequent presentation of these results of the December 2007 presidential (and parliamentary and local) elections in Kenya to be the primary cause of the tragic violence and ethnic cleansing, which shocked not only Africa, but the entire world during January and February 2008.

The other factors attributed to the violence were, vote buying and rigging, tribalism, alleged non-existence or dead voters appearing the register and locking out of some people from voting. Moreover there was the allegation that some key politicians funded and supported violence against people of some tribes, their main tool being land ownership.

### 3.3 The Constitution of Kenya 2010

The Sovereignty of the people and the supremacy of the constitution are recognized by the New Constitution 2010.<sup>39</sup> This secures the people from abuse by those that will wield power a fact the old constitution failed to recognize. Rather it placed the institution of the Presidency above all else through direct and indirect interpretation.<sup>40</sup>

Under the new Constitution, the Bill of Rights<sup>41</sup> is for once so elaborate and the state will not be allowed to grant rights. The exceptions as to when any right may be abrogated have been clearly provided for. Harassment and intimidation will be a thing of the past. Redress for breach of rights is provided for. The Bill of Rights forms a basis for the realization of human dignity and self fulfillment.<sup>42</sup> Under the Constitution 2010 every citizen is free to make political choices. That is to participate in forming, a political party, to participate in the activities of, or recruit members for, a political party or to campaign for a political party or cause.<sup>43</sup>

Moreover, every adult citizen has the right, without unreasonable restrictions, to be registered as a voter, to vote by secret ballot in any election or referendum, and to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.<sup>44</sup>

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<sup>39</sup> Article 1(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. Article 2(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

<sup>40</sup> Chapter 4 of the Constitution 1964

<sup>41</sup> Chapter 4 of the Constitution 2010

<sup>42</sup> Article 19(2) Constitution of Kenya 2010

<sup>43</sup> Article 38 (1) Constitution of Kenya 2010

<sup>44</sup> Art 38 (3)

For the first time in Kenyan law history, the Constitution 2010, links land and environment.<sup>45</sup> Land is now recognized as a common heritage. No one person may own obscenely large tracts of land.<sup>46</sup> Foreigners cannot have absolute ownership of land.<sup>47</sup> The classification of land protects the common heritage in the user systems in accordance with the National Land Policy. The National Land commission will work within the national values and principles of leadership thus minimize abuse of power. The constitution classifies land as belonging to the people of Kenya collectively as a nation, as communities and as individuals.<sup>48</sup> Article 40 provides protection to property owners. It provides that

*Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya.*

Common resources and opportunities are shared equitably.

The Constitution 2010 has the principles of leadership and integrity. It clearly outlaws unpatriotic conduct and deals a serious blow on Nepotism and tribalism. Those in power are bound by these principles in a bid to reduce or even extinguish favoritism.<sup>49</sup>

The constitution also deals with the electoral system, the sanctity of the vote, the right of every adult citizen to participate either as voters or candidates, independent candidates and party lists

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<sup>45</sup> Chapter 5

<sup>46</sup> S 68 (c)(i) enact legislation to prescribe minimum and maximum land holding acreages in respect of private land;

<sup>47</sup> Article 65 (1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine years.

<sup>48</sup> Article 61(1)

<sup>49</sup> Chapter 6

to promote equity in representation.<sup>50</sup> Inclusion of gender parity, constitutional regulation of political parties are all important gains so that the corruption that has hitherto existed with individuals owning political parties or parties being tribal/ ethnic outfits thus politically polarizing the country will be things of the past. The Independent Electoral and Boundaries commission will take away the gerrymandering that has previously occurred whereby government delineated boundaries to the benefit of some and to the disadvantage of others.<sup>51</sup> In the old constitution, the electoral system was not elaborate. No gender equity. Political parties were fiefdom cases though recognized by the law just as vehicles for election. Electoral malpractices were not forbidden out rightly as in the current one. Systems and structures promoted nepotism.

### **3.4 Independent Electoral and Boundaries Commission Act**

Politicians have since been using all manner of corruption including buying votes to influence the outcome of the election in their favor. The new Act seeks to ensure that the new organ supervising elections has both financial and legal muscle to punish those who flout the rules. The commission has been given powers to limit the amounts that candidates or political parties can spend in an election campaign. The Act says the IEBC will be responsible for the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any

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<sup>50</sup> 81. The electoral system shall comply with the following principles—(a) freedom of citizens to exercise their political rights under Article 38; (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;(c) fair representation of persons with disabilities; (d) universal suffrage based on the aspiration for fair representation and equality of vote; and (e) free and fair elections, which are— (i)by secret ballot; (ii) free from violence, intimidation, improper influence or corruption; (iii) conducted by an independent body; (iv) transparent; and (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

<sup>51</sup> Article 89(5) The boundaries of each constituency shall be such that the number of inhabitants in the constituency is, as nearly as possible, equal to the population quota, but the number of inhabitants of a constituency may be greater or lesser than the population quota



election.<sup>52</sup> This will require parties and candidates to declare the funds they have raised for their campaigns with a clear monitoring system to report those who will flout the law.

The IEBC will set a strict code of conduct and rules, which candidates for all political positions and parties will be required to uphold. In particular, the electoral and boundaries commission will monitor the nomination of candidates by political parties with a view to lock out those who will act outside the law. In a departure from the past where election officials looked up to the police to prosecute law breakers, the Act gives the IEBC the mandate of investigating any malpractices and punishing the culprits. The IEBC will also regulate the way political parties nominate their candidates to ensure that no short-cuts are used by party leaders to give their favorite aspirants party tickets.

### **3.5 The Assumption of the Office of President Act 2012**

This, in respect to the fact that assumption of the office by President Mwai Kibaki was a cause of violence, is an Act of Parliament to provide for the procedure and ceremony for the assumption of the Office of President by the President-elect, in accordance with Article 141 of the Constitution<sup>53</sup> and for connected purposes enacted by the Parliament of Kenya to come into force upon the announcement of the date of the first elections under the Constitution.

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<sup>52</sup> Section 4

<sup>53</sup> Article 141 (1) The swearing in of the President-elect shall be in public before the Chief Justice, or, in the absence of the Chief Justice, the Deputy Chief Justice.

The Act establishes a committee to be known as the Assumption of the Office of President Committee<sup>54</sup> to ensure that the President-elect and Deputy President-elect are accorded adequate security, upon the declaration of the final results of a presidential election by the Commission under Article 138 of the Constitution and section 39 of the Elections Act.<sup>55</sup> The Act provides that the swearing in of the President-elect shall be conducted in a public ceremony held in the capital city in accordance with Article 141 of the Constitution.<sup>56</sup> The Committee shall publish, by notice in the Gazette, the date and place for the conduct of the swearing-in ceremony. The day on which the President-elect is sworn in shall be a public holiday.<sup>57</sup>

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<sup>54</sup> S 9

<sup>55</sup> Article 138(10) (a) Within seven days after the presidential election, the chairperson of the Independent Electoral and Boundaries Commission shall declare the result of the election. Section 39 (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling

<sup>56</sup> *supra*

<sup>57</sup> S 12

### 3.6 The Elections Act 2011

The Act was passed to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes. The Act provides for the Right to vote.<sup>58</sup> It states that an adult citizen shall exercise the right to vote specified in Article 38 (3) (b)<sup>59</sup> of the Constitution in accordance with this Act if the citizen is registered in the Principal Register of Voters which according to S 6 will be open to the public at all times for inspection.

Only registered voters are eligible to vote under the Act.<sup>60</sup> A person will be disqualified under the Act if he or she directly or indirectly participates in any manner in any or public fundraising or harambee within eight months preceding a general election or during an election period. In any other case, shall be disqualified from contesting in the election held during that election year or election period.<sup>61</sup> This in my opinion is to discourage what is viewed as vote buying. The determination and announcement of election results by the IEBC under the Act will be as per S 39 (1), immediately after close of polling.

The Act deals with election offences. In relation to offences relating to register of voters and voter's cards and print & possession of the said without authority, the Act states that whoever sells or offers for sale a voter's card to any person or purchases or offers to purchase a voter's

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<sup>58</sup> S 3 (1)

<sup>59</sup> Article 38 (3) (b) Every adult citizen has the right, without unreasonable restrictions to vote by secret ballot in any election or referendum

<sup>60</sup> S 10

<sup>61</sup> S 26(1)

card from any person, commits an offence and is liable on conviction, to a fine not exceeding one million shillings and to imprisonment for a term not exceeding six years or to both.<sup>62</sup> Multiple registrations are an offence under S. 57 of the Act.

Forging, counterfeiting, defacing or destroying any ballot paper or the official perforation, stamp or mark on any ballot paper; without authority supplying any ballot paper to any person; selling or offering for sale any ballot paper to any person, purchasing or offering to purchase any ballot paper from any person; without authority taking out of a polling station any ballot paper or possessing any ballot paper outside a polling station; without authority destroying, taking, opening, disposing of or otherwise interfering with any election material in use or intended to be used for the purposes of an election; without authority printing any ballot paper or what purports to be or is capable of being used as a ballot paper at an election; voting more than once in any election; interfering with a voter in the casting of his vote in secret; are offences under the Act liable to conviction, a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both.<sup>63</sup>

Treating under the Act is an offence.<sup>64</sup> This is where a candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election before or during an election undertakes or promises to reward a voter to refrain from voting; gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks refreshment or provision of any money, ticket or other means or device to enable the

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<sup>62</sup> S 56(f)

<sup>63</sup> S 58 Elections Act

<sup>64</sup> S 61

procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election; or after an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid, commits the offence of treating. Moreover, a voter who accepts or takes any food, drink, refreshment, provision, any money or ticket, or adopts other means or devices to enable the procuring of food, drink, refreshment or provision knowing that it is intended to influence them commits the offence of treating.<sup>65</sup>

Undue influence is also an offence under the Act. This includes directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election inter alia.

Bribery, use of force or violence during election period and use of national security organs to induce people into violence are all offences under the Act.<sup>66</sup> Section 67 on the other hand, lists offences under the Act to include; personation, treating, undue influence or bribery; printing, publishing, distributing or posting up, any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names and addresses of the printer and

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<sup>65</sup> S 68(2)

<sup>66</sup> Sections 64, 65 and 66 respectively

publisher; forging, defacing or destroying any nomination paper, or delivers to a returning officer any nomination paper knowing it to be forged; interfering with election material by removing, destroying, concealing or mutilating or assists in the removal, destruction, concealment or mutilation of any such material save on the authority of the Commission or under the provisions of this Act and, directly or indirectly printing, manufacturing or supplying or procuring the printing, manufacture or supply of any election material in connection with the election save on the authority of the Commission.

The sections also lists it an offence if any person interferes with free political canvassing and campaigning by using language which is threatening, abusive or insulting or engages in any kind of action which may advocate hatred, incite violence or influence the voters on grounds of ethnicity, race, religion, gender or any other ground of discrimination; directly or indirectly, using the threat of force, violence, harassment or otherwise preventing the conduct of any political meeting, march, demonstration or other event of a political nature or any other person from attending or participating therein; creating a material disruption with the intention of preventing a political party from holding a public political meeting; impeding, preventing or threatening to impede or prevent the right of any representative of any political party from gaining access, in the manner and during the hours prescribed to voters in any particular area, whether public or private for the purposes of canvassing and campaigning and soliciting membership and support; or impeding, preventing or threatening to impede or prevent a member of the Commission, a representative of the Commission or any other authorized person or organization engaged in voter education from gaining access, in the manner and during the hours prescribed, to voters in any particular area, whether public or private, for the purposes of

conducting voter education, commits an offence and is liable on conviction, in the cases specified in paragraph (a), to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both, and in any other case, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.

It is a requirement of the Constitution of Kenya that all candidates and all political parties must comply with the code of conduct prescribed by the Independent Electoral and Boundaries Commission.<sup>67</sup> The intended Code of Conduct has been enacted as part of the Elections Act 2011.<sup>68</sup> The act of subscription to the Electoral Code of Conduct create further obligations to political parties, referendum committees, officials of political parties and referendum committees and candidates.

### **3.7 The Leadership and Integrity Act, 2012**

The Act was assented to by the president and it contains part I to Part IV. The Act contains two schedules; the First Schedule contains a Self –declaration form which should be filled and submitted by State officers seeking elective posts to the Independent Electoral and Boundaries Commission, while the Second Schedule contains a list of registrable interests.

A state officer is required to obey and abide by the law in carrying out his/her duties and without violating rights and fundamental principles of the citizens and exercise responsibility vested in him/her in the best interest of the state. It provides that a gift or donation given to a state officer

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<sup>67</sup> Article 84 of the Constitution of Kenya

<sup>68</sup> The second schedule

on a state or official visit shall be treated as a gift or donation to the state.<sup>69</sup> It prohibits a state officer from using his/her office for unlawful acquisition of property.<sup>70</sup>

Upon appointment or election a state officer shall sign and commit to a specific integrity and leadership code within seven days of appointment and election breach of which amounts to disciplinary action. Lastly part V provides for the offences and penalty.

### **3.9 The Media Act, 2007**

The act provides that quoting persons making derogatory remarks based on ethnicity, race, creed, colour and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms.<sup>71</sup>

The Media Act was passed in 2007 prohibiting the media in relaying information to the public that may cause post-election violence. A clear example would be Joshua Arap Sang who worked at the popular Kalenjin-language radio station KASS FM since 2005. On March 8, 2011, he was indicted by the International Criminal Court for four charges of crimes against humanity committed during the 2007–2008 Kenyan crisis. The 2007 elections were held amid unprecedented media attention.

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<sup>69</sup> S 14

<sup>70</sup> S 15

<sup>71</sup> Media Act No. 3 of 2007, Second Schedule to the Act, titled “Code of Conduct for the Practice of Journalism in Kenya”, Regulation 25



The print and electronic media sought to outdo each other in election coverage from the campaign stage right through to the transmission of election results. The elections came at a time when the media arena had been fully liberalized. The consequence was the entry of exciting new players, mainly in the form of frequency modulated (FM) radio stations. Many of these went straight into interactive vernacular radio broadcasting complete with call-in facilities. Millions of anxious and excited Kenyans who for years had been only passive listeners to one state-owned radio station could now access a wide choice of radio stations including those that broadcast in their respective home languages.<sup>72</sup>

In the 2013 elections, Kenya's Media Owners Association told The Associated press that media leaders made a "gentleman's agreement" to balance the national interest and the public's right to know, including not reporting anything that could incite ethnic tensions and not airing political statements live.<sup>73</sup> Last but not least is the transparency of the Independent Electoral and Boundaries Commission (IEBC) is paramount to maintain peace in the country

### **3.10 Kenya Communications (Broadcasting) Regulations, 2009**

This is an annex to the Kenya Communication Act that seeks to set guidelines for the broadcasters.

Sections 15(c) and (d) of the regulations provide that a licensee shall not broadcast any matter which glorifies violence or depicts violence in an offensive manner and is likely to incite or perpetuate hatred or vilify any person or section of the community on account of the race, ethnicity, nationality, gender, sexual preference, age, disability, religion or culture of that person

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<sup>72</sup> Kreigler & Waki Report 2009

<sup>73</sup> JASON STRAZIUSO Associated Press Mar 7, 2013, *Kenya media self-censoring to reduce vote tension* )

or section of the community. Section 40 makes provisions for breach of the regulations. Where any person contravenes the regulations, s/he commits an offence and on conviction shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both.<sup>74</sup>

### **3.11 The Penal Code Cap 63, Laws of Kenya, Revised Edition 2009 (2008)**

From the provisions discussed in chapter 2, it can be noted that speech intended or calculated to promote feelings of hatred and enmity between different races or communities in Kenya as long as there are not uttered in good faith or not aimed at combating the roots of discrimination constitutes subversion which is a punishable crime under the penal code. Section 96 of the Penal Code addresses threatening breach of peace or violence. The section makes it an offence punishable by a prison sentence of up to five years if a person ‘without lawful excuse utters, prints or publishes any words, or does any act or thing, indicating or implying that it is or might be desirable to do, or omit to do, any act the doing or omission of which is calculated inter alia, (a) to bring death or physical injury to any person or to any class, community or body of persons.’ In this case, the burden of proof lies on the one who alleges. Hate speech may also extend to forms of expression that intend to degrade or intimidate as a consequence of one’s religion. In this regard, section 138 criminalize intentional acts, oral, written, gestured or through use of objects, by any person that have the effect of wounding his or her religious feelings.

### **3.12 The Political Parties Act, 2011**

Kenya’s constitutional order, as anchored on the Constitution of Kenya, 2010, has placed greater significance to the formation, management and organization of political parties as institutions of

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<sup>74</sup> The regulations were enacted on 22 December 2009 through Legal Notices No.2 of 1998 and No. 10 of 2007.

governance. The legal regime governing political parties is two-fold, to wit; the Constitution of Kenya 2010 and the Political Parties Act, 2011.

The constitutional expectations of every political party are as spelt out in article 91 of the Constitution. These expectations are the positive and the negative expectations.

The positive expectations of political parties in Kenya by the Constitution are as follows:

*(a) Every political party must have a national character as prescribed by an Act of Parliament.*

*(b) Every political party must have a democratically elected governing body.*

*(c) Every political party must promote and uphold national unity.*

*(d) Every political party must abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party.*

*(e) Every political party must respect the right of all persons to participate in the political process, including minorities and marginalized groups.*

*(f) Every political party must respect and promote human rights and fundamental freedoms and gender equality and equity.*

*(g) Every political party must promote the objects and principles of the Constitution and the rule of law; and*

*(h) Every political party must subscribe to and observe the code of conduct for political parties.*

From the negative front, the following prohibitions are fashioned by the constitution against political parties, namely;

*(a) A political party should not be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis.*

*(b) A political party should not engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person;*

*(c) A political party should not establish or maintain a paramilitary force, militia or similar organization;*

*(d) A political party should not engage in bribery or other forms of corruption;*

*(e) A political party should not accept or use public resources to promote its interests or its candidates in elections except as are provided for under Chapter Seven of the Constitution or by an Act of Parliament.*

In addition to the foregoing prescriptions on the character of political parties in Kenya, the Constitution demands of Parliament to enact legislation to make certain provisions regarding political parties.<sup>73</sup> The constitutional concerns for the said legislation are the following;

*(a) The reasonable and equitable allocation of airtime, by state-owned and other specified categories of broadcasting media, to political parties either generally or during election campaigns;*

- (b) The regulation of freedom to broadcast in order to ensure fair election campaigning;*
- (c) The regulation of political parties;*
- (d) The role and functions of political parties;*
- (e) The registration and supervision of political parties;*
- (f) The establishment and management of a political parties fund;*
- (g) The accounts and audit of political parties;*
- (h) Restrictions on the use of public resources to promote the interests of political parties;*
- (i) Any other matters necessary for the management of political parties.*

The provisions of the new laws in Kenya demand to say the least that every person in the country, leaders and citizens alike respect the new legal order by providing not only sanctions for breach of the laws but also legal redress and channels of receiving justice. This might bring back the lost trust by the people in the electoral, judicial and administrative system.

## CHAPTER FOUR

### 4.1 Examination of the Efficacy of the New Legal Regime on Elections and Election Violence in Kenya Challenges and Prospects

In this chapter the researcher looks in detail at how the said laws have been effective so far in curbing and making sure that post-election violence will not be repeated in Kenya. This will be done by evaluating how the key causes of post-election violence have been addressed by the new laws and how these laws have been effective.

### 4.2 Hate Speech

According to the NCIC, hate speech refers to a whole spectrum of negative discourse, stretching from hate or prejudice and inciting to hatred. Hate speech is designed to degrade, intimidate, or incite violence or prejudicial action against a person or group of people based on their race, ethnicity, nationality, religion, language ability, or appearance.<sup>75</sup>

However, the most suitable definition can be fetched from the Council of Europe Committee of Ministers as referred in the European Court of Human Rights in *Gunduz v Turkey*<sup>76</sup> as:

*all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism,*

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<sup>75</sup> National Cohesion and Integration Commission, *Guidelines for Monitoring Hate Speech*, August 2010, 4

<sup>76</sup> Application. No. 35071/97

*discrimination and hostility towards minorities, migrants and people of immigrant origin.*<sup>77</sup>

The past defines the future. Consequently, the first tribal clashes in 1992 during the advent of multi-party politics cannot go unnoticed. Reports show that the electioneering period follows an ethnic ploy which is a precursor of hate speech.<sup>78</sup> In the researcher's opinion, hate speech is the instigator of the other causes of election and post election violence in Kenya and as such it will be widely looked at.

The Constitution protects each individual's freedom of expression, which extends to freedom to seek, receive or impart information or ideas, freedom of artistic creativity, academic freedom as well as freedom of scientific research.<sup>79</sup>

However, the Constitution limits freedom of expression by stating that it does not extend to: propaganda for war, incitement to violence, hate speech or advocacy of hatred that constitutes ethnic incitement, vilification of others or incitement to cause harm.<sup>80</sup> In addition, such freedom of expression must not violate any ground of discrimination specified or contemplated under Article 27 (4)[1] and must be exercised with respect to the rights and reputation of others.

Regulation 25 of the Media Act under the Code of Conduct for the Practice of Journalism in Kenya limits hate speech. The code provides that,

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<sup>77</sup> Committee of Ministers Recommendation as of October 30, 1997

<sup>78</sup> The Kenya National Dialogue and Reconciliation, Building A Progressive Kenya, 37. See also, Supra note 25, 1 See also Ghai, Y. and Cottrell Ghai, J., "The Choice in the Referendum: A comparative analysis of the Constitution of Kenya and the Current Constitution", July 2010, p. 6, where the authors assert that 'our politics have become largely the politics of ethnicity...Ethnic politics have influenced people's attitude to state institutions: either they are ours or they are the enemy.

<sup>79</sup> Article 33

<sup>80</sup> paragraph (2) of Article 33

*‘Quoting persons making derogatory remarks based on ethnicity, race, creed, color and sex shall be avoided. Racist or negative ethnic terms should be avoided. Careful account should be taken of the possible effect upon the ethnic or racial group concerned, and on the population as a whole, and of the changes in public attitudes as to what is and what is not acceptable when using such terms.’*

Apparently, the above section has been met with strong resistance as regards restrictions vis-à-vis freedom of the media. A code of conduct binds the professionals by setting the minimum threshold conduct expected from each individual abiding to the same failure to which should attract a penalty. In this instance, journalism is expected to encourage positive criticism and not to spur any negative and adverse criticism especially as regards discriminatory views.

Kenya’s hate speech laws read as follows under

*“Any person who utters words intended to incite feelings of contempt, hatred, hostility, violence or discrimination against any person, group or community on the basis of ethnicity or race, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings, or to imprisonment for a term not exceeding five years, or both or a newspaper, radio station or media enterprise that publishes the utterances referred to in subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding one million shillings.”<sup>81</sup>*

In January 9, 2013, Human IPO reported that the Kenyan government will be monitoring users of social media and taking action against anyone found inciting violence or using hateful or

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<sup>81</sup> Section S 62 of the National Cohesion and Integration Act 2008



ethnic language in the build-up to the March 4 general election.<sup>82</sup> The government would issue hefty fines of up to KSh1 million or a three year jail term to those who are caught using hateful or ethnic language on social media. Despite of this warning, Kagonya Awori and her Umani (web-based monitoring project) team of six which had been tasked with monitoring Facebook and Twitter for any warning signs of a repeat that was the post-electoral tragedy of 2007, told Reuters she and her colleagues have reason to worry about escalating inter-tribal tensions.

*“The amount of dangerous speech is going up but, this time; the people who are saying these things are not hiding at all... There are outright calls to kill, forcefully evict and steal as well as discriminate against members of particular communities.”<sup>83</sup>*

Arrests have also been made in connection to hate speech in a bid to curb a repeat of post-election violence. On 10<sup>th</sup> January 2013, the government released a list of facebook pages and websites linked to spreading hate speech and took the administrators to court. These pages included; Gor Mahia is Not A Club, It's a Lifestyle but do we say (Now deleted), STOP Uhuru Kenyatta NOW and 1000000 Likes To Stop Raila and Kalonzo From Winning 2013 Election. Among the websites is one blog, The Kenyan Daily Post, and two online forums: Mashada.com and Kenyanlist.com.<sup>84</sup>

#### **4.2.1 The Role of the Courts in the Prosecution of Hate Speech**

In June 2012 three kikuyu musicians, Kamande wa Kioi, Muigai wa Njoroge and DeMatthew were arrested, charged and convicted on basis of their music which was termed as hate speech.

<sup>82</sup> Tom Jackson 'Kenyan government warns social media users on hate speech' HumanIPO, January 9, 2013

<sup>83</sup> Brandon Gregory, 'Social media hate speech in Kenya undeterred by government warnings' HumanIPO, February 6, 2013

<sup>84</sup> Mwakilishi.com | Kenya Government Releases List of Websites and Facebook Pages Spreading Hate Speech Thu, 01/10/2013 11:43AM -0500

However, as former political detainee and civil rights activist Timothy Njoya said while calling the Kenya's National Cohesion and Integration Commission a waste of taxpayers' money.

*"It is a toothless commission. It doesn't even have a bark, let alone a bite...There has been no conviction, not even anything close to a conviction."<sup>85</sup>*

To date, the commission has investigated more than 100 hate speech cases, some involving the very top of Kenyan society. However, fewer than ten of those cases went to court, and none of the accused was found guilty. One hate speech and incitement case against a prominent politician was dropped simply because he made a public apology, but officials said they are also working to unify previously rival peoples.<sup>86</sup>

In September 2012 Junior Kenyan minister Ferdinand Waititu was charged with hate speech and inciting violence and suspended from his government post, following a speech he made against ethnic Maasais. His case was however dropped after making a public apology. On 5<sup>th</sup> march 2010, Assistant Minister for Roads Wilfred Michage and lawmakers Fred Kapondi and Joshua Kutuny arrested for a hate speech they allegedly made during rallies against a draft constitution

In the recently released Press Statement on KHRC's Interim Report on the March 4, 2013 General Election it was confirmed that the reports that politicians and vernacular radio stations are employing coded language to engage their listeners and incite people and communities against each other during the electioneering period. For example some would say things like:

*"Our children cannot climb the mountain! Never again!" meaning we will never work with a perceived 'enemy' community. Or "our children drowned when we*

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<sup>85</sup> AFP, *Kenya tackles hate speech ahead of elections* January 21, 2013

<sup>86</sup> AFP, *Kenya tackles hate speech ahead of elections* January 21, 2013

*went to the land of water. These meaning they suffered when they voted for a perceived 'enemy' community.*"<sup>87</sup>

#### **4.2.2 Jurisdiction**

The NCIC also functions to investigate complaints and make recommendation to the AG, the KNCHR or any other relevant authority(s) on the remedial measures to be taken where such complaints are valid.<sup>88</sup>

Complains regarding hate speech can be filed and henceforth brought before the court. This begets the question of jurisdiction i.e. which courts have the jurisdiction to entertain and determine questions of hate speech? To arrive at a solution, it is imperative to examine the relevant sections of the law relevant to the issue in question. To start as off, sections 13(2) of the NCI Act provides that a person who commits an offence that constitutes hate speech shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or both. This provision has two jurisdiction constraints, that is. pecuniary and the penalty period that can assist in formulating the right court of justice in connection to the question of jurisdiction. As regards prosecution of the crime against hate speech, the district magistrate's court and the resident magistrate's court have the jurisdiction to prosecute such matters.<sup>89</sup>

Further, hate speech matters are also subject to the Criminal Procedure Code<sup>90</sup> which spells out the offences that are triable in either court. As regards the three year punishment prescribed by

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<sup>87</sup> Press Statement on KHRC's Interim Report on the March 4, 2013 General Election

<sup>88</sup> See section 25(2) (h) of the National Cohesion and Integration Act that make provisions for the objectives and functions of the Commission.

<sup>89</sup> See sections 4 and 8(1) of the Magistrates Court Act, Cap 8, Laws of Kenya.

<sup>90</sup> Cap 75, Laws of Kenya.

the NCI Act, the Criminal Procedure Code under the first schedule provides that the case in addition to the High Court is triable under the subordinate court of the first or second class.<sup>91</sup>

As regards the crimes under sections 77 and 96 of the Penal Code against subversive activities and incitement to violence and disobedience of the law consecutively, the punishment prescribed amounts to three years and five years consecutively and are triable under the subordinate court of the first class or second class but for the latter, first class only. As such, the High Court has the most critical role to play in the prosecution process in view of the nascent nature of hate speech crime. The Constitution can well serve as evidence. First, the High Court under article 165(3) (a) has unlimited jurisdiction in both criminal and civil matters and can therefore proceed to prosecute. Secondly, the High Court under article 165(3) (d) has jurisdiction to hear any question respecting the interpretation of the Constitution especially as regards article 33 on freedom of expression and its limitations including hate speech which has been only recently incorporated. Thirdly, the High Court under article 165(3) (e) has original jurisdiction and therefore consideration should be made that hate speech crime is original and nascent hence need to hear the matter.

### 4.3 Land

Land allocations in Kenya were used to reward “politically correct individuals”, and became heavily politicized.<sup>92</sup> Given that the recommendations of the Ndungu Report<sup>93</sup> were never

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<sup>91</sup>R v. Joshua Serem Kutuny Criminal Case No. 1141/10 at the Chief Magistrates Court at Nairobi (Unreported).

<sup>92</sup> Report of the Ndungu Commission on Illegal and Irregular allocation of public land, 2003

<sup>93</sup> The Ndungu Commission, which was composed of 20 prominent citizens, lawyers and civil servants (drawn from ministries particularly concerned with the land issue) was appointed by President Kibaki in June 2003, and was charged with inquiring into the unlawful allocation of public lands, ascertaining the beneficiaries, identifying public officials involved in illegal allocations, and making recommendations for appropriate measures for the restoration of illegally allocated lands to their proper purpose, for prevention of future illegal allocations, and for appropriate criminal prosecutions. It was but one of a series of measures designed to tackle the issue of corruption and to realise the fruits of a newly democratic era.

implemented, this has increased the sense of frustration in attempting to deal with land tenure disputes. Furthermore, as land issue is a motive, politicians have capitalized on issues surrounding it, including encouraging violence during elections. There was found to have been widespread abuse of presidential discretion with regard to unalienated urban land, with 'in many instances' (both) Presidents Kenyatta and Moi making grants to land to individuals without any consideration to the public interest, for political reasons, and without proper pursuit of legal procedures, whilst there was also extensive illegal allocation by the presidents of alienated land (viz. land which they did not have legal power to allocate).

The resettling IDPs in Kenya from whom land and property were taken has remained a thorny issue to date. In the post-election violence the displacement and killing of people as well as the destruction of property was witnessed when tribes turned against each other and accused each other of owning land where they are not supposed to.<sup>94</sup> Article 40 of the Constitution of Kenya 2010 however, provides protection to property owners. It provides that Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. Common resources and opportunities are to be shared equitably. Although most IDPs have been resettled and camps closed like the Nawamu IDP camp in Nakuru, it remains to be seen whether the land provisions in the new laws will be respected in coming years and whether the ownership of land by anyone anywhere in the country will actualize.

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It however remains a contentious issue as witnessed in the recent debates<sup>95</sup>. During the campaign, Raila Odinga caused a stir when he implied that that Mr. Uhuru Kenyatta was among those in possession huge tracts of land across the country and could therefore not reform the sector. Kenyatta responded by claiming he was 'clean and that Odinga should respond over his involvement with the Kisumu Molasses Plant.<sup>96</sup>

The National Cohesion and Integration Commission (NCIC) however, through its chairman Mzalendo Kibunja stated that such statements were a form of incitement.<sup>97</sup> Kibunja was contradicted by Constitution Implementation Commission (CIC) chairman Charles Nyachae who said candidates cannot be prevented from discussing land issues during their campaign. The recently appointed police Inspector General David Kimaiyo whose name appears in the Ndungu Land Commission's report on illegal/irregular allocation of public land also added his voice asking for politicians not to debate land matters. Rejection of debate on land matters also came from the Anglican Church of Kenya.<sup>98</sup>

As such the IREC recommendation through Kreigler's Report in 2009 that a media and elections policy should be developed, to include guidelines for verifying data before going on air, vetting of live broadcasts and screening of paid-for advertisements, responsibility to announce accurate results and training of journalists on the Electoral Code of Conduct, and elections reporting and the manner of reporting on opinion polls was enforced.

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<sup>95</sup> The Presidential Debate 2013

<sup>96</sup> The Presidential Debate 2013

<sup>97</sup> The Presidential Debate 2013

<sup>98</sup> The Presidential Debate 2013

## 4.4 Ethnicity and Tribalism

Ethnicity and tribalism in Kenya is largely a political problem. Ethnic polarization and the mobilization of ethnic sentiments by political leaders during campaigns are partly to blame for the violence. Further-more, the fact that both the police and military are perceived historically to have been recruited along ethnic lines to protect the particular government of the day has increased the likelihood of their breaking down along ethnic lines in a crisis and being either unable or unwilling to maintain law and order impartially.

This meant that post election violence proliferated and intensified for a number of months, and that politicians and businessmen allegedly chose to hire gangs of youth to fight their attackers rather than call in forces whose loyalties could not necessarily be counted on, the problem of ethnic distrust in the poll violence was clearly a factor.<sup>99</sup>

Notwithstanding the passage of the Constitution of Kenya 2010, the hype about cohesion and integration by the National Cohesion and Integration Commission the spell, the grip that nepotism, tribalism and cronyism has refused to waver even in the 2013 elections with the voters voting done along tribal lines. Even though Article 38 of the constitution of Kenya provides for the political right of each individual, the current situation in Kenya is that certain tribes are politically inclined to their tribal kingpin regardless of the performance. In short it's about the tribe wielding the power of presidency not what development such presidency might bring.

Further the Political Parties Act states that political parties based on tribal or ethnic lines shall not be registered.<sup>100</sup>

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<sup>99</sup> Kreigler Report 2009

<sup>100</sup> S. 14

This is meant to act as a deterrent to tribal parties. Regardless of this and with the example of the prominent parties in Kenya today i.e. The National Alliance (TNA) and Coalition for reforms and Democracy (CORD) it is a clear evidence that the affiliation to a political party is based on tribal lines. TNA is led by Hon. Kenyatta and Hon. William Ruto and has consequently a large Kikuyu and Kalenjin following. The CORD led by Hon. Raila Odinga and Hon. Kalonzo Musyoka has a large following of Luos and Kambas. The main fuel of tribalism in Kenya can be said to be the tribal kings themselves. In the quest for political power in the country, the politicians have used tribalism to garner most votes. It has come to be an accepted fact in Kenya that large voting blocks vote their tribe into power and as such, power especially the presidential power has become a tag of war between tribes with each tribe wanting their tribesman in power. In 2007 the Luo tribe felt it was their time to be in power and violence erupted when a Kikuyu got the seat.

The new laws have provisions in place in regard to tribalism but these provisions are far from addressing the problem itself. Although if followed the laws would indeed end tribalism, in regard to voting, the decision is based on individual voters. This is what poses the problem. The common citizen is inclined to listen to their political kingpins. An evident example is the Kajiado North by-election following Hon. Saitoti's death. Peter ole Mositet then of Orange Democratic Movement lost to TNA's Moses Ole Sakuda. In 2013 Peter Ole Mositet campaigned on TNA ticket and got the majority votes. This clearly showing that it's not the politician running for the seat but the tribal kingpin party that he is in that matter.



## 4.5 The Electoral Process

The manner in which the electoral process was conducted was largely the main contributing factor in the post-election violence. This included the campaigning that largely awakened tribal animosity through hate speech and incitement, political influence, vote buying, treating and bribing, and then there was the election tallying and the assumption of the office of the president

### 4.5.1 Campaigning

The new legal order has provided clear guidelines on how to and how not to campaign. The Constitution provides for the political right of every citizen to be a political candidate for and hold if elected a public office.<sup>101</sup> Also, every citizen has a political right to vote without any restrictions. The Elections Act 2011 states the election offences under the Act among them treating, bribing and undue influence. Under S. 67 (g) (i) anyone who interferes with free political canvassing and campaigning by using language which is threatening, abusive or insulting or engages in any kind of action which may advocate hatred, incite violence or influence the voters on grounds of ethnicity, race, religion, gender or any other ground of discrimination; or publishes, repeats or disseminates in any manner whatsoever, information with the intention of creating hostility or fear in order to influence the process or outcome of the election S. 67 (m), commits an offence and is liable on conviction, in the cases specified in paragraph (a), to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both, and in any other case, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both. These laws have in a way been adhered to due to the implementation in place. On 1<sup>st</sup> march 2013, three

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<sup>101</sup> Article 38(c)

people were arrested in connection with circulation of leaflets warning people of Mombasa against participating in the 4<sup>th</sup> march elections.

In the recently released press statement on KHRC's Interim Report on the March 4, 2013 General Elections these were their findings on voting malpractice. Their monitors and media reports indicate that there are many incidents of bribery of voters mainly through dishing out cash handouts or through 'treating' where potential voters are given food or money in order to attend political functions/events. As such the laws are there but although these offences are not as profoundly carried out like previously, they are still there.

#### **4.5.2 Tallying of Results**

In 2007 most of the rigging of votes was carried out during the tallying of the results. This was done by the polling officers or returning officers. According to the new legal order, it is an offence to directly or indirectly print, manufacture or supply or procure the printing, manufacture or supply of any election material in connection with the election save on the authority of the Commission; the offender is liable on conviction or to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both, and in any other case, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.<sup>102</sup>

This discourages the rigging of results and ensures a fair election which in turn will hopefully help in curbing post-election violence.

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<sup>102</sup> S. 67(f) of the Elections Act

### 4.5.3 Assumption of the Office of the President

It is standard practice to lay down in electoral legislation a period of some length between elections and winners' assumption of office. In the well known case of the United States, the presidential election takes place on the Tuesday following the first Monday in November and the new president is inaugurated on 20 January the following year. Mexico has an even longer period: the 2006 elections took place on the first Sunday in July and President Calderón sworn on only on 1 December. There are two reasons for this practice: The first, which has been extensively, is to allow sufficient time for the solution of all pending electoral disputes and for the verification of election results. The period was used for such purpose in both countries mentioned above.

The second reason is that there should be a peaceful and orderly transition of power. For instance, a new president may have to select a cabinet, and the new members of the cabinet should be adequately briefed by their predecessors.<sup>103</sup> The manner in which President Kibaki was sworn into office was also a major cause of post-election violence.<sup>104</sup> The Assumption of the Office of the President Act provides clear guidelines about the swearing in of the president to avoid such a scenario recurring. The Constitution provides the swearing in of the President-elect shall be in public before the Chief Justice, or, in the absence of the Chief Justice, the Deputy Chief Justice.<sup>105</sup> The President-elect shall be sworn in on the first Tuesday following the fourteenth day after the date of the declaration of the result of the presidential election, if no petition has been filed under Article 140<sup>106</sup>; or the seventh day following the date on which the

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<sup>103</sup> Kreigler & Waki Report

<sup>104</sup> President Kibaki was sworn in at dusk in State House for his second term after chairman of defunct Electoral Commission of Kenya (ECK) Samuel Kivuitu controversially declared him the winner. The Standard Newspaper

<sup>105</sup> Article 141

<sup>106</sup> Article 140 (1) A person may file a petition in the Supreme Court to challenge the election of the President-elect

court renders a decision declaring the election to be valid, if any petition has been filed under Article 140.

The Act provides that the swearing in of the President-elect shall be conducted in a public ceremony held in the capital city.<sup>107</sup> If these laws are adhered to, it means that no president-elect will be sworn in amidst confusion as to who is the real winner of the elections. As such it may curb post-election violence on that basis.

The new legal order is efficient if properly administered. However the sluggish pace at which say, the new constitution is being implemented, leaves a lot to be desired in the efficiency of the new laws. However the Media Law seems to be fully in effect and the Elections Act.

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within seven days after the date of the declaration of the results of the presidential election.

<sup>107</sup>S 12

## CHAPTER FIVE

### 5.0 Recommendations and Conclusion

#### 5.1 Conclusion

Conclusively, Kenya has enough laws that forbid use of ethnicity, hate speech and any acts that stem from the two be it land issues or electoral violence. Further, available institutions equipped to prosecute the same and accord justice to the state and any aggrieved individual are standby. However, prosecution of hate speech in Kenya is generally nascent and the institutions afforded with the opportunity to prosecute have been regarded as toothless. This has widely been caused by factors that hinder the implementation of the constitution, public ignorance, lack of cooperative effort by concerned parties and loopholes that exist in the new legal regime.

The new legal order provides an opportunity to address all aspects regarding the factors that cause post-election violence. However, the implementation process is moving at a very slow pace which has barred the development of prosecution such. This can be seen in courts which ought to be the refineries of law. The new legal order is clear that these factors that cause post election violence but the courts seem reluctant in the progress of the law by failing to interpret and apply it. The implementation process should be stepped up by all organs of the government. The government especially the Judiciary should place policies and procedures that will hasten the Implementation process especially of the new constitution. The new constitution has indeed effectively provided for the effort of curbing post election violence though it does contain some loopholes as discussed herein.

In the Rwandan 1994 genocide, leaders have been accused to have directly influenced the ignorant locals to commit genocide. The same has often been witnessed in Kenya. This emphasizes the need for public awareness to be informed of the malignant effect of inflammatory speech and how leaders can manipulate the public into committing violence. Although the law has not held back in providing for the consequences of inciting election violence by leaders and citizens alike, it is largely to be noted that the public remains ignorant of these laws. This despite the fact that ignorance of law is not a defence. This means that these factors will be slow in reducing since the public will not be a part of implementing the new law as they remain ignorant.

To a larger extent therefore the new laws have been and will be efficient if implemented in preventing election and post-election violence in Kenya. However as seen there are some loopholes that need amendment in the new legal order.

## **5.2 Recommendations**

According to the Kenya National Dialogue and Reconciliation {KNDR} dubbed “Reforms and Preparedness for Elections,” without the deterrent effect of the law, old behavior will continue. Different groups or supporters of candidates will begin to zone off their geographical territories against those they consider as their opponents. This, on its own, is a worrying indicator of the extent to which the freedom of assembly may be interfered with in the run-up to the next elections.

### **5.2.1 Concerning Hate Speech**

It is acknowledged that amendments are still required to cover all aspects of hate speech, ethnicity, land issues and electoral process in Kenya. It is imperative to seal the few loopholes that exist for a larger efficacy of the new legal order. This is imperative to ensure that the onus of

proof as it is in criminal cases is properly covered beyond reasonable doubt. For instance, sections 77(3) and 96 of the Penal Code should be amended to penalize persons who utter words of hatred towards a target group and to expound on the definition of incitement to violence as statements that would actually create prima facie risk of violence against a target group consecutively. The Code of Conduct in the Second Schedule under the Media Act should also be amended to incorporate Principle 9 of the Camden Principles on Freedom of Expression and Equality. This is because the principle appreciates the media's wider role in furthering democracy and recognizes its ability to transform. In this regard, it not only captures the traditional media but also the new technology, for instance, digital broadcasting, mobile telephony and the internet. It delegates responsibilities to the media and is much clearer on the code of professionalism.

### **5.2.2 Concerning Land**

The persistence of land issues in Kenya requires more than the few laws added recently to eliminate them. It is recommended to undertake a complete overhaul of the land office in each constituency and this includes the government taking time to listen and solve all the land issues in the contentious areas. This would serve to not only bring peace in areas with different tribes but also to develop respect for all bona fide owners of land. Also strict laws on land should be put in place and enforced.

### **5.2.3 Concerning Ethnicity and Tribalism**

It is recommended that politicians or political party platforms that use ethnic-mobilization and incitement as avenues for consolidating political support must be exposed and dealt with in accordance with the law. Politicians must make a commitment to Kenyans that they will conduct

their campaigns in a peaceful manner and that they are committed to be governed by the law during the campaign period, at the elections day and after the elections upon the announcement of the elections results. Similarly, media platforms that act as conduits of ethnic incitement must be dealt with in accordance with the law.

#### **5.2.4 Concerning Electoral Process**

##### **a. Campaigning**

It is recommended that a mechanism or a commission to oversee the enforcement of the Political Parties Act be put into place to ensure that these are not used as the main weapons against fighting tribalism.

##### **b. Voting**

It is important to have stronger sanctions such as disqualification for candidates involved in the practice of voter treating, bribery and undue influence. The complementary practice of allowing assistance on the basis of illiteracy should be discontinued, and voter education programmes adjusted accordingly. This is because some clerks mislead the old and illiterate in voting.

As such, adequate and transparent investments in voter/civic education/information campaigns are recommended. Since district officers of the IEBC have little to do when there are no elections, they could be used for civic education if provided with complimentary resources, such as mobility.

On training of poll workers it is important to identify the penalties for perjury, fraud and rigging and communicate them during training.



### **c. Tallying of results**

Since the tallying of results is also a major cause of post election violence and confusion in the electoral process, a secure electronic voters system would greatly reduce the burden of IEBC. An integrated and secure tallying and data transmission system, which will allow computerized data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.

### **d. Assumption Of The Office Of The President**

It is vital that the IEBC mandates itself to follow the Assumption of the Office of the President Act.

### **e. Media Participation**

Media must have full access to this new system and should liaise with the IEBC. Ample time must be given for verifying provisional results, so that they are only declared final/official, when there is no risk that errors can still be found or non frivolous objections raised. This will assist the media in obtaining fully reliable results at high speed from all over the country and will also place the IEBC in the driver's in relation to providing the media with fast and reliable data.

A good relationship with the media is essential to the establishment of a positive image and to build credibility with voters. There are many challenges in the implementation of new rules and regulations for the IEBC, but when challenges are overcome, they become good opportunities for interacting with the media and defining the Commission's role in ensuring free, fair, and open elections. The IEBC should be proactive in providing a regular flow of information, especially in

the context of potential conflicts. The public should feel informed about the election and campaign process, and problems should be discussed and analyzed publicly in the early stages to avoid misinformation and misunderstandings that can ignite a violent response.

12. The Electoral Process in Kenya: *A Review of Past Experience and Recommendations for Reform*, Open Society Institute, East Africa Initiative (OSIEA) IFES Final Report  
August 2008

Human Rights Team - *Report on Post-election Violence in Kenya*, Final OHCHR Kenya report 19  
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11. Kriegler and Waki Reports 2009

## APPENDIX I

### QUESTIONNAIRE

Dear respondent

I am Kimathi N. Bridah a student of Bachelors of Laws in Kampala International University. My research topic: “The effectiveness of the new electoral laws in curbing post-election violence in Kenya.”

This instrument is meant to gather data about the above mentioned topic and the information will be used for this study. Kindly assist me by filling as you can. It is not meant to test your knowledge, but rather gather necessary information about the topic under study. It's for academic purpose and any information given shall be treated with utmost confidentiality. Tick where appropriate.

#### Background information

1. Name of the division.....
2. Occupation .....
3. Sex :         Male [  ]   Female [  ]
4. Ages :        18-24 [  ]   31-40 [  ]   51+ [  ]  
                                  25-30 [  ]   41-50 [  ]
5. Marital status: i Single [  ]  
                                  ii Married [  ]  
                                  iii Divorced [  ]  
                                  iv Widowed [  ]

6. Were you affected by the 2007-08 post-election violence?

Yes [ ]

No [ ]

7. If yes, how? E.g. rape, destruction of property, IDPs etc

a) .....

b) .....

c) .....

d) .....

e) .....

8. Do you believe that the inadequacy of the ethnic division was a major cause of the violence?

i. Strongly agree [ ]

iii. Strongly disagree [ ]

ii. Strongly disagree [ ]

iv. Disagree [ ]

9. If you agree with the above question according to your understanding what were the other factors that led to post election violence?

i. Politics [ ]

ii. Inadequate electoral law [ ]

iii. Religion [ ]

iv. Poor administration [ ]

v. Lack of civic education [ ]

vi. The media [ ]

10. How was the government's intervention in stopping the wave of violence or its recurrence?

- i. Excellent [ ]
- ii. Good [ ]
- iii. Very good [ ]
- iv. Fair [ ]

11. Did you agree with the mode of government's intervention? a) Yes      b) No

12. If yes or no tell us why?

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13. Do you think the intervention of the international community, the NGOs, the civil community, the media, has brought any change? a) Yes      b) No

14. Give a reason for your answer

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15. Are there any committees or bodies to implement the new electoral laws, peace and reconciliation?

- i) What are the committees?
- ii) How often do they meet?
- iii) What is the composition of the committees?
- iv) Are all groups represented?

16. What is your opinion on post-election violence?

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## APPENDIX II

### INTERVIEW GUIDE

#### Dear respondent

I am Kimathi N Bridah a Bachelor of Laws student in Kampala International University. My research topic: “The effectiveness of the new electoral laws in curbing post-election violence in Kenya.”

This instrument is meant to gather data about the above mentioned topic and the information will be used for this study. I kindly request you to spare me some of your valuable time and respond to the questions as genuinely as possible. It is not meant to test your knowledge on the matter but to gather necessary information for study. I promise to treat your answers with utmost confidentiality and will be used for academic purpose only.

1. Is ethnicity the major cause of post election violence or does the problem lie with the politics played?
2. What were the effects of post-election violence in the area?
3. What mainly led to the violence in the area?
4. Do you agree that chasing a particular tribe from the region is not right?
5. If given an opportunity what would be your advice to the government and the community at large on matters of ethnicity and other factors leading to post-election violence?
6. What is the attitude of the IDPs and the administration specifically the police?
7. What peace and reconciliation activities are in place in your area?
8. Have there been incidents of tension, threats or violence so far between the locals and the IDPs?