

**DEMOCRACY AND ELECTIONS IN AFRICA: THE CASE OF KENYA, 2007 - 2012**

**By**

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## DECLARATION

This project is my original work and has not been submitted for another degree in any other University

Sign .....

**Anyango L. Ongoro**

**Date**

This research project has been submitted for examination with my permission as University supervisor

Sign .....

**Dr. Ibrahim Farah**

**Date**

## **DEDICATION**

To my teacher the late O.J.D Olewe Nyunya, who taught me research at post-graduate level, the knowledge he imparted upon me has shaped me to who I am today; special dedication to my lovely mother Judith Ongoro and my dear father, the late Joseph Ongoro who instilled good moral principles and cultivated a readership culture in me and my siblings,

I am forever indebted to them.

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## ABSTRACT

In the contemporary world, elections have become one of the most accepted ways of demonstrating democracy. The importance of a good electoral system cannot be underestimated in Africa where elections are more often than not reported to be marred by irregularities. A new constitution, passed in a peaceful referendum in August 2010, aims to fortify democracy and temper zero-sum competition for the presidency by checking executive powers. As of now, the new Independent Electoral and Boundaries Commission (IEBC) enjoys public trust. Judicial reform, including the appointment of a respected new Chief Justice, also augurs well for a more robust response to electoral fraud and disputes. Despite the reforms, many structural conflict drivers – continuing reliance on ethnicity, competition for land and resources as well as poverty and youth unemployment – underlying the 2007-2008 violence remain unresolved and may be cynically used by politicians to whip up support. The study explored maximalist and minimalist concepts that are set out as being at opposite ends of the spectrum; maximalists defining democracy as a regime that seeks to protect and promote human rights that are understood broadly to encompass individual, civil, social, economic and political rights whereas minimalist conceptions are basically procedural, formal and institutional. The research was conducted by the use of interview and observations. The study employed a consultative approach to this review to ensure interactive engagement with various stakeholders. The methodology consisted of literature review of relevant documents produced by relevant organizations, scholars, academia, development partners, media organizations; interviews, observations and in-country consultations with relevant institutions. The findings were analyzed on a desk review basis from where conclusions and recommendations were drawn. The study argues that the realization of the democratic promises that underpinned the struggle for pluralistic politics are yet to be achieved; it is on this premise that this study critically observes the root causes of undemocratic general elections and proposes that adopting the basic part of institutionalization, participation, transparency, and accountability are plausible way forward to sustainable democratic election processes. It is within these broad democracy discourses and progress made thus far that the debate about the various types of electoral systems and their implications and/or impact on multiparty democratic governance becomes central and timely. All said and done, democratic consolidation is not dependent solely upon elections and the nature of electoral system(s) in operation given that various other ingredients are crucial.

## **LIST OF ABBREVIATIONS**

ACK	Anglican Churches of Kenya
AFRICOG	Africa Centre for Open Governance
BRC	Boundary Review Commission
BVR	Biometric Voter Registration
CIC	National Cohesion and Integration Commission
COMESA	Common Market for East and Southern Africa
CORD	Coalition for Reform and Democracy
CSO	Civil Society Organizations
DLAS	Department of Land Adjudication and Settlement
EAC	East African Community
ECK	Electoral Commission of Kenya
FBI	Federal Bureau of Investigations
FBO	Faith Based Organizations
FM	Frequency Modulator
GDP	Gross Domestic Product
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
IEBC	Independent Electoral Boundaries Commission
IREC	Independent Review Committee
KBC	Kenya Broadcasting Corporation
MCK	Media Council of Kenya
MOU	Memorandum of Understanding

NARC	National Rainbow Coalition
NCIC	Constitution Implementation Commission
NDI	National Democratic Institute
NGOs	Non Governmental Organizations
NSIS	National Security Intelligence Service
OAU	Organization of African Unity
PEV	Post Election Violence
RTS	Results Transmission System
TEA	Tax Enough Already
UDHR	Universal Declaration of Human Rights
UN	United Nations
US	United States

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## CHAPTER ONE

### INTRODUCTION TO THE STUDY

#### 1.1 Introduction

Africa began the final decade of the 20th century with a wave of democratic movements that swept away authoritarian regimes which seemed firmly entrenched into governance systems. Majority of African states have held legislative and presidential multiparty elections since the onset of the 1980s, an indication that Africa has beyond doubt made remarkable strides towards achieving fully fledged democracy. For a majority, fourth and fifth elections have now been convened, suggesting that regularized elections have become the *modus operandi*:<sup>1</sup> Nigeria, Zimbabwe, Kenya, Uganda and Congo to cite but a few, are some of the states practicing pluralism (the acknowledgment of diverse political systems; better understood as multi-partyism).

This though may be attributable to international emphasis, demand and funds for elections, the internal pressure for democracy, and the need to legitimize the rule of law, and because elections provide a means of distributing power evenly within coalitions, parties and movements.<sup>2</sup> Most of these elections, however, have been more often than not, marred by irregularities that almost rendered elections meaningless as will be revealed in discussions herein.

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<sup>1</sup> Rakner and Ronning. *Do elections imply democracy or autocracy?* Election Processes, Liberation Movements and Democratic Change in Africa. (Volume 9 No.2, March 2010). p 1

<sup>2</sup> Ibid. p 2

Okolo argues that the electoral system of any given country plays a fundamental role in sustaining and molding the political behavior of its citizens.<sup>3</sup> The dignity, way and manner in which elections are conducted in a country go a long way to determine the level of political culture, political participation and good governance in the country. These assertions give a clue to the importance of good and healthy electoral system in a country. Since democracy means rule of, for and by the people, the electorate are able to choose politicians they want to represent their interest in government through elections. Although African history has it that it is difficult to hold elections that are completely free and fair.<sup>4</sup> Lindberg has shown that even when elections leave a lot to desire in terms of freedom and fairness, the process of repeated, competitive elections tend to generate a momentum for greater democratization. Arguably, however, both scholars and members of the international community may have put too much faith in the model of democratization through elections.<sup>5</sup> Hypothetically speaking, Africa's multiparty elections have not produced anything but minimalist democracies.

The central focus of this research is to locate the potential room for political debate and possibilities for building demands for political action that would demonstrate accountability and democracy. Poll mechanisms also come under unparalleled scrutiny and criticism in this study. The role of various actors in their endeavors to promote democratic change will also be discussed. The results of the study may contribute to a wider understanding of challenges in the area of development policies.

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<sup>3</sup> Okolo, G. *Education and Political Stability in Nigeria*. (The Beacon, a Journal of the Tai Solarin College of Education, Ijebu-Ode, 2002).

<sup>4</sup> Ibid

<sup>5</sup> Lindberg, S. *Democracy and Elections in Africa*. (Baltimore, The Johns Hopkins University Press. 2006)

This research finds that elections are likely to be open, free and fair when the electoral process is managed by a special body established by law. This body, generally known as an electoral commission, should be impartial. It should be independent from the government of the day, from all political parties and from any other internal or foreign forces. Popular participation in the elections and the acceptance of the results of elections are also dependent on the confidence the electoral bodies enjoy among the citizens and major political parties. To finer details, this study investigates the state and role of democracy and political governance in Africa and more so in Kenya on three major fronts namely: Political representation and participation; institutional effectiveness and accountability; and good governance.

## **1.2 Statement of the research problem**

The promise of the independence movement that freedom would rapidly improve the quality of life for independent African people was subverted by decades of authoritarian rule in post-colonial Africa. By the 1960s, all of the North African states had gained independence and by 1966, all but six sub-Saharan African countries had as well. That same year, there were eight military coups in Africa. Three straight decades of decline did not tell a bright story of the short history of independent Africa.<sup>6</sup>

In Africa, governments are characterized by a top-down organizational structure where power and decision-making are highly centralized, more like a minimalist structure. This leaves little or no room for participatory and democratic decision-making processes. As seen from Kanyongolo

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<sup>6</sup>Nana Akufo-Addo. "The future of democracy in Africa and the Arab spring." In proceedings of the 2012 Oppenheimer Lecture. (Arundel house, London, UK. February, 2012), p 2

and Malyamkono's perspective, this rigid organizational structure is in part inherited from the colonial legacy where colonial administrators and other political elites dictated to and made decisions on behalf of the native populations without consultation.<sup>7</sup> These practices lead to severe limitations on processes fairness, freedom and transparency while breeding patriarchy and hence compromising democracy.<sup>8</sup>

Election malpractices have their roots in autonomous executive; an all-powerful arm which is solely responsible for appointing the leading electoral commission staff, including the leadership. In the absence of candor and sincerity, democracy will remain vague and approximate, if folk wisdom and political expediency takes precedence. Political expediency has been a pain in the neck that has always made sure that Africa stagnates right where she is. Trust is vital to democracy. Trust connects citizens to the institutions — legislatures, judiciary, executive, etc. — that legitimize and sustain democratic order. When that sense of trust is violated, so too, is the future of democracy. Increasing unrest and volatility within the electorate result in greater political unpredictability. It is important to monitor the development of forms of political participation, involvement and influence. The mass media and the civil society also play an important part as catalysts of change in interactions between voters, parties and public authorities. This research also analyzes the situation of democracy and elections in Kenya and by extension, Africa, viz-a-viz the verity that free, fair and successful election is a methodical yardstick of measuring heights of democracy.

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<sup>7</sup> Malyamkono, T.L. and Kanyongolo F.E. *When Political Parties Clash*, (Dar es Salaam, ESAURP, 2003), p 273

<sup>8</sup> Josh Maiyo. *Political Parties And Intra-Party Democracy In East Africa: From Representative to Participatory Democracy*, (Amsterdam. August 2008), p 7

It is on this premise that the study seeks to answer the question: Do free and fair elections contribute to the development of democracy and good governance in Africa and more so in Kenya?

### **1.3 Objective of the study**

The overall objective of this study is to critically examine the role of free and fair elections in deepening democracy in Africa with the case of Kenya between 2007 and 2012.

More specifically, the study aims to;

- i. Provide an overview of democracy and elections in Africa;
- ii. Investigate and highlight best practices, gaps, and other emerging issues from the 2007 general elections;
- iii. Analyze the role of various internal and external actors in the consolidation of democracy in Africa and more so in Kenya

### **1.4 Literature review**

This literature review is an overall evaluation of the electoral systems and development of democracy in Africa. Its purpose is to provide an overview of the knowledge base in order to generate the foundations for the analytical framework and methodology to be applied in this study, based on various dimensions of democracy-inclined issues: proponents, opponents and critics of democracy; literature on the concept and the relationship between democracy, multipartyism and elections in Africa; and issues predominantly associated with election years e.g. ethnicity, land. It also represents key references to scholarly and academic schools of thought on democracy and elections regarding current knowledge on what works, what doesn't and why.

### 1.4.1 Definitions and debates

Democracy is a complex concept that is closely related to multipartyism and elections. As Hoffman pointed out, it is the most discussed and contested notion of political theory.<sup>9</sup> Nwabueze stressed that “no word is more susceptible of a variety of tendentious interpretations than democracy.”<sup>10</sup> According to Wiseman, “[m]any governments of quite different types wish to describe themselves as democratic”.<sup>11</sup>

Huntington describes global democratization as coming in three waves, the first beginning in the early 19th century and the third being a current event. The first wave of democracy began in the early 19th century when suffrage was granted to the majority of white males in the United States. At its peak, the first wave saw 29 democracies in the world. The ebb of the first wave lasted from 1922 until 1942, during which the number of democracies in the world dropped to a mere 12.<sup>12</sup> The second wave began following the allied victory in World War II, and crested nearly 20 years later in 1962 with 36 recognized democracies in the world. The second wave ebbed as well at this point, and the total number dropped to 30 democracies between 1962 and the mid-1970s.<sup>13</sup>

Paxton notes that the appearance of waves of democracy largely disappears when women's suffrage is taken into account; moreover, some countries change their positions quite dramatically: for instance, Switzerland, which is typically included as part of the first wave, did

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<sup>9</sup> Hoffman, J. *State, Power and Democracy: contentious concepts in practical political theory* (Sussex; Wheatsheat 1988) Books 31.

<sup>10</sup> Nwabueze, B. “*Constitutionalism in the emergent states*” (London: Hurst, Enugu: Nwamife Publishers 1, 1973)

<sup>11</sup> Wiseman, J. “*Democracy in black Africa. Survival and revival*” (New York: Paragon House Publishers, 1990), p 4

<sup>12</sup> “What Is Democracy? - Democracy's Third Wave”. (U.S. State Department. Retrieved 2007-08-07)

<sup>13</sup> Ibid

not grant women the right to vote until 1971<sup>14</sup>. The Third wave began in 1974 and included the historic democratic transitions in Latin America, Asia Pacific countries and Eastern Europe after the collapse of the Soviet Union. The exact tallies of the number of democracies vary depending on the criteria used for assessment, but by some measures there are well over 100 democracies in the world today, a marked increase in just a few decades. Many of these newer democracies are not fully consolidated, however, meaning that while they have electoral institutions in place, political democracy remains fragile. Reasons for this fragility include economic instability, continued elite dominance of politics, ongoing military interference in civilian affairs, and others<sup>15</sup>.

The spread of the third wave of democratization to Africa in the early 1990s represented the most significant political change in the continent since the independence period three decades before. Throughout the continent, significant political liberalization resulted in the emergence of a free press, opposition parties, independent unions and a multitude of civic organizations autonomous from the state. In 29 out of 54 states in the region, the first multi-party elections in over a generation were convened between 1990 and 1994. In a smaller set of countries, elections were fully free and fair and resulted in the defeat and exit from power of the erstwhile authoritarian head of state. By the end of the decade, only a small minority of states were not officially multi-party electoral democracies, even if the practice of democratic politics was often far from exemplary<sup>16</sup>.

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<sup>14</sup> Paxton, Pamela. "Women's Suffrage in the Measurement of Democracy: Problems of operationalization." *Studies in Comparative International Development* (2000), pp 35(3): 92-111

<sup>15</sup> Diamond, Larry. "Is the Third Wave Over?" *Journal of Democracy* (1996), p 7(3).

<sup>16</sup> Walle N. *The Impact of Multi-Party Politics in Sub-Saharan Africa*. (Michigan State University. Prepared for delivery at the Norwegian Association for Development Research Annual Conference, September 25, 2000). Walle

Olokushi opines that democracy has an element of process in it: it is a set of institutions and procedures to enable the government of, for and by the people.<sup>17</sup> Budeli and Mangu oppose the view often expressed by proponents of maximalist theories of democracy by emphasizing that individual and civil rights are not simply “bourgeois” concepts, they also matter in a democracy. Democracy should not stop at forms and institutions, it must include individual and collective rights, civil and political rights as well as social and economic rights since all human rights are interdependent and interrelated.<sup>18</sup>

Dahl supposes that there are certain conditions which make it easier to maintain a democracy in a given country. He writes that these include "the effective control by elected leaders over the military and police, a political culture supportive of democratic beliefs, and a relatively well-functioning economic order, among others." He proposes that highly unfavorable circumstances cause instability, no matter the constitutional systems. Under highly favorable circumstances, a country may remain democratic given a range of possible constitutional arrangements, whether or not the system is the best kind for promoting stability. In mixed conditions, he postulates, the details of a country's constitution may tip the balance between stability and undesirable changes, such as conversion to dictatorship<sup>19</sup>.

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N. “*The State Under Pressure*”, Bergen, Norway. The Impact of Multi-Party Politics in Sub-Saharan Africa (October, 2000) [1], Pp 5-6

<sup>17</sup> Bangura, Y. Mangu, A. “*Authoritarian rule and democracy in Africa: a theoretical discourse,*” in Nyang’oro (1998), p 186.

<sup>18</sup> Mangu and Budeli. *Democracy and elections in Africa in the Democratic Republic of Congo: Lessons for Africa.*

<sup>19</sup> Dahl R. *How Democratic is the American Constitution?* A book by political scientist Robert A. that discusses seven "undemocratic" elements of the United States Constitution.2001, ISBN 0-300-09218-0.

Over the span of three decades, amendments to the constitution of Kenya were made to systematically erode balances in favor of strengthening presidential powers. Roberts posits that the result of these broad powers effectively made the presidential office equivalent to a dictatorship, which gave the president the ability to use and abuse this power.<sup>20</sup> And as observed by Bangura, although democracy is primarily concerned with the rules and institutions that allow for open competition and participation in government, it also embodies social and economic characteristics that are crucial in determining its capacity to survive.<sup>21</sup>

#### **1.4.2 Democracy, multipartyism and elections in Africa**

With more and more African countries opting for elections, it is important to revisit the concept of democracy and its relationship to multipartyism and elections within the context of Kenya experience. Every year at least one African country goes to the polls. Recent general elections took place in countries such as Zimbabwe, Angola, Kenya, Lesotho, and Congo among others. Multipartyism presupposes the existence of several parties in a country. A multiparty system is the opposite of ‘one-partyism’ or even ‘no-partyism’. After decades of one-party or no-party systems, several African countries embraced a multiparty system of government from the late 1980s.<sup>22</sup>

According to Joseph, elections and democracy have become virtually synonymous in political thought and analysis;<sup>23</sup> Ake also observed that more recently, in the hurry to globalize

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<sup>20</sup> Roberts, Mara J. *"Conflict Analysis of the 2007 Post-election Violence in Kenya"*. New Dominion Philanthropy Metrics, 2009. No.14.

<sup>21</sup> Bangura Y *"Authoritarian rule and democracy in Africa: a theoretical discourse"*.

<sup>22</sup> Sorensen G. *"Democracy and the developmental state"* in Nyang'oro J (ed) *Discourses on Democracy: Africa in comparative perspective* (Dar-es-Salaam: Dar-es-Salaam University Press, 1996)

<sup>23</sup> Sono T *"Comments on democracy and its relevance in Africa"* African Perspective: (1992) Selection of Works 3; Mangu A *"The road to constitutionalism and democracy in post-colonial Africa"* (LLD Thesis University of South Africa, 2002), p 173.

democracy in the aftermath of the ending of the Cold War, democracy was reduced to the crude simplicity of multiparty elections to the benefit of some of the world's most notorious autocrats who were able to parade democratic credentials without reforming their repressive regimes. Consolidation of democracy occurs whenever the winners of founding elections are defeated in a subsequent election, and the new winners accept an electoral turnover.<sup>24</sup>

According to the liberal theory, there is no democracy without political pluralism, understood as multipartyism. Political parties have been identified as crucial to the process of democratic transition and consolidation. However, multipartyism and regular elections is not democracy. On the other hand, political parties are relatively recent arrivals on the political scene and, as demonstrated in some pre-colonial African, Asian and European societies, it is possible to have democracy, or some measure of it, without a multiparty system of government. Where it does exist, multipartyism and regularization of elections does not necessarily guarantee democracy because, even in a multiparty system, authoritarianism can overshadow the democratic elements in the system.<sup>25</sup>

Zimbabwe is a recent case in point. Past examples include apartheid South Africa and Mobutu's Zaire. The South African regime under apartheid was an authoritarian one despite the existence of several parties. It was undemocratic as the black people who constitute the overwhelming

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<sup>24</sup> Ake C "*Democracy and Development in Africa*". (Washington. Dfc: The Brookings Institution, 1996), pp 132-134, 137.

<sup>25</sup> Sono T "*Comments on democracy and its relevance in Africa*" African Perspective: (1992) Selection of Works 3; Mangu A "*The road to constitutionalism and democracy in post-colonial Africa*" (LLD Thesis University of South Africa, 2002), pp 173

majority of the population were denied their political rights and excluded from the government.<sup>26</sup> In the former Zaire, integral multipartyism with more than four hundred political parties during Mobutu's guided transition of 1990-1992 did not contribute to the establishment and consolidation of democracy. Instead of advancing democracy, this wild multipartyism rather contributed to the survival of the authoritarian regime of President Mobutu. Accordingly, multipartyism is not synonymous with democracy.<sup>27</sup>

#### **1.4.2.1 Multi-party criticism**

Ben Yahmed rightly warned that African people, who would be content with multipartyism, thinking they had already entered the paradise of democracy, would not take long to be disappointed.<sup>28</sup> Former Zaire, the Republic of Congo, Burkina Faso, Burundi, Cameroon, Central African Republic, Ethiopia, Gabon, Zimbabwe, Egypt, Libya and Kenya are but a few African countries where democracy has not prospered despite the establishment of a multiparty system. Across Africa's multiparty systems, competitive political contestation has failed to take root. As noted by Rakner and Van de Walle, even in countries with the most institutionalized democratic elections, the opposition rarely gains more than 25 per cent of the seats. The government often sets their goal at winning an absolute majority of two thirds so that they can change constitutions at their own whims.<sup>29</sup>

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<sup>26</sup> Sono T "Comments on democracy and its relevance in Africa" African Perspective: (1992) Selection of Works 3; Mangu A "The road to constitutionalism and democracy in post-colonial Africa" (LLD Thesis University of South Africa, 2002), pp 430 - 434

<sup>27</sup> Ibid

<sup>28</sup> Yahmed B, as quoted by Pierre-François Gonidec "Démocratie et développement en Afrique: perspectives internationales et nationales" (1993) 14 Afrique (2000), pp 57-58.

<sup>29</sup> Van de Walle N "Economic reform and the consolidation of democracy in Africa" in Ottaway M Democracy in Africa. The hard road ahead Boulder & London: Lynne Rienner Publishers (1997), pp 316.

Criticism against multipartyism should not, however, be used to celebrate the one-partyism of a previous era in African politics. In the 1960s and 1970s, many political leaders and a number of intellectuals backing them justified and praised the one-party state as the best instrument to help build the nation and consolidate national unity, stabilize power and achieve economic development.<sup>30</sup> Nzungola-Ntalaja noted that if multipartyism is not necessarily synonymous with democracy, it is difficult, if not impossible, to show that a one-party system, whether of Marxist, socialist, communist or African tradition, can be democratic and contribute to the consolidation of a democracy. Accordingly, it is worth emphasizing once more that although multipartyism is important to ensure the establishment of democracy, it should not be confused with it. Nor should democracy be confused with elections.<sup>31</sup>

### **1.4.3 Democracy and international law**

#### **1.4.3.1 The principles of democracy**

Democracy is a universally recognized ideal as well as a goal, which is based on common values shared by people throughout the world community irrespective of cultural, political, social and economic differences. It is thus a basic right of citizenship to be exercised under conditions of freedom, equality, transparency and responsibility, with due respect for the plurality of views, and in the interest of the polity. Democracy is both an ideal to be pursued and a mode of government to be applied.<sup>32</sup>

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<sup>30</sup> Sono T “Comments on democracy and its relevance in Africa” African Perspective: (1992) Selection of Works 3; Mangu A “The road to constitutionalism and democracy in post-colonial Africa” LLD Thesis University of South Africa (2002), pp 173

<sup>31</sup> Nzungola-Ntalaja G “The state and democracy in Africa” in Nzungola-Ntalaja G, Margaret Lee (eds) The state and democracy in Africa (1997) African World Press 15.

<sup>32</sup> Bassiouni, C et al. *Democracy: Its Principles and Achievement*. (Inter-Parliamentary Union, Geneva, 1998), p IV

As an ideal, democracy aims essentially to preserve and promote the dignity and fundamental rights of the individual, to achieve social justice, foster the economic and social development of the community, strengthen the cohesion of society and enhance national tranquility, as well as to create a climate that is favourable for international peace. As a form of government, democracy is the best way of achieving these objectives; it is also the only political system that has the capacity for self-correction. A state of democracy ensures that the processes by which power is acceded to, wielded and alternates allow for free political competition and are the product of open, free and nondiscriminatory participation by the people, exercised in accordance with the rule of law, in both letter and spirit. Democracy is inseparable from the rights set forth in the international instruments.<sup>33</sup>

Individual participation in democratic processes and public life at all levels must be regulated fairly and impartially and must avoid any discrimination, as well as the risk of intimidation by State and non-State actors. Judicial institutions and independent, impartial and effective oversight mechanisms are the guarantors for the rule of law on which democracy is founded. In order for these institutions and mechanisms fully to ensure respect for the rules, improve the fairness of the processes and redress injustices, there must be access by all to administrative and judicial remedies on the basis of equality as well as respect for administrative and judicial decisions both by the organs of the State and representatives of public authority and by each member of society.<sup>34</sup>

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<sup>33</sup> Bassiouni, C et al. *Democracy: Its Principles and Achievement*. (Inter-Parliamentary Union, Geneva, 1998), p IV

<sup>34</sup> Ibid, p V

A sustained state of democracy thus requires a democratic climate and culture constantly nurtured and reinforced by education and other vehicles of culture and information. Hence, a democratic society must be committed to education in the broadest sense of the term, and more particularly civic education and the shaping of a responsible citizenry. Democratic processes are fostered by a favourable economic environment; therefore, in its overall effort for development, society must be committed to satisfying the basic economic needs of the most disadvantaged, thus ensuring their full integration in the democratic process. The state of democracy presupposes freedom of opinion and expression; this right implies freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. The institutions and processes of democracy must accommodate the participation of all people in homogeneous as well as heterogeneous societies in order to safeguard diversity, pluralism and the right to be different in a climate of tolerance.<sup>35</sup>

#### **1.4.3.2 The Universal Declaration of Human Rights (UDHR)**

Elections offer the opportunity for citizens to choose freely between several programmes or policies presented by several parties or candidates. Elections are governed by law, both international (human rights) and domestic law. In international law, the right to vote is a political right entrenched in a number of legal instruments. For example, the Universal Declaration of Human Rights (UDHR) provides that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. This right is supported by the right to freedom of peaceful assembly and association. Although the UDHR is a UN General Assembly resolution and not binding per se, it can be argued that its acceptance by the overwhelming

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<sup>35</sup> Ibid, p VII

majority of UN member states, Kenya inclusive has made it binding as part of customary international law.<sup>36</sup>

### **1.4.3.3 The International Covenant on Civil and Political Rights (ICCPR)**

The International Covenant on Civil and Political Rights (ICCPR), which is a treaty binding on states parties, also entitles every citizen to take part in the conduct of public affairs of his/her country, directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and held by secret ballot, guaranteeing the free expression of the will of the electors. The right to vote and to be elected is entrenched in almost all modern Constitutions and electoral laws enacted to enforce them.<sup>37</sup>

On the domestic level, Ntalaja and Lee opines that there is no single African country where the Constitution does not provide for the right of every citizen to vote during regular, free and fair elections even though electoral politics has taught otherwise.<sup>38</sup> Elections have become a political game, but a game that has to be played according to some agreed rules and principles entrenched in the Constitution and electoral laws. Unfortunately, the rules of the game are very often manipulated by some political leaders to either get their way into power or remain in power.

## **1.4.4 The role of institutions**

### **1.4.4.1 The Media**

Media in democracies is often referred to as the fourth pillar of power, and rightfully so. Ideally, they exert control over politics by reporting on what they see and be part of a decision making

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<sup>36</sup> United Nations: Universal Declaration of Human Rights 1948 (III) of 10 December 1948.

<sup>37</sup> United Nations: International Covenant on Civil and Political Rights 1966 (999 UNTS 171).

<sup>38</sup> Nzongola-Ntalaja G "The state and democracy in Africa" in Nzongola-Ntalaja G, Margaret Lee (eds). The state and democracy in Africa (1997) African World Press 15

process as citizens need to be informed on all aspects relevant to them. What the media finds out and reports about might, however, differ from the image politicians want to give. In this case, hardly anybody is self-critical enough to admit flaws in his or her policy but rather blames it on the media.<sup>39</sup>

Jefferson once said that if he was to choose between a government without newspapers or newspapers without a government, he would go with the latter; the reason is quite clear, media is the fourth arm of government and governments are almost voiceless in the absence of media. On the downside, Coronel acknowledges that the reality is that the media does not always live up to the ideal.<sup>40</sup> They are hobbled by stringent laws, monopolistic ownership, and sometimes, the threat of brute force. State controls are not the only constraints. Serious reporting is difficult to sustain in competitive media markets that put a premium on the shallow and sensational.

Moreover, the media are sometimes used as proxies in the battle between rival political groups, in the process sowing divisiveness rather than consensus, hate speech instead of sober debate, and suspicion rather than social trust. In these cases, the media contribute to public cynicism and democratic decay. In her rejoinder, in many fledgling democracies, the media have been able to assert their role in buttressing and deepening democracy.<sup>41</sup> Investigative reporting, which in some cases has led to the ouster of presidents like in the case of Richard Nixon in the Watergate scandal and the fall of corrupt governments, has made the media an effective and credible watchdog and boosted its credibility among the public. Investigative reporting has also helped

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<sup>39</sup> Omar, Jamila. Media and Elections: The role of media in democracies” (Kabul. August 2010)

<sup>40</sup> Coronel SS. The role of the media in deepening democracy. p 7

<sup>41</sup> Ibid. p 1

accustom officials to an inquisitive press and helped build a culture of openness and disclosure that has made democratically elected governments more accountable.<sup>42</sup>

Coronel further argues that the media can make full use of their potential to contribute to the consolidation of democracy if their rights are protected. Moreover they need to have the requisite skills for the kind of textured and in-depth reporting that new democracies require. Because the media are powerful, there should also be mechanisms to ensure they are held accountable to the public and that ethical and professional standards are upheld. Media independence is guaranteed if media organizations are financially viable, free from the intervention of media owners and operate in a competitive media environment.

A free and independent press is a cornerstone of democracy, as it helps promote political debate and keeps government accountable to an informed citizenry. A free press is also crucial for credible elections, as it fosters the free exchange of ideas and provides information on the electoral process. This includes political parties, candidates and their platforms.<sup>43</sup> The media's power is enhanced if they have broad reach in, and support from, society. Democracy suffers if large segments of society are inaccessible to the media and therefore excluded from the arena of public debate.

#### **1.4.4.2 The Church**

Resistance and failure of the state to institutionalize democracy in many African countries have made some scholars argue that the state needs to be pushed by church to embrace democracy.

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<sup>42</sup> Ibid p 19

<sup>43</sup> International Foundation for Electoral Systems (IFES). *The Role of Media in Elections: A Cornerstone of Democracy*. (May 3, 2013)

Other scholars have even argued that institutionalization of democracy in these countries can benefit more from the involvement of Civil Society Organizations including the church than from the State's leadership. Nevertheless, many countries exhibit undemocratic tendencies, despite the existence of numerous CSOs in their countries<sup>44</sup>. While Faith Based Organizations (FBOs) are informed by the theological underpinnings of their mainstream religion, they often make a conscious decision to enter the political realm, therefore performing dual roles, as both political and religious actors.

The challenge for the church in this regard is to play a balancing act to be provocative without being bound by loyalty to a specific political party; to analyze economic systems and their consequences, without adhering to one economic theory or ideology; to challenge and question policies that exclude or marginalize specific sections of society; and to challenge the priorities of public spending.<sup>45</sup>

In an essay outlining why the church is not a democracy, Wallace states that as the spiritual body, the church is called to a far higher standard of inclusivity, equality, and generosity of spirit than democracy alone can guarantee.<sup>46</sup> Therefore, being true to their identity is the biggest challenge the church can pose to political and economic processes that seeks to be elitist, that only represent the interest or the ideologies of a selected group. In the process the church will sometimes oppose popular (and even "majority") interests – for the sake of peace, social justice

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<sup>44</sup> Church in the Struggle for Democracy in Kenya - <http://mvuleafricapublishers.com/church-in-the-struggle-for-democracy-in-kenya/>

<sup>45</sup> Botman Russel H. Gemeinsame Konferenz Kirche und Entwicklung (GKKE). *Joint Conference Church and Development. Good governance – the role of the churches – a South African perspective*. Stellenbosch University. p 7

<sup>46</sup> Wallace, Catherine. *Not Politics as Usual: Why The Church Is Not A Democracy* (Published in U.S Catholic, volume 68, no. 4 , April 2003), pp. 36-39.

and fairness. There is need to do this in the public arena, but also within the church self.<sup>47</sup> This should be the focus of the church without fear or favour.

#### **1.4.5 The problematique of democracy**

The embrace of dubious electoral and political arrangements on the grounds that, at this stage of Africa's development, it is the only outcome that can be realistically expected, is very problematic as notes Olukoshi.<sup>48</sup> Terry rightly criticized assessments of democracy building and consolidation based on elections or what he labeled "the fallacy of electoralism" postulating the confusion between democracy and elections. As we have seen in many African countries, where elections have been organized several times since independence without the country achieving democracy, formal procedures for elections do not create a democracy because elections can and did exist with systematic abuses of human rights and disenfranchisement of large segments of the population.<sup>49</sup>

History has it that it takes but one enabling law to unhinge the rule of law and replace it by an ideological tyranny, as happened when Hitler came to power in Germany in the 1930s. It cannot be said too often that democracy and the rule of law are not the same thing. There are lawless democracies and undemocratic states of law.<sup>50</sup> The constitution of liberty requires both and the rule of law is the more difficult of the two to establish and maintain, for it requires not just a

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<sup>47</sup> Botman Russel H. Gemeinsame Konferenz Kirche und Entwicklung (GKKE). Joint Conference Church and Development. Good governance – the role of the churches – a South African perspective. Stellenbosch University. P 14

<sup>48</sup> Olukoshi A. "State, conflict, and democracy in Africa: the complex process of renewal" in Joseph R (ed) State, conflict and democracy in Africa (Boulder & London: Lynne Rienner Publishers, 1999) pp 456-457

<sup>49</sup> Bratton M, Posner DN "A first look at second elections in Africa with illustrations from Zambia" in Joseph R "State conflict and democracy in Africa" (Bouwer London: Lynne Rienne Publishers, 1996), p 378

<sup>50</sup> In this regard, see Dahrendorf Ralf. *Elections alone do not guarantee a free democracy: There is no ultimate safeguard against the abuse of political power, especially if that power has been democratically gained.* <http://www.taipeitimes.com/News/editorials/archives/2005/11/22/2003281257>

constitution but, almost more importantly, an independent judiciary that is sensitive to violations of constitutional and other legitimate rules.<sup>51</sup>

Ntalaja indicates that it would be too simplistic to identify democracy with the holding of elections since the question of democracy goes beyond elections to the realization of democratic principles of governance and to the balance of social forces in the political community. Electoral democracies are but cosmetic democracies. However, while dismissing the electoral fallacy, we should not embrace its antithesis, what Mitchell and Booth called the “anti-electoralist fallacy”, which assumes that elections never matter for democratization. In our modern era, you can have elections without democracy, but you cannot have democracy without elections. The regularity, openness and acceptability of elections signal whether basic constitutional and attitudinal foundations are being laid for sustainable democracy.<sup>52</sup> Elections remain fundamental not only for the installation of democratic government but for broader democratic consolidation.<sup>53</sup>

#### **1.4.6 The correlation between elections and democracy**

Election and democracy are inextricably linked. Princeton revealed that whatever else is essential to make democracy effective and sustainable, elections are the lifeblood of the system, the constant affirmation of legitimacy for its leaders and the bond that links the leaders with the people. His assertion is based on the fact that elections have meaning for most people only in a democratic context, because they lead to choice of decision makers by the majority of citizens.<sup>54</sup>

The major purposes of elections according to Ejebe are to: Ensure that voters freely choose those

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<sup>51</sup> Dahrendorf, Ralf. Elections are not enough. (November 2005)

<sup>52</sup> Nzongola-Ntalaja G “*The state and democracy in Africa*” in Nzongola-Ntalaja G, Margaret Lee (eds) *The state and democracy in Africa* (1997) African World Press 19.

<sup>53</sup> Bratton M, Posner DN “*A first look at second elections in Africa with illustrations from Zambia*” in Joseph R “*State conflict and democracy in Africa*” (Bower London: Lynne Rienne Publishers, 1996).

<sup>54</sup> Lyman, Princeton. *Electoral Reform: The Next Milestone in Nigeria's Democracy*. Council on Foreign Relations March 19, 2005

who will represent them; Enable voters to make choices among the parties, candidates' and programmes; Ensure that elected officials are accountable to the electorate; Promote citizens sense of belonging in government; Promote public confidence, trust and support for government and its programme; Provide the mechanism for collective efforts towards the development of the country.<sup>55</sup>

All the above listed items are invariably common sing song of democracy. In other words, the democracy of a country started to crawl if such a country failed at this preliminary stage of conducting free and fair elections.<sup>56</sup> It will be recalled that the 2007 Kenya elections wrecked of all manner of chicanery characterized by the brazen attempt to disenfranchise the electorate and announce fictional results in areas where no elections took place, not to mention intimidation of the electorate by the police and military in many places – this was the crawling point of democracy in Kenya.

What scholars do not point out though, is what measure can actually be put in place to bring some order in elections thereby upholding democracy and if free and fair elections is the key to democracy in Africa. Viable and achievable way forwards have failed to feature prominently in the schools of thought reviewed in this study; these are the areas this study seeks to delve into in-depth.

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<sup>55</sup> Odion I. *Elections, Electoral Reforms And Post- Election Violence: Problems And Way Forward*. PoliticsView Discussions. Department Of Social Studies - College Of Education, Igueben, Edo State November 5, 2012

<sup>56</sup> Ibid

## **1.5 Justification of the study**

One can argue that over two decades of good governance advocacy, anti-corruption work, constitution building, democracy promotion, all costing billions, have seemingly almost bore no fruits. This study will play a significant role in establishing the extent to which democracy and political governance issues have been advanced in different sectors and in Government at the level of elections and realize the potential that democracy can help foster for pro-poor development.

The analyses of the study are intended to provide guidance on how to improve the relevance, efficiency and effectiveness of the democracy and political governance thematic areas. It will also help understand the value and uses of transparent elections for deepening democracy and the role that free and fair elections play in securing good governance and democracy in a society and nation.

That the research area around democracy and elections in Africa has been tapped into by a plethora of scholars and researchers is not question subject to discussion. However, this research contributes to the exploration of the multiple facets of the problems of democratic governance, particularly as they relate to elections; and suggests correct strategies for growth. The researcher seeks to expose the dangers of infringement on democratic governance. This will be achieved by questioning the requirements for free and fair elections which would then be pointers to democracy - against the backdrop of the recent experience of Kenya (elections held in 2007), a country where, with assistance from various national and international role players, has over the years moved from a deeply authoritarian system to a multi-party system of government. This

research evaluates this experience and asks whether true democracy has now been established in Kenya and what this process can tell us about experiences elsewhere in Africa.

## **1.6 Hypotheses**

The study will test the following three hypotheses:

- i. Transparent, inclusive and participatory systems of governance leads to maximalist democracies
- ii. The more transparent, accountable and institutionalized government structures, the higher the levels of democracy
- iii. No state can be said to be democratic if it does not hold free and fair elections regularly.

## **1.7 Conceptual framework**

There are indeed minimalist and maximalist conceptions of democracy<sup>57</sup>, this research singles out these two thematic, theoretical areas. These conceptions (minimalist and maximalist) of democracy have been informed by the two dominant ideologies; liberalism (A philosophy that is associated with progressive ideas particularly individual liberty and equality, but it is often loosely used to represent any non-traditional ideals.) and socialism (Denotes an economic system that favors policies within which wealth is systematically distributed throughout a population based on the idea that all members have some relative claim to resources).<sup>58</sup> In mainstream scientific discourse these conceptions of democracy are generally set out as being at opposite ends of the spectrum. In maximalist conceptions, democracy is defined as a regime based on some core values and principles. It is a regime that seeks to protect and promote human rights

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<sup>57</sup> Mangu A “The road to constitutionalism and democracy in post-colonial Africa” (LLD Thesis University of South Africa, 2002), pp175

<sup>58</sup> Ake C. “Democracy and Development in Africa” Washington. Dfci: The Brookings Institution (1996), pp 132-134, 137.

that are understood broadly to encompass individual, civil and political rights as well as group, social and economic rights. On the other hand, minimalist conceptions are basically procedural, formal and institutional - Democracy is considered a specific political machinery of institutions, processes and rules. These include institutions such as elections and representation in elected structures via political parties.<sup>59</sup>

Minimalist theory views democracy as no more than a system of regular elections thus employs the presence or absence of elections in different countries to yardstick democracy. Maximalist theory on the other hand, includes in its definition of democracy, rights protections, freedom of the press, division of powers etc., and thus uses the presence or absence of such to benchmark democracy.

Schumpeter in *Capitalism, socialism and democracy* defines democratic method as that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote. In this system, multiparty elections are held at regular intervals for head of government and legislative bodies - no social or economic aspects are included, no measure of accountability, responsibility, responsiveness or representation, no measure of freedom, liberties or human rights, no measure of participation and no reference to civil-military relations. This definition automatically translates to a minimalist democracy.<sup>60</sup>

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<sup>59</sup> Dahl R *"Polyarchy: participation and opposition"* New Haven Yale University Press; (1971). Dahl R. *Democracy and its critics*. Yale University Press (1989) pp 220-224

<sup>60</sup>See Concepts of democratic governance.pdf Powerpoint\_Slides\_Fall2010/1DPI403  
<http://www.hks.harvard.edu/fs/pnorris/DPI403> Fall09/DPI403

Long tradition of liberal democratic theory by Locke, Madison, Bentham, Mills and a modern version drawn upon Dahl deems two concepts important: Contestation (competition and pluralism) and mass participation. For Dahl, modern democratic states can be understood in practice as polyarchies (A political system in which power is dispersed). These can be identified by the presence of certain key political institutions: elected officials; free and fair elections; inclusive suffrage; the right to run for office; freedom of expression; alternative information; and associational autonomy.<sup>61</sup> Weber on the other hand indicates governance reflects the capacity of regime authorities to perform functions essential for collective well-being to maintain state sovereignty (through monopoly control over the use of military force and laws within territorial boundaries) and to implement public policies through bureaucratic values of efficiency, effectiveness, impartiality, and accountability.<sup>62</sup>

‘Good’ governance is a concept increasingly commonly used in the last decade as advanced by Kaufmann and Kraay, advocating for adherence to the rule of law; effectiveness of the government; transparency and control of corruption; voice and accountability; regulatory quality; political stability and absence of violence.<sup>63</sup>

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<sup>61</sup> Dahl, R. Does (Liberal) Democracy Make Us Equal?

<sup>62</sup> Fukuyama, F. *The Origins of Political Order: From Prehuman Times to the French Revolution*. New York: Farrar, Strauss and Giroux. (2011).

<sup>63</sup> Kaufmann-Kray. *Measuring Good Governance*. The World Bank Institute. <http://info.worldbank.org/governance/>

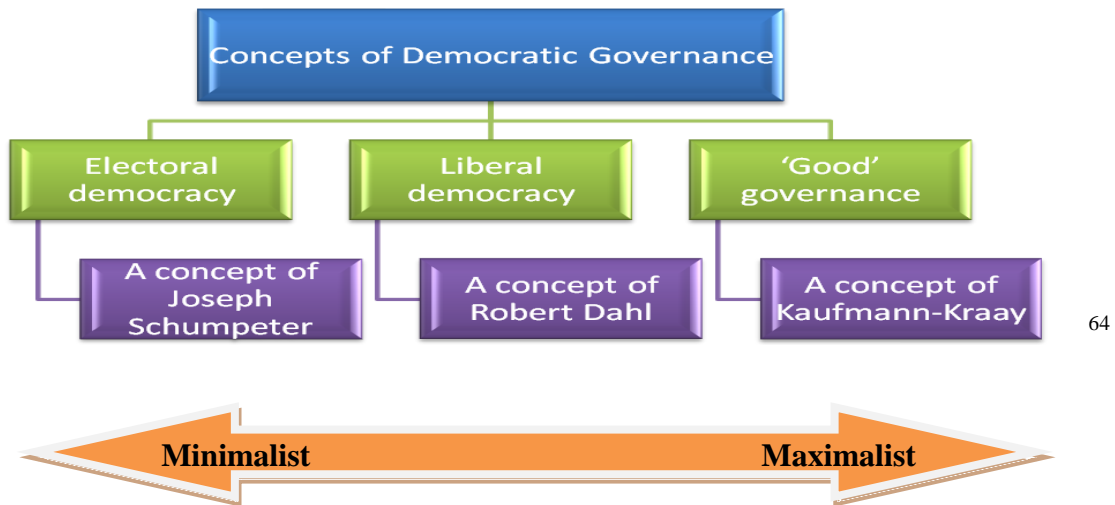


Figure 1: Figure illustrating the variation of democracy from a minimalist to a maximalist point of view

The research was conducted by the use of interview and researcher’s observations. The findings of this research were drawn from 19 *vox-pop* respondents, 14 of them were the common *mwananchi* who were picked randomly and other 2 were politicians of great credence, 2 were certified media personnel and one was a civil society and human rights activist, all of them are citizens of Kenya.

Responding to the problem, the researcher came out with the following proposal that power should be decentralize further to smaller units; and the electoral body should be independent from the government of the day as well as any form of manipulation. The study employed a consultative approach to this review to ensure interactive engagement with different stakeholders. The methodology consisted of; literature review of relevant documents produced by relevant organizations, scholars, departments, agencies, academia, civil society, political parties, development partners, media organizations; Interviews, observations and in-country

<sup>64</sup> Introduction: Concepts of democratic governance. DPT-403 (2010)

consultations with all relevant media houses, academic institutions, as well as civil society, and political figures. The findings were analyzed on a desk review basis from where conclusions and recommendations were drawn.

## **1.9 Chapter outline**

This study is structured in five chapters;

- Chapter One: contains the skeletal framework and will as such carry the introduction to the study including, the background, the statement of the problem, the objectives, the research question, the significance and the justification of study.
- Chapter Two: a more descriptive overview of the research area with issues and reviews on key definition of concepts, and other related key issues in the existing literature. In brief, it presents an overview of the major variables which contribute to the understanding of the discussion pertaining democracy and elections.
- Chapter Three: will cover my case study of Kenya elections between 2007 – 2012
- Chapter Four: discusses the emerging issues in the discourse(s) of elections and democracy including political representation and participation, institutional effectiveness and good governance as well as electoral reforms including constitutional and legal framework, administrative and organizational issues, and dispute resolution
- Chapter Five: a liquefying point, with summary, key findings and recommendations of the study.

## CHAPTER TWO

### DEMOCRACY AND ELECTIONS IN AFRICA: A CONCEPTUALIZATION

#### 2.1 Introduction

Democracy is based on the existence of well-structured and well-functioning institutions, as well as on a body of standards and rules and on the will of society as a whole, fully conversant with its rights and responsibilities. Democracy is founded on the right of everyone to take part in the management of public affairs; it therefore requires the existence of representative institutions at all levels. The key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people's will to be expressed. These elections must be held on the basis of universal, equal and secret suffrage so that all voters can choose their representatives in conditions of equality, openness and transparency that stimulate political competition. To that end, civil and political rights are essential, and more particularly among them, the rights to vote and to be elected, the rights to freedom of expression and assembly, access to information and the right to organize political parties and carry out political activities.<sup>65</sup>

While general elections do not necessarily guarantee outright democracy, no state can be said to be democratic if it does not regularly hold general elections in accordance with the laws of the land in question.<sup>66</sup> In his 2009 Cairo speech, President Barack Obama points out that politicians should maintain power through consent, not coercion and respect the rights of minorities, and participate with a spirit of tolerance and compromise. Leaders must also place the interests of the people and the legitimate workings of the political process above their parties. Without these

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<sup>65</sup> Bassiouni, C et al. *Democracy: Its Principles and Achievement*. (Inter-Parliamentary Union, Geneva, 1998).

<sup>66</sup> Mangu and Budeli. *Democracy and elections in Africa in the Democratic Republic of Congo: Lessons for Africa*.(2008)

ingredients, elections alone do not make true democracy. No credible election can be held without a large dose of freedom, and no government can be described democratic without recourse to democratic process of elections. This is how snarled the concepts in question are, more or less inseparable.

## **2.2 Definitions and debates**

In a plethora of literature, democracy has as many definitions as there are writers on the subject. Democracy has acquired different, even contradictory meaning(s). It has been used and abused to such an extent that defining it has become a challenge<sup>67</sup>. Schools of thought defining the true meaning of democracy may lead to confusion about the way in which democracy should be defined or the basis to which countries should be judged democratic or not;

According to the National Democratic Institute (NDI), democracy can best be defined as a system that is based on a free and fair electoral process where elections are held on a regular basis; the respect for basic civil rights and political liberties, and effective mechanisms of accountability<sup>68</sup>. While Gandhi describes it as *“My notion of democracy is that under it the weakest should have the same opportunity as the strongest.”*<sup>69</sup>

For the purpose of this study, democracy is taken to mean a political system that allows citizens to freely choose their government over time through fair elections; a system that accords them adequate participation in national affairs and; a system in which the national affairs are run in a

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<sup>67</sup> Sono T “Comments on democracy and its relevance in Africa” (1992) African Perspective: Selection of Works 3; Mangu A “The road to constitutionalism and democracy in post-colonial Africa” (LLD Thesis University of South Africa, 2002), pp 173.

<sup>68</sup> The definition of Democracy: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/events-presentations/939.pdf>

<sup>69</sup> Mahatma Gandhi, leader of India’s non-violent struggle for freedom.

transparent and accountable manner and, above all; a system in which mechanisms are effective.<sup>70</sup> Democracy not only entails participatory politics either directly or through elected representatives but also encompasses social, economic and cultural conditions that sets a conducive environment for free and equal practice of political self-determination.

Election on the other hand is an act of selecting candidates who will represent the people of a country in the parliament and in other positions in the government. Elections are highly organized channel of popular expression<sup>71</sup>. Election is part of a complex system. It appears as an important step and an expression of the construction of democratic regimes. It is in fact an expression of democracy in the process of devolution of political power. Uwagboe<sup>72</sup> opined that elections are the means by which the people choose and exercise some degree of control over their representatives. It is a formal decision - making process by which a population chooses an individual to hold public office. A democratic regime is governed by the idea of freedom and liberty of populations whose international legal instruments claim sovereignty in determining policy choices and, by extension, in choosing responsible people to exercise the real power after the elections.

But why then does election fail in several African countries? Several reasons can be stated on this failure. The fundamental causatives include deficit in democracy, freedom and a very low capacity of institutionalization. This maxim can be isolated from Africa if some preconditions

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<sup>70</sup> *Guidelines for Enhancing Coordination of RCM Cluster and Sub-cluster Activities: A Compilation of Programming Tools for Better Results.* Economic Commission for Africa

<sup>71</sup> Aderibigbe, S. *Basic Approach to Government.* Joja Educational Research and Publishers Limited, Ikeja, Lagos. (2006).

<sup>72</sup> Uwagboe, H. E. *Foundation to Citizenship Education.* Conceptual Approach. Daveprints Publisher Associate, Benin City. (2009).

are met for fair and credible elections. Democracy cannot be reduced to the holding of elections under a multiparty system. Multiparty elections have been held regularly, with a clean bill of health generally delivered by international observers without many African countries entering the promised land of democracy. Although they are not synonymous, elections and multipartyism nevertheless constitute a step forward in the process of establishing genuine democracy.<sup>73</sup> Unfortunately, multi-party politics in Kenya is after all a story of murder, mayhem, gerrymandering, expediency, financial scandals, election rigging, unprincipled calculations of tribal and self-interest, defections, political resurrections and reincarnations. There are no heroes, there are no losers. It is a tragic farce in which none of the actors possesses the moral courage to do the right thing.

If after almost an average of 40 years of independence in many African Nations, Africa cannot boast of sufficient governance dividends, then there is something wrong. One of the characteristics of democracy is the capacity to change leaders after a certain period of time. In Africa most countries practicing democracy do not meet required standards. Incumbents hang on to power for many decades. African countries have been turned into political states where those who cry for justice are arrested, detained, tortured, imprisoned and even killed, yet these countries claim that they are oases of freedom. African leaders always seek their personal interests.<sup>74</sup> Their eyes are always on the material things, on what can be taken from the proverbial "national cake". This is a general sickness of African leaders. African leaders are moving billions daily into private accounts overseas to feed the already overflowing economies

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<sup>73</sup> Mangu A. *Challenges to constitutionalism and democratic consolidation in Africa* (2005) pp 321-330.

<sup>74</sup> Langeh J.T. *The Problems with African Democracy* <http://www.leffortcamerounais.com/2011/11/the-problems-with-african-democracy.html>. 2011.

of the West. In effect, for democracy to succeed, Africans must take a second look at their leadership formation and their succession processes. In the past years, Africans have been rendered miserable, hopeless, and have fallen from grace to grass because of corrupt leadership.<sup>75</sup>

Also linked to this problem of leadership, is that of ethnicism and god-fatherism. It is almost impossible for a qualified person to lead a democratic government. Governance is now an issue of ethnic provenance. A leader may be bad, but since he comes from a particular ethnic group, he is preferred to a better person from a different ethnic group. Corruption is a canker worm which eats deep into our politics. Commenting on the situation in Nigeria, John Odey insists, "*Today in Nigeria, corruption has become a structural sin so contagious that it hardly leaves anybody without a smear. And since the country was justifiably stigmatized as a den of corruption, all Nigerians, both the guilty and the innocent, have been paying very costly for it. Everywhere in the world, Nigerians are generally feared like mad dogs, dreaded like criminals, cautiously approached like dangerous snakes and watchfully avoided like lepers.*"

The biggest obstacle to Africa's democratization is its economic fragility. On this note, the former secretary-general of the Organization of African Unity (OAU), Dr. Salim Ahmed, remarked: "*Political reform cannot raise the world prices for Africa's commodities.*"<sup>76</sup> Spoils of office are always being shared between members of the same elite wearing different political colours. In effect, the situation has reached a level where economic uncertainties chip away at

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<sup>75</sup> Odey J. *Africa: The Agony of a Continent: Can Liberation Theology offer any Solution?* p 153

<sup>76</sup> Smith P. "Crazy for Democracy", in BBC Focus on Africa, Vol. 15, n° 2, April-June 2004, p 28.

idealism and new-style regimes find it easier to co-opt and corrupt rather than to bludgeon their opponents.

In the opening pages of his work; *Philosophy in Politics, Law and Democracy*<sup>77</sup> Njoku Francis, dwells on Hubert Humphrey's famous statement as a litmus test for a true government. The latter insists that the moral test for government is how it treats those who are in the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadow of life, the sick, the needy and the handicapped. There is a growing consensus that most African countries have not yet achieved required democratic standards. On this note, John Odey was bold enough to affirm that, "Democracy is an illusion not a reality in Nigeria." One can extend this by saying that democracy remains an illusion in most African Nations.

### **2.2.1 Critics of democracy**

Free-market-oriented economists have strongly criticized the efficiency of democracy. They base this on the argument that voters are irrational, among other things. Their criticism towards democracy is that voters are highly uninformed about many political issues, especially relating to economics, and have a strong bias about the few issues on which they are fairly knowledgeable.<sup>78</sup> The masses are not adequately educated to be able to foresee the betterment of the community they belong to, and therefore are unable to cast a vote to that effect. But given the right to vote, an uneducated man would certainly cast a vote which will more likely be wrong as effected by the personality charisma of the candidate or some other superficial reasons. An ordinary voter may also be lured into casting a vote on the basis of financial help or some other

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<sup>77</sup> Owerri: Claretian Institute of Philosophy, 2002

<sup>78</sup> Caplan, Bryan. "From Friedman to Wittman: The Transformation of Chicago Political Economy", *Econ Journal Watch*, April 2005

petty promises.<sup>79</sup> The insurmountable evidence in favor of voter irrationality remains the Achilles heel of democratic government. The problem is not mere lack of information; it is that voters badly interpret and judge the information they do have. Unfortunately, according to Caplan, the problem lies in the fact that the relative cost of learning about a particular issue is very high compared to the cost of not knowing that information. This really becomes an issue when those ignorant people vote, which they will do because of the good feeling it gives them.<sup>80</sup> Other economists, such as Meltzer and Richard, have added that as industrial activity in a democracy increases, so too do the people's demands for welfare. However, because of the median voter theorem, only a few people actually make the decisions in the country, and many may be unhappy with those decisions. In this way, they argue, democracies are inefficient.<sup>81</sup>

This could result in a wealth disparity in such a country, or even racial discrimination. Fierlbeck points out that such a result is not necessarily due to a failing in the democratic process, but rather, "because democracy is too responsive to the desires of a large middle class increasingly willing to disregard the muted voices of economically marginalized groups within its own borders."<sup>82</sup> The criticism remains that the will of the democratic majority may not always be in the best interest of all citizens within the country or beneficial to the future of the country itself.

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<sup>79</sup> Ibid

<sup>80</sup> Ibid

<sup>81</sup> Meltzer, Allan and Richard, Scott. A rational theory of the size of government. Carnegie-Mellon University, (Vol. 89, No. 5 1981) p 914

<sup>82</sup> Shrag, P. "California's elected anarchy." *Harper's*, 1994. 289(1734), pp 50-9.

Furthermore, some have argued that voters may not be educated enough to exercise their democratic right. A population with low intellect may not be capable of making beneficial decisions. They argue that the lack of rationality or even education is being taken advantage of by politicians that compete more in the way of public relations and tactics, than in ideology.<sup>83</sup> While arguments against democracy is often taken by advocates of democracy as an attempt to maintain or revive traditional hierarchy in order to justify autocratic rule, many extensions have been made to develop the argument further.<sup>84</sup> This is interesting given Lipset's 1959 essay<sup>85</sup> about the requirements for forming democracy, where he found that good education was present in almost all emerging democracies. However, education alone cannot sustain a democracy, though Caplan did note in 2005 that as a person's education increases, their thinking tends to be more in line with most economists.

One such argument is that the benefits of a specialized society may be compromised by democracy. As ordinary citizens are encouraged to take part in the political life of the country, they have the power to directly influence the outcome of government policies through the democratic procedures of voting, campaigning and the use of press. The result is that government policies may be more influenced by non-specialist opinions and thereby the effectiveness compromised, especially if a policy is very technically sophisticated and/or the general public inadequately informed. For example, there is no guarantee that those who campaign about the government's economic policies are themselves professional economists or academically competent in this particular discipline, regardless of whether they were well-educated.

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<sup>83</sup> Head to head: African democracy

<sup>84</sup> Ibid

<sup>85</sup> Bendix, Reinhard and Lipset, Seymour. Political Sociology: An essay with special reference to the development of research in the United States of America and Western Europe. P. 79

Essentially this means that a democratic government may not be providing the most good for the most amount of people. However, some have argued that this should not even be the goal of democracies because the minority could be seriously mistreated under that purported goal.<sup>86</sup>

Additionally, some political scientists question the notion that democracy is an "uncontested good."<sup>87</sup> If we base our critique on the definition of democracy as governance based on the will of the majority, there can be some foreseeable consequences to this form of rule. For example, Fierlbeck<sup>88</sup> points out that the middle class majority in a country may decide to redistribute wealth and resources into the hands of those that they feel are most capable of investing or increasing them. Machiavelli put forth the idea that democracies will tend to cater to the whims of the people, who then follow false ideas to entertain themselves, squander their reserves, and do not deal with potential threats to their rule until it is too late to oppose them. He put forth a cyclical theory of government where monarchies always decay into aristocracies that then decay into democracies, which decay into anarchy, then tyranny, then monarchy.<sup>89</sup>

More recently, democracy is criticized for not offering enough political stability. As governments are frequently elected on and off there tend to be frequent changes in the policies of democratic countries both domestically and internationally. Even if a political party maintains power, vociferous, headline grabbing protests and harsh criticism from the mass media are often enough to force sudden, unexpected political change. Frequent policy changes with regard to

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<sup>86</sup> Arrow, Kenneth and Lind, Robert. Uncertainty and the Evaluation of Public Investment Decisions. (Vol. 60, 1970) p 364

<sup>87</sup> Fierlbeck, K. Globalizing Democracy: Power, Legitimacy and the Interpretation of democratic ideas. (Manchester University Press, New York. 1998) p. 13

<sup>88</sup> See [http://en.wikipedia.org/wiki/Criticism\\_of\\_democracy](http://en.wikipedia.org/wiki/Criticism_of_democracy)

<sup>89</sup> Ibid

business and immigration are likely to deter investment and so hinder economic growth. For this reason, many people have put forward the idea that democracy is undesirable for a developing country in which economic growth and the reduction of poverty are top priority.<sup>90</sup>

The constitutions of many countries have parts of them that restrict the nature of the types of laws that legislatures can pass. A fundamental idea behind some of these restrictions, is that the majority of a population and its elected legislature can often be the source of minority persecutions, such as with racial discrimination. Some countries throughout the world have judiciaries where judges can serve for long periods of time, and often serve under appointed posts. This is often balanced, however, by the fact that some trials are decided by juries. While many, like Wittman, have argued that democracies work much the same way as the free market and that there is competition among parties to prevent oppression by the majority, others have argued that there is actually very little competition among political parties in democracies due to the high cost associated with campaigning.<sup>91</sup>

Plato's *the Republic* presents a critical view of democracy through the narration of Socrates: "*Democracy, which is a charming form of government, full of variety and disorder, and dispensing a sort of equality to equals and unequaled alike.*"<sup>92</sup> In his work, Plato lists 5 forms of government from best to worst. Assuming that *the Republic* was intended to be a serious critique of the political thought in Athens, Plato argues that only Kallipolis, an aristocracy led by the unwilling philosopher-kings (the wisest men) is a just form of government. Some Right-

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<sup>90</sup> Head to head: African democracy. BBC News

<sup>91</sup> Becker, Gary S. Competition and Democracy; 1 J.L. & Econ. 105 (1958)

<sup>92</sup> Plato. *The Republic of Plato* (London: J.M Dent & Sons LTD.; New York: E.P. Dutton & Co. Inc.), 558-C.

Libertarians criticize democracy because they claim it is impractical or immoral.<sup>93</sup> The criticism for impracticality is essentially that in order to be logically consistent people would need to vote on all action, and that this would lead to the extermination of the human species. Others criticize democracy for being immoral on the grounds that it coercively involves people, i.e. it violates voluntarism and property rights.<sup>94</sup>

The other forms of government place too much focus on lesser virtues, and degenerate into each other from best to worst, starting with timocracy, which overvalues honor. Then comes Oligarchy, overvaluing wealth, which is followed by Democracy. In Democracy, the oligarchs, or merchant, are unable to wield their power effectively and the people take over, electing someone who plays on their wishes, by throwing lavish festivals etc. However, the government grants the people too much freedom, and the state degenerates into the fourth form, Tyranny/mob rule.<sup>95</sup>

Some thinkers believe democracy will result in the people's distrust and disrespect of governments or religious sanctity. The distrust and disrespect pervades to all parts of society whenever and wherever there is seniority and juniority, for example between a parent and a child, a teacher and a student. This in turn is suggested to be the cause of frequent divorces, teenage crimes, vandalism, hooliganism and low education attainment in Western societies, all of which are lower in Asian societies. It could be argued that Democracy follows essentially a doctrine of moral relativism, where no particular moral code is privileged

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<sup>93</sup> Karsten, Frank. 'Democracy Can't Be Fixed. It's Inherently Broken', Lew Rockwell, April 13, 2012.

<sup>94</sup> Sampat, Mike. "Editorial betrays a Western bias". Toronto Star.

<sup>95</sup> Michels, Robert. Political Parties – A Sociological Study of the Oligarchical Tendencies of Modern Democracy, Jarrold & Sons. London, 1916.

by any form of reasonable evidence or argumentation to be true or more worthy; only what a particular group of people (that defines a particular nation) would agree to value, is to be given any value. This intrinsic property of the democratic thesis appears to conflict the very meaning of 'moral values' in a way that still demands serious scholarship and careful academic consideration.<sup>96</sup>

Democracy is also criticized for frequent elections due to the instability of coalition governments. Coalitions are frequently formed *after* the elections in many countries and the basis of alliance is predominantly to enable a viable majority, not an ideological concurrence. This opportunist alliance not only has the handicap of having to cater to too many ideologically opposing factions, but it is usually short lived since any perceived or actual imbalance in the treatment of coalition partners, or changes to leadership in the coalition partners themselves, can very easily result in the coalition partner withdrawing its support from the government.<sup>97</sup>

Democratic institutions work on consensus to decide an issue, which usually takes longer than a unilateral decision.

Mere elections are just one aspect of the democratic process. Other tenets of democracy, like relative equality and freedom, are frequently absent in ostensibly democratic countries. Moreover, in many countries, democratic participation is less than 50% at times, and it can be argued that election of individual(s) instead of ideas disrupts democracy. The new establishment of democratic institutions in countries where the associated practices have as yet been uncommon or deemed culturally unacceptable, can result in institutions that are not sustainable

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<sup>96</sup> Minogue, K. *The Servile Mind: How Democracy Erodes the Moral Life*, Encounter Books, 2010.

<sup>97</sup> [en.wikipedia.org/wiki/Criticism\\_of\\_democracy](http://en.wikipedia.org/wiki/Criticism_of_democracy)

in the long term.<sup>98</sup> One circumstance supporting this outcome may be when it is part of the common perception among the populace that the institutions were established as a direct result of foreign pressure. Sustained regular inspection from democratic countries, however effortful and well-meaning, are normally not sufficient in preventing the erosion of democratic practices. In the cases of several African countries, corruption still is rife in spite of democratically elected governments, as one of the most severe examples, Zimbabwe is often perceived to have backfired into outright militarism.

### **2.3 Ethnicity and its effects**

Ethnicity in Kenya cannot be treated adequately without putting it within historical perspective. Kenya has been plagued by the scourge of ethnic manipulation throughout its colonial and post-colonial history. Colonial policies created the breeding ground for later ethnic polarizations.<sup>99</sup> In much of the discourse, the tendency is to treat entire groups as homogenous and to assume they exhibit uniform behavior. Essentially, the problem in Kenya stems from the persistent and increasing ‘ethnicization’ of the political sphere. Linked to this process of ethnic manipulation is the instrumentalization of political power to gain, secure and entrench economic advantage. Kenyan politics through the reign of its three post-colonial presidents – Jomo Kenyatta, Daniel Arap Moi and Mwai Kibaki – degenerated into a realm of ethnic contestation. Progressively, over the 45 years of the country’s independence, an increasingly powerful presidency rendered the quest for political power a zero-sum game. Ethnic power blocks were manipulated to maintain a stranglehold on government to the advantage of the groups favored by the president

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<sup>98</sup> Ibid

<sup>99</sup> Murithi T. *Kenya A year after the crisis: The Quest for Electoral Reform and Transitional Justice*. Institute for Security Studies, Situation Report, 2009.

of the day. This was to the detriment of the ethnic groups that were not able to obtain the patronage of the ruling president and party.<sup>100</sup>

Some communities or regions were excluded from the mainstream of development because they did not fall within the parameters of what the colonial authorities considered to be worth developing. Inequalities between regions and ethnic suspicions have deepened and become a marked feature of politics in contemporary Kenya, putting democracy in question. Ethnic polarization and the mobilization of ethnic sentiments by political leaders during campaigns are partly to blame for elections that go sour. Furthermore, the fact that both the police and military are perceived historically to be recruited along ethnic lines to protect the incumbent's tenure of office has increased the likelihood of their breaking down along ethnic lines in a crisis and being either unable or unwilling to maintain law and order impartially.<sup>101</sup> This means election violence may proliferate and intensify for a number of months, and that politicians and businessmen may choose to misuse the youth as guns for hire to fight their attackers rather than call in forces whose loyalties may not necessarily be counted on, the problem of ethnic distrust in elections is undeniably a dynamic to reckon with.

Kenya is host to over 43 tribes; the average person identifies with the tribe and values the tribe. Politics uses ethnicity to distribute resources yet ethnicity is a social construct; the society shapes and cultures you into being you who you are and teaches you coherence of the customs you pledge allegiance to. The elite and the political class use ethnicity to gain their own ends - They

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<sup>100</sup> Ibid

<sup>101</sup> Patel, P. *Multiparty elections in Kenya*. Research fellow, London school of hygiene and Tropical medicine. *Revisia Ciencia Politica*, volumen xxi, No1,2001

are not promoting public good but using such as a vehicle to gain their own selfish interests. Symbols, historical events, common songs, etc, all rally people together to support politicians. Political issues then become predominantly associated and synonymous with conflicts. Politicians then become war entrepreneurs promoting their selfish gains ones they take office which is then followed by targeted deprivation and if the community does not redeem itself, it bears the brunt. Ethnicity is a falsehood, it is not a natural phenomena but a social construction that societies should shun when looking to achieve greater matters of national interest.

As a result of prejudice, ethnic bigotry has seen treatment of other tribes with hatred, contempt, and intolerance. The mind of a bigot is like the pupil of the eye, the more you pour upon it, the more it will contract. Also, some communities have done better than others which are poorer, less well developed, and more marginalized from the mainstream. This in turn has generated feelings of resentment and powerlessness, sentiments that can and have been mobilized violently. Furthermore, there is a large and growing under-class of urban poor who are not landowners and are unlikely ever to be landowners; this cadre of Kenyans, especially living in urban slums, and afflicted by poverty, engage in the electoral violence more easily.<sup>102</sup>

## **2.4 Electoral Issues: Land, poverty and the economics of elections**

### **2.4.1 Land**

Kenya is an intrinsic agrarian society, making land an integral factor of production. Land has been an acute issue in the majority of conflicts since Kenyan independence. Fifty years later; it remains a leading cause of conflict and an emotive issue. In a country where the vast majority

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<sup>102</sup> *Post-Election Violence, 2007 – How Deep Are the Roots? The Facts And Surrounding Circumstances Relating To The Post Election Violence.* p. 33

depends on agriculture for their livelihoods, there is enormous demand for fertile land. However, only 20% of Kenya's land is suitable for agriculture, with the rest being arid and semi-arid, this leads to a huge population scrambling for a very small prime agricultural land. Land is also not only essential for agricultural production but is also a symbol of wealth. Land has a cultural and family value, thus the dire need for most people to be associated with it.

Weak property rights institutions were a marked feature and a central component in the displacement and Violence of 1992, 1997, 2002, and 2007, and have significantly obstructed Kenya's chances for sustainable development even through 2013. Prior to the 1992 multiparty elections, property rights institutions in Kenya were thought to be relatively strong.<sup>103</sup> Land was not allocated equitably under Kenyatta or Moi, but formal understandings of property rights and ownership were fairly clear. These Administrations made significant investments in the Ministry of Land's Department of Land Adjudication and Settlement (DLAS), which worked to establish and enforce rules regarding property acquisition and disposal<sup>104</sup>. When land disputes arose, the DLAS used its division leaders to resolve them, relying on a regulatory framework that was enforced by local police.<sup>105</sup>

Land related grievances were among the underlying causes of the violence that followed Kenya's disputed presidential elections results in 2007. Some communities such as those in the worst affected Rift Valley Province, invaded land that did not legally belong to them but which they perceived their birth right. More recently, conflict in the coastal regions have been driven in part

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<sup>103</sup> Damdinjav, M. et al. *Institutional Failure in Kenya and a Way Forward*. Journal of Political Inquiry at New York University, Spring Issue (2012)

<sup>104</sup> Ibid

<sup>105</sup> Ibid

by land related interests. When interviewed, Atsango Chesoni affirmed that land disputes date back to the colonial times when British colonists displaced people from Kenya's fertile highlands and either resettled them elsewhere or left them landless, effectively turning them into squatters. These issues were not addressed at independence and still remain unattended even 50 years post independence. Land was not redistributed in a fair, transparent manner, instead, the incoming elites perpetuated these injustices, thus the legacy of multiple displacements; initially the colonial experience then the wrath of the various regimes that have reigned over the years.<sup>106</sup>

Recent land reform debates in Kenya have rekindled heated discourses. Since 1992 when multiparty politics were finally introduced in Kenya, land related tensions are exploited by politicians, often during campaigns, even resulting in pre-election violence. Almost 80% of population at the coast lacks land titles, large chunks of land there were misappropriated by the governments that were in power then, much of it distributed to outsiders in a system of political patronage. During the 2012 election campaigns, there was an emerging chorus of public figures who came out condemning politicians against raising the issue of land and "historical injustices". What was at issue was supposedly so divisive and volatile that it could throw Kenya into yet another cycle of violence. During the campaign, Raila Odinga, one of the CORD luminaries caused a stir when he implied that Uhuru Kenyatta was among those in possession of huge tracks of land across the country and could therefore not reform the sector. In a rejoinder, Kenyatta responded by claiming he was clean and that Odinga should respond over his involvement with the Kisumu Molasses Plant. The National Cohesion and Integration Commission (NCIC), through its chairman Mzalendo Kibunja stated that such statements were a form of incitement.

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<sup>106</sup>IRIN Briefing: *Land reform key to Kenya's future*, 2012

Kibunja was contradicted by Constitution Implementation Commission (CIC) chairman Charles Nyachae who said candidates cannot be prevented from discussing land issues during their campaign. The police Inspector General David Kimaiyo whose name appears in the Ndungu Land Commission's report on illegal/irregular allocation of public land also added his voice asking for politicians not to debate land matters. Rejection of debate on land matters also came from the Anglican Church of Kenya (ACK). All this mudslinging is a clear indication we are not ready to move on but will shift blames, accusations and counter-accusations for as long as democracy is to be disregarded. Until landless Kenyans can be awarded with title deeds, a lot will still be left to desire of our systems and institutions.

#### **2.4.1.1 Ndung'u Land Report**

Past recommendations on land reforms from the report of the commission of inquiry into the illegal/irregular allocation of public land popularly known as the Ndung'u report after the commission's chairperson were not implemented. The report found illegal allocation of public land in Kenya to be one of the most pronounced manifestations of corruption. Among its recommendations, the report called for all allocations of public land to be nullified and the land repossessed, the investigations and prosecution of public officials who participated or facilitated the illegal allocation, and recovery of all monies and proceeds acquired as a result of it. The Ndungu report was not implemented for lack of political will but the current constitution fills the gap. There is hope in land reforms with the establishment of National Land Commission, however, the commission's credibility rests on its independence as top government officials have vested interests in land and may hinder it from yielding positive results.<sup>107</sup>

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<sup>107</sup> Republic of Kenya, Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Pubic Land (The Ndungu Report), Nairobi: Government Printer, June 2004, p. 8.

With respect to property rights, the 2010 Constitution takes away considerable power from both the executive and the Ministry of Lands, and redistributes it to other bodies such as the National Land Commission (NLC)<sup>108</sup> and implementing sweeping land rights reforms, including the devolution of lands grabbed illegally by the state. Along With NLC, management of these lands, constitutionally mandated land allocation powers are given to the new forty-seven semi-autonomous local governments.<sup>109</sup> Considerable resources will be needed in order for institutional capacity building to take place and for property rights institutions to become more salient.<sup>110</sup> Thus, even with effective implementation of the devolution reforms, property rights institutions will be susceptible to political influences.

#### **2.4.2 Poverty**

Most people living in Africa today are poor. Too many of them are among the absolute poor. Three quarters of the population of Africa live in squalor conditions with under a dollar a day. Sadly the knowledge gap increases every top of the hour. J.M. Kariuki once said, “*Kenya has become a nation of 10 millionaires and 10 million Kenyans*”. This statement cannot get better, yet, poverty is a condition brought about by poor leadership with poor policies.

Poverty reduction efforts have traditionally been guided by the paternalist ‘welfare’ approach where the state becomes the benefactor of the poor who must wait upon ‘the generosity and goodwill of the giver’. A charitable approach to development also allows richer nations to keep

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<sup>108</sup> The Land Development And Governance Institute, 2012.

<sup>109</sup> Boone, C. Conflict over Property Rights in Land in Africa’s Liberalized Political Economies. Workshop in Political Theory and Policy Analysis. Accessed on October 15, 2012. (2009)  
<[http://www.indiana.edu/~workshop/colloquia/materials/papers/boone\\_paper.pdf](http://www.indiana.edu/~workshop/colloquia/materials/papers/boone_paper.pdf)>

<sup>110</sup> Ndonga, S. Kenya: MPs Urged to Prioritise National Land Commission. All Africa. Accessed on November 29, 2012. <<http://allafrica.com/stories/201207180013.html>>

development assistance at the level of grace and favor, reinforcing dependencies and sharpening misleading perceptions of the alleged inadequacies of the developing world.<sup>111</sup>

Haggard and Kauffman demonstrated that the effects of democracy on social policy are clearly conditioned by the distribution and organization of interests. They highlighted the importance of historical legacies, drawing attention to the constraints that these place on countries in terms of the social policies they can pursue. Critical realignments and political coalitions produced distinctive authoritarian models, which, in turn, created constituencies that influenced the course of social policy in new democracies.<sup>112</sup>

Kenya is one of the African states that have the highest percentages of poverty, with about 51 percent of Africans living below the poverty line. Africa also has the greatest levels of economic inequality: The richest quintile of the population captures 65 percent of the national income while the lowest quintile shares in only a very small percentage of the wealth. African states are unique in terms of governance. In Kenya primordial structures hinder effective governance based on Universalist concerns. The norm too often is pursuit of particularistic concerns within hierarchical sociopolitical structures. Effective policies must move the concerns of African states from the particular to the universal<sup>113</sup>. High levels of poverty and inequality not only lower the quality of democracy, but may pave the way for the emergence of authoritarian populists and

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<sup>111</sup> [http://www.humanrightsinitiative.org/publications/hradvocacy/cpa\\_chri\\_human\\_rights\\_module.pdf](http://www.humanrightsinitiative.org/publications/hradvocacy/cpa_chri_human_rights_module.pdf)

<sup>112</sup> Haggard and Kaufmann. *Poverty, Inequality, and Democracy: A Conference of the Network of Democracy Research Institutes (NDRI) organized and cosponsored by The International Forum for Democratic Studies, The Center on Democracy, Development, and the Rule of Law, The Institute for Public Affairs, with the financial support of the United Nations Democracy Fund (UNDEF). (Bratislava, Slovakia, April 26–28, 2009)*

<sup>113</sup> Ibid

democratic backsliding. Therefore, addressing the social question, which warrants attention in its own right, is critical to the sustainability and quality of democracy.

### **2.4.3 The economics of elections**

Kenya is strategically and centrally located in the East Africa region and has consolidated its status as the gateway to East Africa and a leading trade hub in the region. It is considered a business leader and first choice destination for investors co-coordinating business and humanitarian activities in the region. The Kenyan Economy is diversified; Tourism, tea, coffee production for export, floriculture and horticulture, banking and professional service and telecommunication are all areas of the economy experiencing remarkable growth. Transport and infrastructure continue to be revived as the country targets investment opportunities. Kenya tops the list of highest exporting countries in the 19-member East and Southern African trading bloc, emerging as the top performer in the regional East African market. In recent years, Kenya has also been labeled as a viable business hub in the East African region and many foreign companies have set up assembly plants in Kenya to penetrate the lucrative markets in the region. As a result, Kenya has become a focus of attention for international businesses looking to penetrate the emerging markets of East Africa.<sup>114</sup> Kenya is also viewed as an ally of the West and a stable and central state in the fight against terrorism.

Aside with all the political showdown and strategic guesswork surrounding belligerence and political correctness in Africa, elections gone bad resulting to any form of violence in Kenya would be detrimental to East Africa, Africa and the global economy. Transportation would be disrupted, exports to the west, East and the rest of Africa would stall, and interest and insurance

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<sup>114</sup> Kenya Top Trading Hub In Comesa: <http://www.africa-business.com/features/kenya-dubai-business.html>

rates would rise two folds, making commerce more costly within and without. Kenya, which ranks in the top 5 in Africa economic stability in both exports and imports, would bear the greatest brunt, with lives lost and its capital destroyed. In the event that Kenya goes into electoral/civil war, the bloodshed would cut Kenya's tourism industry in half, and literally throw Kenya's Gross Domestic Product to the dogs virtually overnight. These negative economic effects would ripple throughout East Africa, as Kenya is a lynchpin economic and transit hub, and has persisted for the past many years. Taken together, these effects would subtract a good number of billions from the world GDP.

The post election violence in Kenya (P.E.V. 2007) had serious economic ramifications throughout East Africa, particularly for the landlocked countries of the Great Lakes region (Uganda, Rwanda, Burundi, and eastern parts of the Democratic Republic of Congo). These countries depend upon Kenyan infrastructure links for vital imports as well as export routes.<sup>115</sup> Significant shortages of gasoline were reported in Uganda as well as Zanzibar following the elections. The economic consequences of the post-electoral crisis were substantial. Kenyan citizens experienced a net increase in the prices of basic commodities such as bread, milk, flour and vegetables. Nationally, the loss of revenue from regional and international trade as well as tourism and exports of agricultural produce was estimated at close to US\$30 million a day or approximately US\$2 billion over the two-month period from the end of December 2007 to

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Mohamed, Nura. Capacity Challenges in Post-conflict and Transitional Situations: *The Role of Leadership in Developing Capacity in Post-Conflict and Transitional Situations: Kenyan Case* (Kenya Institute of Administration. Nairobi Kenya 17-19 March, 2010)

February 2008.<sup>116</sup> When the losses to neighboring countries are factored in, the cost of the violence would be even higher.

In the 1960's Kenya was at the very same pedigree with Singapore and South Korea. Today, the World Bank records Kenya Per capita income at \$1,700, Singapore at \$60,000 and South Korea at \$30,000. This means that if Kenya had grown as fast as Singapore, the Kenya economy would be about 35 times bigger than it is today. Kenya would not have 3 million Kenyans settled outside Kenya who are there for economic opportunity. This is faulted on poor economic governance and independence and lack of political responsibility.<sup>117</sup>

The current Kenya is similar to what inspired the Taxed Enough Already popularly known as TEA party movement that gave rise to the Economic Independence of U.S. in the late 1700's. In 2010 the TEA party put a halt to government growth through changing the power structure in D.C. For any country to achieve economic independence and also sustain this independence there is need to check the tax growth.<sup>118</sup> There is need for a lean government that does not keep reaching into the pockets of Kenyans.

For the past 50 years Kenya Government has tried to grow Kenya and failed, not realizing that it has blindfolded itself by awarding its legislature executive, judiciary, huge pay cheques. It is time for economic independence. Whereas Government can play a role as investor, it is when

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<sup>116</sup> Murithi T. *Kenya A year after the crisis: The Quest for Electoral Reform and Transitional Justice*. Institute for Security Studies, Situation Report, (2009), p 9

<sup>117</sup> Ibid

<sup>118</sup> Jamhuri Magazine: Independent Candidates & Economic Independence of Kenya Independent Candidates & Economic Independence of Kenya. Jamhuri Team (27/04/2012)

people employed in government become developers that the biggest waste occurs. Developers should be entrepreneurs that given the incentive will give a return in a system of transparency and accountability.<sup>119</sup> On the flip side, a diverse argument is that developing countries including Kenya are characterized by significant election-year increases in public expenditures and deficits. Though conventional wisdom is that high expenditures or deficits may help an incumbent get re-elected, Brender and Drazen<sup>120</sup> find no evidence that deficits help an incumbent get reelected in these democracies. This suggests that the increases in spending in election years may reflect something other than the incumbent's attempt to gain votes. Political cycle in new democracies reflects the fragility of democracy in these countries, that is, the less than full belief of citizens in the efficacy of democracy in producing good economic results. This perception leads governments to expend resources at points where democracy may be especially vulnerable in order to convince the public that "democracy works". The resulting increase in expenditures and deficits may be significant.<sup>121</sup>

## **2.5 The role of civil society**

Civil society is the entire range of organized groups and institutions that are independent of the state, voluntary, and self-generating and self-reliant. This includes non-governmental organizations, professional associations, mass media, universities, and social and religious groups. Within established and emerging democracies saddled with anaemic democratic institutions and systemic power imbalances, civil society must take a leading role in preventing democratic backsliding.

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<sup>119</sup> Ibid

<sup>120</sup> Drazen and Brender. *Electoral Economics in New Democracies: Affecting Attitudes About Democracy* The Foerder Institute for Economic Research and The Sackler Institute of Economic Studies, Working Paper No. 11-2006 August, 2006.

<sup>121</sup> Ibid

Unregulated by restrictive legislation, civil society can help establish the institutions and mechanisms necessary to irritate autocratic regimes. While generally subject to fewer arbitrary and unwarranted restrictions, civil society operating in established, market-orientated democracies, are forced to compete with the outsized influence of mammoth corporations and business interests. At its core, fostering resilient and pluralistic democracies is a matter of ensuring that a wide spectrum of society is able to have their voices and interests recognized within governmental processes.

Over time, groups that have historically been oppressed and confined to the margins of society can organize to assert their rights and defend their interests as well.<sup>122</sup> Democracy cannot be stable if people only associate with others of the same religion or identity. When people of different religions and ethnic identities come together on the basis of their common interests as women, artists, doctors, students, workers, farmers, lawyers, human rights activists, environmentalists, and so on, civic life becomes richer, more complex, and more tolerant.

In a democracy, civil society groups have respect for the law, for the rights of individuals, and for the rights of other groups to express their interests and opinions. Part of what the word “civil” implies tolerance and the accommodation of pluralism and diversity. Civil society organizations have been working bravely for decades on a myriad of malignant crises of political accountability, poverty, human rights, and social disempowerment. At the time when politicians were locked in an impasse immediately following the December elections and in early January

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<sup>122</sup> \_\_\_\_\_What Civil Society Can Do to Develop Democracy. Presentation to NGO Leaders. (Convention Center, Baghdad February 10, 2004)

2008, it was Civil Society Organizations (CSOs) that took the initial lead to encourage mediation and peace building. In the aftermath of the violence, CSOs played a significant role in implementing relief operations for internally displaced people. Kenyan civil society organizations were able to provide both Commissions with information, contacts and expertise related to the electoral crisis and post-election violence.

A vibrant civil society, supported by a free press and other independent organizations, not only supports electoral outcomes by ensuring fairness, legitimacy, and compliance, it also supports post-electoral follow-through, in the form of government accountability, transparency, and rule following. Civil society engages in a daily struggle to head off repressive laws, expose corruption, and ensure the fair representation of all groups, interests, and ideas. It must strive to compel government accountability, and to assure that officeholders continue to play by the rules of the game.<sup>123</sup> Strong civil society organizations in a transition can provide constructive channels for democratic participation. Civil society organizations can help rebuild citizens' trust in government, promote their rights and interests, and encourage the inclusion of minorities and disenfranchised groups. Civil society will also have its vital role to play in continuing with humanitarian relief, promoting civic education and reconciliation across the country.

Election monitoring involves both civil society groups and the international community to ensure that the results of an election express the will of the voting public. International groups have monitored elections to ensure their integrity. A true democratic transition in Kenya will require that civil society can take a more active role than what has been previously possible. However,

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<sup>123</sup> Gilley B. Civil Society, Democracy, and Elections. IIP Digital. 2010

such a partnership between government and CSOs simply cannot exist if leadership still feels threatened by democratic growth. The energy and passion of the Kenyan people that culminated in the fall of 2007 elections enhanced the civil society; it was a vital and important way for the democracy building in Kenya.

Access to information is essential to the wellbeing of a democracy, One; because it ensures that citizens make informed choices rather than act out of ignorance and two; because information is power, it ensures that elected representatives uphold their oaths of office and carry out the wishes of the people. Media is referred to as fourth estate as it is known to be one of the most powerful institutions that is capable of making or breaking a nation.

As part and parcel of CSOs, media wields immense power owing to the huge public relations apparatus and machinery employed to transmit information from one corner of the country to the other. Unfortunately, the media in Kenya today has degenerated to unbelievable lows, regrouping into tribal cocoons and resorting to sifting through items, giving more weight to those that suit their own interests while relegating matters of national importance to the rear, in a fallacy known as ‘editorial policy’. The role of the media has become controversial with media houses openly displaying open partiality in their coverage. News reporting is supposed to be objective, but journalists are people, with feelings, opinions and preconceived ideas. The influence of the mass media affects politics in Kenya a great deal. Borrowing from the ‘Magic Bullet Theory’<sup>124</sup>, the public's point of view is curved by the coverage, weight and priority given

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<sup>124</sup> Davis, D.K. & Baron, S.J. "A History of Our Understanding of Mass Communication". In: Davis, D.K. & Baron and S.J. (Eds.). *Mass Communication and Everyday Life: A Perspective on Theory and Effects* Belmont: Wadsworth Publishing. (1981). Pp 19-52

to political news items. When the public's views are affected, the voting trends are too, hence electing new leadership into office, who then get to rule the country; these makes media the vanguard of determining the future of our country.

Media personnel can influence the selection of candidates and issues during election time. This is based on opinion polls, debates, coverage, a case in point portraying the right honorable Raila Odinga as the man to beat in the 2013 polls or a “two-horse race contest”. The types of candidates that emerge have also been altered by the new media politics. Political recruiters have become extremely conscious of a candidate's ability to look impressive and to perform well before the cameras. Yes we need groomed politicians, but the coat is just that!<sup>125</sup>

Media has in many occasions played a key role in fueling violence, the Rwanda genocide a case in point where the media played a significant part both internally and internationally. The genocide was among the most appalling catastrophes of the 20th century. Prior to the genocide, radio stations and newspapers were carefully used by the conspirators to dehumanize the potential victims, Rwanda's Tutsi minority. During the genocide, radio was used by the Hutu extremist conspirators to mobilize the Hutu majority, to coordinate the killings and to ensure that the plans for extermination were faithfully executed. While a series of terrible massacres of Tutsi were carried out and as the signs of ever-increasing violence grew, Rwanda was totally ignored by the international media. When the genocide came, the erratic media coverage largely conveyed the false notion of two tribes of ‘African savages mindlessly slaughtering each other as

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<sup>125</sup> <http://www.nairaland.com/search/georgia/7>

they had done from time immemorial'. As a result, there was little public pressure in the West for governments to intervene.<sup>126</sup>

You will recalled that some of the vernacular FM stations contributed to a climate of hate, negative ethnicity and many incited violence over the year of election in Kenya. These include the vernacular music and negative ethnicity. Since the 1930s until the mid- 1990s the media had been controlled formally by the state. The media was subject to harassment, torture, imprisonment, and fines for expressing their views. Censorship and self censorship also ensued, stemming from fear of reprisals by the state. After the 2002 elections in Kenya, the Government engaged in a process of liberalization. This included licensing many new stations. These changes took place in the absence of a new regulatory and legislative framework, leading to something of an uncontrolled free for all. As such, certain media took advantage of this lacuna and began to operate freely and sometimes recklessly and irresponsibly. In the 2007 elections, live broadcast of vote tallying of the 2007 election results at the KICC was cut off (and later banned) when visible acrimony of political leaders at the tallying hall became too obvious. This inflamed tensions, bringing the country to the brink. The media must rise above propaganda, and uphold democracy for the collective good of this nation.<sup>127</sup>

The media has great influence and they are highly influential and the public lends credence to what they hear or see reported. As such, the media must set agenda with powerful effects but the audience bears the greatest responsibility depending on how they decode and interpret messages.

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<sup>126</sup> UNESCO. Communication and Information. Communicating for development: Capacity building of women radio journalists, 2012

<sup>127</sup>[www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)

Thus, responsible, accurate, timely and veracious information ought to be disseminated to the public at every juncture. As it stands currently, the media, political parties and other stakeholders do not seem to inspire public confidence in their abilities to successfully conduct their roles.

Kenya is predominately Christian, with approximately 45% being Protestant and 33% being Roman Catholic. This vast majority means that the Church does play a key role in politics. The Church's role in politics stems historically from how the British used Christian missions to penetrate communities and spread Christian messages laced with British culture. During this colonial era, the Church was intimately involved with politics.<sup>128</sup> The movement for constitutional reform following the 1992 elections was energized by calls for a new constitution by the Church. Religious leaders should use their religious teaching opportunities to educate their followers on their social consciences. Professional religious persons should also take public stands in their professional areas and demand public adherence to ethical professional conduct.

In the Rwanda genocide event, Christians could not appeal to the Christian conscience to address the situation. Even those in positions of authority could not raise their conscience above the criterion of ethnicity. Christianity, for some, is like a coat that can be put on only when it is needed; when it is not, it is forgotten in the wardrobe. This is the sign that Christianity is still on the periphery of the African way of life. Religious leaders should set an example by encouraging participatory decision-making in the religious community especially when setting priorities and allocating resources. Motivated and strengthened by their moral and spiritual views, the church

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<sup>128</sup> Roberts, M. Conflict Analysis of the 2007:Post-election Violence in Kenya, (September, 2009) p. 8

must fearlessly denounce irregularities both in institutions and in leadership. The church must break loose from the shackles of dominion in the spirit of democracy.<sup>129</sup>

## **2.6 Public opinion**

Kenyans strongly support democracy despite frustration in some years with unfair elections, corruption and unresponsive political leaders. However, though Kenyan populace is overwhelmingly in favor of democracy in principle, individuals differed when asked about its practice. All were also unanimous that many political parties are needed to make sure that [citizens] have real choices in who governs them. The 19 interviewees felt that over the years since independence and the entrance of multiparty politics that elected leaders generally have constantly failed to pay attention to the people and they generally perceived government officials as crooked. Yet, majority agreed that there is light at the end of the tunnel, Kenya having passed the new constitution passed in 2010.

Kenyans overwhelmingly support the International Criminal Court (ICC) at The Hague, where the alleged ringleaders of the violence that followed the country's disputed election in 2007 are being tried. However, the majority of voters support Uhuru Kenyatta who is among those the ICC indicted. Therefore, it seems that support for the ICC may play little or no part in determining voter intentions in the March 2013 elections.

The accredited international and regional observer groups are expected to be impartial. They are also expected to have the financial and logistical capacity to carry out the observation process.

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<sup>129</sup> Tarimo, J. Politicization of Ethnic Identities and the Common Good in Kenya. (Santa Clar University, April 2008).

But the lack of open information channels on elections may lead to the publication of inaccurate and alarming documents on the subject. The impact of opinion polls on the outcome of the 2007 presidential elections are controversial. While politicians seek to downplay the significance of opinion polls on the outcome of the presidential race, it is obvious that the polls are being taken seriously by political campaign strategists, voters and even the presidential contestants.

Majority expressed voter fatigue and apathy asked if they'd vote in the next election. Under the winner takes it all presiding in Kenya, the 'goodies' are not shared equally. Unless this government delivers to the segments of the society that perceive themselves the "underdogs", there may be a repeat of election violence which in result can do huge damage to a budding economy in a short spun of time if there is decent on the ground.

Despite the sometimes overwhelming ambivalence over the role of the media in political and democratic processes, there is popular acknowledgement that the media plays a significant role in society by providing information upon which critical decisions are based. In essence, the media is a key instrument in decision making, providing information, and providing a platform for articulation and aggregation and formation of (public) opinion.<sup>130</sup> However, what is not certain is whether there is a direct relationship between the media and journalism, and political outcomes, or democratic activities and processes.

Since *wananchi* have almost given up on the current regime, Kenya's next president will have to implement the new constitutional dispensation, oversee devolution among other reforms to restore confidence and optimism of Kenyans. Implementation of the constitution or reform is one

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<sup>130</sup> Nyabuga, George. *Mediatizing Politics and Democracy: Making sense of the role of the media in Kenya*. Media Focus on Africa Foundation (Nairobi) p. 4

of the main campaign agenda as Kenyans hope to see how major changes in the system, especially the devolved governments, affect them.

## **2.7 Conclusion**

Creating institutions that channel and manage public participation by individuals and groups in policy making should be high on the reform agenda of Kenya. It has become widely understood that a healthy democracy requires more than elections. That is why most democracy promotion and assistance should focus on supporting civil society and strengthening effective legislative processes. Nations that hold fair elections where the winners are accountable to clear standards of good governance share a key advantage: strong civil society institutions; civil society and democracy are mutually reinforcing. A democratic state cannot be stable unless it is effective and legitimate, with the respect and support of its citizens. The church, media, professional associations, Non Governmental Organizations (NGOs) etc play the role of checks and balances and monitoring, but also vital partners in the quest for this kind of positive relationship between the democratic state and its citizens. In the contemporary Kenya, maximalist democracy would work best, one which, in order to mitigate electoral issues (poverty, land, ethnicity etc), mainstream accountability, inclusiveness and effectiveness, allows citizens to freely choose their government over time through fair elections and accords them adequate participation in national affairs and runs its national affairs in a transparent and accountable manner and promotes national unity.

## **CHAPTER THREE**

### **DEMOCRACY AND ELECTIONS IN KENYA, 2007 – 2012**

#### **3.1 Introduction**

The realization of the democratic promises that underpinned the struggle for pluralistic politics are yet to be achieved; Institutionalization, participation, transparency, and accountability are plausible way forward to true and sustainable democratic election processes. It is within this broad democracy discourses and progress made thus far that the debate about electoral systems and their implications and/or impact on multiparty democratic governance becomes central and timely. Democratic consolidation is not dependent solely upon elections and the nature of electoral system in operation given that various other ingredients are crucial.

The 2007 election between Odinga and Kibaki went terribly wrong; a (purported) near tie in the ballots led to spontaneous as well as politically sponsored violence. The road back to recovery was difficult as the country tried to reconcile ethnic tensions and strengthen institutions to prevent a full blown civil war and/or a recurrence of the same in subsequent elections. The pressure is on the 2013 general election to be free, fair and peaceful. This chapter uncovers the happenings of election years (2007), the role of the CSO, the taskforce enquiry into P.E.V. and the extent to which their recommendations have so far been implemented in readiness for the forthcoming elections.

### 3.2 Reflections on 2007 elections

In order to effectively analyze the post-electoral crisis in Kenya, it is necessary to situate the events that were witnessed in December 2007 and early 2008 within a historical context. It would be limiting to analyze the post-electoral violence in 2007 as an aberration that spontaneously emerged. It would be more accurate to consider what happened as the logical consequence of the continuous political ethnic manipulation that had been taking place prior to the introduction of multiparty politics in 1992. Both the 1992 and 1997 elections were beset by violent ethnic clashes. The root causes of those clashes can be attributed to the twin problems of economic impoverishment and ethnic chauvinism. The tragedy of Kenya's situation is that the seeds of dissension that manifested after the elections in the form of spiraling violence were sown in the very fabric of the post-colonial nation-state, when the country inherited its current constitution, system of government and its electoral system from the British colonial administration.<sup>131</sup>

Records have it that after the 2007 bungled general elections, violence ensued that saw 1,500 dead, 3,000 women raped, and over 350,000 people internally displaced. This was one of the worst carnages in Kenyan history with most bloodshed occurring spontaneously within the first 2 weeks after the announcement of former president Kibaki as the winner of the elections. In his own words, "*I don't know whether Kibaki won the election*" the late Samuel Kivuitu, chair of the now defunct Election Committee of Kenya (ECK) confessed on January 2, 2008.<sup>132</sup> This statement further threw the country into miasma of doubts with regard to the electoral systems

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<sup>131</sup> Murithi, T. *The Kenyan Post-Electoral Crisis and the Prospects for Stabilization*. Center for Dialogue on Humanitarian, Peace and Development Issues in the Horn of Africa, April 2008

<sup>132</sup> Internal Displacement Monitoring Centre (IDMC). *Speedy reform needed to deal with past injustices and prevent future displacement: A profile of the internal displacement situation*, 10 June, 2010

and whether the structures in place could ever be trusted to independently and autonomously run general elections. The violence that erupted could most likely have been prevented. From my perspective, the violence that took place during the Kenyan 2007 elections had its roots in an autonomous executive; an all powerful arm which is solely responsible for appointing the leading electoral commission staff, including the chairmen. One possible explanation is that Kivuitu may have feared acting in contravention to his employer's desires, a testimony to the imbalance of power in the executive branch.

The forthcoming elections scheduled for March 2013 will take place five years after a marred 2007 general elections in a multi-party system where many parties formed coalitions in a scenario the researcher would refer to as "Same script different cast". The Electoral Act used in 2007 was also drafted in such a way as to advantage the incumbent leader.<sup>133</sup> The electoral commission, which mainly depended on Western powers and the international community that fund the elections, was not really autonomous and independent from outside actors, nor was it independent from the executive who appointed its chairperson. Some vote-rigging took place in a number of constituencies despite the claim by many international observers that the elections were open, free and fair.

On the other hand, the judiciary was subjected to the whims of the President because he had the power to hire and fire.<sup>134</sup> In the absence of an independent judicial commission, the members of the judiciary were appointed and could be suspended or dismissed at the discretion of the

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<sup>133</sup> Mangu and Budeli. *Democracy and elections in Africa in the Democratic Republic of Congo: Lessons for Africa*. p. 110

<sup>134</sup> Constitutionally speaking. <http://constitutionallyspeaking.co.za/>

President, making it unlikely that they would uphold results which did not declare him the winner of the Presidential elections.

### **3.2.1 Political responsibility**

Leaders and politicians must take political responsibility and live up to fulfill promises to the people. Within weeks of 2007 general elections, the memorandum of understanding (MOU) that forged the tribal outfits into the NARC alliance and that got Kibaki elected had effectively collapsed. The agreement in the MOU to share power within the cabinet did not occur as the then president broke his election promise and filled many appointed positions with fellow tribesmen and cronies, thus following in the footsteps of his presidential predecessors by selecting people for appointed positions primarily through tribal bigotry and allegiance. This in turn led to discrimination of many people of other tribes who were more qualified. Whether the decision to keep the massive executive power was premeditated, or whether the executive succumbs to certain pressures by his inner circle to hoard power within the tribe once in office, is indistinct.<sup>135</sup> On February 28th, 2008 a political compromise was reached with Raila Odinga agreeing to co-run a coalition government with the then incumbent Kibaki.

### **3.3 The Krieger report: An overview**

The Krieger Report set out to highlight the findings relating to the Independent Review Commission IREC's examination of all the aspects of the 2007 election with a view to ensuring that similar tragic events can be avoided in 2013 and beyond. To that end, six recommendations were developed along with detailed provisions about what ought to be implemented before the next election. The report applied a forward-looking perspective not only to examine the status of implementation of each of the recommendations but also to identify the gaps and weaknesses in

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<sup>135</sup> [http://www.knchr.org/Portals/0/Reports/Waki\\_Report.pdf](http://www.knchr.org/Portals/0/Reports/Waki_Report.pdf)

realizing the same. IREC was appointed by president Kibaki under the Commissions of Inquiry Act (Cap. 102). Its formation was formally gazetted through a Gazette Notice 1983, Kenya Gazette of 14th March 2008. The membership to the commission was arrived at through consensus between the two parties to the negotiations under the PNU and ODM axis. Ten members were agreed on. They were sworn in on the 20th March 2008. The mandate of the Kriegler commission (IREC) was to examine the 2007 elections from a number of angles: The constitutional and legal framework with a view of identifying weaknesses and inconsistencies; The structure and composition of the ECK in order to assess its independence, capacity and functions; The electoral environment and the role of the political parties, civil society, the media and observers; The organization and conduct of the 2007 elections, extending from civic and voters education and registration through polling, logistics, security, vote-counting and tabulation to the results-processing and dispute resolutions; Vote-tallying and counting to assess the integrity of the results of the entire election with special attention to the presidential contest; Assess the functional efficiency of the ECK and its capacity to discharge its mandate; Recommend electoral and other reforms to improve future electoral processes.<sup>136</sup>

When the Commission mirrored the Kenyan elections practice in relation to the legal regimes that exist, the major weaknesses emerging were that elections witnessed irregularities to which IREC's analysis of the laws indicates that there is a legal framework to curb offences itemized in its report. And the true reason of the failure for the 2007 elections was the failure to protect the electoral process from these unacceptable deeds. If the government authorities and police were concerned about the state of affairs, they were certainly very patient. The ECK, with its powers

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<sup>136</sup> The National Council of Churches of Kenya. *Independent Review Commission (IREC) {Kriegler Commission} Final Report*, June 2009

under the National Assembly and Presidential Elections Act, the Code of Conduct thereto and the Electoral Offences Act which include powers to prosecute must have been toothless then. Public opinion cheered on for as long as it seemed to benefit the authorities.<sup>137</sup>

Amongst the myriad of findings, most importantly, the commission found that the conduct of the electoral process was hampered and the electoral environment was polluted by the conduct of many public participants, especially political parties and the media and that the electoral management process as a whole needed to be revised. According to the IREC, even though the leading newspapers, television and radio stations were not very openly biased for or against any of the candidates, there were discernible preferences shown by the tilt they gave in favour of or against the candidates and their campaign issues. Most media houses avoided hate speech but several FM stations incited ethnic animosity.

The ECK lacked the necessary independence, capacity and functionality during the preparation and conduct of the 2007 elections - this was due to the weaknesses in its organizational structure, composition and management systems. Additionally, the institutional legitimacy of the ECK and public confidence in the professional credibility of its commissioners and staff had been gravely impaired and that it lacked the functional efficiency and was incapable of properly discharging its mandate. IREC also noted that there were serious defects in the voter register and anomalies in the way the boundaries of constituencies were marked which impaired the legitimacy of the electoral process and the integrity of the 2007 elections even before polling started.

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<sup>137</sup> Ibid

According to IREC, there was a generalized abuse of polling, characterized by widespread bribery, vote buying, intimidation and ballot stuffing; That there was defective data collection, collation, transmission and tallying and ultimately the electoral process failed for lack of adequate planning, staff selection/training, public relations and dispute resolution, these together impaired the integrity of the process and the credibility of the results thus it was irrelevant whether or not there was actual rigging at the national tally centre. The ECK was largely to blame for these mistakes and misunderstandings. The resultant torrent of vilification to which the 2007 elections was subjected is not entirely undeserved.<sup>138</sup>

The Commission made its recommendations on three fronts: Constitutional and Legal framework; Administrative and organizational reforms and Dispute resolution.

On constitutional and legal framework, IREC came to a unanimous resolution that voting by universal and equal suffrage and by secret ballot should be guaranteed for all without discrimination. The seven man bench recommended an establishment of an electoral dispute resolution court with the final jurisdiction to handle electoral disputes. There was need to entrench a statutory limit to ensure that election petitions are finalized in good time with a limit of not more than six months. It also recommended that the current rules and regulations on the procedures of election petitions should be repealed and replaced with new rules that ensure that petitions are heard in a just and timely manner. On the now defunct ECK, the commission recommended an enactment of a dedicated law with more detailed provisions on the ECK's institutional aspects which takes into account the relative complexity of the organization and its responsibilities and a re-organization of the expiry of the terms of office of ECK members to

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<sup>138</sup>Kriegler And Waki Reports: Summarised Version Revised Edition (2009)

ensure that their retirement does not coincide with election years and that all commissioners have at least two years' work experience before every election.<sup>139</sup>

The commission recommended a review of the ECK's administrative and organizational procedures, with a view to introducing as much certainty as possible in key operational areas so as to ensure uniformity of performance throughout the electoral process, from polling station level up to the various teams at the national tallying centre. The IREC recommended a revision of the ECK secretariat structure with a view to introducing performance management across the board. Ensure that the commission secretary, among other qualifications, is an experienced election manager, competitively recruited from the open job market, and has the status of permanent secretary. Enumerate ECK's roles to include advising the government, Parliament and other stakeholders on electoral law reform. Take ECK's advice henceforth more seriously than has been the case in the past and deliberate such proposals expeditiously with the ECK and with other stakeholders, with a view to incorporating them into electoral law.<sup>140</sup>

Once Parliament has been dissolved, no more political parties should be registered and application for party symbols should also be suspended. The campaign period should be specifically defined and ECK must ensure that all parties comply with the electoral code of conduct. The election date should also be pre-set, taking into account all the required timelines for efficient conduct of the election. The ECK and CSOs should be encouraged to work together, and particularly in voter education as this eases tensions and improves delivery. A permanent

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<sup>139</sup> Ibid

<sup>140</sup> The National Council of Churches of Kenya. *Independent Review Commission (IREC) {Kriegler Commission} Final Report*, June 2009

domestic observer group should be constituted comprising diverse civil society interests. Co-operation and coordination of local, regional and international election observer groups should be encouraged.<sup>141</sup>

Election regulations should be amended to allow observation of the tallying process at all levels and provide copies of all authentic statutory forms to observers. The basic principle for the delimitation of constituencies should be the equality of the vote. The process of delimitation should be transparent and conducted in consultation with the public. Establish a Boundary Review Commission (BRC) and remove constituency delimitation from the ECK. The commission wished upon a simplification of qualifications for entitlement: entitlement to vote should be based on residency, unless there are strong arguments for maintaining some of the other categories presently included. Requirements of voter's card for voting: this is a redundant requirement. If their name is in the register, voters should be allowed to vote with the simple presentation of the National ID or passport.<sup>142</sup>

The commission also recommended a consideration of establishing a special electoral court to deal expeditiously with disputes arising from party primaries. The ECK should establish a clear, non-adjustable timeframe within which all parties should hold their primaries and certify their nominees. Electoral law should be amended to require political parties not only to conduct elections in accordance with their constitutions or rules but also to conform to establish standards of fair practice. Review and update of the job descriptions of all relevant temporary positions to

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<sup>141</sup> Ibid

<sup>142</sup> Ibid

take into account additional skills essential to the competent management of a modern, IT-facilitated electoral process.

As per the commission, the ECK was to enhance the training of returning officers to match the importance of their function in the electoral process, as well as consider earlier selection and recruitment to allow a longer period of training and engagement in ECK work. Personnel at each level should be involved in the training of personnel on a level below, to allow greater familiarity with the chain of work. For instance, National Tallying Centre should be involved in training returning officers for the tallying and transmission of results. The electoral body was to outsource the selection of key temporary personnel to third party agencies, with a requirement for testing of some essential skills (e.g. IT). Actual participation in electoral activities should be made conditional on verified participation in all prescribed training events.<sup>143</sup>

Encourage public forums such as round tables at which specific local issues can be discussed. Voter education should teach the electoral code of conduct and highlight the ill effect of fraudulent election practices. Vet organizations well in advance so as to have candidates for conducting voter/civic education/information campaigns. Recommendations were also to put monitoring and evaluation measures in place to ensure that CSO's responsible for voter/civic education/information campaigns conduct their programmes properly and in accordance with ECK guidelines. The ECK was to immediately make regulations for the Political Parties Act not

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<sup>143</sup> Kriegler And Waki Reports: Summarised Version Revised Edition (2009)

only to provide a clearer legal framework for the registration of political parties but also to achieve the political finance objectives of the Act.<sup>144</sup>

Ample time must be given for verifying provisional results, so that they are only declared final/official. When there is no risk that errors can still be found or non-frivolous objections raised, Institutionalize the practice of post election audits and evaluations and improve the quality of the objective data involved, Publish all polling stations results (form 16A) on the ECK website to ensure transparency, Post election audits should be conducted by external auditors and made public, and establish an appropriately composed and empowered Special Electoral Dispute Resolution Court, Introduce a transition period between a successful candidate's election and his swearing in, Develop procedures for safe storage of election materials until any post election analysis is complete, Store certain relevant election materials (such as the election results) in electronic format.<sup>145</sup>

The Kriegler commission recommended long-term investment in voter/civic education/information campaigns and in as much as IEBC Act provides for voter education; structured voter education was not properly done and was left until the eleventh hour, within thirty days to the elections. Civic education also suffered similar fate. There ought to have been massive campaigns on sensitization and education of the public to make the process smooth. The management of polling day operations must be well thought out and all technical and other forms of relevant assistance ought to be extended by the IEBC. The Commission failed and had no

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<sup>144</sup> The National Council of Churches of Kenya. *Independent Review Commission (IREC) {Kriegler Commission} Final Report*, June 2009

<sup>145</sup> Ibid

fidelity towards election laws. It brazenly breached electoral timelines and procedures and rules.<sup>146</sup>

### **3.4 The Independent Electoral and Boundaries Commission (IEBC)**

The Independent Electoral and Boundaries Commission (IEBC) is an independent regulatory agency that was founded in 2011 by the Constitution of Kenya after the disbandment of the ECK. The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament. It was created in a provision of the 2010 constitution and the Independent Electoral and Boundaries Commission Act. Its mandate includes; the continuous registration of voters and revision of the voter's roll, the delimitation of constituencies and wards, the regulation of political parties process, the settlement of electoral disputes, the registration of candidates for elections, voter education, the facilitation of the observation, monitoring and evaluation of elections, the regulation of money spent by a candidate or party in respect of any election, the development of a code of conduct for candidates and parties ,the monitoring of compliance with legislation on nomination of candidates by parties.

As of now, the IEBC enjoys public trust; its credibility will be put on litmus test come election 2013.

### **3.5 Preparations for the 2013 elections**

There are challenges to democratic consolidation in Kenya as well as the rest of the African continent that are yet to be dealt with. Kenyans had internalized lessons from the bloodbath of

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<sup>146</sup> Review of the Implementation of the Kriegler Commission Report: Status Audit of Kriegler Recommendations

the 2007 presidential elections. The experience had imprinted a bitter legacy on the national psyche which no one wants a repeat of.

The Constitution of Kenya has two requirements for any candidate to be declared winner: to win at least 25% of the vote in a majority of Kenya's forty seven counties; and to garner 50% + 1 vote of the total valid votes. If none of the candidates fulfill these requirements there is to be a runoff between the two contenders with the highest number of votes. The vice president is the running mate of the candidate that wins the presidential election whilst other cabinet members will be appointed, with approval from the National Assembly, from outside Parliament.<sup>147</sup> The unicameral National Assembly has 224 members, 210 members elected for a five-year term in single-seat constituencies, 12 members nominated by political parties in proportion to their share of seats won in the single-member constituencies and 2 ex officio members: the attorney general and the speaker. In the 2013 March elections, a further 80 members for single member constituencies will be added to the National Assembly in addition to 47 women elected from counties, as it becomes the lower house in a bicameral parliament. There will be a senate with 68 members. 47 elected from counties acting as single member constituencies, 16 women nominated by political parties, a man and a woman represents youths and a man and woman represents people with disabilities. The speaker is an ex officio member.<sup>148</sup>

The judiciary is divided into Superior Courts and Subordinate Courts. Superior Courts consist of: a chief justice, deputy chief justice (who are members of the Supreme Court), Supreme Court judges, High Court judges, and judges of Kenya's Court of Appeal (no associate judges)

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<sup>147</sup> [http://en.wikipedia.org/wiki/Politics\\_of\\_Kenya](http://en.wikipedia.org/wiki/Politics_of_Kenya)

<sup>148</sup> [http://en.wikipedia.org/wiki/Politics\\_of\\_Kenya](http://en.wikipedia.org/wiki/Politics_of_Kenya)

appointed by an independent Judicial Service Commission. The Chief Justice and his or her deputy are nominated by the President from names selected by the Judicial Service Commission and vetted by the National Assembly. Subordinates Courts are Magistrates Courts, Kadhi Courts and Courts Martial

### **3.6 The role of civil society**

Strong civil societies empower healthy democracies. By assuring fair elections and then holding the victors to standards of good governance, they cultivate the political conditions within which democracy can thrive.<sup>149</sup> Since the ousting of the longest serving president of Kenya Daniel Moi in 2002 in a NARC coalition outfit, Kenya has experienced an electoral transition — in 2007. Its democratic gains in that period have been stunning. Despite widespread fears of conflict and political raptures ahead of the 2013 elections, an active and organized civil society supplied much of the glue that helps Kenyans adhere to democratic expectations and norms.

CSOs promoted political participation in the past election through educating people about their rights and obligations as democratic citizens, and encouraging them to listen to election campaigns and vote in elections. CSOs can help to develop other values of democratic life: tolerance, moderation, compromise, and respect for opposing points of view. Without this deeper culture of accommodation, democracy cannot be stable. These values cannot simply be taught; they must also be experienced through practice.<sup>150</sup>

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<sup>149</sup> Gilley B. *Civil Society, Democracy, and Elections*. IIP Digital. 2010

<sup>150</sup> \_\_\_\_\_ What Civil Society Can Do to Develop Democracy. Presentation to NGO Leaders, Convention Center, Baghdad February 10, 2004,

Ahead of the 2013 general election, the CSOs should take an active part in helping to inform the public about important public issues. This is not only the role of the mass media, but of the entire civil society which can provide forums for debating public policies and disseminating information about issues before parliament that affect the interests of different groups, or of society at large. They must also play a vital role in monitoring the conduct of elections. This brings together a broad coalition of organizations, unconnected to political parties or candidates, that deploy neutral monitors at all the different polling stations to ensure that the voting and vote counting is entirely free, fair, peaceful, and transparent. It is very hard to have credible and fair elections in a new democracy unless civil society groups play this role.

Civil society organizations can play an important role in mediating and helping to resolve conflict. In Kenya, CSOs need to develop formal programs and training of trainers to relieve political and ethnic conflict and teach groups to solve their disputes through bargaining and accommodation. CSO is an arena for the expression of diverse interests, and one role for civil society organizations is to lobby for the needs and concerns of their members, as women, students, farmers, environmentalists, trade unionists, lawyers, doctors, and so on. NGOs and interest groups can present their views to parliament and provincial councils, by contacting individual members and testifying before parliamentary committees. Civil societies are the pillar of a democracy.<sup>151</sup> CSOs strengthen democracy by providing new forms of interest and solidarity that cut across all forms of tribal, linguistic, religious, and other identity ties, these are the watch dogs to achieving democracy and good governance.

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<sup>151</sup> What Civil Society Can Do to Develop Democracy. Presentation to NGO Leaders, Convention Center, Baghdad (February 10, 2004)

### **3.7 Lessons learned**

One of the central features entrenched in the constitution is the system of devolution. This allows for the diffusion of political power vertically across different levels of the State, bringing government closer to the people. One may argue that unlike the former centralized system which tended to promote a “winner takes all” electoral culture at the national level, leaving dissatisfied but resolute vanquished parties with limited options to secure power but violence, the possibility of securing the same at devolved levels of the state offer consolation through broad power-sharing.

Constitutional and legal reform recommendations, can be effectively implemented if the letter and spirit of the law is observed. The judicial function of interpretation is considered vital to achieving the desired aspirations of the Kenyan people, particularly with regard to elections and its outcomes. In relation to the structure and composition of the electoral management body, doubts about the integrity and effectiveness of the electoral body still linger owing to the myriad of slips and errors witnessed in the 2007 election.

Political parties, civil societies, observers and the media, are necessary to validate the transparency and legitimacy of the electoral process. However, this can only be achieved where they conduct their roles professionally and neutrally. Political parties owe the country a duty to ensure that fair conduct, practice and factual information guide their activities, while civil societies and observers need to act in a non-partisan manner to ensure that transparency and credibility are built into the process. The government on its part also owes the electorate a duty to put in place adequate mechanisms for free and fair elections.

### **3.8 Conclusion**

Electronic transmission was identified as a way to ensure accurate, transparent, credible and verifiable results as they were transmitted from polling centers to the county, and to the national tallying center. It is considered essential to change Kenya's history of electoral fraud. Democracy still lingers somewhere waiting to be fully realized in Kenya. Kenyans want to have a say in the government and to have control over their lives and make sure the elections have real integrity; this remains a whim and with real institutionalization and pressure upon accountability and transparency, people participation and maximalist democracy will be achieved in Kenya. The public must be educated about the election process and the responsibilities of both the public and the election officials. The post-election processes ought to be as transparent and participatory as the pre-election procedures. If this is done and the political interference which is constantly decried at every stage of the electoral process is eliminated, then the election result can be accepted as fair and legitimate.

The March 2013 Kenya General Election will be guided by absolutely a new legal framework under the new Constitution that encourage participation by all citizens to ensure impartiality, credibility, inclusivity, fair competition and accountability by both leaders and the country's institutions. The Citizens must therefore take advantage of the relevant provisions of the new constitution, the IEBC Act, the Political Parties Act and the Election Act of 2011 to strengthen the successes of the electoral commission of the country more for successful elections. Civil society organizations (CSOs) must play an invaluable role in sustaining a growing democratic culture and contribute immensely in the promotion of voter registration as well as participate in

the election observation process. The visibility of civil society in an electoral observation process is critical in ensuring compliance and respect for the rule of law and deterring irregularities.

So formally, the opportunity for significant change is in place with the new constitution. However, implementation is very much a work in progress and the new mechanisms are currently being tested. With existence of strong institutions and civil society, accountability and transparency will set in. Additionally, independence of the judicial institution in adjudication without political interference is necessary for building true democracy and good governance.

## CHAPTER FOUR

### DEMOCRACY AND ELECTIONS IN KENYA: A CRITICAL ANALYSIS

#### 4.1 Introduction

The election of a new government opens a window of opportunity enabling it to launch audacious reforms. Well-institutionalized democracies are more likely to produce, over the long run, effective, efficient and sustainable economic and socio-political policies, because they provide effective and stable institutional and procedural mechanisms to represent interests, arbitrate disputes, provide checks and balances, and negotiate change.<sup>152</sup> Taking cognizance of the fact that governance institutions do not operate in a vacuum and need other well-functioning national institutions to function optimally in turn, leaders of institutions should develop and adopt policies to promote transparency in the disclosure of the private interests of politicians seeking office, commissioners and senior officials to guard against conflicts of interest.

The correlation between democracy, representation and participation is that under democracy, governments are representative because office holders are elected. Elections serve to select good policies and/or policy-bearing politicians and to hold governments responsible for the results of their past actions. Because they anticipate the judgment of voters, governments are induced to choose policies that in their judgment will be positively evaluated by the citizens at the time of the next election.<sup>153</sup> Minorities and indigenous peoples in the country remain some of the groups that have suffered most from this dynamic of exclusion. While political participation alone does

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<sup>152</sup> Santiso, C. *Good Governance and Aid Effectiveness: The World Bank and Conditionality*. Paul H Nitze School of Advanced International. (Studies, Johns Hopkins University, The Georgetown Public Policy Review, Volume 7 Number 1 Fall 2001) pp.1-22

<sup>153</sup> Stokes, A Przeworski, A. *Democracy, Accountability and Representation*. Cambridge University Press, 1999

not lead to inclusion; it is the necessary first step in the long process towards bringing in the voices of communities and improving their capabilities.

## **4.2 Emerging issues**

### **4.2.1 Political representation and participation**

The direct involvement/engagement of ordinary people in the design, implementation and evaluation of planning, governance and overall development programmes at local or grassroots level, has become an integral part of democratic practice in recent years.<sup>154</sup> Poor inclusion of citizens in public affairs is a significant governance challenge facing Kenya. Many citizens – especially from minority groups<sup>155</sup> – view the state as accessible to only the economic heavyweights or strong ethnic affiliations with holders of political power. Exclusion of whole regions of the country from the benefits of state-sanctioned development and the specific targeting of entire communities for discrimination is not an unusual phenomenon in Kenya.<sup>156</sup> For many, the greatest sense of belonging and security derives not from the state itself but through the mediation of ethnic networks to which they belong.

The youth have resort to violence because systems have long failed to give them and their generation the freedom and opportunity to pursue the prosperity that they desired. Africa's young and enthusiastic social media generation have no time for non-performing leaders. The good news is that they have accepted the wisdom in expressing their impatience through the ballot. Autocracy placed an unsustainable check on the spread of opportunities. Urgent attention is

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<sup>154</sup> See for example: <http://www.ids.ac.uk/ids/particip/information/index.html#introart>

<sup>155</sup> Makoloo, M., *Kenya: Minorities, Indigenous Peoples and Ethnic Diversity*, London, MRG, 2005.

<sup>156</sup> Ndzovu, H., *Muslim Relations in the Politics of Nationalism and Secession in Kenya*. PAS Working Papers 18. Evanston, IL: Northwestern University Press, 2010. Available at: <http://www.northwestern.edu/african-studies/docs/working-papers/Hassan-Muslims and Secessionism in Kenya-FINAL.pdf> (accessed 30 December 2012).

needed to foster inclusive growth, to improve political accountability, and address the youth bulge. The dearth of inclusiveness and opportunities for the youth will sink African democracy unless we can end jobless growth driven by extractive industries and raw material exports. There is urgent need to transform stagnant, jobless economies built on the export of raw materials and unrefined goods to value-added economies that provide jobs to build strong middle-class societies.<sup>157</sup>

Representation is an issue because politicians have goals interests and values of their own and they know things and undertake actions that citizens cannot observe or can monitor only at a cost. Once elected, politicians pursue their private goals or some public objectives that differ from those of citizens. With such motivations, they do things other than represent the public. And voters do not know everything they need to know, whether to decide prospectively what politicians should be doing or to judge retrospectively if they did what they should have done. If citizens do have sufficient information to evaluate the incumbent governments, the threat of not being reelected is sufficient to induce governments to act in the best interest of the public. Voters therefore can enforce representation by using their vote to choose policies and politicians, using the vote to sanction the incumbent, or using their vote simultaneously in both ways.

Concerning facilitating effective participation, the consideration of involving the populace in matters pertaining to elections is supreme. Participation helps to build ties supporting policy reform while the involvement of civil society helps build social capital. Restricting participation

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<sup>157</sup> Akufo-Addo, Nana. 'The Future Of Democracy In Africa And The Arab Spring'. The 2012 Oppenheimer Lecture, (The Le Kuan Yew Conference Room, Arundel House, London, UK 29th February, 2012) p. 2

in policymaking often weakens the legitimacy, accountability and the quality of decisions made within governments. Participation and representation are more likely to lead to public policies that are more responsive to the needs of the people and it requires regular, free and fair elections and a genuine choice between alternative government policies.<sup>158</sup>

Participation also occurs beyond and between elections. It calls for a continuous consultation in the formulation, monitoring and implementation of public policies in order to reach a sufficient agreement to sustain reform. If elections are freely contested, if participation is widespread, and if citizens enjoy political liberties, then governments will act in the best interest of the people. Effective participation is inextricably linked to the existence of legitimate and representative parliamentary procedures, which are a constituent part of a democratic regime. However, participation in the formulation of public policies and representation in the parliament are impossible without a sufficient level of civil liberties and political rights as well as a functioning multiparty system.

While the existence of an active civil society is an essential element of democracy, the capacity and willingness of individuals to participate in democratic processes and make governance choices cannot be taken for granted. It is therefore necessary to develop conditions conducive to the genuine exercise of participatory rights, while also eliminating obstacles that prevent, hinder or inhibit this exercise. It is therefore indispensable to ensure the permanent enhancement of, *inter alia*, equality, transparency and education and to remove obstacles such as ignorance, intolerance, apathy, the lack of genuine choices and alternatives and the absence of measures

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<sup>158</sup> Governance, Civil Society and Participation. <http://web.worldbank.org>

designed to redress imbalances or discrimination of a social, cultural, religious and racial nature, or for reasons of gender.<sup>159</sup>

Women participation in politics must also be mainstreamed. Chauvinism must now be relegated to the rear for women to also take part in active politics. Women in Kenya have demonstrated their agency and capability as actors to assert rights and create non-state alternative political platforms, for voicing their perspectives and visions and for acting decisively in engaging formal governance processes. Rwanda, South Africa, Uganda and other African countries have attained the minimum 30% gender threshold.<sup>160</sup> Kenya should also dine with the rest of the world. In so doing, there is also need to ensure that attention is paid to develop viable criteria and process of attaining quality political leadership. There is need to set criteria and mechanisms for enforcing accountability among political office seekers, bearing in mind that once in government, some female and male politicians may only symbolically “stand for” women and other citizens, rather than genuinely and substantively represent or “act for” for them.

Women’s status and capacity for meaningful political representation largely depend on i) the kind of access women have to formal political structures-parliaments, political parties, etc. ii) the specific socio-cultural contexts that mitigate women leader’s capacity to influence policy and in turn fulfill a transformative gender agenda and remain accountable to the constituent group(s) they represent ; iii) the size of the numerical presence/physical numbers of women in political

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<sup>159</sup> Bassiouni, C et al. *Democracy: Its Principles and Achievement*. Inter-Parliamentary Union, Geneva, 1998.

<sup>160</sup> Nzomo, M. et al. *Representational Politics In Kenya: The Gender Quota And Beyond*. Institute of Diplomacy & International Studies, University of Nairobi Paper presented and published by African Research & Resource Forum, (December 2012). p 30

office and iv) the nature of the institutional norms and practices pertaining in governance institutions<sup>161</sup>

Lack of awareness, notably, the rights, freedoms, protections and privileges enshrined in the constitution is a challenge. The constitution has endeavored to create a greater space for participation, but there has been a lack of corresponding measures to make people aware of this. The populace cannot take advantage of what they do not know about. For instance in as much as people basically understand the concept of dual citizenship and their right to vote, they do not know how it can be operationalized and awareness would be required for that.

#### **4.2.2 Institutional effectiveness and good governance**

The overarching thrust is to improve governance architecture in Kenya, with a view to nurturing and consolidating democracy and sustaining peace and political stability, which are the key prerequisites for sustainable development and the eradication of electoral corruption.

The forty years of high levels of patronage has created a great institutional deficit that continues to affect ordinary citizens. As decisions were made by elites and for elites, the systems of governance needed by the rest of the population were left to languish and atrophy. By not allowing a great Number of people to access services essentially locking Them out of the Process of governance simply because of their ethnic affiliation – they are deprived of the basic right to governance and economic self determination. The unfair distribution of resources, poor infrastructure, and inadequate government services are the more benign manifestations that

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<sup>161</sup> Nzomo, M. et al. *Representational Politics In Kenya: The Gender Quota And Beyond*. Institute of Diplomacy & International Studies, University of Nairobi Paper presented and published by African Research & Resource Forum. (December 2012).

common people experience with patronage systems: Such arrangements can also lead to physical violence as seen in Kenya In 2007.

Since the restoration of multiparty politics in 1991, Kenya has become Prone to economically damaging conflicts caused by acts of Institutionalized violence (Waki Report 2008, viii) that weaken the power of state Institutions and defeat their purpose of promoting development and social protection. There is a strong correlation between higher levels of intranational conflicts and weak institutions as per Damdinjav in a 2012 journal quoting Besley and Reynal - Querol 2012.<sup>162</sup>

Institutions have been destabilized even Further by The use of Institutionalized violence that forces the country endure a cycle of fear, lack of integrity, and impunity. Violence has become widespread and part of everyday life, and is not limited to election time.<sup>163</sup> Four key factors contribute to this cycle of institutionalized violence, fear, lack of integrity and impunity: 1) the lack of coordination between security mechanisms; 2) the lack of accountability; 3) the use of organized ethnic gangs as a way to assert political power and provide public services; and 4) the personalization of presidential power to deliberately weaken public institutions.<sup>164</sup>

Interaction of governance institutions with human rights bodies, should be strengthened, systematized and made more visible. Ensuring that politicians spend public funds usefully and

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<sup>162</sup> Damdinjav, M. et al. *Institutional Failure in Kenya and a Way Forward*. Journal of Political Inquiry at New York University, Spring Issue (2012)

<sup>163</sup> Waki Report (2008)

<sup>164</sup> Ibid

that their decisions/ recommendations comply with the law, and tapping into them as a resource in fulfilling its oversight responsibilities and ensuring that their recommendations are implemented.<sup>165</sup> The executive should also be more cooperative about furthering the work of these institutions by complying with its legal requirement. Institutions are established to perform specific functions and purposes. Because institutions are to achieve certain goals or objectives, good management is an essential precondition to achieve institutional effectiveness. The constantly changing environment of institutions also requires organizational flexibility. Local institutions and public agencies concerned with management and democratic practices must possess organizational flexibility in addition to improving their cunning anticipatory or predictive capability to see much ahead of time opportunities and develop the necessary strategies to achieve certain and specific objectives.

Public institution and its officials should maintain transparency in governance. This is premised on the principle that a public office is a public trust. Those elected and entrusted with leadership and representation must all the time be transparent in their official actions and therefore publicly accountable. Transparency makes public institutions trustworthy. Modernization and Technology exert tremendous pressure on public agencies. These challenges will compel and force these organizations to have an inner look at themselves. Otherwise these institutions will lose relevance in their constantly changing environment. Unless Kenya strengthens its institutions, a lot will still be left to desire of our electoral systems.

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<sup>165</sup> Musuva, Catherine. *Promoting the effectiveness of Democracy Protection institutions in southern africa south africa's Public Protector and human rights commission*. (EISA research report no. 41, 2009)

Corruption, non-transparent decision making, limited possibilities of participation and social discrimination pose a challenge for the growth of democracy in Kenya and every society. Every leader with an awareness of related problems and the knowledge and capacity to find solutions for them need to spearhead implementation of transparent, efficient and democratic governance based on the rule of law and social justice. The Institute on Governance gives a broader definition according to which “governance comprises the traditions, institutions and processes that determine how power is exercised, how citizens are given a voice, and how decisions are made on issues of public concern”.<sup>166</sup>

Getting good governance calls for improvements that touch virtually all aspects of the public sector – from institutions that set the rules of the game for economic and political interaction, to decision-making structures that determine priorities among public problems and allocate resources to respond to them, to organizations that manage administrative systems and deliver goods and services to citizens, to human resources that staff government bureaucracies, to the interface of officials and citizens in political and bureaucratic arenas.<sup>167</sup>

Dimensions of good governance include voice and accountability, which includes civil liberties and political stability; Government effectiveness, which includes the quality of policy making and public service delivery; The lack of regulatory burden; The rule of law, which includes protection of property rights; and Independence of the judiciary; and control of corruption<sup>168</sup>

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<sup>166</sup> <http://www.iog.ca/about.html>

<sup>167</sup> Grindle M. *Good Enough Governance Revisited: A Report for DFID with reference to the Governance Target Strategy Paper*, 2001 (Harvard University, February 2005)

<sup>168</sup> Kaufmann, Kraay and Zoido-Lobaton. *Anticorruption In Transition: A Contribution to the Policy Debate*, World Bank. (September, 2009)

Another important characteristic of good governance is predictability. This means that institutions have established policies, rules and regulations that provide guides for the general public what are the regulations in transacting business with governments. Predictability also means that policies should not be constantly changed at mid stream at the expense of confusing the general public. Another notion of predictability is that mandatory obligations of authorities must be faithfully complied even if such obligations were incurred by previous government administration.<sup>169</sup>

Although a good constitution, other good laws, strong institutions and structures constitute a good infrastructure for the operation of good governance, the experience in Kenya shows that democracy is headed for a fatal crash and the nation collapses if steered by individuals of no vision and character. The achievement of good governance, therefore, does not exclusively depend on the presence of a good constitution and other good laws. Indeed good leadership is a more critical factor in the quest for good governance. Thus, however good the democratic infrastructure of a nation state or a county is, people perish without good leadership.

#### **4.2.3 Other issues**

The 2010 Constitution and the inscribed devolution plan provide the legal framework and courses of action to confront the challenges of corruption, electoral fraud, ethnic divisions, and ill-defined property rights. The document specifically prohibits “political parties [from]

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<sup>169</sup> Gaudioso C., Sosmeña, Jr. *Achieving Institutional Effectiveness for Local: Governance and Democracy*. KAS-EU Project on Local Governance and Democracy in Southeast Asia as a background as a thematic theme on Institutional Governance. p 10

engag[ing] in bribery and other forms of corruption [...] to promote its interests or its candidates in elections”<sup>170</sup>

The implementation of the Kriegler Commission recommendations presents a conundrum for politicians and society in Kenya. The Commission Report’s contribution to transitional justice was measured by the extent to which the implementation of its recommendations enabled the establishment of an electoral legal framework, administrative and dispute resolution reforms that would avert any kind of future electoral crises.<sup>171</sup>

#### **4.2.3.1 Constitutional and legal frameworks**

Rule-based, predictable legal regimes are of the utmost importance for an election to thrive. As a consequence, the strengthening of the rule of law should constitute a central element of Kenya’s strategies to fight rampant and overt corruption. Legal and judicial reform should become a core component of a democracy’s governance portfolio, which should be primarily motivated by its concern with finding durable solutions to elections and electioneering period. Enhancing good governance entails ensuring the effective separation of powers. It thus requires addressing the factors underpinning the political independence of the judiciary, guaranteeing the impartial administration of justice and reducing “the opportunities for corruption by cutting back on discretionary authority”<sup>172</sup>

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<sup>170</sup> Constitution of Kenya (2010) p 58.

<sup>171</sup> Institute for Security Studies, Situation Report. Kenya – A Year after the Crisis: The Quest for Electoral Reform and Transitional Justice. 2009

<sup>172</sup> World Bank (1997) p 8

Therefore there must be a focus on ensuring the stability and predictability of the legal framework, focusing on enforcement of the rule of law. However, the reliability of the rule of law is determined by the political context. A judiciary independent from executive meddling is vital to ensure that the legislative and executive remain fully accountable under the law, and to interpret and enforce the terms of the constitution.

In terms of its operational efficiency post 2007 election, the judiciary was sluggish in the administration of justice and non-transparency in its functions. To remedy this fact, nothing short of comprehensive constitutional reforms would restore the desired confidence and trust in the judiciary.

#### **4.2.3.2 Administrative and organizational issues**

Furthermore, the current efforts at reforming and modernizing the state focuses on the devolution of power to lower levels of government in the spirit of devolved systems of government. The devolution plan – an integral component of the 2010 Constitution – provides a framework to strengthen Kenya’s institutions and promote sustainable and equitable economic development. The plan includes the establishment of forty-seven new counties and the Diffusion of power from the national to local governments. The researcher agrees with Akech’s doubts as to whether the 2010 Constitution establishes principles and Mechanisms that circumscribe the exercise of power in all three branches of government (2011, 383).<sup>173</sup> If the perceived Inability of the constitution to curb the centralized powers of the political elites is borne out, this will impede the potential

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<sup>173</sup> Dandinjav, M. et al. *Institutional Failure in Kenya and a Way Forward*. Journal of Political Inquiry at New York University, Spring Issue (2012)

successes of the proposed reforms in addressing the main sources of institutional weakness and the lack of Kenya's long-term development.

#### **4.2.3.3 Dispute resolution**

By and large, general elections have ended the way they do because the electoral dispute resolution mechanisms and process in the country do not enjoy public confidence. Regrettably, the judiciary is still operating on a trust deficit. Additionally, the manner in which it had handled elections until this point has led to a widely held belief that it is impossible to not only serve and file an election petition against an incumbent president, but also that one cannot obtain a favorable judgment. Election petitions were filed with respect to a number of parliamentary and civic elections all over the country as well as to the presidential election that had been the subject of so much disgruntle. If unsatisfied role players have faith in the ability of the electoral dispute resolution machinery to resolve their disagreements, violence is less likely to be seen as an alternative.

The superfluity of provisions against the involvement of public servants in elections should be consolidated into one provision in the consolidated electoral law and also bar the use of any public financial and material resources. Adequate monitoring mechanisms to collect information on public servants involved in partisan political activity must be in place for use in prosecution and other penalties sanctioned by law. There is need to reintroduce realistic and functional expenditure caps on election expenditure and take steps to eliminate bribery, including stronger sanctions - like disqualification - for candidates involved in it and discontinue the complementary practice of allowing assistance on the basis of illiteracy and adjust voter

education programmes accordingly. As proposed by the IREC, the IEBC must stop using black book and consider using only tendered ballots instead.

The Chief Justice, in recognizing the multiple and special roles played by the Judiciary in the elections constituted an Electoral Dispute Resolution Court whereby election disputes will be heard and concluded within six months from election date. However, there are concerns that the capacity of the judiciary still needs to be built, particularly in terms of the number of judicial officers who can be availed to complete the task and their knowledge and expertise on election offences. Other concerns relate to lack of the judiciary's appreciation of the political economy and social context upon which laws are made as the judiciary only seems to be aware of the legal context.<sup>174</sup>

To that end, the Kenyan government has embarked on a set of essential institutional and legal reforms in response to the recommendations of at least two commissions of inquiry formed after the 2007-8 post election violence. However, progress implementing them has been slow and insufficient. The new dispensation should accelerate reforms in the security sector, as the 2010 constitution creates a framework and timelines for institutional and legislative reforms, and contains a strong bill of rights.<sup>175</sup>

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<sup>174</sup> Kenya Human Rights Commission. *Transitional Justice In Kenya - A Toolkit for Training and Engagement*. Chapter 5, 13.

<sup>175</sup> *Ibid*

The fifth schedule of the constitution also recommends relevant legislation for dealing with land grievances.<sup>176</sup> Injustices around land, such as land grabbing and dispossession, have fueled ethnic and election-related violence since 1990s and are still the root causes of tension in various parts of the country. Land reforms have been slow and acrimonious.<sup>177</sup> The NLC has yet to embark on its key mandate following more than a year of delay in setting it up. The new administration must prioritize land reforms and ensure that the relevant agencies are provided with adequate financial and other support, including that the key concept of community land under the 2010 constitution is recognized in practice.

#### **4.3 Conclusion**

To this end, the below institutional factors merit attention with regard to effects of particular institutional arrangement on voters participation and political representation; voters must be able to assign clearly the responsibility for government performance. Majority-inducing institutions increase the distance between the ideal position of the voter and of the government, thus it seems institutionalization generates governments that are farther from the voters in policy space but more accountable. Voters must also be able to vote out of office, parties responsible for poor governance and the parties they select must be able to enter government. Politicians must have incentive to want to be reelected. This condition becomes problematic when there are limitations on re-eligibility ubiquitous in presidential system.<sup>178</sup> Coefficients to functions relating to the probability of reelection to economic outcomes are higher and their estimates are tighter when party systems are stable.

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<sup>176</sup> Constitution of Kenya

<sup>177</sup> See IRIN report *Land reform key to Kenya's future*, (2012). Also above Fn 106

<sup>178</sup> Stokes, A Przeworski, A. *Democracy, Accountability and Representation*. Cambridge University Press, 1999

The opposition and the civil society must play the watchdog role and monitor the government meticulously and inform the citizens of the ongoing as any reasonable understanding of representation must involve the opposition quite intimately. The opposition is the agent of citizens because it wants to win the heart of populace and also eyeing office come the next dispensation. It must also anticipate the retrospective judgments that voters will make about the incumbent at election time. Building the capacity of IEBC and other government entities to hold free fair and peaceful elections is paramount for the growth of democracy. Institution strengthening including training of election officials and developing a legal framework and civic engagement efforts need to be treated with the weightiness it deserves. Trainings in collaborative leadership including the media and building resources for democracy, governance and elections also need to be considered critically.

## CHAPTER FIVE

### CONCLUSION

#### 5.1 Summary

Kenya's new leadership will have both opportunity and obligation to address serious electoral discrepancies and human rights challenges that left unaddressed, continue to fuel violence and human rights abuses. The government should uphold key rights for civil society, ensure accountability for serious crimes and breach of law and pursue essential reforms.<sup>179</sup>

Civil war is a product not of grievances but of the greed of leaders, that is, of the extent to which the economic, social and political structure creates an opportunity for leaders to profit from mobilizing violence. Thus the point remains that elections can create an opportunity for political entrepreneurs to advance their careers through extremist appeals to mobilize their ethnic or religious groups and that such 'out-bidding' can lead to increased violence in society. Although elections are a precipitating rather than an underlying cause of violence in the society, the ability of elections to mobilize extreme opinions that outlast the immediate contest should make us cautious about their conduct when conflict is already present.<sup>180</sup>

Studies showing that previous bouts of electoral violence are strong predictors of repeated violence reinforced the need for prevention. Elections alone do not guarantee the establishment of a true democracy but are essential to it, since no regime would qualify as democratic in our modern era if it does not hold regular elections. The risk of violence was, and remains, very real.

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<sup>179</sup> Human Rights Watch. *Kenya: Human Rights Priorities for the New Administration*. April 2013

<sup>180</sup> Leonard, David. *Elections and Conflict resolution in Africa*. Chapter 3

Previous studies have shown that observers have documented warning signs of violence, from stockpiled weapons to ethnic incitement, which was a root cause of earlier violence. Fearful families sent women and children to the farm or out of the country. Kenyan businesses closed in anticipation of violence, with economic repercussions across East Africa. With East Africa's largest economy, Kenya looks set to continue the economic growth that will restore the \$7 billion dollars' worth of losses since 2008. This, in turn, will lift many out of poverty, led by sustainable commercial growth rather than scarce aid dollars.<sup>181</sup>.

Elections are likely to be open, free and fair when the electoral process is managed by a special body established by law. This body, generally known as an electoral commission, should be impartial. It should be independent from the government of the day, from all political parties and from any other internal or foreign force. Popular participation in the elections and the acceptance of the results of elections are also dependent on the confidence the electoral bodies enjoys among the citizens and major political parties. The electoral process usually comes to an end with the proclamation of the results. This is left to the judiciary to which the electoral body or commission is subject and which decides the electoral disputes. It is therefore extremely important that both the electoral commission and – even more importantly – the judiciary should be independent and impartial. An electoral process may be totally derailed in the end if the judiciary is biased. Down the line, the judiciary therefore plays a crucial role in determining whether elections were open, free and fair and to be considered democratic.

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<sup>181</sup> Lord, Kristin M. And Wilson, Jacqueline. *Lessons Learned from Kenya's Election*. Foreign Policy Democracy Lab, 2013

Considering the persistent doubt over the ability of the new reforms to ease the election problems and the tensions caused by systematic corruption and ethnic divisions, it is unlikely that the 2010 Constitution and devolution plan alone will not effectively deal with violence, especially if the catalyst to violence is another factor altogether unrelated to elections such as the ethnic conflict. The role of political parties, civil society organizations, observers and the media, all these stakeholders are necessary to validate the transparency and legitimacy of the electoral process. However, this can only be achieved where they conduct their roles professionally and with neutrality. Political parties owe the country a duty to ensure that fair conduct, practice and factual information guide their activities, while civil society organizations and observers are meant to act in a non-partisan manner to ensure that transparency and credibility are built into the process. The government on its part also owes the electorate a duty to put in place adequate mechanisms for free and fair elections.<sup>182</sup>

As noted by the Kriegler Commission, the media has great influence and all Kenyans agree that they are highly influential and the public lends credence to what they hear or see reported. As such, the media set the agenda with powerful effects but the audience bears the greatest responsibility depending on how they decode and interpret messages. Thus, responsible, accurate, timely and veracious information ought to be disseminated to the public at every juncture. In spite of the gravity of their roles, the verdict is that all these stakeholders do not seem to inspire public confidence in their abilities to successfully conduct their roles.<sup>183</sup>

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<sup>182</sup>Damdinjav, M. et al. *Institutional Failure in Kenya and a Way Forward*. Journal of Political Inquiry at New York University, Spring Issue (2012) also Fn 163

<sup>183</sup> The National Council of Churches of Kenya. *Independent Review Commission (IREC) {Kriegler Commission} Final Report*, June 2009

Thus, it is hoped that in future, each one of these groups of stakeholders will embrace their duties with the urgency and professionalism required to avoid electoral malfunction at all costs. With the increasing proliferation of media houses owned by politicians' impartiality and professionalism and even political propaganda stand the risk of being seriously compromised hence reversing the gains made so far. Furthermore, the Elections Act focuses on state owned media and the right to equal coverage and accountability.

All said and done, democracy will have no meaning if the pledges of democracy turn out to be empty promises. To this end the convergence between democracy and development must be explored. Participation in elections and other political processes will have little meaning for hungry electorates.

## **5.2 Key findings**

In publication by Falana as quoted in a study by Odion<sup>184</sup>, corruption has become endemic and manifests itself in many different ways across the governance institutions. While acknowledging the existence of a legal and institutional framework that has since been established, the capacity of the latter remains a challenge. Corruption remains a big threat to achieving democracy despite the existence of different institutions with a mandate to tackle it. Studies on elections have revealed that transiting from one regime to another is often the problem in most African state. The violence that occur before, during and after which the elections must have taken place (post-election violence) often bring about instability in the political system in most Africa countries.

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<sup>184</sup> Odion I. *Elections, Electoral Reforms And Post- Election Violence: Problems And Way Forward*. PoliticsView Discussions. Department Of Social Studies - College Of Education, Igueben, Edo State November 5, 2012 (Also in Fn 51, 52 above)

Failure of systems in the 2007 elections and thwarting of democracy dovetailed to make violence the method of choice to resolve a range of political differences and to obtain political power. Violence is endemic, it is used routinely to resolve political differences, and therefore threatens the future of the nation. Ahead of the 2013 general elections, there is an escalation of intensified campaign for peace and in the wake of the occurrences of the 2007<sup>185</sup> Kenyans are not ready to send this country to the dogs – not again. Lobby groups, the civil society, religious groups and media have set up spirited campaigns against violence.

The nature of democracy is that elected officials are accountable to the people, and they must return to the voters at prescribed intervals to seek their mandate to continue in office. For this reason, when elections are called, politicians and supporters will begin to oil the political machines to influence policy by competing directly for the votes of the electorates in what are call campaigns. In an attempt to address the stark ethnic divisions that facilitated inequality and violence, the devolution plan seeks to diminish the power of ethnicity in politics.<sup>186</sup> Prior to the institution of the new counties, the previous regions of Kenya were divided the according to ethnic group and were maintained by the ruling group as a convenient way to allocate resources according to the ruling group's own preferences. The reorganization is structured to prevent such unequal distribution of resources by reducing strong concentrations of ethnic groups. Moreover,

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<sup>185</sup> Post-Election Violence, 2007 – How Deep Are the Roots? the facts and surrounding circumstances relating to the post election violence

<sup>186</sup> Jean-Pierre, Benoit and Kornhauser, Lewis A. "Social Choice in a Representative Democracy." (American Political Science Review 88.1 (1994) pp 185–192.

the constitution prohibits discrimination and creates affirmative Action plans<sup>187</sup>. It further disallows any political party that “is Founded on an ethnic, age, tribal, [...] basis”<sup>188</sup> which is meant to force politicians To reach across ethnic lines to represent all their constituents as well as decrease the amount of tension created along ethnic lines, all of which should benefit minority populations.

The Kenyan state has a responsibility to protect its citizens based on a number of international declarations that it has signed up to as well as its membership of the Civil Society, Electoral Reform and Transitional Justice in Kenya Regional Implications of the Kenyan Crisis African Union (AU) whose Constitutive Act as well as its Protocol on Democracy, Elections and Governance calls for an explicit adherence to the rule of law and upholding of human rights.

### **5.3 Recommendations**

The issues at play seem malignant. They are not any different from the previously experienced challenges in election in Kenya and elsewhere in Africa. These are terminal African illnesses, so engraved and that must be eradicated ones and for all for true democracy to prevail. To usher in a democracy or contribute to democratic consolidation, elections should meet a number of criteria that need to be revisited. First, a democratic regime being one based on the rule of law, democratic elections should also be provided for and organized in terms of rules and principles adopted by the legitimate representatives of the people and accepted by the majority of the citizens and parties. These rules and principles cannot be made dependent on the incumbent political leader or party who would decide when elections are to be organized, who should be

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<sup>187</sup> Damdinjav, M. et al. *Institutional Failure in Kenya and a Way Forward*. Journal of Political Inquiry at New York University, Spring Issue (2012). Also Fn 103

<sup>188</sup> Republic of Kenya. *The Constitution of Kenya*. Nairobi: Government Printer, (2010).

entitled to vote or stand for elections, under which conditions these elections should be organized, how the electoral process should be managed and which institutions should be involved in the management of the process or in the promulgation of the results.<sup>189</sup>

There should be a legitimate constitution and legislation adopted by people's representatives in Parliament to set up the rules and principles which would constitute the electoral law. Arguably, this is the main criterion of democratic elections on which others depend. Without a constitution or electoral legislation adopted or agreed upon by the citizens or the major political parties, elections are unlikely to be open, free and fair.<sup>190</sup>

Democratic elections should be fair, open and free. This requires that elections should be held on a regular basis. They should be exempted from any rigging. They should be open to all in the sense that every adult citizen should be entitled to vote although he or she may not actually take part in voting. On the other hand, any citizen or political party should be allowed to participate in these elections. Moreover, they should be allowed to vote or campaign freely. Again, the regularity, fairness, openness and freedom of elections should be provided for by the Constitution and the electoral law.

A peaceful election requires tremendous effort around the clock from all quarters and stakeholders. Kenyan government and grass root organizations must implement a nationwide early-warning and early response network to quell violence before it spread. Hate speech, libel,

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<sup>189</sup> For more on this, Mangu and Budeli. *Democracy and elections in Africa in the Democratic Republic of Congo: Lessons for Africa*. Also Fn 17, Chapter one above

<sup>190</sup> *Ibid.* p 109

slander or any form of defamatory utterances as well as insinuations and inflammatory statements must also be put on check. When signs of it are looming, police must secure the polling places, religious leaders and local committees to monitor and calm tensions and there should be calibrated peace messages to groups preparing to clash.

Kenya is moving away from the days of autocratic presidents and the police henchmen who had been the enforcers of their repressive measures. Groups that are trying to reconcile the nation should ground their approaches on a sound political economy of development and underdevelopment. The land question, anti-poverty strategy, uneven development, plundering of the government coffers, corruption, and affirmative action in the distribution of key positions in the government and other institutions should be the major parameters that define the missions of such organizations as we stride towards a democratic era.<sup>191</sup>

Speech in the media, including in vernacular FM radio stations, aiming to foment ethnic hatred and/or incite, organize, or plan for violence should be investigated thoroughly in a timely fashion when it occurs. Legislative framework governing the Media should clamp down on media misconduct and against hate speech. The country must also make decisions to change the way politics is conducted, as well as to its intersection with other issues related to land, marginalization and inequality, and youth. Short of that, violence including that related to elections will continue to appear and will be ignited ever more readily.

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<sup>191</sup> Mwalimu Edari. Kenya Elections 2013: The Issue of Land and the Political Economy Under Girding Public Issues. Kenya Coast Development Forum

The lost confidence in the institutions of governance in Kenya as a result of political crisis witnessed every election year must be restored. The principle that should guide the re-constitution of the Kenyan state should focus on ensuring ethnic accommodation by ensuring minority participation and mitigation against majoritarian domination. In order to curtail the inevitable drive of the executive to consolidate and centralize power within itself to the detriment of other institutions, the legislative and judiciary need to be constitutionally independent and sufficiently endowed with the power to implement a system of checks and balances to constrain the potential excesses of the executive.

The study recommends that web technology be given a critical consideration. Web technology might advance local governance reform. Current uses of web technology have the potential to support reform of local governance. The rapid adoption of Internet technologies by government and political officials suggests that they may be valuable tools for governance reform. There has been particular attention, both in academia and professional practice, to local government uses of electronic technology.<sup>192</sup> Nonetheless, the debate regarding democratic uses of new communications technologies has remained largely speculative. There has been little systematic empirical evidence regarding the quality of government services on-line and the extent to which government use of technology provides the information and interactive capabilities that can meaningfully improve governance.

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<sup>192</sup> Musso J et al. Designing Web Technologies for Local Governance Reform: Good Management or Good Democracy? (University of Southern California. April 1999) p. 2

Abramson, Arterton and Orren argued a decade ago that new technologies conceivably could influence governance through a number of processes: citizen lobbying, government mobilization for public support, communications between levels and branches of government and citizen participation.<sup>193</sup> However, discussions about the usefulness of communications technology for democratic participation generally produce confusion because the nature of the causal connection between technology and political effects is so nebulous. This thematic area calls for further research to establish the usefulness of ICT in democracy.<sup>194</sup>

Ultimately, any hope of resolving the situation in Kenya will require the active participation of civil society. Civil society will also have an important role to play in the implementation of the peace building. They will therefore need to continue monitoring the implementation of both the Kriegler and Waki Commission recommendations. In the medium to long-term, they will need to undertake country-wide reconciliation and civic-education initiatives to ensure that a commitment to democracy and transitional justice is sustained.

It is an essential function of the State to ensure the enjoyment of civil, cultural, economic, political and social rights to its citizens. Democracy thus goes hand in hand with an effective, honest and transparent government, freely chosen and accountable for its management of public affairs. Public accountability, which is essential to democracy, applies to all those who hold public authority, whether elected or non-elected, and to all bodies of public authority without exception.

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<sup>193</sup> Ibid. p. 8

<sup>194</sup> Ibid. p. 26

There is need to enhance transparency and accountability in our governance structures and build strong institutions that can fight corruption and undemocratic traditions. It is time we heard African leaders and institutions speak strongly and clearly with one voice against such retrogressive developments. In this century we should speak with one voice, one set of common values, to determine the direction of our continent. Democracy should not be subject to individual interpretation, and it should not be a negotiation between elites and stakeholders. Democracy will be best established when institutions are trusted, the rules of the game clear and political actors prepared to win or lose. Democracy, whether in Kenya or Tanzania, Tunisia or Libya, South Africa or Nigeria, has to be seen to be delivering on two fundamental fronts: the electoral process must command the full confidence of voters, and elected leaders must use their mandate to serve the interests of the people.

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