

A CRITICAL APPRAISAL OF THE
ELECTORAL LAWS IN KENYA WITH
SPECIAL REFERENCE TO THE 1979
GENERAL ELECTIONS

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BY G.M. NJUGUNA

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ABBREVIATIONS - CASES

A.C. - Appeal Cases
E.P. - Election Petition
ch - Chancery

JOURNALS

EAJ - EAST AFRICAN JOURNAL

THIS DISSERTATION IS DEDICATED TO MY
FATHER, MOTHER, BROTHERS AND SISTERS FOR
THE INSPIRATION THEY HAVE RENDERED UNTO
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A CRITICAL APPRAISAL OF THE ELECTORAL LAWS IN KENYA WITH SPECIAL REFERENCE TO THE 1979 GENERAL ELECTIONS

INTRODUCTION

Any organized community needs and depends upon predetermined rules of conduct which have general acceptance and enforceability. It also requires a body of selected individuals who are entrusted with the responsibility of ensuring that the said acceptance and enforceability conform with agreed or imposed norms of conduct for the time being prevailing within the community. This is in essence what the concept of democracy tries to achieve. It is submitted that elections are one of the means through which the above proposition can be effectuated. It is one of the basic tenets of constitutionalism that the people who are vested with power must derive their authority from the people. This should be the case bearing in mind that democracy simply means, a rule by the majority. Our present societies have developed to such an extent that it is not possible for all people to take part in the decision making process, and it is for this reason that the system of representation has held sway for a considerable length of time. It is argued that people must be given a chance to change their leaders regularly so as to inject fresh blood into the national leadership. It is at this time when redundant leaders are thrown out by the electorate. My prime concern in this study is to undertake a critical analysis of our electoral laws as they stand, pointing out the strengths and weaknesses which are inherent in them. It is intended to ascertain the extent to which truly democratic elections can be carried on under the existing laws. Elections conducted under unfair or unjust laws would be a hollow sham, and not living in line with the democratic spirit which our country is striving hard to achieve.

Chapter I will involve a slight glance at the concept of democracy as it relates to the process of elections. A brief reference will be made to the Greek concept of democracy because it is from this community that the current theories of democracy sprung from. The writer will try and answer the question whether it is possible to pursue the Greek type of democracy. By virtue of the fact that we were a colonised state, it is important to examine the government system which subsisted during the colonial era with a view of establishing whether there were manifestations of democracy, especially through popular elections. It shall be argued that the colonial

Legislative Council was not a democratic body as the British Parliament. Further, it shall be conceded that the Council was just an extension of the Executive power, a body intended and devised to advance the interests of the colonial power. The Africans who were the majority in the colony were denied the right of representation in the legislative council and this was essentially a negation of democracy. Such a historical exposition of the electoral system will aid us in understanding the nature of our present electoral laws.

Chapter II will focus on the electoral laws as they stand. This will involve a description of the various legislations that govern the conduct of elections. Mainly, our discussion shall revolve around the Kenya Constitution, the National Assembly and Presidential Elections Act, the K.A.N.U. Constitution and the Election Offences Act. I shall then proceed on to examine critically the provisions so described. It is sought to answer a number of basic questions: Do the laws provide for a machinery which ensures elections are free and fair? Do they provide the assurance that only a candidate who is popular with the electorate is elected into Parliament? Are there sufficient safeguards against any electoral malpractices? An attempt will be made to analyse these laws in light of the social-economic set up. It has been argued that the laws tend to express the will of the ruling class in society. How the electoral laws relate to this view is of vital importance to those lawyers who are interested in the development of law and democracy in our country. In analysing our laws, the writer proposes to dig out whether the laws provide a means for the change of leadership, or whether elections are held as a matter of course to maintain the status quo. Kenya is a de facto one party state, and thus, this study must be undertaken within that framework - The role played by the party within the electoral framework shall be examined in order to see whether this negates the idea of a free choice by the people. One important issue in this respect is the question of clearance.

The third chapter shall set out to examine the practical application of the electoral laws analysed in the foregoing chapter. The main objective is to analyse the difference that obtains between theory and practice. It is intended to examine how the laws are adhered to or departed from by those charged with the responsibilities of conducting the elections. Emphasis shall be put on the rules that were made during the 1979 General

Elections. The issue of clearance shall be examined in some detail because it raised eyebrows in many quarters. Specific instances where electoral laws were flouted shall be pointed out. The manner of conducting campaigns also requires some attention because it determines to some extent the outcome of the elections. It has been argued that elections in emergent states are charged with emotion and tension which ultimately flares up in violence. Acts of intimidation against supporters of rival candidates tend to interfere with the free choice of a voter. The aftermath of elections is illustrative of the manner in which the elections were conducted. The number of election petitions was recorded to be relatively higher than during previous elections. All these tend to show that the electoral laws are not watertight and there is a need for reform. It is intended to discuss a few of the petitions, analysing the issues which were raised, in order to answer the question whether the 1979 General Elections were free and fair as the laws of the country postulate.

In the last section of the paper, an attempt will be made to decide whether the electoral laws have achieved their utmost objective, that is, ensuring free and fair elections. The writer also proposes in this conclusion to put forward suggestions and recommendations which might help in remedying and filling the loopholes existing in our electoral laws. The recommendations will centre mainly on the provision for a viable electoral machinery which shall try to minimise the evils of corruption, cheating and other electoral malpractices which mar our democratic process. It is only if such maladies are cured that the electorate can have total faith in the electoral process.

HISTORICAL BACKGROUND TO THE ELECTORAL SYSTEM IN KENYA

It is a commonly agreed point that a people's history to a large extent determines their present day existence. In light of this general assertion, it is important to trace the development of the electoral process in Kenya. Liberty is one of the important elements of constitutionalism. Liberty in political matters includes inter alia, the freedom in an electorate to choose who should govern, a choice which can be effectively exercised only where political parties are free to compete with one another for the favour of the electorate.¹ How this cardinal concept has been propagated and adhered to shall be our main preoccupation while discussing the democratic process in the colonial era. The chapter shall deal with the wider concept of democracy focusing briefly on the origins of democracy, in early Greece, before proceeding on to examine the electoral process in the colonial era.

THE CONCEPT OF DEMOCRACY WITH SPECIAL REFERENCE TO EARLY GREECE

Professor B.O. Nwabueze one of the most distinguished constitutional law writers has asserted that, "No word is more susceptible of a variety of tendentious interpretations than democracy..."² As if echoing the words of the Professor another academician observes that,

"One of the most powerful and emotive political forces in the contemporary world political scene is the notion of democracy. Yet, as a concept, democracy has been widely and deliberately misused, abused and misunderstood."³

From the foregoing quotations one can argue that it is not an easy task to define democracy, because since its inception the concept has undergone numerous changes. Each country which purported to adopt the concept has in one way or another tried to evolve its own model of what it believes to be democracy. But there is one definition which has achieved almost universal acceptance, that is, the definition by Abraham Lincoln, a government of the people, by the people, for the people. The underlying idea here is the popular basis of government, the idea that the government rests upon the consent of the governed, given by means of election in which there is universal franchise.

On examination of all the definitions pronounced on democracy, we discover that the concept can mean two things. It can mean

both a theory of government and an idea of a particular society. As ^a theory of government, democracy stipulates the kind of conditions under which the government can have legitimacy or the right to govern; as well as the conditions and the manner by which the citizens control and, if need be, remove the government. As an idea of a particular kind of society democracy means no more than a description of government machinery.

The original definition of the term 'democracy' dates back to the 5th century B.C. The term was coined by Herodotus a Greek Political Philosopher, and since then it has been adopted and modified by many different societies. The word was coined from the words "demos" meaning people, and "Kratem" meaning, to rule. Thus, the word "democracy" implied a rule by the people, or in other words, a rule by the majority. There were a number of notable aspects which are discernible in the Greek concept of democracy. Political and legal rights were guaranteed particularly during the election of leaders and voting on vital matters. Criticism of the governing powers was welcome and this is one of the most important features that the present day government should try and emulate. There was strong respect for the law which acted as a restraint on the government, and in effect guaranteeing the rights of the individual. However, despite all the positive aspects noted above, there were crucial limitations on the Greek concept of democracy. The concept of citizenship was a very limited one in that all women, children and slaves were not regarded as citizens. Also, the democracy had parochial characteristics due to the fact that it was only limited to the city states, for example, Athens. The form of democracy is not practicable in a modern state despite its good features. The populations have increased tremendously and also the exclusion of some people from exercising democratic rights is totally contrary to the current ideas of human equality. It is from this miniature democracy that the present day democracies have sprung. However, thorough elaboration and amplification of the concept has been taking place through the centuries. The Greeks later realized the impracticability of mass participation in the decision making process, and they evolved a system of representation which has been adopted by present day democracies.

The early Greek philosophers tried to propound theories of the ideal state. Though their observations were strongly

influenced by the conditions in the small Greek city states, they later assumed wider dimensions. After the gradual decline of the Greek civilization, the Roman empire arose. It was under the auspices of the Roman emperors that some of the theories propounded by the Greek Philosophers were articulated and put into practice. Plato's conception of a state was one based on a class system. He believed that men were unequal and thus a certain class had the right to rule over the others. He was also of the view that justice was to be administered without law. Justice was to be governed by the free intelligence of the best men rather than by the rule of law.⁵ His contention that only men made of 'gold' should rule over others is not tenable in modern democracies mainly because it negates the idea of free choice of leaders. Aristotle who was a student of Plato was highly influenced by the ideas of his teacher but he later departed from them in many respects. He postulated a state based on law as the only practicable means of achieving a 'good life' which according to him was the chief goal of political organization.⁶ The stoic philosophers played a great role in the democratisation of the Roman Empire which was built literary on slavery. The laws relating to husband and wife, parents and children, started assuming more human forms although this was accomplished very slowly and gradually. Though the stoic philosophy was not wholly responsible for these changes it is arguable that this humanitarian philosophy played some role in the legal and social reforms in this period of Roman history. It was in fact the Romans who tried to put the concept of a Republic into practice.

The principle objective of this short section was to trace the concept of democracy in its rudimentary stages. It has been portrayed that although the Greeks did not make some of the sophisticated distinctions which exist so far as democracy is concerned, they still had their system which enabled the society to lead a properly organised life. As already pointed out, it is not possible to adopt many features of the Greek type of democracy because they are not suited to the modern society.

ELECTORAL LAWS: A COLONIAL PERSPECTIVE

Before the imposition of colonial rule, Kenya was occupied by many tribes living separately. Politically, many of the communities were not organized in form of kingdoms such as

Baganda, Bunyore, Ankore and Toro in Uganda. Thus, among many communities, there was no clearly defined political unit. These tribal societies had not reached a level of political integration where a central authority was recognized - for example, a chief, a tribal council etc. Among the Kikuyu tribe for example, it was not possible to point out at any single person as the leader of the entire tribe. If an important issue required attention, the tribal or clan elders would convene a meeting to discuss the issue. There was no permanent council of elders. The elders were given this task because due to their age and experience they were in a better position to decide the issues at hand. Like in early Greece, male chauvinism was displayed to a great extent among the Kikuyu, because women were not allowed to take part in the decision making process. The system among the Kikuyu community can also be traced among other Kenyan tribes, for example the Kambas. Thus, this was briefly the situation before the tentacles of British colonialism extended into the Kenyan protectorate, which was to become a colony later on.

This study does not propose to analyse the motives of the British in coming to Kenya. But in passing it can be mentioned that the reasons given by the British are very different from the actual reasons. The British stipulated that they were prompted to Africa by the desire of abolishing slave trade and civilizing the Africans, and to awaken them from the "abyss of barbarism." It is no wonder then that the missionaries preceded the colonial administrators with a message of their philanthropic mission to Africa. But it is hereby conceded that the British motives were mainly three fold: Firstly, they wanted to acquire new sources for raw materials to feed the industries which had increased as a result of the Industrial Revolution in Europe; secondly, there was a need to seek new markets to buy the goods produced by the established industries; thirdly, the Industrial Revolution had accelerated the growth of surplus capital and it was essential to find areas where this capital could be invested in the interests of the metropolitan country, and Africa provided such a fertile ground. Though there were other political and strategic factors that hastened the process of colonization, the economic one was most dominant. Thus, in discussing the democratic process in the colonial epoch, the present writer intends to argue that the internal political organization was geared towards the realization of the economic goals. Once these were achieved, the rights of Africans could remain in the background. This chapter postulates that the

British colonial administration aimed at evolving a system of government which approximated the home government in some respects, to facilitate the realization of their goals.

After the partition of the East African territories in 1886 the Imperial British East Africa Company took the reigns of power in the Kenya Protectorate. By 1895 the company was unable to execute the duties conferred upon it due to the problem of under-capitalization. As a result, the British government through the Foreign office started direct administration of the Protectorate in 1895. The structure of the colonial government was completely opposed to the concept of democracy. Administration was carried on through imposed machinery, rigidly hierarchical and predominantly military in character, in that the Commissioner (to become governor later) was the executive himself. Each and every administrator was responsible to his immediate superior and was not answerable to those he ruled. This is what has been called the principle of subordination.⁷ The governor himself was only answerable to the Colonial Secretary. The administration was not at all representative of the subjects - they never participated in the selection of the colonial officials

The provisions of the Foreign Jurisdiction Act, 1890, portray the nature of the colonial government. Under the Act the Governor was to promulgate regulations by ordinances in council in order to create a comprehensive framework for administration. In essence, therefore, the colonial administrative hierarchy combined in one body the executive, legislative and judicial functions. This was contrary to the situation in Britain where the doctrine of separation of powers was to some extent adhered to. As time went by, the colonial office found it desirable to establish separate institutions for daily conduct of policy and administration. The most important of these were the legislative council (for making the law), and the Executive Council, (for implementing the law). However, in Kenya like in other colonies, the colonial office remained the supreme legislative and executive power.

It has been asserted that Kenya's colonial constitutional history was profoundly influenced by the presence and the claims of her immigrant communities, primarily the Europeans and secondly, the Asians.⁸ The period 1905-1923 was characterised by settler politics. The settlers agitated for a legislative machinery to replace the procedures of the administrative machinery

laid down in the East African Order in Council,⁹ which emphasised on judicial powers and institutions. It is a feature of the early constitutions that they concentrated on organizing jurisdiction rather than on establishing legislative and executive organs. Under the order, the governor had the responsibility for the maintenance of law and order, for which he had power to legislate, to establish courts and to deport.¹⁰ However, the Governor's Legislative powers were seriously restricted. There were formal restrictions and also most of the legislations he enacted was preceded by consultations with the British Government, whose approval in practice, was essential.

From 1903 we note an increasing involvement in politics by settlers. The outstanding effect of European settlement was to accelerate constitutional development. The aim of the settlers was to achieve responsible government under white rule. But the Indian community tried hard to prevent the achievement of those objectives. The British government was also opposed to the settler views. However, the settlers had won an early victory when the 1905 order in council was passed. The governor's power was generally restricted due to the establishment of two key institutions, the legislative council, and the Executive Council. The most significant innovation was the legislative council, which was invested with power to make laws for the peace, order and good government of the protectorate. At first, the settlers envisaged a legislative council under official majority (their view was to change later on). The council was composed of the Governor and such other persons, not less than two in number, as may be appointed by the crown, the tenure of the latter was subject to the Crown's pleasure. The Governor apparently lost his power to make laws on his own. But in actual fact the Governor had power to veto legislations passed by the council, and as such, the council could not operate efficiently without his support. The Imperial Government had power to disallow an ordinance passed by the council. The arrangement set up by the 1905 order marks the move from the autocratic rule, and it is here that we note the genesis of the doctrine of separation of powers. It can be argued that this body was not intended to be independent if the Home Government had power to abrogate legislations passed, and also to legislate directly through Orders in the Council.

The question of representation started assuming wider dimensions. At first, there were six official members, and two unofficial members, all of them Europeans. The two unofficial members were to represent settler interests. While the initial settler demand was for nominated representation, they soon began to agitate for elective representation, arguing for it on the ground, inter alia, they paid taxes. This was opposed on the grounds that the settlers constituted only a small section of the population. However, the principle of Europeans elective representation was conceded in 1916. In 1919, elective representation was provided for by the Legislative Council Ordinance.¹¹ The Ordinance provided for full adult white suffrage -men and women, the protectorate thus becoming the first place in the Empire (outside Britain) to grant the vote to women. Female suffrage had been opposed by the settlers, but it was eventually accepted as a means of increasing the White vote. The qualifications for franchise were that a person should be an adult and a British subject of European origin or descent. He had to have ordinarily resided in the Protectorate for at least one period of twelve consecutive months prior to the date of his application, and had resided in the electoral area in which the application was made for at least three months. A candidate had to fulfill the above requirements and in addition, the residential requirement was two years ordinary residence before nomination, and the ability to read, write and speak the English language. The qualifications portray the fact that other races were not to have any political say in the administration of the colony though they were the majority.

With the extension of the franchise to Indians and Arabs, the communal roll system was initiated. This solved the problem of demarcation of constituency boundaries. As it shall appear later in the paper, the communal system would become the centre of attacks from the Asians and Africans. The system was evolved basically with the aim of creating a racially stratified community with Europeans at the helm. Settlers continued agitating for a majority of unofficial members in the council. On the other hand the Indians claimed an equality of rights with the settlers. The Indians' agitation focused imperial attention on the fundamental issue for the development of the colony. The colonial office responded with the famous Devonshire White Paper, 1923, known as "Indians in Kenya" This paper rejected the common roll system on the grounds that such a system would .../8

not act as a bridge between the races. Indian claims of equality of representation with Europeans were also rejected, though an increase in elective membership was proposed, to bring the total number to five.

The Paper's importance lay in the recognition of the claims of the Africans. Though the Europeans and Indians had assigned themselves the role of defenders of African interests, it is very doubtful whether they were genuinely concerned about them. The Paper was emphatic in saying that Kenya is an African country and the interests of Africans were paramount, and if these interests and those of the immigrant races conflicted, the former should prevail. However, the Paper was not followed by a significant increase in African representation or share in the government. Previously the Africans were represented by the Chief Native Commissioner. The Paper recommended the policy of nominating a missionary to the Council to advise on African matters, "until such a time comes when the natives are fitted for direct representation." This shows the paternalistic attitude assumed by the British. It is very doubtful whether the Missionary knew the needs of Africans.

The Indians did not accept the 1923 awards, and they boycotted the Legislative Council in protest against the refusal of the common roll electoral system.¹² They urged a common roll on the basis of the Hilton Young Commission Report of 1929-30. The Report's recommendation had as its corollary that universal adult franchise must be abandoned before a common roll could be introduced. Franchise qualifications were necessary to ensure that Europeans were not swamped by the majority Africans and Asians.¹³ Though the Indian agitation continued, the question of a common roll was closed till the first steps were taken towards dismantling this racial edifice in 1958. But by this time the Indian vigour was declining because the common roll would include Africans as well. The period 1923-54 was also characterised by persistent settler agitation for an unofficial majority which had actually been recommended by the Hilton Young Commission. An unofficial majority was reached in 1947 with the connivance of the British Government. It then became possible for the Legislative Council to reject government measures.

So far as the Africans were concerned, the initial

assumption was that they were unable to represent themselves and thus a representative was nominated to speak on their behalf. Missionaries represented the Africans but, Ghai and McAuslan observe that,

"It was, however, inevitable that the views of Missionaries and the Africans did not always coincide, nor was the effectiveness of the African cause enhanced by the discretion given to the member to put the African case as he judged best.¹⁴

The Africans not satisfied with this system continued to press their political demands for representation. From the early 1920's one notices a proliferation of political parties based on regional, but rarely national phenomena. The East African Association gave expression to African needs and aspirations. The activities of the Association culminated in the shooting of some Africans and the deportation of its leader, Harry Thuku, to Kismayu. The Africans continued to argue that they were capable of representing themselves and that they knew what was good for them. Furthermore, no European with the right sympathies and understanding could ~~not~~ be found; and they wanted a greater say in the colony's major councils and not just in the local Native Councils. The Kikuyu Central Association (KCA) in particular demanded nothing less than representation by Africans.

African political demands obtained some concessions from the Government. Native tribunals were formed in the 1930's although they were never intended to act as a political forums in any independent sense, bearing in mind that they were controlled and manipulated by the colonial administration. For example, the D.C. who was a white, was an ex-officio Chairman¹⁵ of the tribunal. "The tribunals were an attempt at representational administration." The first attempt at effective African representation though advocated as early as 1923 was only realized in 1944 when Eliud Mathu was nominated to the Legislative Council. Before this time African representation was through two missionaries. The two had to be nominated without restriction of age or profession - this it was contended, was an administrative discretion not a constitutional safeguard. African representation (through nomination) had increased to representation by six Africans by 1952. A procedure for consultations with Africans before nomination had grown up.

The Kenya African Union (K.A.U.) was formed around 1944. But one of the unsatisfactory features of the representational methods was the alienation of political organisations from the Legislative Council. African political groups were becoming active but there was little opportunity for the expression of their views in the Council.¹⁶ The European community viewed the African political demands as emanating from a view hotheads and unrepresentative of the mass of the people. It is then arguable that, "the failure of the constitutional system to accommodate the legitimate demands of the Africans was partly responsible for the outbreak of Mau Mau ..."¹⁷ It now became clear that a viable constitutional arrangement had to be devised in order to placate the Africans. A British Parliamentary delegation visited Kenya and reported to the colonial Secretary in 1954. It emphasised the necessity to provide an outlet for African politics and urged immediate discussions with representative Africans, with a view to arriving at an acceptable basis for the election of African members to the Legislature. The major keynote of the report was a need to create a new system of race relations.

The political violence which found expression in the Mau Mau insurgence called for a radical change in administrative approach. The Lyttelton constitution was launched to try and achieve this objective. In 1955 a Commissioner was appointed to advise on the best system of choosing African representatives. The report was strange and conservative.¹⁸ Basically the Commissioner assumed that the vote is a public privilege, not a universal human right. Franchise was made especially difficult for the three "Mau Mau" tribes, Kikuyu, Meru and Embu. The Government modified the proposals. Under the new Lyttelton constitution an African to get a vote had to be twenty one years or over. He should also have completed intermediate schooling or gone through government service. There were also property qualifications. African leaders correctly/critical of/w these provisions, though they did contest elections under them. Under this constitution, eight African elected members joined the Legislative Council. Almost from the beginning, they campaigned for the increase of African members to fifteen. Their intransigency forced the colonial secretary to make his own award, which formed the basis of the Lennox Boyd constitution.

Under the new constitution the number of Africans was increased to fourteen, thus in parity with the Europeans. There was also a move away from the communal roll system. The

constitution also emphasised the importance of safeguards for the minorities, which was a typical feature of the British rule in Kenya. It is quite clear then, that the colonial administration had realised the dominance of the Africans. What the Africans were now lacking was the political force through political parties so as to be able to push their demands further. However, the Africans in the legislative council played the role of a pressure group with splendid dexterity.²⁰

The period from 1958-63 can be described as one characterised by party politics. The government had realized the futility of denying the majority Africans the right to self-government. Logically, it could not withstand the "wind of change" which was sweeping through the entire African continent, fuelled mainly by the attainment of independence by Ghana in 1957. The dominant feature in this period was the re-awakening of tribal and racial feelings among the diverse communities in Kenya. The colonial structure was fully responsible for the cultivation of these animosities. In the 1960 Lancaster House Conference, safeguards for the minorities were stressed.

As it happened recently in Zimbabwe, after the 1960 conference twenty seats out of fifty three were communally reserved, the remainder being open to contest by anyone. This was to avert an overwhelming African majority in the legislature. The settlers led by Blundell and Cavendish Bentick organized their own parties to advance the interests of settlers. Later on Blundell decided to convert his party into a multi-racial party but to the bitter dismay of the great mass of settlers. Some Europeans tried very hard to prevent the conclusions reached in the conference but with little success. Mr. Tom Mboya observed that, "The five weeks of the Lancaster House Conference --- not only brought about the declaration we had sought, that Kenya was to be an African country, it also reversed the whole constitutional process."²¹

It is important to discuss the political activities that took place between 1960 and 1963, because the factors that were in issue are still discernible in our political system. It has been asserted that,

"the last stages of Kenya's path to independence was characterised not by a vigorous and final onslaught by the Africans, but by a slow and tortuous period of reconciliation of competing claims." ²²

The major protagonists in the battle were K.A.N.U. and K.A.D.U. The settlers viewed K.A.N.U. with a lot of suspicion. It was regarded as a party of radical nationalists who despite institutionalized safeguards, could easily nationalise settler property. It was also a "Mass party" because of the large following it got from the large tribes especially the Kikuyu and the Luo. The smaller tribes became sceptical about KANU and as a result they amalgamated their tribal parties to form KADU.²³ KADU had the sympathy of the settlers who were more interested in the protection of their property. KANU advocated a unitary system of government while KADU wanted a Regional form of government in order to protect minority interests.

The 1961 elections were almost a straight fight between KANU and KADU. The former won 72% of the popular vote but only 24% of the 65 of the elective seats. The elections were quasi-representative. By this time the franchise had been extended. Requirements for qualification were capability to read and write one's own language, to be over forty years of age, and to be an office holder in a wide range of schedule posts at the time of registration. One had to have a minimum income of £75 per annum. The stage had now been set for the transfer of power on the basis of the Westminster Model. Ethnical factors played a great role in subsequent elections. This is clearly portrayed by the defection of Mr. Paul Ngei from KANU to form the African People's Party (A.P.P), which was dominated by the Kambas. The 1963 elections were seriously marred by tribal loyalties. KANU won the elections comfortably and was invited to form a government. KANU then re-directed its efforts to the policy of centralisation, stability and legitimisation.²⁴

Kenya started as a multi party state. However, this was to change in 1964 when KADU Members crossed the floor to join KANU and thus we had a de facto one party state. During the colonial era we had only one Legislative Council but at independence we have a bicameral Legislature. There was the Senate and the House of Representatives. The Senate was to act as a political safeguard for "Majimbo" It was to consist of five members from each region, chosen by the Regional Assembly, and it was to be subordinate to the House of Representatives. The KANU government was determined to abolish the bicameral legislature. The Senate was finally abolished in 1966. The elected members of the two Houses were declared elected members of the new National Assembly. The Specially Elected Members of the House of Representatives was declared the specially

members are nowadays referred to as Nominated Members. The structure of the legislature remained the same mainly because Kenya has a one party state except for a short spell during the life of K.P.U.

C O N C L U S I O N

This chapter has attempted to trace the development of representative democracy from 1880-1963. It was the intention of the author to prove that the colonial regime was authoritarian with little respects for the rights of the majority. It has been seen that the ultimate power vested in the Governor, though he was subject to dictation from the Colonial Office. The Legislative and Executive Councils never helped much in the devolution of power. Their roles were mainly advisory, and the fact that there was an official majority in the councils go far to prove that these were bodies to be manipulated by the colonial administrators. However, settler agitation injected some life into the Legislative Council. It became the forum to air grievances and criticize the government or its officials, but in relation to legislation its role was insignificant.

The colonial regime was then a complete antithesis of a representative democracy. A person can be described as a representative only if his election involves some obligation however slight, to advance the interests or opinions of his electors. This was totally lacking in the case of the Legislative Council so far as the majority were concerned. If one holds the view that democracy is an expression of the will of the majority then there was no trace of democracy in the era under discussion, simply because the majority were granted voting rights only in 1957. Furthermore the right was limited to the elite and propertied Africans. The strategy here was to create a class which / take over power after independence, and prepared to /would perpetrate the same policies as the colonial regime.

It was then true to argue that the electoral laws so established were made to suit the interests of the ruling class, that is, the settlers. So long as this class could articulate their grievances the other races could as well do without representation! The British clothed with ideas of White superiority assumed a paternalistic attitude by appointing Missionaries to represent the African interests. The Devonshire White Paper which purported to recognize the rights of Africans

was a mere hypocritical device to masquerade the intentions of
*the British. The Africans read through these intentions and
they continued to press for their political rights which were
finally achieved through a bloody struggle. The task before
the new Kenyan Government was to try and resolve the contradictions
of the colonial systems - its laws, institutions, policies etc.
How this has been done in reference to electoral laws is the
objective of the forthcoming chapter.

This chapter aims at describing the electoral laws as they are, while at the same time pointing out the weaknesses and loopholes inherent in the laws. As present election laws stand, they provide firstly for the procedural machinery for holding elections, and secondly for sanctions against activities that prevent a free and fair election. The rules are of vital importance if the whole election exercise is to remain free and fair. The records of elections in post independence Africa shows that the law needs to protect the system not from the voters, nor even the candidates but from the organisers of the elections, the incumbent executive¹. All the laws are not water tight and so the possibility of manipulation by the organisers cannot be ruled out. The chapter sets out to demonstrate how the laws have buttressed the democratic system in Kenya. Our main concern will be the examination of the National Assembly and Presidential Elections Act,² Election Offences Act, the Kenya Constitution⁴ and the KANU Constitution. It is posited to deal with the electoral machinery for the General Elections, Presidential Elections, and lastly the election offences. A democratic legislature is regarded as the linch pin of the new constitutional order and so elections to this body must follow the laid down procedures.

There are three types of membership in the National Assembly. The most important grounds is that of elected members, each of whom represents a single member constituency. Then there are the nominated and ex-official members.

FRANCHISE

The constitution provides that elections for the elected members are to be held on a wide franchise. Under S.43(1)(a) all those persons who are eighteen years and over are entitled to register as voters. No one can vote unless he has been so registered. The age limit is important because one should be in a position to make a correct choice, otherwise the election will serve no purpose. S. 43 (1)(b)(c) lays down the residential requirements before registration can be obtained. The applicant must have been resident in Kenya either for a period of not less than one year immediately preceding the date of application or for a period of, or periods amounting in aggregate to not less than four years in the eight years immediately preceding that date. He must also have resided for five months in the previous

twelve months in the constituency in which he applies to be registered; alternatively, he must for a similar period have been employed, possessed property, or conducted business in the constituency. A voter can be disqualified from registration on the grounds of insanity, being an undischarged bankrupt, if he is under a death sentence, if he is in lawful custody, or if the National Assembly so prescribes due to the Commission of an election offence.⁶ A voter cannot register or vote twice. There is no requirement that a fresh register be drawn up before an election. The Electoral Commission has the power to direct the registration of voters in a constituency where by elections have become necessary.⁷ While this power is exercisable at the discretion of the Commission, it is desirable that there should be a provision for the revision of the register not less than four nor more than five years since the previous general elections. The register should as much as possible reflect the changes that are taking place in the constituencies. The register was revised in 1979 General Elections. The matter was discussed in the Wangari Mathai Case. Her name did not appear in the new register and so her nomination as a candidate in the Nyeri by-election was refused. Her contention that she had registered in 1974, and that the supervisor of Elections had power to include her name in the new register was not upheld.

QUALIFICATIONS FOR CANDIDATES

A person must be registered as a voter in a constituency (though he is not restricted to contesting elections in that constituency only). The age limit is twenty one years.⁸ The logic is that only mature persons should be eligible to represent the masses. Candidates must pass proficiency tests in the English and Kiswahili languages.⁹ The argument put forth in favour of this requirement is that a candidate should be able to participate fully in the deliberations of the National Assembly. In the election petition of Muhammed Jobat Ali and Abdullahi Sirat Oman -V- G.K. Githinji and Ibrahim Abbas Noor,¹⁰ the High Court nullified the election of one M.P. who was found to have attained his language proficiency certificate through fraud or deceit by using another person to sit the language tests for him. The candidate must be nominated by a political party.¹¹ This requirement is of great hindrance to the practice of free democracy bearing in mind that Kenya is a de facto one party state. There is a strong case for a provision for independent candidates to participate in the election because it is the only way the voters can exercise a proper choice. It is the contention of the writer that only

those who will cooperate in the perpetration of the system will be nominated. However, some of the persons once nominated and elected into parliament do not toe the line of the ruling classes.¹² The provision was passed in 1968 basically as a counterforce to K.P.U. activities.¹³ The provision was put into operation in the 1974 and 1979 General Elections when some ex-K.P.U. Members and other "disgruntled elements" were barred from contesting seats in the elections.¹⁴ Furthermore, details of the clearance procedure are not well laid down.

A person is disqualified if: he owes allegiance or obedience to any foreign state; he is under a sentence of death or under a sentence of imprisonment exceeding six months; if he is adjudged to be of unsound mind; if he has entered into any contract with the government; and if holds any office in the public sector.¹⁵ This last disqualification is to rule out the chances of a candidate misusing his public office to win the election. The provision relating to bankruptcy is questionable. Perhaps the rationale is that one who is not capable of managing his personal affairs is not fit to represent members of the public. Parliament may also provide that a person who commits an election offence that is prescribed by Parliament is not qualified to be nominated for election as a Member of National Assembly for a period not exceeding five years.¹⁶

The power of nominating a person as a Member of the National Assembly vests in the President.¹⁷ They are nominated from amongst persons who, if duly nominated, would be qualified to be elected as Members of the Assembly. The President is at liberty to nominate only such persons as to whose subservience he is assured. The major role of the nominated Members is fortification of the executive. Since they owe their appointments to the Chief Executive, naturally, they are inclined to supporting the government's policies in Parliament. If the nominated members are to play an impartial and purposeful role in Parliament, then they should be appointed by the Electoral Commission or the National Assembly. In the current legislature the front bench exceeds the backbenchers. Thus when the nominated members and some backbenchers join with the front-bench, it becomes very easy to bulldoze any government Bill through Parliament. Conversely, any Bill which is unpopular with the government is very unlikely to pass through. Recently, a number of M.P.'s stormed out of Parliament complaining that

they were not being given sufficient time to debate controversial Bills because of the voting superiority of the frontbench.¹⁸ There are also assertions that the frontbench attends Parliamentary sessions on particular days in order to pass through a government Bill or to oppose a bill which the government dislikes.¹⁹

CONSTITUENCY DEMARCATION

The Electoral Commission prescribes how constituencies are to be divided. Parliament may prescribe the minimum number of constituencies, which should not fall below 158 and the maximum number should not exceed 168.²⁰ In demarcating constituencies the Electoral Commission takes into consideration the density of population, population trends, the means of communications, geographical factors, community interests and the boundaries of existing administrative areas. This power is vested in the Commission to avoid gerrymandering by the Government. The commission when directed by Parliament can review the number, boundaries and names of constituencies at intervals of not less than eight and not more than ten years.²¹ Such a review is important because it takes account of increased population in order to ensure the electorate is properly represented. (But as surfaces later, the role of the Commission/i has been of minimal significance).

In Kenya we have single member constituencies. Designation of constituencies in reference to ethnicity has served to heighten parochialism and sectionalism. Ethnicity has had the further effect of exacerbating tribal sentiments which the national leaders are striving hard to eradicate.²² Members of certain constituencies have come to regard these as their personal domains where other M.P.'s have no right to set foot on. This attitude is deplorable because an M.P. should take into consideration the interests of the entire nation, though, at the same time not forgetting to advance the cause of his electors. Many constituencies follow the administrative structure devised by the colonial government to suit its avowed objectives of divide and rule. This is a defect which should be remedied by the independent government.

As the present electoral laws stand, the ruling party can nominate as many candidates as possible. It is questionable whether the most popular candidate gets elected. Elections are held on the basis of "first past the post" system i.e. the candidate who gets the largest number of votes is declared

elected. It has been argued and with justification that when candidates share the votes extensively the chances are that a very unpopular candidate might go through. Of late there has been much talk about limiting the number of candidates to make sure that the most popular candidates gets elected. This is quite fair on one hand but on the other hand, the ruling party might misuse its power by imposing candidates on the electorate. This question demands urgent action since there is no opposition party.

ELECTORAL MACHINERY

If elections are to be free and fair, it is important to have an electoral machinery which ensures that the democratic process is not jeopardised. To safeguard against any abuses the constitution has provided for voting by secret ballot and an electoral machinery central to which is an independent Electoral Commission. The President has the power to appoint the Chairman and not less than four other members.²³ Appointments are made for five year period, and dismissal can only take place through a procedure that applies to the dismissal of a judge. A member can only be dismissed on grounds of infirmity, misbehaviour or inability to exercise the functions of his office.²⁴ The security of tenure is to safeguard the independence of the Commission at least in constitutional theory. The body is not subject to the direction or control of any other person or authority in the discharge of its functions, and it may ~~require~~^{regulate} its own procedure.

The Commission serves two important functions. Firstly, it draws up the constituency boundaries and it is responsible for the conduct and supervision of elections, though in regard to the latter, it is doubtful if the implementing legislation²⁵ gives full effect to the constitutional provisions. The Commission also directs and conducts the registration of voters. But this role is vefy limited because it can only order the preparation or revision of the registration,²⁶ and the government provides machinery for such legislation. The appointment of returning officers and designation of polling stations is done by the government. Normally, the administrative officers are appointed as returning officers. This situation gives the electorate the impression that there is direct or indirect influence by the government. Thus, it is arguable that the great~~e~~ power delegated to the Commission by the constitution is

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seriously curtailed under Cap. 7. In order to portray that elections are free and fair there is a need to limit the role of the government in elections. The Commission should designate officers to prepare the register of voters and to act as returning officers. As it stands, the electoral commission has remained a toothless bulldog.

If there is a claim that elections were not conducted according to the proper procedure the High Court has original jurisdiction to determine whether a person was validly elected or whether a seat in the National Assembly is vacant.²⁷ Any person entitled to vote in the elections to which the application relates, or the Attorney General can petition the High Court to adjudicate on the matter. The constitution (S.44(5)) provides that determination by the High Court of any question Under S.44 shall not be subject to appeal. This limitation is meant to reduce the occurrence of litigation ad infinitum. These extensive powers are vested in the High Court on the assumption that the judiciary is impartial and independent. But on deeper scrutiny we find that this is only illusory. The judiciary can and has been subject to manipulations by the executive. Even if the court reaches a correct decision the executive might intervene through its executive and legislative power. This occurred in the Paul Ngei case (discussed later in this chapter).

The National Assembly and Presidential Elections Act (Cap 7) provides for the procedure of voting. For the purposes of a parliamentary election the speaker issues a writ to declare a vacancy in the House. This occurs upon a dissolution of the Assembly or when a vacancy arises out of any other cause. The writs are then delivered to the Supervisor of Elections who should specify within ten days, the date of preliminary elections, the nominations day, and also the day when the poll is to be taken.²⁸ In Kenya the preliminary elections are combined together with the actual elections. Candidates are supposed to take their nomination papers to the District Commissioners who normally act as returning officers. Situations have arisen where a returning officer misuses his power by refusing to accept the nomination papers of a certain candidate on the ground that the candidate is time barred. But on most occasions the directives come from other persons in the higher ranks of the political hierarchy.

Candidates are supposed to make a deposit before they can be allowed to contest and seats. The purpose of this provision is to keep out the many who are not privileged from joining the ranks. Advocates of the provision will argue that this is ^{the} only way of showing one's commitment but this is highly doubtful. Also to be nominated as a candidate one must subscribe 1000/= to be a life member of the ruling party KANU. These provisions call for a quick repeal if we are to maintain equality in the elections.

Every candidate is supposed to appoint an election agent. A candidate can act as his own agent and thereby he shall be subject to the provisions of part (V)A of Cap. 7, as a candidate and as an election agent. The agent represents the candidate at a polling station to see to it that there is no unfair dealing.

There are Regulations which govern voting by secret ballot, designation of polling stations, the erection of polling booths, the conduct of voting and the principles applicable in the counting of votes.²⁹ Regulation 26 provides that no person shall communicate with a voter within the precincts of the polling station. Communication is not defined but it may include carrying a candidate's poster or wearing his badge or T-shirt. There is also provision for sealing ballot boxes so as to avoid the possibility of including illegal ballot papers. The procedure for counting the votes and a recount where necessary is laid down in the Regulations. The prime objective of these regulations is to ensure that the elections are not marred by any malpractices. But on observing the various grounds raised in the petitions, it is clear that the rules are too often flouted. Sometimes the returning officers breach the rules in order to make sure a candidate of their choice is elected.

The electoral machinery tries to guarantee a free and fair election but still there are many loopholes some of which have been pointed out. There is a need to amend the laws, in order to facilitate easy apprehension of the people who try to distort the electoral process. This is the only way of maintaining the sanctity in the entire process.

PRESIDENTIAL ELECTIONS

Presidential Elections have never been a reality in Kenya since independence. The constitution and the National Assembly and Presidential Elections Act provide for the procedure of electing the President.³⁰ To qualify as a candidate for the

Presidency one must be a Kenyan citizen of thirty-five years of age, and should be registered as a voter in the elections to the National Assembly.³¹ In our system the President is "elected" directly by the people through their representatives in Parliament. A candidate must be of a higher age because for a president you need a greater degree of maturity since the responsibilities involved are considerably greater.

Under S. 5(3) (a), the President must be nominated by each political party in the elections. (The constitution presupposes a multi-party system). To be valid the nomination of a president must be supported by not less than one thousand persons who are registered as voters. Where more than one candidate is validly nominated a poll shall be taken in each constituency. If only one candidate is nominated (as has been the case since independence) he shall be declared to be elected as President. The President must represent a constituency in Parliament. In case there is a vacancy in the Office of the President, elections are to be held within the period of ninety days following the occurrence of that vacancy.³²

The practice in Kenya is that the leader of the party is automatically nominated as the party's Presidential candidate. In the final analysis this leads to extreme personalisation of power, and the President becomes synonymous with the government. It has been argued that in the traditional African systems, we never had two leaders at the top competing because this was likely to cause disunity. It is a question of debate whether such an argument should subsist when everybody is yearning for the strengthening of the democratic process. The President is vested with almost absolute power which can easily corrupt so far as elections are concerned. For example, he is the one who appoints the Members of the Electoral Commission. Also the returning officers owe their positions directly or indirectly to the President. Thus, there is no reason why they cannot act in accordance with Presidential directives and in the process conducting elections unfairly.

Elections for a President are to be held after every five years when the National Assembly is dissolved. There is a strong case for limiting the term the President can serve in office. This will reduce the chances of a President entrenching

himself in power to such an extent that he is able to distort the democratic process at will. As it is in other emergent states, the office might come to be regarded as a personal chattel which is not to be relinquished unless under the force of arms. At present the powers of a President are so immense that the idea of a person rising up to oppose him in the Parliamentary elections is almost totally inconcievable.

ELECTION OFFENCES

The present election laws as they stand provide for sanctions against activities that prevent a free and fair election. A large part of the legislations create offences and provides for punishment for the illegal activities of voters, candidates, their agents and the officers. In this paper it is intended to deal only with the most recurrent offences.

No one can register as an elector in more than one constituency nor can one be registered as an elector more than once in the register of voters.³³ A dual vote is restricted because if allowed it would negate the principle of a fair election. A voter can be struck off the register if within the preceding five years he has been convicted of an election offence by the Election court.³⁴ If a voter knowingly makes a false statement on or in connection with any application to be placed on any register of voters, he is guilty of an offence. This includes dealing fraudulently with the ballot papers or voting in an electinn where one is not entitled to vote.³⁵ Personation by a voter is also prohibited.

The other category of offences are those committed by election officers. These include: recording false information; wilfully refusing a person to vote while he is so entitled; refusal to count a ballot paper or breach of official duty without reason.³⁶ The punishment provided is three years imprisonment. It is important that officers be restricted otherwise they would indulge in many malpractices which would render the whole exercise a sham. It is possible that an officer might be corrupted by one candidate, but the fear of prosecution will act as a restraining factor. Every officer, clerk, interpreters, candidates and agents take an oath of secrecy.³⁷ None of them should ask a voter whom he intends to vote for or whom he had already voted for. However, it is highly doubtful if the oath is a sufficient restraining mechanism. Nowadays the binding effects of an oath are not felt. Even in a court of law the

oath is just taken as a matter of ritual, but not as a guarantee for speaking the truth. An oath will only have an effect if it is administered to a person whose religious convictions are above average. Any person who aids, abets, counsels or procures the commission of any of these offence is also liable.

Offences by candidates are the most recurrent in election petitions. It is only fair that a candidate gets elected to Parliament through the proper procedure, otherwise he would not be a proper representative of his electors. Treating is prohibited in the Election Offences Act.³⁸ It is defined as the giving or procuration of any food or drinks or the provision of money by or on behalf of the candidate to an elector to influence him either not to vote at all, or to vote for another candidate. Sometimes it becomes difficult to determine for what purpose such nourishment or victuals were given. It is traditional to offer food and drinks to visitors or friends and a failure to do so is interpreted as a gesture of meanness. The court should distinguish between treating during polls and during campaigns. If we involve the traditional argument above, the court should be reluctant to pronounce any conduct as treating in the latter case.

Any person is guilty of the offence of undue influence³⁹ if he directly or indirectly by himself or by another person on his behalf makes use of any threats, force or violence with the aim of inducing a person to give or refrain from giving his vote, whether to^a particular candidate or not. Other acts which amounts to undue influence include: impeding or preventing the free exercise of the franchise; inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate. This issue arose in the case of Mr. Paul Ngei. The petitioner, Mr. Mbondo, alleged that Mr. Ngei had threatened him and thus forced him to withdraw his candidature. As a result Ngei went to Parliament unopposed. The court in deciding the petition in favour of the petitioner observed that,

"He (the second respondent) was in our opinion acutely conscious of his high government position, and it was this that moved him ... to a sense of outrage when he learnt that he was to be opposed by the petitioner ... to whom he referred to as a 'little man.'"⁴⁰

However, an amendment was bulldozed through Parliament without due observance of the standing orders. The President was conferred with power to pardon any person who has been found guilty of an election offence. The impeding of a person from being nominated as a candidate for an election or from being registered as a voter also amounts to undue influence. If such unbecoming conduct was to be left unchecked, the effect would be making the electoral process a farce.

Legislation against bribery and other corrupt practices has existed in common law jurisdictions for over 300 years. The progression of tighter laws and stiffer penalties has only served to emphasise the inadequacy of these laws.⁴¹ Bribery is too rampant in the entire fabric of the Kenyan society, and so its appearance in the election process is not an isolated incident. Bribery under the election laws⁴² consists in the direct or indirect giving of money or other valuable consideration to induce a person to vote or procure votes for a candidate. It may also be constituted in the procurement or giving, by or on behalf of a candidate, any office, place or employment so that the person so given may vote for a candidate or procure votes for him or refrain from electing another candidate. It is submitted that bribery denies the impoverished electorate of their freedom to exercise the franchise freely, and it also minimises the chances of a poor candidate winning the elections. But looking at the high incidence of bribery one can only conclude that the laws are not effective.

There is almost official recognition of the inability to enforce the laws. Thus, the ruling party indicated in 1979 that,

"The government may not be vigorous in its enforcement of the election law passed by the last parliament in August limiting election expenses ... to Shs. 40,000/= in the respect of the 1979 General Elections."⁴³

Candidates will only stop such practices if the certainty of detection is a much higher risk than any likely gain, and if the electors make it manifest that attempted corruption will not have any significant effect on the outcome of any elections. But the biggest problem is that voters are too willing to "milk"

something from the candidates since this is the only chance they have of reaping any material benefits from the would be members of parliament. Some M.P's are known to forsake their constituencies only to return when the next elections are near.

It has been suggested that corruption in the Parliamentary election in Britain has declined due to a number of crucial factors, inter alia: the growth of responsible political parties; the growth of mass media and national platforms; the spread of elementary education and mass literacy. Also the reform of the legal system and the rise of a well trained and incorruptible civil service have aided in the gradual eradication of corruption. Though these changes have occurred in a different political, economic and social context, it is worthwhile carrying such efforts in Kenya.

It is an offence to publish or cause to be published before or during elections any false statement of fact relating to the personal character or conduct of any individual candidate, or to make or publish before or during elections any matter for the purpose of promoting or procuring the election of any candidate.⁴⁵ In JOSPHAT KARANJA -V- MANASSEH KABUGI and MAGUGU⁴⁶ the petitioner alleged that the respondent had been guilty of two election offences - giving food and drinks to voters to influence them to vote for him, and that he had distributed published material containing false statements about the petitioner. He alleged that in the cartoons so published, he was depicted as an irresponsible person who had caused great suffering to University students while he was the Vice-Chancellor by inviting the police to come and beat the students. He contended that the publication of the leaflets caused him to lose in the elections. The court dismissed the petition on the ground that no sufficient evidence was adduced to prove that the second respondent was responsible for the publication and distribution of the defamatory leaflets.

No payment or contract for payment should be made for ~~the~~ purpose of promoting or procuring the election of a candidate.⁴⁷ For example, a contract conveying electors to and from the polling station constitutes an illegal practice. The provision attempts to prevent illegal transportation of voters which is a popular

ground in petitions. Under the same Act (Cap. 66), every employer is supposed to permit every worker a reasonable period for voting and no money should be deducted from his salary. This is an importance provision because every citizen has a right to vote.

The electoral offences and the penalties prescribed thereof, are a measure to bring fair play in the elections. However, the decision to prosecute lies with the Attorney General. This is a great drawback on the enforceability of the law because the Attorney General is part and parcel of the executive. ^{He} It might abstain from instituting proceedings if it is not in the interest of the executive to pursue the matter. Although a voter in the elections or a candidate can file a petition seeking to nulify the elections, the procedure is not widely known among the electorate. Up to date there₄₈ has been only one case where a voter has filed a petition. Furthermore, the costs of instituting a pet^{it}ion are too enormous for the common man to bear. Another serious drawback on the efficacy of the laws is the power of the President to pardon a candidate who has been found guilty of an election offence. This provision does not augur well for the future of the democratic spirit in Kenya. Mr. George Anyona when opposing the Ngei Amendment Bill said,

"Anyone who breaks the law while being elected and is later found to have committed an offence should not only be thrown out of parliament but should be jailed... If leaders are going to be elected in ways which are illegal and they are pardoned for the illegality then you will find so many people locking up their opponents in houses to prevent them from presenting their papers.⁵⁰"

The Bill was passed albeit through an improper procedure. This incident shows how the executive can interfere with the judiciary in order to achieve its own ends.

It was the prime postulate of this chapter that though there is a mass of legislation which regulates the conduct of elections there are still many loopholes which need rectification. If the laws are there only on paper and not in practice, then they serve no useful purpose. There is an urgent need to initiate amendments and the repeal of some of the objectionable provisions. It is essential that the voting system should create confidence in the electorate. The whole success of any election by any method depends entirely upon the honesty of the candidate and the voters; so indeed does the good government of the country. Thus, the need for a watertight electoral system must be emphasise₇₂₈

THE 1979 GENERAL ELECTIONS

In 1979 the Kenyan citizens were again called upon to exercise their democratic right of electing their representatives in Parliament. Because of the belief that leaders are responsible to the people the government organizes elections to give the people the chance to re-elect their leaders or throw them out if they had failed to effectively represent them. This chapter sets out to examine the 1979 General Elections with the main objective of ascertaining whether the electorate laws discussed in the previous chapter were strictly adhered to. Such a study is of vital importance because it portrays the extent to which democracy has developed in Kenya since independence. We shall try to answer the question whether the electoral process is just a legitimisation process of the existing regime. Elections to be of any significance must be seen to be free and fair in the eyes of the General electorate. This called for a total commitment on the part of the government and the Ruling party which played a great role in the elections. Our main focus of study shall be the rules laid down to guide the conduct of the elections, the role of the party and the petitions that followed after the elections. It is only through the analyses of a few petitions that we can see the breaches of the laws discussed in the previous section.

REGISTRATION OF VOTERS

The elections were preceded by the process of registration because a new register was being made. The registration took a rather low start. Although the voting age had been lowered from 21 to 18 years, there was a strong manifestation of apathy towards elections. Ng'weno observed that, "All this does not hide the fact of apathy. Probably given Kenya's one party system of government, the lack of issues generates some apathy on the part of the public --- Whatever the reason behind the apathy, it does not augur well for the vigour of politics in Kenya. Apathy in politics is often the next state to political cynicism."¹ Other reasons advanced for the low turn-out of voters were inter alia: the voters disappointment at the performance of past and present Members of Parliament, the large number of candidates who had declared their intention to run for the seats and there was a mistaken belief that the exercise was part of the regular updating of registers. People did not know that they could not use the old cards for voting.

The apathy so displayed demonstrated the fact that many Kenyans did not share the same enthusiasm for the elections as exhibited by politicians. One writer when discussing apathy in elections observed,

"Apathy or indifference is an insidious malady to which democratic electorates are especially susceptible, because the freedom of the democratic citizens usually includes the privilege to abstain from exercising the electoral rights --- the individual elector can so easily excuse himself from his duty on the plausible assumption that anyhow one vote more or less is not going to affect the result."²

By the end of the registration deadline only four million people had registered as opposed to the targeted figure of 6,432,830 people. The registration period had to be extended for an extra week. At the close of registration the total number of voters was 5,529,574. Only a few districts like West Pokot, Uasin Gishu and Mandera met their targets. This shows that the areas in the periphery showed a great enthusiasm with the registration exercise. In Nairobi Areas it was argued that only those who were committed to a certain candidate bothered to register. It might have been different if there were issues involved that would make most people feel they must vote one way or the other. Complaints were being raised that people were being turned away from registering. John Bruno Oloo, a Kisumu K.A.N.U. Official alleged that about 18,000 people had been turned away from registering in the town although they worked there³. But according to Montgomery, the Supervisor of Elections, the issue of where people should register should not have been a major problem at all, for people had a right to register and vote where they lived, worked or owned land or property. It was the problem of the voter to choose where to vote from as long as that requirement was met. The apathy to registration is a manifestation of the electorate's distrust of the whole electoral process. Many of the defaulters might have reasoned that since past elections had not brought any material changes in their lives, then there was no need to participate. To dispel such an apathetic attitude in the future the government should embark on a crush

programme to educate the electorate on the importance of elections. In a country where the majority of the population are poorly educated, it is necessary to make the public aware of their rights. The candidates must also ensure that they try to fulfill the objectives as outlined during the campaigns. This might be a very effective way of inculcating public confidence in elections.

1979 ELECTION RULES

New election rules and amendments to the existing laws were passed before the elections. The prime objective was to try and ensure that the elections were free and fair. All Members of corporate bodies set up by an Act of Parliament were barred from contesting the elections if they had not resigned their membership by May 15th 1979⁴. Another Legal Notice⁵ clarified the matter and provided that only those who were "Members of Councils and other bodies" working on a full-time basis would be barred from contesting. The aim was to limit the chances of a candidate using his official position to get himself elected. This position is different from that obtaining in Tanzania where even civil servants can contest elections and still retain their seats. As a result of the directive many civil servants, heads of institutions and parastatal executives resigned their posts to enter the political field. Some observers argued that the reasons why these personalities resigned were to be found in their past records. Some feared that the government might victimise them for the mismanagement that surfaced during their tenure of office. It was better to resign "honourably" rather than be sacked from the job. One can also raise the argument that the motive for indulging in politics was to seek stronger entrenchment in the political scene for the better protection of their private property. It is not a disputed fact that politics and wealth are intimate bed-fellows in Kenya. It is my submission that the Tanzanian system is more viable. The new directive instils fear in the persons concerned because there are all the chances of ~~being~~ ^{losing} on both sides. I feel that the civil servants or parastatal executives should only resign his official job if he gains election into Parliament. On the issue of misuse of official power the electoral laws must be tightened to take care of such malpractices.

the permissible campaign expenses, to reduce the maximum campaign period to three weeks, provide for the appointment of election agents, and to raise the penalties for the election offences - a heavy punishment of a prison term not exceeding seven years was proposed for candidates who exceeded the permitted amount of election expenses. Election expenses were defined in the Bill as any purchases, payments, distributions, loans advances, deposits of money or anything of value made in respect of the conduct or management of a campaign by a candidate or by another person on his behalf, or in his interests. The Bill was passed on 21/8/79 albeit with some amendments. The maximum amount of expenses was fixed at Shs. 40,000/= instead of the proposed Shs. 20,000/= A candidate was defined to mean a person who on or after the day fixed for nomination seeks elections at a preliminary or parliamentary election, whether he is elected or not. The amended definition of election expenses clearly identified and set out the items that would be considered election expenses. These included inter alia, any purchases, payments, distribution, loans, advances, deposits or gifts of money or anything of value. made in respect of printing, advertising, publishing, issuing and distribution of posters, addresses and notices, stationery, messages, postage, telegrams, cost of hiring halls, remuneration of election, polling and counting agents. The KANU government in a bid to masquerade the naked fact that elections are almost a preserve for the rich, decided to fix the amount of expenses. However, the figure that was agreed to is one that the majority of the citizens cannot afford. Furthermore, the fact that the expenses limit becomes operative at nomination day makes the objectives of the provision superfluous because most of the money is spent a long time before the actual elections take place.

The then Attorney General, Mr. Njonjo, moved a Bill seeking to raise the deposits for election petitions to Shs. 50,000/= A bid by some M.P's to lower the deposits failed. Mr. Njonjo said that most of the election petitions after the 1974 elections were "frivolous and fictitious"⁷ and the raising of petition deposits was the only way of telling that the petitions were genuine. The sitting Members passed

this figure because they knew they were better disposed to meet it. It is submitted that the figure was very unrealistic because it never took into account the fact that this was very unfair to the poor candidates who felt dissatisfied with the outcome of elections. This augments the contention that democracy is only available to the propertied classes in Kenya. In a wider perspective this provision clearly portrays that the law will always express the wishes of the economically dominant class in society. Parliament also approved Election Regulations amendment proposals tabled by Mr. Njonjo allowing sitting members to request allocation of election symbols they had used in the 1974 elections. The MP's who got elected through by-elections could use the symbols they used in the by-election. The President had alleged that "he held strong views⁸" on the Election Amendment Bill. Possibly, the MP's passed the Bill because they did not want to challenge the President, otherwise they would be referred to as "dissidents" and "anti-Nyayo". The limitation in the election expenses was very ineffective as it surfaced in the election petitions. The ruling party KANU expressly admitted its inability to enforce the law. The party was reported as saying,

"The Government may not be rigorous in its enforcement of the election law passed by the last parliament in August limiting elections expenses --- to Shs.40,000 in respect of the 1979 General Elections."⁹ (emphasis added)

This official recognition of the inability to enforce the law is a great drawback on the concept of democracy. The natural consequence arising out of such a situation is candidates and other people involved in the election process deviating from the laws, knowing too well that no punitive action will be taken.

As is usual in Kenya's elections, money and beer flowed throughout the election campaigns to the last day. It is arguable that in a country where the majority live a life of misery and poverty, the enticements of money and beer will influence them to give their votes to the highest bidder. However, in some constituencies the electorate agreed to take money and beer from a candidate although in the actual exercise they voted for a different candidate.¹⁰ There is

a common saying during elections to the effect that, "Kula Kwa X, Kura Kwa Y (East from X, vote for Y). The high incidence of bribery and teating is attributable to the high rate of corruption that permeates into all sectors of our society. Nwabueze observed that "Absolutely free elections are a dream in the developing countries --- In an atmosphere charged with so much heat and passion, with --- an electorate ready to sell their votes to the highest bidder, free elections are largely an illusion."¹¹ This contention applies correctly to the Kenyan situation.

ROLE PLAYED BY K.A.N.U. IN THE ELECTIONS

Kenya being a de facto one party state, we must discuss the 1979 elections within that rubric. Since independence the party has been generally inactive only to raise its head during elections. The reasons for this state of domancy are beyond the scope of this paper, but it suffices to point out that the Executive arm of the Government has totally overshadowed the party as it has done to the legislative and Judicial arms of the state. This state of affairs arises because of the concentration of power in the hands of a single person, the President. One party system of government have tended in almost every case to produce one man rule. One writer has tried to advance a reason that gives rise to this tendency. He observes:-

"Government is a mere abstraction, incomprehensible to the masses, but a national leader is visible to them."¹²

As a result the party has not lived up to the expectations of being a mass movement but it rather has become an elitist movement. The views of the people in the higher ranks of the party matter more than the policy of the party as a whole. We are going to see that during the 1979 elections the party lacked any coherent policy. What appeared to be operative was the personal whims of the top party officials.

Article 2 of the KANU constitution lays down the procedure for election of party candidates. Under sub-article (b) paragraph (1) any member of KANU wishing to stand as a candidate for a parliamentary seat has to apply on a prescribed

KANU form of application to the party President. Such application requires a number of details which include a compulsory pledge of loyalty to the President and the Party. On the eve of Elections the party became very active with the task of nominating its candidates. The issue of KANU Life Membership certificates started getting the prominence that/always gets when elections are sensed in Kenya, especially more so in the 1974 elections. Resurrecting from its apparent dormancy the National Executive Council of the Party (N.E.C.) rose to the occasion to announce publicly that it would be reviewing the Party's constitution, "to bring it in line with present Kenya realities and aspirations."¹³ This pledge was never fulfilled. Possibly, the said "realities and aspirations" were in reference to the eminent elections and nothing more.

What was clearly noticeable was the confusion in the party itself. At no time prior to the elections did the party come out with clear objectives and policies. On many occasions party officials at the headquarters gave contradictory statements in relation to the issue of clearance which had assumed magnificent heights. Initially, the clearance was to affect only the ex-KPU candidates but it later transpired that all would-be candidates were to be cleared first by their local branches which would then forward the applications for the final ratification by the party headquarters. Mr. George Anyona commenting on the contradictory statements by Mr. Matano, the Party Secretary-General on the fate of the ex-KPU Members, said that this was a negation of the "new spirit of democracy and nationalism prevalent in Kenya today."¹⁴ Mr. Matano had alleged that the ex-KPU Members were a security risk while at an earlier stage he had stated that Mr. Odinga and his fellows had the right to be cleared. He was quoted as saying that "The K.P.U. affair is a serious security matter and the government cannot take it lightly" It was not made clear what the yardstick for clearance was to be.¹⁵ The major question of who was to clear Mr. Matano and company in their respective constituencies was not answered. For one to be nominated as a candidate he had to possess a life membership certificate. It is on this issue where we note a conflicting policy of KANU. Hon. Kibaki who is the Vice-President of the Party said that any Kenyan holding a Shs. 2.00 KANU membership ticket was eligible to contest

the elections. "Kenya being a democratic country must ensure that elections are as free as possible,"¹⁶ Hon. Kibaki said. Mr. Matano had earlier stated that only life members would be eligible to contest. This view was exemplified by the Party President.¹⁷ This clearly shows that there was no coherent party policy. Further contradictions arose between Mr. Matano and Mr. Tipis, the party's National Treasurer. The former contended that all life membership tickets bought outside the KANU Headquarters during Kenyatta's era were invalid, while the latter insisted that they were valid.

Complaints were being raised that some candidates were unable to get their life membership certificates in time. In Ugenya constituency Rev. Ondiek and the other candidates accused Mr Mathews Ogutu who was the KANU Branch Chairman of trying to block their candidature. Mr. Ogutu allegedly said that Mr. Ondieki's matter was one for the headquarters¹⁸ whereas the party leader had said clearance must be sought from the branches. In Meru some of the people were issued with ordinary cash sale receipts after paying Shs.1,000/= However, the party headquarters only recognised the genuine party life membership receipts and so holders of such receipts could not be issued with their certificates until they brought their branch Chairman to vouch for them.¹⁹ Many of them eventually could not get their certificates in time due to this delay and thus they had no genuine party receipt numbers to quote for the purpose of their pre-application information, which in effect meant they were time barred. Many candidates spent money and time moving from branches to the headquarters in search of life membership certificates. There was in fact a move by some individuals especially those holding official positions in KANU to prevent their would be apponents from obtaining the certificates. Mr. Ng'weno commented on this issues, "If all these obstacles which many would be candidates are experiencing are intentionally created, then it is a sad comment indeed on the much vaunted democratic principles upon which Kenya's politics are supposedly based."²⁰ It is true that there were personal biases on the part of the KANU officials²¹ Many observers were of the view that the clearance exercise

would serve no purpose except to give party officials at the headquarters powers to eliminate their political opponents. The party officials were assigning themselves a role that belongs exclusively to the electorate and is the very foundation of the electoral process. The constitutional basis of the clearance procedure was also questioned. It was observed,

"The failure by the party to establish a solid constitutional basis for the many rules and directives has created a situation where even the issue of clearance itself becomes questionable, both in its objectives and its constitutionality."²²

It is my view that this observation was very correct because the clearance procedure tried to destroy the democratic structure that we are/to build in this country. The right to vote for a candidate of one's own choice is a constitutional right which should not be abrogated.

The ex-KPU members were the most hit by the party bureaucracy. The party constitution provided that those who had been members of the defunct party (especially those who had been detained) had to have clearly identified themselves with the development policies and objectives of KANU (though these were not spelt out). The party officials issued a series of contradicting statements. Mr. Matano said that the party headquarters had the final say on whether the ex-KPU candidates were to be nominated. The branch only gave recommendations. Mr. Maina Wanjigi, the Assistant Secretary-General affirmed Mr. Matano's statement stating that for the people affected to be cleared they would have to go to the grassroot level of the party (their respective branches) for clearance. Following Mr. Matano's statement as affirmed by Mr. Wanjigi, Mr. Okiki Amayo, the South Nyanza Branch Chairman recommended the clearance of Mr. Ochola Mak'Anyengo. Mr. Matano reacted to this recommendation very sharply dismissing it as "irrelevant" and castigating Mr. Amayo for rushing to the press before "checking his facts." He even said that the branches action did/reflect the party's view. Mr. Amayo argued that Mr. Mak'Anyengo held a party post in Ndhiwa constituency and the party headquarters had his name. As such, it was very difficult to rationalize Mr. Matano's statements. The party also refused

to implement the recommendations of the branches with regard to Tom Okello Odongo and Ondiek Chilo. Mr. Oginga Odinga who was the leader of the defunct party met similar obstacles. He argued that he possessed a valid life membership certificate obtained from the Nyeri Branch, but Mr. Matano insisted that for a certificate to be valid it had to be issued by the headquarters. Mr. Odinga was also snubbed by Mr. Ogutu (branch Chairman) who refused to recommend him on the ground that his (Odinga's) problem lay with the President. It was also alleged that Mr. Ogutu invited guards to throw Mr. Odinga out of the offices but the former denied this allegations.²³ All this time the President Hon. Daniel Arap Moi was warning that the party would kick out party leaders who tried to block their opponents. The KANU National Executive Committee convened a meeting on 14/10/79 to discuss the KPU issue. On 5/10/79, five former officials of the defunct party were barred from contesting elections. The decision was taken by the governing council chaired by the President. The reason given was that the five had dared to take the ruling party KANU to court. But the five insisted that they had only sued Mr. Matano in his personal capacity for referring to them as a security risk and this was quite legal. Furthermore the party is an organization like any other and there is no reason why it cannot sue or be sued in its own name in a court of law.²⁴ They later withdrew the suit hoping to be cleared but this was refused.

Although the party has the constitutional right to nominate its own candidates, it is submitted that the manner it sought to do this during the period under discussion left a lot to be desired. Lacking any policy the party functioned through a group of officials who were often giving contradictory statements much to the dismay of the electorate. Mr. Odinga's matter was rather critical because eight years had expired since he came from detention. In 1974, he was barred from contesting the elections. The same fate was to confront the old man in 1977 during the party elections. Thus the party aimed at eliminating all those people whose ideological leanings were different from theirs, if they had any. The party is an institution which can be highly misused or manipulated to suit the interests of the individual. This becomes more so in the Kenyan situation where the party is very weak and its officials very powerful. So long as this power persists elections

can never be said to be free and fair, because people are denied the right to elect a person of their own choice.

PRESIDENT'S ROLE IN THE ELECTIONS

The President is the Head of the party as well as the head of the government. As such he wields tremendous power which is likely to be misused. As mentioned elsewhere in this paper, this is a common occurrence in the emergent states. During the 1979/the President assigned himself the role of /elections campaigning openly for some candidates. In doing so, he was usurping the democratic role of the electorate to vote whom they wanted to represent them. It was also ironical that the President cautioned other people against supporting some candidates either financially or orally. The President's utterances smacked of a move towards elitist rule in Kenya which goes contrary to the stated underlying principles of KANU being a mass movement.²⁵ We cannot conclude that elections were free and fair in the constituencies where the President expressed support for particular candidates. Bearing in mind the immense power borne by the President it is correct to argue that the minds of some citizens were likely to be corrupted by the statements, and this might have been given expression in the elections. The President argued that he supported "development conscious" incumbent M.P's through he never explained what he meant by development. The President was in effect knowingly and consciously encouraging the concept of "unopposed" elections, which is loathed by all democratic minded citizens. When he visited Karachuonyo in Nyanza the President supported Okiki Amayo who was then an Assistant Minister, mainly because he had done well in the areas development. He also praised Mr. Henry Wariithi and Davidson Kuguru because they were "development conscious" At the same meeting the President expressed the view that he was conscious of being "unduly criticised" for his public support of some M.P's. He said, "Some say that I should keep quiet and refrain from talking about the good work some M.P's have done for their people."²⁶ This was difficult for him, he argued, because he was committed to development. On other occasions he had intimated that Mr. G.G. Kariuki and Hon. Mwai Kibaki should be elected upopposed. While on a tour at the /~~Cost~~ the President/^{can} sought to vent his anger on two M.P's²⁷ He attacked Abu Somo

who was a former M.P. for Lamu West asking, "What kind of leader is he?" Madhubuti who was an M.P. from the same region was described as one who could only lead a "government of monkeys." He also called him a black marketeer and that he had lost Shs. 3 million in illegal business. But the disappointing part of the matter was that the President did not elaborate nor say whether Madhubuti would be prosecuted, which would have been the proper course to take the matter to its logical conclusion! It was not clearly stated why the President would rather declare his support for some candidates and not all candidates since he was the party boss. On 12th May 1979 he had advised politicians to first check their chances of success before wasting money and time and further enhanced that "in a near future the ruling party will only allow the candidates thought to be able to win a seat to contest." 28. But he never spelt out who was to select the suitable candidates.

The President's utterances had one major objective: to ensure that as many as possible of those sympathetic to his policies and the system were returned to Parliament. However, the President was in for a great surprise because the electorate decided to go their own way unfainted by his remarks. In Karachuonyo Mr. Okiki Amayo was thrown out and in Lamu Madhubuti was elected. Some of his "appointees" were all the same elected albeit through stiff competition. A case in point is Laikipia where Mr. G.G. Kariuki was opposed despite the President's wish that he be elected upopposed. Even many of the President's colleagues at the higher level of the party were rejected by the electorate. Mr. Nathan Munoko the National Organizing Secretary, Mr. Omollo Okelo, the National Chairman, and Mr. Maina Wanjigi, the Assistant Secretary-General all lost their seats. Possibly the electorate reacted in this manner because of the way the officials had handled the KPU affair. This was more so in Kamukunji constituency where Mr. Nicholas Gor defeated Mr. Wanjigi due to Mr. Achieng Oneko's support. The electorate clearly manifested their democratic maturity by refusing to be influenced through the manouvres of the President. Such a belittling on his personality served to lower the respect accorded to the office of the President. The results of the elections will possibly serve

as a lesson in any future election. If democracy is to be practiced or be seen to be practiced, the President has to assume a low profile so far as comments on particular candidates are concerned.

BREACH OF THE ELECTORAL LAWS: AN EXAMINATION OF SOME ELECTION PETITIONS

In Chapter II an attempt was made to analyse critically the electoral laws in Kenya. The writer alluded to the fact that the laws are not watertight, and they are infringed on various occasions. In this section we set out to examine some concrete instances where the laws were not complied with. Election petitions are a popular feature after elections in many countries, and thus they are not a peculiar feature to Kenya. After the elections many petitions were filed and this shows that the people are becoming more conscious of their rights. The petitions were filed on a variety of grounds ranging from oathing, irregularities, bribery and other electoral malpractices.

The Mbiri constituency elections had generated a lot of interest even in the entire country. It was referred to as the "battle of giants." The two giants, met again but this time not on the campaign platforms but in the court corridors. In JULIUS GIKONYO KIANO -V- HUDSON MISIKO AND KENNETH STANLEY NJINDO MATIBA,²⁹ 22 grounds were raised in the petition. The petitioner alleged that agents of the second respondent used undue influence, and also used or threatened spiritual injury to voters and electors by stating that those who did not vote for the second respondent should perish or be cursed by the soil of the land. It was also alleged that there were irregularities in the dealing with ballot papers. The major ground was that the agents of the second respondent, and with his concurrence, connivance and knowledge caused oaths to be administered to persons in order to vote for the second respondent, upon penalty of temporal, physical and spiritual injury, and thereby impeded and prevented the free exercise of the franchise of the voters. Treating and bribery were also listed in the petition. At the close of the petition the court observed that the petitioner had failed to discharge the burden of proving any of the allegations. The petitions

was dismissed and the petitioner was ordered to pay costs to the second respondent at a higher scale. Many observers expected the executive to interfere with the judiciary's function not only because the petitioner was a former Cabinet Minister, but also because he (petitioner) is allegedly a good friend of the President. This petition asserted the independence of the judiciary to some extent.

The petition of ARCHI BISHOP STEPHEN ONDIEK -V-STANLEY THUO and JOSEPH MATHEWS OGUTU ³⁰ also raised much excitement because it was filed against a Cabinet Minister. The petitioner's main grounds were that several voters were turned away at Sikalame polling station and that there were irregularities in the counting hall. The second ground was hotly contested since the returning officer had given three contradictory results with the last one giving the second respondent the victory with a margin of 23 votes over the petitioner. The petitioner brought to court as evidence 16 ballot papers to prove that some known supporters and other voters were turned away during the voting day. Although the court accepted this evidence and nullified the elections the petitioner was found guilty of an election offence by possessing the 16 ballot papers. Mr. Ondiek was thus technically barred from contesting the by-elections. However, in the by-election Mr. Ogutu was given a straight forward thrashing by Ondiek's brother-in-law, Mr. James Orengo. Possibly, the conduct of Mr. Ogutu during the clearance period contributed to his downfall.

Important issues relating to the law of evidence were raised in BAHATI MUSIRA SEMO -V- WALTER MUGANGA AND MOSES MUDAVADI ³¹ The petitioner alleged that there was mass administration of oaths either by Mr. Mudavadi himself or by others on his behalf, and undue influence among other malpractices during the campaigns. The petitioner was unable to adduce convincing evidence to prove the alleged oathings. As an incidence of undue influence Mr. Semo alleged that Mr. Mudavadi had ordered the sacking of 11 chiefs and sub-chiefs a fact Mr. Mudavadi did not deny. He admitted having written a letter to the Office of the President requesting the sacking of the chiefs, but before he could elaborate on the issue the chief Justice, Wicks cautioned that the letter could not be produced because the state had claimed privilege under Section 131 of the Evidence Act (Cap 80 of the Laws of

Kenya). The section allows the Minister to refuse production of a document if he is of the opinion that its production would prejudice the public service due to its class or contents. Mr. G.G. Kariuki the Minister who was then in charge of Internal Security swore an affidavit to this effect. In many commonwealth countries a sizeable body of opinion exists that the court should itself examine the documents in question and make a decision on it.³² In Kenya there is a need to amend the Evidence Act which is based on a case which was overruled in England.³³ Furthermore this case had been decided in war time. If the present situation persists it would mean a delegation of excessive power on the Minister. The judges are part and parcel of society and they are in a good position to decide which documents are prejudicial to the interests of the state. Without paying due regard to the fact that Mr. Mudavadi had himself not denied writing the alleged letter the court dismissed the petition and ordered the petitioner to pay the costs of Mudavadi's counsel at a higher scale. The evidence that was withheld was very crucial to the petitioner's case and thus there was unfair play on his part. In effect, the court's decision gave the Minister's license to victimize any junior servants.

In TITUS MBATHI -V- JOSEPH THUNGU AND DANIEL MUSYOKA MUTINDA ³⁴ the petitioner alleged that the second respondent had engaged in acts of bribery, either by himself or by others on his behalf. It was argued that the second respondent was doing this to induce voters to vote for him. The second respondent was found guilty of an election offence (bribery) and was accordingly barred from contesting elections for a period of five years. In the by-election that followed thereafter the petitioner succeeded although against tough competition from the second respondent's brother.

The issue of bribery was also raised in the petition of DAVID OKIKI AMAYO V PHOEBE ASIYO AND EZEKIEL NYARANGI.³⁵ The petitioner was the KANU Branch Chairman in South Nyanza District, and furthermore, he had received open support from the President. The petitioner alleged that the first respondent had bribed voters with salt, and that the ballot boxes for

Koyigi Polling Station which had 1,450 votes were not included in the count. The petition was allowed. However, Mr. Amayo was satisfactorily beaten in the 22nd September 1980 bye-election in which he polled 8,769 votes against Mrs. Asiyo's 13,079 votes. One reason for this bitter defeat for Mr. Amayo and by implication the President, was due to the strong influence/r which Mr. Odinga had in Nyanza. Other politicians in Nyanza who had participated in the conspiracy to block Mr. Odinga's reappearance in the national politics met a fate similar to Mr. Amayo's. For example, Mr. Odongo Omamo, Omolo Okero and Mathews Ogutu lost in their respective constituencies.

Although these few petitions form only an insignificant figure of the large number of petitions filed after the 1979 General Elections, they serve to highlight the fact that the electoral laws were flouted in a wide range of constituencies. The offences of bribery and oathing appear to have been more recurrent. This calls for a tightening of the electoral laws. Petitions are important in our electoral system because they bring to the surface the evils that are likely to wreck the entire process. The chances that one might lose his post through an election petition will help in restraining some of the candidates from engaging in illegal practices.

CONCLUSION AND RECOMMENDATIONS

It was the aim of this paper to examine the nature of our electoral laws as they stand. It is important for lawyers to scrutinize critically all the provisions and practices relating to elections to see whether they aided or undermined the electoral process. For the better understanding of the present laws it was necessary to cast a glance at the pre-independence era. It was observed that this period was characterised by authoritarian as opposed to democratic rule. The representative system was tailored to suit the foreign communities in Kenya. To the extent that the majority were not represented in the Legislative Council, we can conclude that the law making body was there to enhance colonial domination in the colony.

The analysis of electoral laws portrayed that there are many loopholes and weaknesses in our electoral system. It surfaced that the gaps in the laws gives room for manipulation by the executive, the candidates, and to some extent the voters. Though there is a mass of legislation that tries to govern the conduct of elections, there still remains a lot to be achieved. The recurrence of electoral malpractices such as bribery, treating, meddling with ballot papers, goes far to prove our point. Through a study of the 1979 Elections it was attempted to show that elections are not free and fair as the organisers would like the majority in the country to believe. By the illustration of a few election petitions this point came out very clearly in the thesis.

The people in a democracy have the right to control their own affairs including the Government that is formed on their behalf. This can be achieved through the process of elections. The electorate must be free to elect their own representatives to Parliament. It was seen in this paper that the ruling party KANU has assumed the role of the electorate in that it undertakes the duty of selecting its nominees irrespective of whether they are popular with the voters or not. In the 1979 elections KANU lacked any coherent policy and as such the party leaders tried to eliminate their political opponents by the process of clearance. It is my submission that such a curtailment of the freedom of choosing candidates is not at all conducive to the spirit of democracy that we are striving to build in Kenya. It was also noted that the President has a lot of influence over the conduct of elections. This emanates from his absolute

power as head of the Government as well as the party. In 1979 Elections the President openly campaigned for some candidates whom he described as "development conscious". This, we contend, would portend the death of free democracy if it became a precedent. Since Kenya is a de facto one party state it is important that the electorate is given a chance to exercise their choice freely. (At the time of writing the Attorney General's Chambers have published the Constitution (Amendment) Bill and Electoral Laws (Amendment) Bill both of 1982. The Bills seek to make Kenya a de facto one party state - see Daily Nation, Friday June 4, 1982). Forcing representatives on the people is a very undemocratic gesture which should be opposed by all democratic minded citizens.

The fact that democracy is not fully manifested in our electoral system should not raise a sort of pessimism and sense of despair because the democratic spirit is still rife in Kenya. It is the opinion of the present writer that if some changes are effected into the electoral system, elections would become a more viable institution. In pursuance of this objective, the following suggestions and recommendations are put forth:

1. The Electoral Commission should be put in its right place. Since it's constitutionally charged with the duty of conducting and supervising elections it should be allowed to fulfill this purpose freely and independently. In exercising its duty it should be free from any sort of government interference. Administrative involvement in elections should be reduced because it makes the electoral process appear to be a state of fan fare. To curtail executive interference members of the Commission should be appointed by the National Assembly. This is the only way of ensuring that elections are free and fair in the eyes of the entire public.
2. There is an urgent need to educate the masses on the purpose of elections. It is only when the electorate understand the utility of the system that they can participate fully. The ruling party carries this onerous tasks. What the party should do is organise rallies in all areas of the republic with a view of informing the public. The Members of Parliament who are Members of the Party can act hand in hand with the party officials if this objective is to be achieved. A strengthening of the party from the top to the grassroot level is of vital importance

if the whole process of educating the masses is to be a success.

3. The concept of "unopposed" elections to the National Assembly should be totally discouraged. It is important that the electorate be given a real opportunity to elect their representatives. Any system that faces the electorate with a fait accompli or that offers them a narrow or no choice at all is not in keeping with the democratic process. However, the answer to this problem lies on the personalities involved. Normally the people who go unopposed are the top men in the government. These personalities should make it clear that they are prepared to meet opposition though they stand the risk of losing their privileged positions in society. This then would be real democracy.

4. The Legislation that /to protect the electoral system / *sets out* from manipulation is pathetically unsatisfactory. There is an urgent need to amend or repeal the objectionable provisions pointed out in the main body of the thesis. We need an electoral machinery that is both self-monitoring under public scrutiny. For example, provision should be made to ensure that ballot boxes are accompanied at all relevant times by candidates or their agents. Also there should be provision for the Presiding Officers to publicly display all empty ballot boxes at the commencement of polling, and the boxes to be sealed by candidates at close of polling. The punishment for electoral malpractices should also be reviewed. Although this would not wholly eliminate the chances for manipulations, it would reduce those opportunities and simultaneously increase the certainty of detection. The certainty of detection will deter many of the would-be law-breakers.

5. There is a need to limit the term -- a President can stay in office. We have noted that the immense powers vested in the President are likely to be abused in relation to elections. Provision should be made to limit the Presidential terms to two terms of five years each as is the case in the United States and Nigeria. This would ensure that the person holding the office does not entrench himself in power to such an extent that he can manipulate the electoral process to perpetuate his stay in power.

6. The power of nominating Members to Parliament should vest in the National Assembly rather than the President. The present system is not viable because the nominated members owe

their appointment directly to the President and thus they cannot dare to antagonise him. As a necessary consequence this affects their exercise of voting power in Parliament. All Members should exercise their voting right in the Assembly without trying to impress an individual.

7. Since there is no opposition party in Kenya, the present elections institutionally offer a choice not between policies but between personalities. The present writer feels that there should be provision for independent candidates in our electoral system. This way, the electorate will be presented with a wider choice. The only other alternative is the formation of an opposition (N.B if the constitutional Amendment Bill alluded to above is passed by Parliament then this is not feasible).

8. So far as election petitions are concerned, the current practice is to have expatriate judges hear the petitions. It is necessary that the African judges are allowed to listen to petitions because after all they are more informed to decide some issues especially those relating to oathing. The possible reason why petitions are allocated to the non-African judges is the assumption that African judges are likely to be biased. However, there is no empirical data to prove that non-Africans cannot be manipulated or be biased in reaching their decisions.

9. As a corollary to recommendation (2), Law Societies and Associations could, as one of their functions, undertake to enlighten the general electorate on their rights and duties. Where they detect signals of erosion of the rights of the electorate they should vigorously expose and condemn such development. After all, all lawyers are supposed to be the society's watchdog for the observance of human rights in general. These recommendations are not exhaustive, but the writer feels that they would inculcate public confidence in the electoral system if they are implemented.

In conclusion, elections in Kenya as in other emergent states do not involve a national change, but they only offer middle level or low level political changes without putting the real executive ruling class at risk. It is our posit that the electoral laws like all other laws are used by the dominant class in society to perpetuate their interests. All in all the elections are merely a legitimisation process. The political leaders feel the moral urge to show the public that they are determined to preserve democracy. But the faults in the entire electoral system cannot ensure the due strict observance of the

democratic spirit as we would like it to be. All those involved in the elections have a duty to ensure that the sanctity of the electoral process is maintained at all times.

1. Nwabueze B.O., Constitutionalism in Emergent States (C. Hirst & Company, London in association with Nwamife Publisher, Enugu) P.140
2. Nwabueze B.O., Supra at p.1
3. Ahmed Mohidden, "An African Approach to Democracy." EAJ (1970)
4. Supra, No. 1 at p.1
5. Plato, The Republic (Translated, FM Cornford)
6. Aristotle, Politices (ed Barker)
7. M. Wight, British Colonial Constitutions (Oxford Clarendon Press, 1952)
8. Ghai and McAuslan, "Public Law and Political Change in Kenya" (Oxford University Press, 1970) P.36
9. East Africa Order in Council, S.R.O. 575.
10. This power so granted to the governor was greater than the power the Queen had during Britain of the day. This fact shows that the colonial regime was law and order oriented.
11. East Africa Order in Council 1919 - This was passed to remove doubts about the Legislative Council's power to pass laws about its own constitution.
12. It was provided in various constitution documents that if a member was not elected from An Indian constituency, the Governor could fill the place by nomination - for example Royal instructions of 1925 and 1927.
13. Supra p.55.
14. Supra p.63
15. Okoth-Ogendo H.W.O., "The politics of Constitutional change in Kenya," African Affairs Vol. 71 of 282.
16. Resberg and Nottingham, The Myth of Mau Mau (New York, Praeger, 1967)
17. Supra p.65.
18. Report of the Commissioner appointed to enquire into methods for the selection of African representatives to the Legislative Council. (Nairobi, 1955)
19. Kenya (Constitution) Order in Council, 1958.
20. Politicians like Odinga continually pressed for the release of Kenyatta from Prison thereby using the Legco as a political platform.

21. Tom Mboya, Freedom and After (London, Andre Deutsch, 1963) p.128.
22. The crucial questions were the Somali and Muslims desire to secede from the independent Kenya.
23. Bennet and Rosberg, The Kenya Election See Chapter 2
24. See generally, Okoth-Ogendo H.W.O. , Supra.

1. Nowrojee P.E. "Democratic Process in Africa and Elections"
p.5
2. Cap 7 of the Laws of Kenya.
3. Cap 66 of the Laws of Kenya.
4. The Constitution of Kenya Act No. 4 of 1969
5. S. 43 Constitution
6. S. 43(2) "
7. S. 32(3) "
8. S. 34(a) "
9. S. 34(b) "
10. E.P. No. 18 of 1979
11. S. 34 (d) of the Constitution. The KANU Constitution lays down the conditions a person must fulfill before he is nominated as a candidate. This is what^{is} generally referred to as "clearance."
12. Recently in Parliament the Minister for Constitutional Affairs attacked some M.P.'s whom he referred to as the "Five sisters." He actually meant the radical M.P's who quite often raise controversial issues in Parliament.
13. Act No. 45 of 1968.
14. Daily Nation, 16th October, 1979. Anyona and Odinga plus others ex-KPU members were barred from contesting the elections.
15. S. 35 Constitution
16. S. 35(4) "
17. S. 33 "
18. Daily Nation, Friday April, 23 1982.
19. Weekly Review, April 30 1982 p.7
20. S. 42 Constitution
21. S. 42 (4) "
22. Lionnel Cliffe, One Party Democracy: The 1965 Tanzanian General Elections. (Nairobi EAPH) Chapters 1 and 2
23. S. 41 Constitution
24. S. 41 (5) "
25. Cap. 7
26. S. 30 Cap 7
27. S. 44 Constitution
28. S. 33 Cap 7
29. Regulations 26-30 subsidiary Legislation under Cap 7
30. S. 5(3) (4) (5) of the Constitution
31. S. 5(2) "
32. S. 6 "

33. S. 5 op. cit
34. S. 6 op.cit.
35. S. 3 Cap 66, Supra.
36. S. 14 "
37. S. 5 "
38. S. 8 "
39. S. 9 "
40. E.P. No. 16 of 1974
41. Nowrojee, Supra p.7
42. S.10 op cit
43. The Nairobi Times ("Overspending in Election not to be pursued) 9th December 1979
44. Nowrojee, Supra p.8
45. S.11 op cit
46. E.P. No. 20 1979
47. S. 12 op. cit
48. Mr. Okada^{who} was just a voter in the 1979 General Elections filed a petition against Mr. Osogo who was a former Minister. The petition succeeded.
49. Act 14 of 1975 - S. 2 - S. 27 (e) of the Constitution
50. Weekly Review, 22 December 1975 p.6

1. Weekly Review July 13 1979 - Letter from the publisher.
2. Hoggan James, Elections and Representation (Cork University Ox-Ford, 1945) P. xxxiii
3. Weekly Review July, 6 1979 at p.11
4. Legal Notice No. 87 of 1979
5. Legal Notice No. 144 of 1979
6. One can cite the case of Dr. Karanja who was the Vice-Chancellor of the University, Matu Wamae the former head of I.C.D.C. and Michuki the former Chairman of the Kenya Commercial Bank.
7. Weekly Review August 7 1979, at p.5
8. Weekly Review August 24 1979
9. See the footnotes for the second chapter, Supra.
10. In Nyandarua constituency, the then sitting M.P. Mr. Muregi was known to have provided beer for his supporters and other people so as to influence them to vote for him. However, in the election he was resoundingly beaten by Mr. Kimani Wanyoike.
11. Nwabueze B.O., Constitutionalism in Emergent States. (C. Hurst & Co.London in association with Nwamje Publishers, Enugu) P. 148
12. Nwabueze, Supra p.159
13. Since 1976 there had been several verbal claims that the party would be revitalised so as to put it in the right places. After saying this the party leaders went no further to translate their words into actions.
14. Weekly Review July 6 1979 p.8
15. Weekly Review July 6 1979 p.8 - Achieng. Oneko argued that the KANU directive was very vague. Odondo Omamo on another occasion had said that he did not know how to determine whether the ex-KPU candidates had undergone a change of heart - what instrument was to be used.
16. Weekly Review July 27th 1979 at p.7
17. Weekly Review August 17th 1979 at p.15
18. Weekly Review September 7th 1979 at p.10
19. Weekly Review September 14th 1979 at p.7
20. Weekly Review September 21st 1979
21. It was alleged that Mr. Justus Ole Tipis who was the KANU Treasurer refused to allow four supporters of Konchellah and Ole Ntimana from getting their certificates. He (Tipis) allegedly tore the application forms into pieces. The reasons for this behaviour was because the two men were .../54

his political adversaries in Narok.

- 22. Weekly Review September 21 1979 p.9
- 23. Weekly Review September 14 1979 at p.9
- 24. SALOMON -V- SALOMON (1897) AC 22 (H.L.)
- 25. Under the KANU Manifesto and the Sessional Paper No. 10 of 1965 KANU is supposed to be a Mass Party. However, this noble/has not been achieved so far. / *Principle*
- 26. Weekly Review August 17 1979 at p.16
- 27. Weekly Review October 12 1979 at p.15
- 28. Weekly Review May 19 1979
- 29. E.P. No. 6 of 1979
- 30. E.P. No. 3 of 1979
- 31. E.P. No. 12 of 1979
- 32. Re Grosvenor (1965) Ch. 1210; Conways V Rimmer 1968 Ac 910
- 33. Duncan V Cammel, Laird & Co. Ltd. (1942) AC 264
- 34. E.P. No. 17 of 1979
- 35. E.P. No. 13 of 1979

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- 3. GHAI and MsAuslan, PUBLIC LAW AND POLITICAL CHANGE IN KENYA (Oxford University Press, 1970)
- 4. HOGGAN JAMES, ELECTIONS AND REPRESENTATION (Cork University Oxford, 1945)
- 5. LIONNEL ELIFF ONE PARTY DEMOCRACY: THE 1965 TANZANIA GENERAL ELECTIONS (Nairobi, EAPH)
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- 9. ROSBERG and NOTTINGHAM, The MYTH of MAU MAU (New York, Praeger, 1967)
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1. AHMED MOHIDDIN, "An African Approach to Democracy" EAJ (1970)
2. NOWROJEE P.E., Democratic process in Africa and Elections."
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3. REPORT OF THE COMMISSIONER APPOINTED to enquire into methods
for the selection of African Representatives to the
Legislative Council (Nairobi, 1955)
4. Okoth-Ogendo H.W.O. , "The politics of Constitutional
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A D D E N D U M:

This dissertation has been overtaken by events in that Kenya has been converted into a de jure one party state. However the differences that will occur in the electoral process shall not be of great magnitude because K.A.N.U. had been operating as a de facto one party state for a considerable length of time.