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Changing Incentives: How Electoral Reform Can Help Remove an Ethnic Focus in Political Competitions in Kenya

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CLAREMONT McKENNA COLLEGE

**CHANGING INCENTIVES: HOW ELECTORAL REFORM CAN HELP
REMOVE AN ETHNIC FOCUS IN POLITICAL COMPETITIONS IN KENYA**

SUBMITTED TO

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AND

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BY

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FOR

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“As a writer once put it, we feel more at ease discussing other people’s tribalism and not our own. And that is the problem in Kenya today.”

-Walter O. Oyugi

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List of Acronyms

ECK	Electoral Commission of Kenya
FPTP	First-Past-The-Post
IPPG	Inter-Parties Parliamentary Group
IREC	Independent Review Commission
KADU	Kenyan African Democratic Party
KANU	Kenyan African National Union
KBC	Kenya Broadcasting Corporation
LCD	Lesotho Congress of Democracy
LDP	Liberal Democratic Party
MCK	Media Council of Kenya
MMP	Mixed-Member Proportional Representation
MPs	Members of Parliament
NAK	National Alliance Party of Kenya
NARC	National Alliance Rainbow Coalition
NGO	Non-governmental Organizations
ODM	Orange Democratic Movement
ODM-K	Orange Democratic Movement-Kenya
PPA	Political Parties Act
PNU	Party of National Unity
PR	Proportional Representation
UNDP	United Nations Development Programme

Introduction

Prior to the presidential elections in December 2007, Kenya was viewed as one of the few politically stable and economically prosperous countries in Africa, a paradigm for other African countries to emulate. At least this was the view held widely in the Western world. Missing in this analysis were the growing ethnic tensions which, although not new to Kenya (the precedence was established during the colonial era), had grown increasingly volatile during the past two decades. The 2007 election results revealed even sharper bitterness and divisions among Kenyans: “A day after President Mwai Kibaki was declared the winner of a second term, people who have lived as neighbors for decades in the Nairobi enclave began speaking of two Kenyas, one for the Kikuyu, Kibaki’s tribe, and one for Luos and other ethnic groups loyal to opposition leader Raila Odinga, who says the vote was rigged.”¹ Ethnic lines were clearly delineated and the country experienced two months of violence that left more than 1,000 people dead and 300,000 people homeless.² Much of the period leading up to the election was politically charged by ethnic hostilities as opposition leader Raila Odinga’s supporters accused incumbent Kibaki of ethnic favoritism towards his Kikuyu community.³ It is important to note that the Kikuyu not only constitute the largest ethnic group in Kenya, but have dominated Kenya’s political scene since the country gained independence from Great Britain in 1963.⁴ While Kibaki and Odinga reached a tenuous power-sharing agreement on February 28, 2008, the election left a coalition government and an elevated level of

¹ Stephanie McCrummen, “Ethnic Fault Lines Emerge in Kenya’s Post-Election Turmoil,” *Washington Post*, January 1, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/31/AR2007123100539.html> (accessed December 6, 2010).

² *Alert*, Spring 2008, Vol. 11 No. 7, pg. 6.

³ “Ethnic Fault Lines.”

⁴ *Ibid.*

concern regarding prevailing ethnic hostilities. One has to ask, would a sense of civic nationalism have averted the riots and the subsequent human and economic fallout?

With ethnic identification increasingly becoming a polarizing force in political competitions in Kenya, it is in the best interest of the Kenyan government to reform its electoral policies and procedures to generate a change in incentives which promote civic nationalism as a way to counter the negative aspects of an ethnically diverse nation.

Changes must be made in three key areas of the current electoral system:

- Changing the current voting system of first-past-the-post (FPTP) to a closed list Proportional Representation (PR) system in parliamentary elections and to a two-round system for presidential elections
- Redefining and creating mechanisms for developing and enforcing better rules for political parties and campaigning
- Reforming the Electoral Commission of Kenya (ECK) to make it the predominant authority on electoral activities in Kenya.

Using Kenya as a case study, this thesis focuses on how electoral reform can be utilized as one way to decrease the use of ethnicity as a political tool which currently creates unnecessary tensions. Each chapter focuses on a different aspect of electoral reform: chapter one looks at changing the current voting system of first-past-the-post (FPTP) to a closed list Proportional Representation (PR) system in parliamentary elections and a two-round voting system in presidential elections, chapter two addresses redefining and creating mechanisms for developing and enforcing better rules for political parties and campaigning, and finally, chapter three explores reforming the Electoral Commission of

Kenya (ECK) to make it the predominant authority on electoral activities in Kenya.

These chapters will each be divided into four sections. Starting from a historical perspective, the beginning of each chapter, Section A, looks at the foundation of ethnic division in Kenya resulting from colonization based on the topic of focus. The electoral institutions and societal mechanisms established during the post-colonial struggle for independence are then discussed. Section B provides an analysis of how the component being discussed in the chapter contributed to the violence of the 2007 elections. This section details the repercussions and implications of the ethnically dominated violence that followed. Section C presents the various reform options available. Using other African countries as examples for successes, failures, and inspiration, this section explores how other African states have tackled the issues that surround multi-ethnic populations and the resulting conflicts. It also looks at the recommendations of the Kriegler Commission which was charged with analyzing the 2007 elections and the resultant fallout. Finally, Section D concludes each chapter by arguing for the best option that addresses the ethnic question in regards to its politicization in the electoral process and promotes civic nationalism over ethnically minded interests.

History has played a large part in the influence of ethnicity in African politics. The impact has been exceptionally damaging: “owing to the extreme arbitrariness and artificiality of colonial era territorial demarcations and manipulations in Africa, the continent has the largest concentration of ethno-political minorities at risk in the world followed by Eastern Europe, Asia, the Western democracies, and Latin America in that

order.”⁵ The problem is amplified by the abuse of ethnic identity by African institutions from political parties to the government itself which repress and manipulate multi-ethnic ties instead of working towards accommodation and mediation.⁶ The use of ethnicity as a political weapon frequently takes center stage during elections because they offer an arena for the political competition that resonates in a country. The consequences of this use of ethnicity have global implications: “In Africa and beyond, ethnic (as well as religious and regional) identity conflicts have hobbled the capacity and legitimacy of governments, drained the integrity and unity of states, and ravaged the cohesion and coherence of civil societies.”⁷ It is the ordinary citizen who suffers the most from these conflicts; many of them become internally displaced persons, losing their homes, meager means of livelihood, and often family and friends. The physical and psychological consequences of this violence and disruption of life are not easily repaired. Political instability as a result of ethnic hostilities not only affects citizens, but has repercussions for neighboring countries which often have to assume responsibility for fleeing refugees, deal the fallout from sheltering rebels, and can take an economic hit if they lose a trading partner. Globally, the rest of the world has to bear the responsibility for humanitarian relief as war torn countries face famine, disease, death, and the weight of internally displaced persons on large scales. The devastation of the events that followed the Kenyan 2007 elections magnified these issues and placed them on the front pages of newspapers worldwide.

⁵ Goran Hyden and others, eds. *African Perspectives on Governance*, (Eritrea: Africa World Press, 2000), 130.

⁶ Ibid.

⁷ Ibid., 123.

Elections have been seen as the cornerstone for countries striving to become (or at least appear more) “democratic.” Kenya is one of the many countries in Africa that has chosen to use elections as a means of selecting its leaders and members of government. This paper is not arguing for democracy in Kenya. Rather, it is looking at an electoral system that has already been chosen and put in place. It is not seeking to argue for ‘free and fair’ elections but to address the ethnic component that is so prevalent in the process. The recommended reforms to the electoral system that are discussed throughout the paper regarding ethnicity will, however, likely cover some of the issues that fall under ‘free and fair.’ Furthermore, it is not looking at regime change. The ultimate focus is on how ethnicity is used as a political tool and what steps can be taken to change this negative use and works towards a sense of national unity. As a case study, Kenya exposes the realities of ethnic divisions in Africa and demonstrates the need for African institutions at all levels to address the abuse of ethnic identities in political competition. Suzanne Mueller argues the 2007 elections brought to light some of the shortcomings not only of Kenya’s electoral system, but political competition as a whole:

Kenyan political institutions have been subject to the power of a highly centralized and personalized presidency; that political parties have been driven by the desire of politicians to acquire access to state resources and patronage; that these political parties have focused overwhelmingly upon the necessity of winning; and that, as a result, elections in Kenya have become a ‘do or die zero-sum’ exercise in which politicians have resorted both to appeals to ethnicity and the use of violence against opponents. In turn, while neither political parties nor voters regard the Electoral Commission and the wider state administrative system as neutral, voters themselves are widely induced to vote along ethnic lines, not least because

of the fear of violence or ‘ethnic others’ gaining advantage over their own communities.⁸

These issues are encapsulated by one problem: the incentives in the current competitive political system are skewed by both politicians and voters alike. The existing and dominant incentive is to gain or maintain power by whatever means necessary; hence the reliance on ethnicity for patronage and even violence if patronage is insufficient. In order to overcome these factors, the priority of the ECK and ultimately the Kenyan government needs to be to change the incentives that currently dominate political competition. This change can begin by reforming the present incentive system by means of the electoral system, focusing on civic nationalism as the end goal. The promotion of civic nationalism would allow Kenyans to see themselves as Kenyans first and members of an ethnic community second. The new incentives in political competition need to promote what is in the best interest of all Kenyans not what is best for one ethnic group. The key lies in a process that leads to a government that is inclusive of all groups and of all interests in its policies and practices. Whether this can be obtained through civic nationalism has been challenged by many political scientists. One of the main criticisms of promoting a civic identity is that an attachment to a nation is not likely to replace loyalty to a group due to the greater emotional resonance in ethnic nationalism.⁹ While this argument has merit, especially given Kenya’s historical background of ethnic division, involvement in various types of organizations from political parties to religious

⁸ Roger Southall, “Alternatives for electoral reform in Kenya: Lessons from southern Africa,” *Journal of Contemporary African Studies*, Vol. 27 No. 3 (2009): 448.

⁹ Stephen Shulman, “Challenging the Civic/Ethnic and West/East Dichotomies in the Study of Nationalism.” *Comparative Political Studies*, Vol. 35 No. 5 (June 2002): 580.

groups can also elicit emotionally charged feelings and actions that can supercede ethnic loyalty.

Several different ways of using civic nationalism to combat ethnic divisions have been suggested which include:

- The promotion of a single language
- The emphasis of ethnic peace in educational systems
- The abolition of traditional chiefs
- And electoral reform

What makes electoral reform stand out among these options in Kenya is that it provides an opportunity for the government and politicians to work through an established institution (elections) that is already accepted by the people. By focusing specifically on the electoral system in promoting civic nationalism in ethnically diverse countries, African states can begin to build trust between themselves and the people, negating some of the criticisms of civic nationalism. What is crucial is emphasizing the importance of the system and portraying the benefits of such a system directly to the people. If a state can provide support for ethnic and cultural components of a society through state and political institutions, while not letting these features dominate the system, civic nationalism can garner support. While clearly it will take more than simply reforming the electoral system, encompassing change from voting structures to political parties to the ECK, these three areas of electoral reform provide visible changes for creating a political competition based on civic nationalism. Since elections draw both national and

international attention, they present a prime opportunity to encourage politicians and voters to begin thinking nationally, not ethnically.

Examining theory and terminology behind ethnic groups provides a basis for understanding why ethnicity remains a prominent source of identification in Africa. Throughout this thesis, ethnic group refers to: “an ascriptive social collectivity whose members not only share such objective characteristics as group name, core territory, language, ancestral myths, culture, religion, and/or political organization, but also possess some subjective consciousness or perception of common identity or descent.”¹⁰ Ethnicity will denote: “the mobilization and politicization of ethnic-group identity in situations of competitive or conflictual pluralism.”¹¹ How ethnic groups function within states varies based on structural components of ethnicity. One distinction is ranked ethnic groups versus unranked ethnic classification, where ranked ethnic groups are based on socio-economic terms or class that result in a stratification of ethnic groups creating a hierarchy whereas in unranked ethnic classification class has no bearing.¹² While most African countries are characterized by unranked ethnic groups, a few ethnic systems such as Rwanda and Apartheid South Africa provide examples of ranked ethnic classifications.¹³ The greater number of unranked ethnic groups is significant as an important element of this group is their highly competitive political orientation while ranked systems are often more ideologically and socially entrenched.¹⁴ This emphasizes the need to monitor

¹⁰ Hyden, 124.

¹¹ Ibid.

¹² Ibid., 126.

¹³ Ibid., 127.

¹⁴ Ibid.

political structures more closely in unranked systems in order to avoid conflict that potentially could arise due to the increase in political competitiveness.

Another factor that differs amongst states is ethnic systems that are centralized and ethnic systems that are dispersed. Ethnically centralized states are characterized by a few large ethnic groups that enjoy demographic or socio-economic predominance over other groups and, as a result, can polarize all aspects of national politics through their interactions and frictions.¹⁵ Countries such as Kenya and Uganda are examples of relatively centralized ethnic states. Geographically, ethnic populations can be concentrated or intermixed. Although geographically concentrated ethnic groups still encapsulate most African states, urbanization and migration has increased the prevalence of intermixed ethnic groups, especially in cities.¹⁶ Geography can have a significant influence on conflict between ethnic groups as, “It is broadly recognized that geographically concentrated ethnic structures are relatively more conducive to inter-ethnic peace, not only because inter-ethnic intercourse and friction are less socially prevalent in such contexts but also because geographical concentration of identity groups facilitates the implementation of federalist and other territorial formulas of ethnic conflict-management.”¹⁷ All of these distinctions can help to explain the role that ethnicity plays in individual countries throughout Africa. However, while these features help categorize countries, they are not always indicative of whether ethnic conflict might arise.

¹⁵ Hyden, 127.

¹⁶ Ibid.

¹⁷ Ibid., 127-128.

There is still much debate on why and to what degree ethnicity has been able to infiltrate the political and social structures of many African societies, but there are two main theories about the role of ethnicity as a key source of identification in Africa: (1) ethnic identities reflect a sense of tradition where ethnicity is fundamentally part of a people (primordialists), and (2) ethnicity is a dominant feature because it serves a functional purpose in society (situationalists).¹⁸ The importance of the primordialist theory is its critical function in helping to explain the psychological role of ethnic groups in African societies and perhaps ascribe part of the reason ethnic conflicts often result in violence. However, the situationalist argument addresses why politicization of ethnic groups often occurs. Ethnic groups provide “a contingent malleable or pliable self-classification that is often contrived by elites and their constituents to obtain economic or other non-ethnic rewards.”¹⁹ The state, through governments and political figures, plays a large role in how ethnic groups serve as a tool, utilized in social and political settings. As an “organizing principle,” the state can animate, define, and frame the ethnic behaviors of a country.²⁰ The impact of ethnicity on a society can be greatly influenced by political instruments created by the state to mediate and regulate the competition amongst ethnic groups. Scholars have identified three institutional paradigms African states tend to resort to in dealing with ethnicity: hegemonic repression, hegemonic exchange, and polyarchial or non-hegemonic exchange.²¹ Hegemonic repression involves state power being controlled by one-party, often a military regime. The danger

¹⁸ Benn Eifert and others, “Political Competition and Ethnic Identification in Africa.” *American Journal of Political Science*, Vol. 54 No. 2 (April 2010): 494-520.

¹⁹ Hyden, 125.

²⁰ *Ibid.*, 126.

²¹ *Ibid.*, 130.

of hegemonic repression is that it alienates certain groups while providing privileges for another which can often result in rebellion or resistance. Hegemonic exchange combines both elements of an authoritarian government with special rules, policies and practices intended to deal with diverse ethnic groups. Kenya, under the leadership of Jomo Kenyatta, provides an example of a period of hegemonic exchange regime as Kenyatta strove to balance his position as leader of the Kenyan nation with that as a patron of the Kikuyu ethnic group.²² Even though hegemonic exchange regimes attempt to create a sense of stability between state-ethnic and interethnic relations, ultimately, the dominant tendency is to manipulate and appropriate ethnic relations in a way that helps secure the survival of the hegemony in power.²³ And because there is a tendency of rulers to focus on self-survival, any ethnic networks or linkages established often disintegrate with the rise of a new political order as the ethnic relations are based on informal, personal relationships as opposed to formal agreements or constitutional rules.²⁴ This is further extenuated by the role of patrimonialism in African politics, where competition for resources and ethno-clientelistic patronage networks dominate government actions over the development of progressive and policy oriented objectives to manage ethnic divisions.²⁵ Polyarchical exchange involves a liberal democracy regime that utilizes the rule of law and special institutions to address ethnic divides.²⁶ Four devices drive ethnic interactions and management in a polyarchical exchange regime: democracy, autonomy,

²² Hyden, 134.

²³ Ibid., 133 and 135.

²⁴ Ibid., 135.

²⁵ Ibid., 136.

²⁶ Ibid.

proportionality, and minority rights.²⁷ In this type of governance, the focus is not on manipulating ethnicity but creating institutions that effectively address the concerns that develop as a result of ethnic pluralism. The overall goal that governments should strive for in regards to ethnicity can be summarized as thus: “governance as an approach to ethnicity would seek to identify and create rules and institutions that may promote equity and amity in inter-ethnic and/or state-ethnic relations and generally channel ethnicity along constructive, rather than oppressive or destructive lines.”²⁸ However, the establishment of these mechanisms by governments has been anything but stable. Nigeria provides an example of a country that embraced polyarchial exchange but slowly deteriorated into a repressive military hegemonic regime.²⁹ Where it is difficult to establish a stable form of government, the challenges facing the implementation of a legitimate electoral system is even greater.

Ethnicity in Africa has emerged as a result of political competition established and promoted by those in and seeking power. Serving as a political tool, ethnicity is used for: “mobilizing people, policing boundaries, and building coalitions that can be deployed in the struggle for power and scarce resources.”³⁰ Two dominant features can be distinguished in the use of ethnic groups as a tool: (1) the promotion of ethnic identities is employed to gain state-controlled power and (2) they are used to exploit economic resources. The reliance on ethnicity for political competition flourishes during times of presidential, parliamentary, constitutional, and general elections. The two key mechanisms that support the increased importance of ethnic identity revolving around

²⁷ Hyden, 143.

²⁸ Ibid., 124-125.

²⁹ Ibid., 138.

³⁰ Eifert, 494.

elections are the same as stated above: the control of state-power and economic resources. In elections, “ethnic identities are tools that people use to get access to political power.”³¹ Elections renew awareness of the political power that is at stake and therefore impact the electoral process by emphasizing ethnic identity above all else:

First, it is widely recognized that the growth and concentration of resources in the state has increased the salience of state control for ethnic groups as much as for individuals, and, hence, has produced a zero sum ethnic struggle for political power. Second, with the whole process of class formation and consolidation at stake for the political class, politicians have been prone to manipulate ethnic attachments and tears as a means both for mobilizing electoral support and for diverting attention from their own corrupt accumulation and abuse of power.³²

In the time leading up to elections, many politicians embrace the psychological influence of ethnic identity and thus “play the ethnic card” in an attempt to bolster support. This tactic brings ethnicity to the forefront of voters’ minds and displaces other identities like membership in religious communities, a particular socio-economic class, and gender categories.³³ Political leaders encourage this emergence of ethnocentrism during elections because it is one of the easiest ways to mobilize support.

This ease of mobilizing support is due in large part to the second force that comes into play during elections (one that politicians do not even have to embrace as a tactic), the competition for economic resources. Without politicians vocalizing the fact, voters recognize the historical importance of ethnic groups in the distribution of economic resources. The allocation of resources in Africa historically follows ethnic lines and election results determine who will be distributing the resources.³⁴ At both the local and

³¹ Eifert, 494.

³² Hyden, 128-129.

³³ Eifert, 495.

³⁴ Ibid.

national level, leaders often allocate to their ethnic groups considerable economic resources as a way to maintain political influence and control over various ethnic groups.³⁵ As a result of the politicization of ethnic identities, ethnic group loyalties move beyond the private sphere into the public sphere.³⁶ Beyond the command of blood-relationships, ethnic solidarity provides economic security. This economic security, goes outside competition between ethnic groups, but is the means for survival. A fear that has been planted in many African populations is that without a member of their ethnic group in power, they will increasingly face a daily struggle to survive. This reliance on patronage in regards to economic resources essentially enables leaders to buy support from their ethnic group.³⁷ But the problem of the use of ethnicity in elections goes deeper than just its exploitation: “participation in public affairs is reduced to a game of advocating ethnic interests rather than building structures that can guarantee equal participation, justice, and development for all. Consequently, people no longer see hard work as the source of economic success.”³⁸ The repercussion of a political system reliant on ethnic mobilization is that the focus of elections shifts from voting for what is best for a country regarding economic performance, health services, education, and the common good.³⁹ The focus is shifted solely to enabling a certain ethnic group to control the state. While multi-party politics may have been introduced in many African states in the 1990’s, these political parties typically became groups divided along ethnic lines. The emphasis to keep their ethnic group member in power has increasingly led to the isolation

³⁵ Aquiline Tarimo, “Politicization of Ethnic Identities: The Case of Contemporary Africa.” *Journal of Asian and African Studies* 45 (2010): 303.

³⁶ *Ibid.*, 304.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

of the less dominant ethnic groups: “Those who belong to the less dominant ethnic groups feel left out and discriminated against by the system. In turn, they feel obliged to act, legally or illegally, to ensure their survival. The tendency of self-assertion emerging from different ethnic groups for survival is, in fact, the root cause of the widespread conflicts in Africa today.”⁴⁰ It is still largely debated to what extent ethnicity plays a role in the conflicts that afflict much of the African continent, but, clearly it plays a part in the instability of many African electoral institutions. The weight placed on ethnicity during elections has created a cycle of dependence as both politicians and voters feel obligated to utilize their ethnic groups as a way to survive.

The link between political competition and ethnic identification in Africa has led to the exercise of exploiting ethnic groups, particularly in periods surrounding elections. A study conducted by Benn Eifert, et al., evaluated data from over 35,000 respondents in 22 public opinion surveys conducted in 10 countries between 1999 and 2004 on the political sources of ethnic identification.⁴¹ Their studies were founded on two key hypotheses: first, as ethnic identities provide a way for people to access political power, during election times when power is at stake, these identities are likely to become more salient; and second, that ethnicity will become an even greater factor in a highly contested and competitive election.⁴² Their findings supported ethnicity as instrumental in political competitions as a result of the close correspondence between ethnic identification and the electoral cycle.⁴³ Most significantly, they found that political

⁴⁰ Tarimo, 305.

⁴¹ Eifert, 497. The ten countries where these surveys were distributed were: Botswana, Malawi, Mali, Namibia, Nigeria, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe.

⁴² Ibid., 494.

⁴³ Ibid., 495.

competition raises salience of ethnic identity for all citizens.⁴⁴ Ethnic attachments in the countries studied were found to be the strongest during periods preceding and following competitive national elections. This is in part due to the increased use of the “ethnic card” played by politicians to rally support as well as the persistent weight of resources on the minds of the voters. Regular citizens (versus elites) are often the most impacted by this secondary influence as they rely on the belief that jobs, favors, and public goods will be disproportionately directed to co-ethnics of the person in power who controls them.⁴⁵ The question that arises is to what extent voters are being manipulated versus how much politicians are simply playing into their expectations. The role of these two factors has resulted in an electoral cycle in Africa:

Politicians will only invoke the need for voters to support members of their ethnic groups if they believe that such appeals will resonate, which in turn will depend on voters’ beliefs about how patronage is channeled in Africa. Similarly, although most citizens do not need to be reminded that their ethnic connection with the election’s winner is likely to affect the level of resource they will receive in the election’s aftermath, politicians’ ethnic appeals almost certainly reinforce such expectations. The result is an equilibrium in which expectations of ethnic favoritism by voters generate ethnic appeals by politicians which, in turn, reinforce voters’ expectations of ethnic favoritism.⁴⁶

This cycle creates a dangerous precedent for voters and politicians. Even if just one political party resorts to the promotion of ethnic identity, it can begin a process of ethnicization of all political parties. Opposition parties often start this process by

⁴⁴ Eifert, 496. The study looked at certain theories regarding ethnicity to analyze the range of the population that political competition impacted as far as ethnic identification. First was the theory that group size creates incentives for ethnic mobilization. The study did not find evidence of the size of ethnic group affecting ethnic identification. Second, the study looked at whether supporters of current ruling parties were more or less likely to ethnically identify themselves. The study found these supporters to be no different than supporters of parties that were not in power. Finally, the study explored the idea of young men as especially likely to identify ethnically. Again the results found there to be no significant evidence that this particular subset of the population was more likely to identify in ethnic terms.

⁴⁵ *Ibid.*, 507.

⁴⁶ *Ibid.*, 507-508.

criticizing the ruling party for discriminating against members of other ethnic groups.⁴⁷

The ruling party often responds with a counter-mobilization of its ethnic group.

Consequently, ethnicity persistently becomes the focus of elections in Africa.

The cyclical nature of ethnic hostilities in Africa frequently compliments election cycles. Political competition has fallen into a pattern of utilizing ethnicity as a tool to win elections. This precedent needs to be altered but the current indifference by African leaders makes resolving this problem challenging: “The problem in Africa so far has been the little interest that the continent’s political leaders have shown in dealing with ethnicity in terms of constitutional and legal provisions that enable people to feel secure and governments able to manage this set of issues in a manner constructive to both itself and its citizens.”⁴⁸ Political leaders seem to have a larger interest in using ethnicity for personal benefit than for the greater good of the people. Because elections make ethnicity more salient, one of the ways to address this mobilization is for African governments to develop policies and institutional mechanisms regarding the electoral process that limit the destructive use of ethnic divisions.⁴⁹ Since ethnic identities are strengthened by political competition, these policies and institutions need to focus on the electoral process and other political instruments that lead to competition: “much can still be done to institutionalize, improve, and expand proportionality practices in Africa, especially through the design of electoral systems that may secure inter-ethnic moderation, toleration, and coalition by inducing and compelling candidates and parties

⁴⁷ Eifert, 508.

⁴⁸ Hyden, 147.

⁴⁹ Eifert, 508.

to seek electoral support across ethnic boundaries.”⁵⁰ These changes in structure and practices can only be implemented by promoting a larger goal that explains the need for structural adjustment. The new electoral system should encourage nationalism.

In regards to Kenya and many other multi-ethnic countries in Africa, the problem with the current electoral system is its support of a precarious type of nationalism. The theory behind using nationalism as a means to unify a country is that it provides an effective way to center the focus of a nation to the common good of all. However, this is not the case with all types of nationalism. There are two dominant types of nationalism: civic nationalism and ethnic nationalism.⁵¹ Key components of civic nationalism include: territory, citizenship, will and consent, political ideology, and political institutions and rights.⁵² The key difference between civic and ethnic nationalism is what state structures put into focus. Ethnic nationalism directs focus to common language, religion, customs, and traditions of a country while civic nationalism turns focus to a shared set of political practices and values.⁵³ While civic nationalism centers on a sense of equal community, ethnic nationalism emphasizes trust only from those in your own blood line.⁵⁴ This element of trust in political institutions that civic nationalism provides is essential as it promotes unity of a whole instead of just a part. But trust in political institutions in Africa is not easily come by. Many African countries have turned to ethno-nationalism

⁵⁰ Hyden, 145.

⁵¹ Shulman, 559. Some scholars have argued the existence of a third type of nationalism, that of cultural nationalism which concerns religion, language, and traditions, versus ethnic nationalism which involves issues of ancestry and race. This distinction is unimportant for this discussion as like ethnic nationalism, cultural nationalism is an unrealistic approach for Kenya and most multi-ethnic African countries to take. Therefore, ethnic nationalism will be inclusive of cultural nationalism in this dialogue.

⁵² Ibid.

⁵³ Ibid., 556.

⁵⁴ Ibid.

because of mistrust in political institutions.⁵⁵ These “civic deserts” can partially be explained by the effects of colonization which often destroyed the civic societies that were previously established. Once these countries gained independence, the newness of these states and regimes made it difficult to establish political and legal institutions that were often unfamiliar.⁵⁶ Ethnic nationalism, therefore “fills an institutional vacuum.”⁵⁷ When civic institutions have failed in the eyes of the population, ethnic nationalism becomes the default option: “It predominates when institutions collapse, when existing institutions were not fulfilling people’s basic needs, and when satisfactory alternative structures are not readily available.”⁵⁸ Since many African countries have fallen into this pattern, it makes the establishment of stable civic structures more and more challenging each time one fails. This is why the state needs to first focus on reform of electoral institutions. Trying to tackle the whole political system is too grand an idea and one that does not directly relate to the people; however, by creating an election process where citizens can actively participate and express their opinions in a legitimate forum, the state can portray positive reform in an effort to implement a stable and trustworthy government. Reform in the electoral process and institutions is one small step to building a country based on civic nationalism and not ethnic divisions.

In countries with not only ethnically diverse populations but ones with numerous languages, religions, and traditions, uniting a country already divided by ethnic nationalism proves exceedingly difficult. However, civic nationalism does not mean that the ethnic components of a country cease to exist: “A truly civic conception of the nation

⁵⁵ Shulman, 557.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

entails no need for cultural unity. People in a purely civic nation are united by such traits as common citizenship, respect for law and state institutions, belief in a set of political principles, and so forth. Similarity in language, religion, and other cultural markers is not necessary for the development of such traits.”⁵⁹ This strategy means that ethnic groups can still exist within the nation; they just do not dominate state institutions. From the promotion of community trust to the maintenance of the cultural aspects of different ethnic groups, civic nationalism has the potential to positively transform a state and shift the public’s attention from ethnically motivated actions to those for the greater good.

An electoral system that is not dominated by ethnicity will lead to a decrease in ethnic tensions. While ethnic groups and cultural traditions remain intact and continue to be a source of identification, in a political system that encourages the good of the whole, in times of political competition, ethnicity will not be wielded as a weapon by the opposition and a tool by incumbents. The stability that results from an unyielding electoral system in regards to the use of ethnicity can provide the groundwork for stability to spread to other government institutions such as areas of economics, health, and safety. This stability will continue to undermine reliance on ethnicity for power, and will increase the mechanisms available for all people as a means for survival. By reforming a small part of the larger political system, African governments can begin to encourage ethnic groups to work together for their common good

⁵⁹ Shulman, 560.

Chapter 1- First-Past-The-Post

“To imagine that with the stroke of a pen what is defective will be made good, that it will be easy to reverse 45 years of post-colonial, stumbling democracy.”

-The Kriegler Commission

The first-past-the-post (FPTP) election system was inherited from Great Britain. In this style of voting, an election is won by the candidate who receives the most votes. The candidate does not have to receive a majority of the votes to win. This voting system encourages a zero-sum style of politics which, in a country like Kenya, leads to ethnic campaigning because losing an election means the loss of power and the loss of resources associated with that power.¹ The concern is that this system has at times led to varying levels of ethnic cleansing due to the ideology that in order for one ethnic group to win another must lose. In order to diminish the current zero-sum mentality of political competition in Kenya, the voting system needs to be changed to a closed list PR system in parliamentary elections and to a two-round system in presidential elections.

Section A- Colonialism: Majimboism and Land

Colonial practices largely influenced the emergence of ethnically centered institutions throughout Kenyan society. With the establishment of the FPTP system in the late colonial/post-colonial era, its limitations began to shape ethnicity in Kenya. The Mau Mau freedom fighters, formed during colonial rule in the 1950s and who essentially initiated the struggle for independence, represent a momentous struggle for land in Kenya’s history that resulted in violence. Their eventual victory led to one of Kenya’s greatest land grabs that continues to cause

¹ Peter Kagwanja and Roger Southall, "Introduction: Kenya - A Democracy in Retreat?," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 269.

problems today (see Chapter 2 for a more in-depth discussion of the role of Mau Mau). In the period leading up to independence, Kenyan leaders had a choice to make regarding state structures that would ultimately determine electoral institutions. The two dominant parties at independence, which were formed along ethnic lines, prescribed different structures of government. The Kenyan African Democratic Party (KADU) promoted a federal structure of government based on regional responsibility for the administration of land in the designated territories known as Majimbo.² Majimboism was essentially ethnic based federalism.³ KADU's endorsement of this style of government was based on the idea of recovery of traditional territories by certain ethnic groups (specifically in the White Highlands which would leave the Kalenjin and Masai with native rights to the land as settlers left), back to the pre-colonial land spheres prior to the migration of ethnic groups that occurred during the colonial period.⁴ Critics of this system, however, argued that Majimboism would lead to larger community expansion into smaller communities, which would potentially threaten minority ethnic groups.⁵ In contrast, the Kenyan African National Union (KANU), predominately comprised of Kikuyu and Luo ethnic groups, sponsored a unitary government committed to upholding and respecting property rights.⁶ Despite these differences, each party was concerned with which ethnic groups would obtain the land in the White Highlands. This issue became the center of the creation of the Kenyan state. The fight between ethnic groups for land control was begun and then greatly exacerbated under colonial rule, making it difficult for the post-colonial government to look beyond ethnic groups when creating government structures.

² Karuti Kanyinga, "The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 329.

³ Kagwanja and Southall, 268.

⁴ Kanyinga, 329.

⁵ Ibid.

⁶ Ibid. This is in large part due Kikuyu movement into the White Highlands during colonial rule, land they would obviously not want to give up.

As the colonial government slowly began to unwind, African groups began to promote the re-Africanization of the White Highlands due to its agricultural wealth. This process, however, led to the emergence of landless squatters, specifically the Kikuyu, who had comprised a large contingent of the Mau Mau freedom fighters, who were threatening to reassemble if they were not given some of the land they deemed was owed to them.⁷ The Kikuyu squatters further antagonized the relations between the Kikuyu and the Kalenjin and as a result, the government's abilities to take ethnicity out of the equation were hindered: "The re-Africanisation of the White Highlands and increased focus on the Kikuyu ethnicised the land question and cultivated conditions for mobilizing ethnicity as a means of accessing land rights."⁸ Attempting to address the landless people issue, the government implemented a string of settlement schemes, however, these plans fell short of fulfilling the land desires of all the landless people and they also contained an ethnic dimension: "A larger number of beneficiaries who were Kikuyu, compared with those from other communities, created a perception that the schemes were meant to satisfy land hunger among Kikuyu rather than any other community."⁹ As the issues surrounding the land questions morphed into ethnic components, the spillover was seen in national politics. The Regional Boundaries Commission of 1962 drew new district boundaries that were largely ethnically based, with groups seeking to be together or separated from others depending on perceived land threats.¹⁰ The large resettlement of Kikuyu in traditionally Masai and Kalenjin territory "aroused ethnic animosity and tensions, adding to tensions that accompanied hostility around the negotiations for independence."¹¹ Instead of concentrating on obtaining independence of the Kenyan people as a whole, the focus was on ethnicity.

⁷ Kanyinga, 329.

⁸ Ibid., 330.

⁹ Ibid., 331.

¹⁰ Ibid.

¹¹ Ibid., 332.

With the KANU victory in pre-independence elections in 1963, the new administration under President Jomo Kenyatta (a Kikuyu) commenced land reform under the auspices of a unitary form of government seeking economic stability, thereby squashing the demand for the sanctity of traditional ethnic territories.¹² Throughout the 1960s the new administration sought to ensure economic stability by addressing the largest source of political unrest at the time, that of the Kikuyu landless in the Rift Valley.¹³ Desire for the control of land manifested itself in political and economic security and resources as ethnic groups gained political power. However, the continual competition for land, exacerbated by land-buying companies, intensified inter-ethnic rivalries as elite members used them to increase their social bases of power, thus consolidating the political positions of their ethnic groups.¹⁴ Although there was a relative period of calm in the 1970's and 1980's under President Moi, as his interests were aligned with that of the Kikuyu landed, the 1990's saw the re-emergence of ethnic campaigns regarding land.¹⁵ As political (inherently ethnic) groups mobilized around land issues, violence related to land began to follow election cycles.¹⁶

The Rift Valley has played a large role in violence that breaks out during elections due to its historically significant role in Kenya's national politics. It is a multi-ethnic region encompassing Kalenjin, Masai, Kikuyu, and Luhya ethnic groups. The region has the largest share of total national votes and parliamentary constituencies, making it appealing for parties to obtain political seats by focusing on the various ethnic blocs in this single area.¹⁷ And finally, like the former White Highlands, ethnic political competition to gain land has been a dominant feature of the region, resulting in ethnically motivated violence.¹⁸ The Rift Valley presents a

¹² Kanyinga, 329.

¹³ *Ibid.*, 335.

¹⁴ *Ibid.*, 333.

¹⁵ *Ibid.*, 337-338.

¹⁶ *Ibid.*, 338.

¹⁷ *Ibid.*, 326.

¹⁸ *Ibid.*

prime example of why the current voting system causes more damage to Kenyan society than it does good.

Based on historical experience, while the FPTP system helped establish electoral practices in Kenya, the plurality system lends itself to widespread corruption and manipulation by incumbent ruling parties which has been seen through the management of land.¹⁹ The period leading up to the 2007 elections saw many of the same patterns emerge.

Section B- Zero-Sum Mentality

Resentment regarding land allocation and ownership continued to taint the political process in the period before the 2007 elections. Regarding the constitutional referendum in 2005, “It was said that the proposed constitution was defeated because the Kikuyu political elite, who were in central positions in government, were not keen to share political power with other tribes. Issues of land and the domination of Kikuyu in the settlement schemes in the Rift Valley shaped those perceptions. The ensuing conflicts were an expression of resentment over wrongs arising from how land issues were addressed.”²⁰ Majimboists re-emerged under the Orange Democratic Movement (ODM), which supported federalism as the best way for policy to be pursued so that people could make decisions on matter specifically concerning their regions.²¹ In contrast, the Party of National Unity (PNU) argued against Majimbo, claiming that such a policy would undermine national unity.²² Representation at all government levels was obviously a concern of both the constituents and political parties. The 2007 elections saw 2548 candidates in the race for

¹⁹ Roger Southall, "Alternatives for Electoral Reform in Kenya: Lessons from Southern Africa," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 446.

²⁰ Kanyinga, 339.

²¹ Ibid.

²² Ibid.

only 210 seats in Kenya's National Assembly (parliament), based on single-member constituencies.²³

Instances of violence sprung up prior to the election based on trying to dissuade voter turnout. For example, "In Kuresoi, violence continued up to a few weeks preceding the 2007 December general election and may have been aimed at reducing voter turnout for the multi-ethnic Kuresoi parliamentary constituency."²⁴ The current FPTP system encourages these practices as the zero-sum mentality it perpetuates leads people to take drastic measures to ensure the vote goes in their favor.

Section C- Reform Options

Kenya needs a system of electoral voting that does not emphasize the winner-take-all approach that FPTP currently props up. The current delimitation of boundaries used in these voting structures does not represent the basic principle of the equality of the vote.²⁵ Kenya needs a system that will incentivize political parties and politicians to compete for votes across ethnic lines. The Kriegler Commission, charged with analyzing the 2007 elections, provided a few alternatives to the current FPTP system²⁶:

- A two-round presidential and parliamentary system
- Mixed-Member Proportional representation (MMP) based on one ballot (requiring changing the current constituency structure)
- Closed list proportional representation (PR) at the provincial level (emphasizing 'gender zipping' to increase fairer representation of women)

²³ Clark C. Gibson and James D. Long, "The Presidential and Parliamentary Elections in Kenya, December 2007," *Electoral Studies* 28, no. 3 (9, 2009): 498.

²⁴ Kanyinga, 339.

²⁵ Republic of Kenya, 2008a, "Report of the Independent Review Commission on the General Elections Held in Kenya on the 27th December, 2007," 77. See appendices I, II, and III for maps of Kenya's current provinces and districts as well as a breakdown of ethnic groups within these regions.

²⁶ Southall, 447.

- Closed list PR (also emphasizing ‘gender zipping’ to increase fairer representation of women) at the national level

These alternatives will be discussed by addressing parliamentary and presidential systems separately as each encompasses its own set of issues and requires different remedies.

Parliamentary Electoral Reform Options

Of course the easiest approach to electoral reform with minimal change would be to maintain the FPTP system but alter constituencies to promote a more equitable delimitation of ethnic groups. While limited change might be less challenging to implement in the short run, simply changing constituencies will not change the inherent problems that plague the FPTP system. It would fail to eliminate the winner/loser mentality as winning parties would still have a disproportionately larger number of seats relative to the votes cast for the losing party.²⁷ It would be very easy for ruling parties to skew the constituency boundaries in a way that was advantageous to the party during elections. The manipulation of constituency delimitations is also problematic in rural areas as they have been principally based around ethnic groups, which further encourages the politicization of ethnicity.²⁸ The result is the creation of the ethnic ‘other,’ whereby ethnic hostilities are cultivated. This then prompts political alliances centered on ethnic arithmetic.²⁹ Both of these issues leave the zero-sum mentality at the forefront of voting, allowing ethnicity to continue to dominate the system. If such a system were to work, the key would be a neutral constituency delimitation process that aimed at equalizing the ‘weight’ of

²⁷ Southall, 449.

²⁸ Ibid.

²⁹ Ibid..

individual votes.³⁰ The success of this would be based on the public trust placed on the neutrality of the re-districting constituencies.³¹

The two-round system of parliamentary elections changes from FPTP as it requires a majority of the vote to win. If no candidate wins a majority of the vote in the first-round within a parliamentary constituency election, then a second round would be conducted where the two candidates who had the most votes would have a run off. The implementation of this system would not only require more work for electoral institutions (like the Electoral Commission of Kenya [ECK] which already seems to be unable to handle its responsibilities [see chapter three for an analysis of the ECK]) by having to run two rounds of voting not just one, but it would also likely result in more petitions as third place candidates might protest the results for the second place position.³² This would only serve to slow up the entire electoral process and would likely not even address the ethnic component of voting as the run-off would still be along ethnic lines.

Mixed-Member Proportional representation, based on a single ballot vote, is a more inclusive voting system that attempts to make sure representation ends up proportionally representing the votes cast instead of it just being based on who has the most votes. The objective of an MMP electoral system is “to rectify imbalances in electoral outcomes produced by constituency elections through the simultaneous holding of a separate PR list election, whereby political parties put up slates of nominated candidates, a proportionate number of these candidates being elected according to the number of votes cast for the different parties.”³³ The principle behind the MMP is that the overall total of party members that is elected should mirror the proportion of votes received. In order to compensate for smaller parties that are often under-represented in parliament, extra seats would be given to these parties based on their proportional

³⁰ Southall, 450.

³¹ Ibid.

³² Ibid., 450 and 460.

³³ Ibid., 451.

representation of the vote.³⁴ The party with the largest number of candidates elected directly from constituencies will not gain further seats in parliament from the PR list.³⁵ Essentially the additional party seats in parliament compensate opposition parties, “topping up” local results.³⁶ The single-vote system would mean that a voter’s vote for a candidate in constituency elections would also count as his/her party vote for the PR reckoning.³⁷

The final recommendation by the Kriegler Commission was the closed list PR at both provincial and national levels, where voters vote for a political party from a list of candidates provided by the party.³⁸ The principle justification for using the closed list PR system is that it allows minorities representation while at the same time discouraging political mobilization centered on ethnicity or race.³⁹ The idea is that if there are no numerically dominant ethnic groups then the list PR system will diminish incentives for parties to campaign on the grounds of ethnicity.⁴⁰ Instead politicians would need to appeal to voters across ethnicities: “by encouraging bids by politicians across the spectrum of race, ethnicity, and religion, PR fosters mutual accommodation.”⁴¹

Each of these systems will be furthered scrutinized following the discussion of presidential electoral reform options.

Presidential Electoral Reform Options

Kenyan current electoral rules designate three requirements in order to be elected president: (1) a candidate must win in a nation-wide count, (2) secure at least 25% of the vote in

³⁴ Southall, 451.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid., 452. In an open list PR voters would be able to list party candidates in order of preference. This could perhaps be an option down the road if the closed list PR proved to be a relatively effective way of decreasing the salience of ethnicity in elections.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

five of the eight provinces, and (3) must win the parliamentary seat in their own constituency.⁴² The FPTP system of voting for president has clearly proven to be ineffective at representing the interests of the people and its flaws were demonstrated by the violence that ensued after the release of the rather dubious election results. A president elected by minority vote does not represent who the people want.

The Kriegler Commission suggested the use of a two-round presidential election, with the second round consisting of the two candidates with the most votes. The goal of this system is to eliminate the possibility of a candidate becoming president with a minority vote. If this system had been used in the 2007 elections, using the ECK's questionable data, Kibaki and Odinga would have moved on to the second round (with 46.4% and 44.1% of the votes respectively).⁴³ Then people would have had to vote between these two candidates, the winner being the candidate to receive the majority of the vote (over 50%). A second recommendation that was briefly alluded to is returning to the pre-1992 elections where presidents were elected directly by parliament.⁴⁴ In theory this would mean that the president would be dependent on the majority in parliament. The reform options for the presidency are obviously less extensive than the many electoral options for parliament. This is rather disconcerting as many claim it is the overly powerful office of the presidency that has played a role in the escalating ethnic tensions in Kenya.

Section D- Recommendations

Each of these electoral systems has positives and negatives, experiencing successes and failures in other African countries with multi-ethnic backgrounds. The recommendations that follow utilize experiences from other African countries and apply their ideas to Kenya's unique situation, the foremost concern being to implement a system that decreases the salience of

⁴² Gibson and Long, 497.

⁴³ Southall, 455.

⁴⁴ Ibid., 456.

ethnicity in elections. With Kenya's current limitations, the voting system needs to be changed to a closed list PR system in parliamentary elections and to a two-round system in presidential elections.

Parliamentary Electoral Reform Recommendation

Reform is more easily accepted in society when the change is relatively small. This explains the appeal of keeping the FPTP voting system and simply changing constituency boundaries in an attempt to decrease the ethnic factors that currently inhibit the FPTP system. Unfortunately, a small change will not suffice to make the impact needed to de-emphasize ethnicity in voting. The trust that would need to be placed in the hands of the institute creating new constituency boundaries to support the FPTP system is absent in Kenyan society. After all of the questions surrounding the 2007 elections and the role of ECK, trust in electoral systems and those in charge of them is greatly lacking. The delimitation of borders would be further complicated especially in rural areas as ethnic groups are largely divided regionally. Thus, a voting system based on boundaries would not eliminate the use of ethnic coalitions in order to gain power. Changing constituencies would have little impact on addressing the ethnic issues that FPTP already fails to deal with and perpetuates.

The two-round system, while achievable for presidential elections (see Presidential Electoral Reform below), creates even more work for a system that already consists of 210 constituencies. Only if the number of constituencies was decreased would this become a viable option.

MMP representation was initially successful in Lesotho following its implementation for the 2002 elections. Although it took help from the South African government to negotiate the use of MMP, the result was that while the Lesotho Congress of Democracy (LCD) won all but one of the 79 constituencies with only 57.7% of the vote, the allocation of extra seats based on the

system of national list representation allowed opposition parties to gain representation in parliament.⁴⁵ Voters did not appear to have difficulty voting for both individual party candidates in constituency elections and then for parties in the PR ballot;⁴⁶ however, Lesotho ran into problems in its 2007 elections. Based on the election results, LCD was the winning party so it did not receive seats under the PR poll. However, the LCD made an alliance with an opposition party, allowing it to essentially secure seats under the PR poll, undermining the intention of MMP.⁴⁷ The single-vote system suggested by the Kriegler Commission would help avoid such a situation from occurring in Kenya. While this system was relatively successful in Lesotho, MMP does come with its own set of problems. First of all, MMPs still require equitable constituency boundaries which have proven to be a challenge for both reasons of trust and implementation. Parliament would also need to be expanded (a financially costly option) or the number of constituencies would need to be reduced (which could lead to protests from ethnic groups worried about losing an advantage).⁴⁸ Another concern would be the treatment of PR Members of Parliament (MPs) as second class citizens as was exemplified in Lesotho.⁴⁹ Perhaps more importantly, “if constituencies continued in essence to represent voters according to ethnicity, as is likely, then the capacity of MMP to diminish the political salience of ethnicity would be limited.”⁵⁰ Thus, MMP still does not take away the ethnic component of voting, but it is at least a step in the right direction, allowing for more diverse representation in parliament.

The closed list PR system is the best solution for Kenya at this point in time. It achieved relative success in post-apartheid South Africa. The system was implemented in South Africa just prior to the 1994 elections. Like most countries’ experience with list PRs, one of the negative aspects is that power becomes greatly concentrated in the hands of parties and party

⁴⁵ Southall, 451.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

leaders, taking power away from the people.⁵¹ The party bosses then have the power to control not only placement of individuals on party lists (which could be based on ethnicity), but they could also expel people from the party to keep them out of parliament.⁵² This would mean that individual MPs would be held responsible to the party above constituents which would be positive if parties represented a large group of constituents, but since parties also tend to run along ethnic lines, this system would allow for the continuation of party politics based on ethnic groups. It could also promote the explosion of even more political parties resulting in each ethnic group having its own party. The incentive to form small parties as a result of a proportional representation system can be seen in the case of Israel.⁵³ Under the current system, political parties and ethnic groups are forced into alliances and coalitions when elections approach. The suggestion for Kenya is that since it has familiarity with constituencies, its adoption of the list PR system operating in its eight provinces would ensure that the individual members of constituencies retained a degree of accountability to their region.⁵⁴ If Kenya were to use a PR system with these eight provinces as constituencies, the ethnic factors would be greatly reduced: “the fact that the provincial constituencies would be relatively large and multi-ethnic would mean that candidates would be hard pressed to restrict their appeal to a narrow set of particular ethnic groups.”⁵⁵ Additionally, demarcation by province would help create an electoral framework for second-tier provincial assemblies if a Majimbo system of government was implemented in the future.⁵⁶ To date the ECK, whose responsibility it is to define constituency boundaries, has largely not performed the role. It blames the unwillingness on Parliament to increase the number

⁵¹ Southall, 453. Although it can be argued that this occurs even in the U.S. as parties to an extent dictate who the public can vote for (though primary elections give the public more input).

⁵² Ibid.

⁵³ Its elections in 2009 resulted in 13 different political parties, some formed from coalitions, being represented in the Knesset (Israel’s legislature). The Knesset, http://www.knesset.gov.il/faction/eng/FactionCurrent_eng.asp (accessed April 21, 2011).

⁵⁴ Southall, 453.

⁵⁵ Ibid.

⁵⁶ Ibid.

of constituencies.⁵⁷ However, with 210 constituencies already, more constituencies would simply increase the amount of work for the ECK in elections. The appropriate number of constituencies that should be redrawn needs more research and evaluation, but as constituencies have often been the source of ethnic divisions, it is crucial that the number of constituencies decrease so they become more ethnically diverse. There is always the concern of scare tactics being used by larger ethnic groups within constituencies against smaller groups in order to get the votes they desire, but the PR system would at least give smaller groups within the provinces some representation. The PR system would essentially make up for having larger districts. It is critical, however, that constituencies do not become too large, as it is these constituencies and the MPs who represent them that know the needs of the local communities within them.

The closed PR system would also allow for the elimination of the 12 MPs the president can currently nominate after an election. Historically these nominations have been handpicked by the president for his own benefit instead of these 12 members being nominated by the political parties based on a proportionate representation in parliament.⁵⁸ While it would be beneficial to use these seats to increase the representation of women, small ethnic groups, and other special interests such as the disabled, the likelihood of corruption makes this too risky and likely unbeneficial to the parties it is supposed to help.⁵⁹ A lesson to be learned from South Africa's experience with list PR is not to allow floor-crossing/party defections once MPs have been elected. This practice distorted the proportionality that had been conveyed by voters, then distorted public financing for parties, and also disrupted the internal functioning of political parties.⁶⁰ Kenya's history with politicians switching allegiance (refer to Chapter 2 on political parties and coalitions) would make floor-crossing a very likely, and disagreeable, outcome. The closed list PR system is a place for Kenyan parliamentary electoral reform to begin. Its

⁵⁷ Republic of Kenya, 77.

⁵⁸ Southall, 453.

⁵⁹ Perhaps the establishment of committees in parliament could help promote interests of these parties.

⁶⁰ Southall, 454.

explanation to the public as a way to encompass all party interests will be critical in the success of its acceptance and implementation into the Kenyan electoral system.

Presidential Electoral Reform Recommendation

Electoral reform for the office of president is extremely important in Kenya. One of the major benefits of having a two round presidential election is the pressure it would take off the incumbent to proclaim a “dubious victory.”⁶¹ This would increase the legitimacy of the president and at the same time defuse the pressures for the incumbent to act unconstitutionally in order to maintain power.⁶² The days of presidents being elected directly by parliament are over. Now that voting for the president has become an institutionalized feature for the public to interact in choosing their leader, it would be difficult to take that power away. It would be increasingly difficult to give the power back to parliament as the lack of legitimacy and trust in the eyes of the people would greatly hinder any confidence in the president parliament chose.

Therefore, it is essential the Kenyan state seek presidential electoral reform in the guise of a two-round system. If anything this will prevent a minority vote from inaugurating a president, thus not representing the will of the people. While this reform will not change the amount of power currently residing with the president (this will need to be addressed in many different sectors of Kenyan society), it would guarantee that the president was ultimately desired by a majority.

In its report, the IREC determined that simplicity was of the essence. As other multi-ethnic countries in Africa have struggled to find an electoral voting system that works within the cultural confines of ethnically diverse societies, reform of the parliamentary and presidential platforms will only address a piece of the political process that has instigated ethnicity as a weapon for success.

⁶¹ Southall, 455.

⁶² Ibid.

Chapter 2- Political Parties and Campaigning

“Political party leaders in Kenya are their own worst enemies, the parties are seen as an end in themselves rather than a means to an end”

-IREC

Most people would assume that an increase in public participation in elections is a sign of positive involvement; however, public participation can also be the very source that incites the problem: “Divisive tribal sentiments propagated by political parties and their supporters were spread and relayed to the public by the media. Civil society was accused of partiality; the faithful abandoned the true message, instead leading their flocks to their respective ethnic nests. Observers to some extent assumed the role of participants, with regrettable consequences.”¹ Political parties in Kenya have certainly embraced ethnic division as a way to gain political support and power and have spread their messages through campaigning during elections, infecting all areas of society. The structure of political parties and the style of campaigning within the present electoral system only create winners who win everything or losers who lose everything in the eyes of both politicians and constituents. If the current practices of political parties are not modified, especially those during election campaigning, then ethnicity will continue to dominate Kenya’s political scene resulting in ethnic violence that has the potential to lead to ethnic cleansing. The rules for political parties need to be redefined and better mechanisms created for developing and enforcing these rules need to be established.

¹ Republic of Kenya, 2008a. "Report of the Independent Review Commission on the General Elections Held in Kenya on the 27th December, 2007," 53.

Three types of political parties prevail in Kenyan politics: the mono-ethnic party, the multi-ethnic alliance type, and the multi-ethnic integrative type.² The use of coalitions in Kenyan politics has dominated the political scene, especially in the periods surrounding elections, largely as a result of the demographic reality that Kenya is made up of 42 ethnic groups, resulting in a prevalence of ethnic minority groups. This makes for a different political need to garner support during elections than say in countries like Rwanda and Burundi which are ethnic bifurcations.³ The seven dominant ethnic groups in Kenya are: the Kikuyu in Central and Eastern provinces (22%), the Luhya in the Western province (14%), Luo in Nyanza Province (13%), the Kalenjin in central and northern areas of the Rift Valley (12%), the Kamba in the Eastern Province (11%), the Kissi in Nyanza (6%), and the Meru in the Eastern Province (6%).⁴ These ethnic groups often form ethnic conglomerations from sub-groups or neighboring ethnic cousins as elections spur the need for coalitions. For example, the Luhya group is comprised of 18 sub-tribes.⁵ With these ethnic groups promoting their own interests, it is no wonder that in the current system of democratization Kenya's political parties have grown from ten in 1992 to 160 by the end of 2008.⁶ With this background, political parties in Kenya come to rely on ethnicity in elections: "Manipulation of mass ethnic feelings is often the surest instrument of electoral success, democratic participation (in elections) serves to fan

² Peter Kagwanja and Roger Southall, "Introduction: Kenya - A Democracy in Retreat?," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 265.

³ Ibid.

⁴ Ibid., 266.

⁵ Ibid. These 18 tribes are: Bukusu, Maragoli, Banyala, Banyore, Batsotso, Gisu, Idakho, Ishukha, Kabras, Khayo, Kisa, Marachi, Marama, Masaaba, Samia, Tachoni, Tiriki, and Wanga.

⁶ Republic of Kenya, 55.

ethnic conflict at the mass level as well.”⁷ This manipulation of ethnicity for political success began long before modern day elections in Kenya.

Section A- Independence and Post-Colonialism

Political parties and campaigning have their roots in Kenya’s colonial past. The constructions of colonial rule and governance greatly shaped how these structures function in modern Kenyan society.

Parties for Independence

“It is the institution of colonialism that created a common centre that all the existing ethnic groups in given colonial states are at once required to relate to. The emerging relations soon became relations of competition over access to goods and services associated with modernity.”⁸ The backdrop to ethnic political parties and campaigning in elections was set during the colonial era with the establishment of the colonial settler economy in Kenya. Land appropriation and alienation through colonial law, such as the Crown Lands Ordinance of 1915, enabled white settlers to occupy the best land that could be of permanent use.⁹ This system bifurcated land into two arenas: land for Africans entitled “native reserves” and land for European settlement (the White Highlands) or “scheduled land.”¹⁰ The resulting dual system of land administration and

⁷ Walter O. Oyugi, "Ethnicity in the Electoral Process: The 1992 General Elections in Kenya," *African Journal of Political Science* 2, no. 1 (1997): 48.

⁸ *Ibid.*, 42.

⁹ Karuti Kanyinga, "The Legacy of the White Highlands: Land Rights, Ethnicity and the Post-2007 Election Violence in Kenya," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 327. The Crown Lands Ordinance of 1915 dictated that any “wasted or unoccupied” land belonged to the crown.

¹⁰ *Ibid.*

political governance not only took away land rights of Africans¹¹, but through the use of taxation forced many Africans to migrate to the white highlands for wage labor on settler farms.¹² This put many ethnic groups in competition for the first time as previously groups had been settled throughout Kenya. Ethnic groups were not only now interacting in a closer vicinity to each other, but were given land units reserved specifically for each ethnic group, laying the foundation for ethnic antagonism as land quality on the reserves varied greatly.¹³ Society was to be divided: “These native reserves laid a firm framework for solidifying ethnicisation of Kenyan society. The administration placed solid sociopolitical boundaries between the various units of the native reserves and by doing so obstructed ‘political’ interactions among the native reserves, and thus prevented inter-ethnic political relationships.”¹⁴ Instead of allowing the different ethnic groups to live and work together, colonial structures purposefully instigated divisions in order to maintain colonial rule. Finally, beginning in the 1940s, a group of Kenyans (predominately Kikuyu), which the British named the Mau Mau, began to rebel against the colonial government.¹⁵ Their rebellion eventually led the British to declare a state of emergency in Kenya that lasted from 1952 until 1959. The irony of this period of struggle is that instead of addressing the colonial injustices regarding land, the reallocation of land in the late colonial and post-colonial period actually increased unequal patterns of land access and ownership across class and ethnic lines.¹⁶ This was largely a consequence of Kikuyu dominance in rebellion against the British resulting in a

¹¹ I use the term African here as the modern Kenyan state did not exist at this time so using the term Kenyan would be inaccurate.

¹² Kanyinga, 328.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Kagwanja and Southall, 268.

sense of entitlement. Therefore, the political parties that were formed after the state of emergency ended, KANU and KADU (see Chapter 1 for a previous discussion), were both formed on the basis of ethnic groups.¹⁷

The tensions between ethnic groups that were exacerbated during the colonial period as a result of land distribution help explain why political parties and campaigning still center on the ethnic unit. Afraid of being dealt a bad hand again, members of each ethnic group want to make sure they are getting the best resources they can and that another group is not receiving an unfair advantage. Because politicians and constituents have become driven by clientism with a winner-take-all view regarding political power and its associated economic byproducts, political parties have become completely reliant on the ethnic factor in order to gain easy support to win the all or nothing elections¹⁸: “The objective is therefore to secure control of the state in order ‘to eat,’ and to ensure that a co-(or allied) ethnic becomes president, this requiring the formation of alliances and cross-ethnic coalitions. Politicians thus obtain power by using ethnic arithmetic and clientage as mobilizing factors, the issue simply being how to win power in order to access state resources.”¹⁹ The result has been political and ethnic struggle for control over the state dominated by the Kikuyu, Luhya, Luo, and Kalenjin groups who occupy the best agricultural land.²⁰ The winning coalition in both parliamentary and presidential elections has thus far been the one that was able to win support of the majority from the four groups.²¹ As a consequence of these four dominant groups, the other 38 ethnic

¹⁷ Oyugi, 43.

¹⁸ Kagwanja and Southall, 270.

¹⁹ *Ibid.*, 272.

²⁰ *Ibid.*, 266.

²¹ *Ibid.*, 267.

groups in Kenya have been drawn to ethnic conglomerations and coalitions especially during elections in order to make sure their interests are protected.²² However, this fixation with crafting coalitions does not end once the election is over: “Once in power, the success and failure of the incumbent president, indeed the legitimacy and stability of their governments, have largely been measured against their ability to cultivate and maintain the support of a broad, multi-ethnic coalition of the four major groups.”²³ It is this constant scramble for support that plays into political parties drawing on the easiest and most convenient means of support, ethnic groups.

The Emergence of Political Coalitions

Despite the emergence of political parties in the struggle for independence, the period between 1969-1991 stands out as all five of the general elections held during this period (1969, 1974, 1979, 1983, 1988) were one party only elections, that of KANU.²⁴ The events of the 1988 election with electoral fraud and resignations led to the birth of an opposition alliance comprised of ‘young’ professionals and intellectuals hoping to mobilize the population for change.²⁵ The pressure of foreign donors who decided to withhold financial aid until Kenya implemented political reform also helped develop the opposition.²⁶ These pressures piloted the KANU government to change the Constitution of Kenya ending one party rule in time for the 1992 elections. Yet despite this change, President Moi and his political party KANU won electoral victories in the 1992 and 1997

²² Kagwanja and Southall, 266.

²³ *Ibid.*, 267.

²⁴ Oyugi, 45.

²⁵ *Ibid.*, 46.

²⁶ *Ibid.*, 47.

elections. It was finally after the 1997 elections when Moi only won by 40% of the vote, that the opposition politicians realized the only way power would change hands would be through alliances.²⁷

The emergence of the National Alliance Rainbow Coalition (NARC), an alliance made up of other political groups including Mwai Kibaki's National Alliance Party of Kenya (NAK) and Raila Odinga's Liberal Democratic Party (LDP- made up of ex-KANU), finally pushed KANU out of power. With Mwai Kibaki winning 62% to Uhuru Kenyatta's 31% (he was Moi's handpicked candidate), the December 27, 2002 presidential elections were the first time since colonial independence that a ruling party was defeated and conceded power.²⁸ However, once in power, the coalition members of NARC began to fragment, the final push resulting during the November 21, 2005 constitutional referendum when LDP members returned to an alliance with KANU, forming the Orange Democratic Movement (ODM), to get the draft constitution rejected by voters.²⁹ After more political realignment during the 2005-2007 interregnum in which the ODM unraveled creating two parties, the Orange Democratic Movement Party of Kenya led by Raila Odinga and the Orange Democratic Movement-Kenya (ODM-K) led by Kalonzo Musyoka.³⁰ Uhuru Kenyatta's KANU faction joined with the Party of National Unity (PNU).³¹ This political shifting would lead to the 2007 election, pitting Raila Odinga of ODM versus Kibaki of PNU (with Musyoka's ODM-K never becoming

²⁷ Republic of Kenya, 54.

²⁸ Kagwanja and Southall, 261.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

a major factor). To see a breakdown of multi-ethnic party coalitions from 1963-2007 see Table 1 in Appendix IV.³²

Party sponsorship is a pre-requisite in presidential, parliamentary, and civic elections meaning that independent candidates are not recognized. As such, political parties are the only vehicle for political representation.³³ These political alliances have created an environment of political parties that lack any sort of permanent party structure or membership.³⁴ As such, their ability to hold primaries, follow electoral rules and regulations, and garner support based on factors other than ethnicity are very limited. By their very nature, political parties in Kenya breed ethnicity.

Institutionalized Fear and Ethnicity

Violence following an election was not a new phenomenon of the 2007 elections. In both 1992 and 1997 politicians used “local resentments against exclusion from land, water rights, employment opportunities and access to other resources to provoke violence against outsiders, not least because the presence of the latter within their constituencies presented a numerical threat to their winning the forthcoming election.”³⁵ These politicians used real issues but put an ethnic spin on them to garner support. Under President Moi’s twenty-four year reign, the use of ethnicity as a political tool became a staple of retaining power. Largely characterized by institutionalized fear, political opposition had little chance of formation against the powerful KANU, as Moi instigated

³² Kagwanja and Southall, 267.

³³ Republic of Kenya, 54.

³⁴ Ibid., 57.

³⁵ Kagwanja and Southall, 269.

state violence and intimidation to pressure people into doing his bidding.³⁶ He was even able to change the Constitution, officially establishing Kenya as a de jure single-party state. When opposition parties did finally form, he was still able to win as a result of divided opposition. While both sides used political killings in order to intimidate the public into voting a certain way, it was Moi's exploitation of ethnic tensions that set a standard for the future. He played on the ever increasing fear of smaller ethnic groups that they would be dominated by larger ethnic groups. The use of ethnicity, specifically the violence used against certain ethnic groups during Moi's presidency, set a dangerous precedent for the acceptability and role of forms of ethnic cleansing in political competitions.

The post-independence construction of ethnically based patronage politics centered around single-member electoral constituencies, the centralization of power around the president, and the growth of armed militias associated with politicians and political groups have all aided in the ethnic component of elections.³⁷ The predisposing conditions of successive governments in Kenya's history ethnicizing political conflict have perpetuated governments and politicians in continuing the pattern of brandishing ethnicity as a political weapon whenever the votes may be close.

Section B- Kenya Against the Kikuyu

Ethnic Campaigning

Ethnicity reared its ugly head in the 2007 elections much like it had in the past. Odinga and Kibaki each drew specific ethnic constituencies to their respective parties.

³⁶ Oyugi, 45.

³⁷ Kagwanja and Southall, 270.

Kibaki's support stemmed from the Kikuyu, Embu, and Meru communities of Central and central Eastern provinces.³⁸ Odinga drew support from the Luo, Luhya, Kalenjin, and some of the smaller ethnic communities.³⁹ Despite both parties being composed of multiple ethnic groups, the Kriegler Report classified the PNU and the ODM in different terms: "The PNU, though registered as a political party under Kenyan law as it then was, was in reality an electoral alliance."⁴⁰ The ODM on the other hand, though relatively new, was a full-fledged political party and as such was more cohesively organized, lending to less competition within the party allowing for a single candidate in each of the provincial and civic contests.⁴¹ Despite these differences in the principles that brought the ethnic groups together under one banner, each party heavily relied on ethnicity to gain prominence and garner more support. While the campaign platforms of the two presidential candidates did not directly promote any sort of ethnic favoritism, ethnicity was the underlying factor in the stance each party took. Outwardly, Kibaki's campaign focused on his past rather successful socio-economic record. Odinga in turn focused on the idea of change especially in regards to fundamental political and socio-economic reform as well as the devolution of state power.⁴² The underlying conditions of Kenya's society revealed something deeper: "The 2007 election took place against the background of a meteoric growth in the Kenyan population, deepening poverty, widening inequality and youth under-employment."⁴³ These were the issues the two political parties had to work with. One of Odinga's major platforms was majimbo upon which he believed

³⁸ Republic of Kenya, 1.

³⁹ Ibid.

⁴⁰ Ibid., 2.

⁴¹ Ibid.

⁴² Ibid., 1.

⁴³ Kagwanja and Southall, 264.

would help reduce power of the executive, give greater political and fiscal authority locally, and place economic development and responsibilities directly in local communities.⁴⁴ Kibaki used this against Odinga claiming that majimbo was simply a strategy to divide Kenya along ethno-regional lines. By focusing on the ethnic factor instead of addressing the issues raised by Odinga, Kibaki diverted the focus from the real issues at hand. Instead of focusing on these issues as a national problem, they both made them an ethnic problem: “Confronted with acute poverty, inequalities and unemployment in the context of ethnic polarization and the resurgence of ethno-nationalism, Kenya’s fragmented ethnic elite resorted to populism and manipulation of genuine economic grievances and disaffection to win the vote of the poor.”⁴⁵

Rhetoric played a crucial role during the campaign in appealing to the poor. Slogans are often what determine who the poor or uneducated will support in elections and are a key tool in piecing different groups together under a common banner. To promote this “unity” among different ethnic groups, the ODM used the slogans “41 against 1” and “Kenya against the Kikuyu” throughout the period leading up to the 2007 election.⁴⁶ ODM campaigning focused on Kikuyu domination in the government and in the economy (including banking and trade), portraying a picture of Kikuyu success as a result of marginalizing other ethnic groups.⁴⁷ Such campaigning, especially the blatant use of directed slogans, helped construct a political conscience against the Kikuyu. The negative connotation increased the already present hostilities between the ethnic groups.

⁴⁴ Clark C. Gibson and James D. Long, "The Presidential and Parliamentary Elections in Kenya, December 2007" *Electoral Studies* 28, no. 3 (9, 2009): 498.

⁴⁵ Kagwanja and Southall, 265.

⁴⁶ *Ibid.*, 259.

⁴⁷ *Ibid.*, 262.

Such slogans gave the people an enemy on which to target their aggression when the election did not go as they wanted: “resurgence of ethnic nationalism which underpinned the campaign and voting during the elections and prepared the ground for the post-election violence.”⁴⁸ Hate speech was a prominent feature of campaigning; however, “Typical in Kenyan campaigns, both sides charged the other with using tribal appeals while boasting of their own multi-ethnic credentials.”⁴⁹ All three leading presidential candidates (Kibaki, Odinga, and Musyoka) tried to establish their credibility as multi-ethnic by running with a vice-presidential candidate from the Luhya community.⁵⁰

The result of hate speech in the election was not just to rally members of a political party around a common goal (keeping/getting power out of Kikuyu hands), but was also a means of threatening people who lived outside their “indigenous” provinces.⁵¹ Many of these people were threatened with eviction, in hopes of them moving, thus making it easier to win the constituency. What furthered perpetuated hate speech in this election was that the media took no steps to curb its use. A large result of this probably stems from the fact that many of the FM stations were owned by politicians or received funding, or bribes from them.⁵² Silent endorsement by the media to certain parties and candidates was a common occurrence.⁵³ The increasing accessibility of information and broadcasting meant ethnic hate speech could reach deeper into society than it ever had before. It also meant that uncensored media at the local level could say and do what it pleased: “Vernacular radio stations’ coverage demonstrated a tendency to grant greater

⁴⁸ Kagwanja and Southall, 262.

⁴⁹ Gibson and Long, 499.

⁵⁰ Ibid.

⁵¹ Republic of Kenya, 59.

⁵² Ibid., 62.

⁵³ Ibid., 65.

access to the parties and candidates with close links to the tribal and political affiliations of their listeners.”⁵⁴ This was exacerbated by new sources of information such as blogs that were intensely tribal and incited negative ethnic feelings.⁵⁵ The ethnic rhetoric used throughout the campaigning process brought ethnicity to the forefront of the public’s minds in regards to the upcoming election.

With ethnicity already dictating much of the campaigns, unsavory practices by political parties including vote buying and selling using public resources, ballot stuffing, and the use of intimidation and violence against political opposition, increasing an already tense situation.⁵⁶ As ethnic disputes and grievances over land and citizenship became key issues during the campaign, escalating tensions that had been building since colonial times finally exploded into the post-election violence and displacement.⁵⁷ A prominent feature of both ODM parliamentary and presidential campaigns was the emphasis that only vote rigging would prevent ODM from taking power in the elections (based on success during the 2005 referendum).⁵⁸ This type of political strategy during the campaign contributed to the violence after the election since the ODM’s predictions come true. The media/information blackout that followed after the announcement of the presidential results accelerated the rash actions of the Kenyan public.⁵⁹ All the ethnic campaigning of the elections finally was acted upon as ethnic groups attacked each other, not knowing where else to place the blame.

⁵⁴ Republic of Kenya, 64.

⁵⁵ Ibid., 66.

⁵⁶ Roger Southall, "Alternatives for Electoral Reform in Kenya: Lessons from Southern Africa," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 447.

⁵⁷ Kagwanja and Southall, 267.

⁵⁸ Republic of Kenya, 1.

⁵⁹ Ibid., 64.

Code of Conduct:

Most of the political campaigning that occurred during the 2007 elections was in blatant disregard of the Electoral Commission of Kenya's (ECK) code of conduct.⁶⁰ This code of conduct had been derived from the Code of Conduct for Political Parties Campaigning in Democratic Elections, published by the International Institute for Democracy and Electoral Assistance.⁶¹ Its basic tenants for political party behavior during elections include⁶²:

- Recognize the right and freedom of all other parties to campaign, and to disseminate their political ideas and principles without fear
- Use its good offices to ensure reasonable freedom of access to all potential voters
- Ensure that none of its supporters are permitted to do anything that is prohibited
- Organize and conduct its election campaign in a congenial and peaceful atmosphere
- Avoid using language that is inflammatory or threatens or incites violence

In addition the political parties violated internationally recognized norms regulating the polling and counting processes along with the abuse of state resources for political advantage⁶³:

- Co-operate with election officials to ensure peaceful and orderly polling, and freedom of voters to exercise their franchise

⁶⁰ Southall, 447.

⁶¹ Republic of Kenya, 55.

⁶² Ibid.

⁶³ Ibid., 55-56.

- Not procure votes by forcible occupation of polling stations or through illegal activities in polling stations
- Ensure the safety and security of electoral officials before, during and after the polls, and not interfere unjustifiably or in bad faith with the duties of election officials.
- Respect and co-operate with official or accredited election observers
- Maintain and aid in maintaining the secrecy of the vote
- Accept the outcome of an election that has been certified
- In the event of grievance, submit any grievance only to the relevant dispute settlement agency
- Accept and comply with the final decisions of the dispute settlement agency
- Not abuse a position of power, privilege or influence for political purpose by offering a reward, threatening a penalty or harm by any other means
- Not use official state, provincial, municipal, or other public resources for campaign purposes
- Not coerce or offer monetary or other kinds of inducements to persons to stand or not stand as candidates

Political parties chose not to follow these rules/guidelines as the ECK did little to enforce them. As such, political parties essentially had free rein to do and say what they pleased despite the negative consequences to Kenyan society.

Section C- Reform Options

Political parties are supposed to be the link between citizens and the political elites.⁶⁴ As a link, they are supposed to provide voters with the best sources of information and to ultimately promote the common good. However, this has largely not been the case in Africa where political parties have become “elite enterprises and vehicles of competition and control over the masses.”⁶⁵ Political parties have simply become the means for attaining power. The constant volatility of political alliances and coalitions means that political parties in Kenya are far from stable institutions and as such, their motivations are centered on obtaining political authority.⁶⁶ This instability means that it is hard for people to ever truly connect with a political party: “This fluidity and high incidence of turnover may present well-known obstacles to voters gathering information on relevant issues or personalities, and inhibit parties’ incentives to cultivate longer-lasting relationships with citizens, aggregate interests, and train new generations of leaders.”⁶⁷ As such, their manipulation of ethnicity during elections is nothing more than a tool to garner support in order to achieve control. The consequences of these actions are great. As one of the primary conduits of ethnic tensions, political parties and especially their use of campaigning need to be reformed if the ethnic violence that resulted from the 2007 elections is to be stopped from occurring after future elections.

The Political Parties Act (PPA) was created in an attempt to address some of the major problems that were made apparent during the 2007 election process. It officially

⁶⁴ Staffan I. Lindberg, "Institutionalization of Party Systems? Stability and Fluidity among Legislative Parties in Africa's Democracies," *Government & Opposition* 42, no. 2 (Spring 2007, 2007): 218.

⁶⁵ Ibid.

⁶⁶ Ibid., 223-225.

⁶⁷ Ibid., 236.

became operational on 1 July 2008. Under the Act, a party can be denied registration if its membership is restricted to or only includes: “members of a particular ethnic, age, tribal, racial, gender, regional, linguistic, corporatist, professional or religious group or if the proposed party’s structure or mode of operation is not national.”⁶⁸ This is designed to not only decrease the number of political parties in Kenya, but to prohibit parties based solely on ethnicity. The Act also addresses funding issues ensuring that a political party’s assets and funds are documented.⁶⁹ This will help with the corruption component of money being spent on bribes for vote-buying or selling. In turn, the Act establishes a Political Parties Fund that designates who gets money and how it can be used. 15% of the Fund is distributed equally among all political parties, while 85% is allotted proportionately to the total number of votes secured at the last election by each party’s candidates, and 5% is retained in order to pay for the administration costs of the Fund.⁷⁰ While this Act is a step in the right direction by trying to establish more equity between political parties, it really does not address the underlying manipulation of ethnicity that political parties rely on.

Although ethnicity lies deeper in society than simply political parties, it is their actions and rhetoric that increase hostilities especially around elections. There are two key areas where political parties in Kenya need to be monitored closer and reform needs to take place in order to stop the promotion of ethnicity as an acceptable political tool: the first is the messages that are being sent during the campaigning process, and the second is increasing political party respect for the electoral institutions already in place.

⁶⁸ Republic of Kenya, 60.

⁶⁹ Ibid.

⁷⁰ Ibid.

Inciting Division

As seen in the 2007 elections, campaign slogans and rhetoric during speeches were central to the message candidates were sending out to the Kenyan people. The ODM, understanding that divided opposition parties in the past had led to unsuccessful campaigns against the incumbent president, pushed the idea of all the ethnic groups against the Kikuyu as its only shot at victory: “Politicians thus obtain power by using ethnic arithmetic and clientage as mobilizing factors for the purpose of winning power to access state resources.”⁷¹ This was a relatively easy venture based on the history of building dogma about the Kikuyu domination: “Combined with the prominent role of the Mount Kenya groups in the commanding heights of the Kenyan economy, the ability of the Kikuyu to tap a vote-rich coalition has transformed the group into a perceptual majority that has always been a target of fear and counter-mobilization by other groups.”⁷² While changing these perceptions which are deeply rooted in Kenyan society, the direct use of hate speech in slogans, speeches, party literature/advertisements, and other political party instruments of information and communication can be changed. The role the media plays in the role of hate speech in regards to elections and campaigning is also a huge factor as that is how political parties are able to spread their hate messages to their constituents.

One of the major concerns with monitoring the use of hate speech is that it will violate not just freedom of speech but freedom of expression. The question becomes when is the freedom of expression less important than promoting public safety? As such, reform options for whom, what, and how to monitor hate speech will be challenging.

⁷¹ Southall, 448.

⁷² Kagwanja and Southall, 266.

Three apparent possible monitors of hate speech are: the media, civic institutions such as non-governmental organizations (NGOs), and the ECK. Political parties have obviously demonstrated their inability to monitor themselves and having them monitor each other would only create more hostilities and situations for violence. As far as what exactly to monitor, blatant ethnic hostility is easy to identify such as the slogan “Kenyans versus Kikuyu.” It is the underlying jabs that will be harder to pin point and to say should be stopped as the meaning could be construed in many different ways. Whoever is in charge of monitoring political parties’ use of hate speech will also need to create some sort of guidelines as to what is appropriate use of ethnicity versus what can be considered hate speech. The monitoring methodology will also be exceedingly challenging as the expansion of media and information into every corner of Kenyan society will make it difficult for any institution to supervise and check everything and everywhere.

Institutional Enforcement

Having an institution that can monitor the behavior of political parties will be critical for any sort of reform to take place. The ECK is supposed to be the institution that monitors electoral matters, but, as the 2007 elections proved, the ECK has not been doing a very good job. While there are many mechanisms in place that allow the ECK to pursue many infringements that political parties commit, the ECK has not enforced any of these rules. For example, political parties are known to use a technique called “zoning” to keep opposition candidates out of certain areas.⁷³ This violates the Electoral Code of Conduct and can be prosecuted by the ECK if it were to bring it to the Attorney-

⁷³ Republic of Kenya, 59.

General. This is only one example of the ethnically motivated political violence that occurs during election periods. The use of intimidation in this manner definitely violates the code of conduct; yet, the ECK did nothing. In order to enforce both the upstanding electoral regulations regarding political party behavior and to implement new standards on hate speech, there needs to be an institution that will actually follow through. There are a few institutions that this responsibility could fall to: (1) the ECK if it were strengthened and given enough authority to hold political parties accountable; (2) an NGO that was committed to monitoring political party behavior especially during elections; and finally, another government institution. The key is that whichever institution is chosen, it needs to have the respect of the entire Kenyan community if it will have any sort of legitimacy.

Section D- Recommendations

The legitimacy of political parties in the future needs to be dependent on their ability to follow the rules set forth that eliminate the focus of ethnicity in elections. To accomplish this, the rules for political parties need to be redefined and better mechanisms established for developing and enforcing these rules. The key to reforming the behavior of political parties is to change the incentives systems that currently dominate the political scene:

Kenyan political institutions have been subject to the power of a highly centralized and personalized presidency; that political parties have been driven by the desire of politicians to acquire access to state resources and patronage; that these parties have focused overwhelmingly upon the necessity of winning; and that, as a result, elections in Kenya have become

a ‘do or die’ zero-sum exercise in which politicians have resorted both to appeals to ethnicity and the use of violence against opponents.⁷⁴

Changing political incentives has been a challenging venture as they are extremely entrenched in Kenyan society. It would be ideal for political parties to have some sort of internal monitoring system: “Parties are meant to have robust internal debate and strong internal structures.”⁷⁵ Because this is not practical in a system that breaks the rules that are in place, it is left to an outside institution to monitor political party behavior to eliminate the negative use of ethnicity.

Inciting Division

“Sticks and stones may break my bones but words will never hurt me.”

Unfortunately, this saying does not apply to the verbal bashing of ethnic groups during elections. Every time a politician, a political ad, or media group uses hate speech, ethnic hostilities become more ingrained into society. The use of hate speech at party rallies via text messages, emails, posters, and leaflets, all become “vehicles of excitement” that often lead to ethnic violence.⁷⁶ With the increased role of the media and technology in the 2007 elections for both direct campaigning and the release of information to the public, it will be important for the mechanisms provided by Kenya’s constitution and legal framework to be utilized. The Kenya Broadcasting Corporation (KBC) Act is crucial to the campaigning process as it covers the public medium of communication.⁷⁷

Part of this act is to ensure there is a fair allocation of broadcasting hours between

⁷⁴ Southall, 448.

⁷⁵ Ibid., 454.

⁷⁶ Republic of Kenya, 100.

⁷⁷ Ibid., 17.

different political views.⁷⁸ In consultation with the ECK, free air time will be allotted to all registered political parties in the election.⁷⁹ These will be a key issues to monitor as state run media tends to side with the incumbent or political party currently in power. But more than that, this Act should include a clause that prohibits these major media corporations from using hate speech or allowing political candidates to use hate speech while on their programs or quotes in their publications. This is one aspect of who will and how to monitor hate speech. In order to take some of the burden off the ECK to monitor all of the media, the Media Council of Kenya (MCK) needs to be the institution to oversee and enforce the media code of conduct that is relevant during elections.⁸⁰ Members of the media itself as well as people providing interviews or speeches on television or through printed media need to be held to a standard that excludes the use of rhetoric or actions that in anyway degrade or place blame on another ethnic group that will incite undue resentment or hostility.⁸¹

There also needs to be punishment for a political party candidate who uses hate speech. While the MCK could provoke airtime or instigate a ban of the party for a period of time, this runs the risk of corruption as parties could pay off the MCK for this not to happen. If the ECK, however, was to enforce such punishment, it would have more lasting authority. While the MCK should help with monitoring, the ECK should be the institution imposing punishment. This will be discussed more in the next chapter. In the future civic institutions should also play a role and have monitoring responsibilities.

⁷⁸ Republic of Kenya, 17.

⁷⁹ Ibid.

⁸⁰ Ibid., 73.

⁸¹ Simply mentioning an ethnic group cannot be grounds for punishment but obviously the context in which they are used will have to be assessed.

Presently, it might be too risky to have NGOs acting as “watchdogs” for the ECK as they will likely have their own political and ethnic biases, but over time, as ethnicity becomes less of a divisive factor civic institutions could not only take some of the burden off the ECK, but would also be able to go deeper into society, looking at local media, blogs, and other such items that might be difficult for the ECK to fully monitor. Hate speech needs to be outlawed as a political campaign tool, much like other forms of ethnic violence have been banned.

Institutional Enforcement

On top of initiating an anti-hate speech section into the KBC Act and into the Electoral Code of Conduct, the ECK needs to be given greater capacity to deal with blatant disregard for the electoral acts that have already established inappropriate political party actions. Because the ECK is already an established organization that the public and political parties have worked with, it will be easier to begin work with the ECK than to start a brand new government institution or NGO. While the task will be challenging as both the Kenyan public and political parties have little respect for the ECK, it would be hard with any organization meant to harness in ethnic hate as: “The culture of impunity maintained by all political players would certainly strain any law-enforcement mechanisms that are established.”⁸² The mechanisms are already in place for the ECK to take charge of elections, it just needs to have more authority and aptitude to do so. For example, there are already rules against campaigning at polling centers. Increased training for ECK members at different constituency polling centers can help prepare these

⁸² Republic of Kenya, 59.

workers for how to deal with political intimidation against certain ethnic groups and how to manage and eliminate bribery for votes from occurring. By focusing on rules that are already present, the ECK will just be enforcing what it legally has the right to do. These small steps at polling centers can help end the use of violence and pressure by political parties to influence the vote. Institutional enforcement of the rules and an application of punishment is the only way that political parties will learn to modify their negative behaviors.

Changing the Incentives System: Common Interests

The ultimate objective of intervening in practices of hate speech and aggression against ethnic groups by political parties during elections is more than stopping the violence, but to change the focus of elections from ethnic group interests to national interests: “The danger of violence diminishes when politicians stress the common interests shared by ‘insiders’ and ‘outsiders.’ ”⁸³ Political parties are currently the main instigators of the ideology of an ‘other’ or ‘outsider’ in Kenyan society. The ultimate goal is for political parties to work together to end the cycle of ethnic violence that began during colonial rule. But until such a time occurs and when corruption is not a dominating factor, political parties need to be monitored and penalized for inciting ethnic violence and hostilities. Part of this process is changing the attitude of the public towards political parties and what they expect from politicians. Easy to say but hard to implement, the people of Kenya need a model to guide the behavior of political actors. The ECK, though in need of reform itself can prove to be a strong mechanism for

⁸³ Kagwanja and Southall, 269.

instituting change within political parties in order to curb the use of ethnicity in campaigning and other electoral processes of candidates. The final chapter addresses the ECK and provides ways in which ECK reform will overflow into useful mechanisms to help reform political parties, forcing them to shift focus from ethnic interest to civic interests if they want political support.

Chapter 3- The Electoral Commission of Kenya

“While elections in Africa are hard to live with, it would be much worse to live without them.”¹

-Emmanuel K.

While Kenya may have been perceived as a “stable” country in Africa before the 2007 elections, the events that occurred after the elections transformed the world’s perception of Kenya: “The country highlights the ever-present risk of election disputes degenerating into deadly conflicts in the context of weak institutions, elite fragmentation, surging ethnic nationalism, authoritarian undertows, corruption, widening social economic inequalities, historically embedded injustices, grinding poverty, debt overhang and the spillover effects of climate change and global recession.”² The question becomes how to address these issues? The Electoral Commission of Kenya (ECK) is the most logical institution to be held responsible for addressing the issues that caused so much destruction in the aftermath of the 2007 elections. The ECK has been assigned a role in almost every aspect of the electoral process. It has already formed many committees designated for different aspects of elections including public education and outreach and administration of political parties. These and other committees can play a large role in addressing ethnic issues that stem from these sources. The current voting system and the ways in which political parties are allowed to function have already been shown to be in need of reform. The ECK will only be an effective institution if it establishes

¹ Roger Southall, "Alternatives for Electoral Reform in Kenya: Lessons from Southern Africa," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 445.

² Peter Kagwanja and Roger Southall, "Introduction: Kenya - A Democracy in Retreat?," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 260.

institutional independence from the government, imposes its legal duties, and finds a better way to resolve election disputes. Although the ECK is currently defunct since it was disbanded by the parliament in 2008 and replaced with the Interim Independent Electoral Commission of Kenya, it will need to be re-instituted after reform has been agreed upon if the Kenyan electoral system has any chance of recovering its legitimacy in the eyes of the Kenyan people.

Section A- ECK and the Constitution

As of the 2007 elections, the ECK was comprised of a chairman and 21 members, the maximum allowed by the Constitution. The functions granted to the ECK set out in Sections 42 and 42A of the Constitution of Kenya are as follows³:

- To determine and review constituencies' boundaries and names at eight-to-ten year intervals. The function similarly applies with respect to the local authorities. Section 10 of the Local Government Act (Cap. 265) also gives power to the ECK to divide local authorities into various electoral areas and prescribe their boundaries and names.
- To register voters and maintain and revise the voter register
- To direct and supervise the presidential, parliamentary, and local government elections
- To promote free and fair elections
- To promote voter education throughout Kenya

³ Republic of Kenya, 2008a. "Report of the Independent Review Commission on the General Elections Held in Kenya on the 27th December, 2007," 16.

- To carry out any other functions as may be prescribed by parliament

The National Assembly and Presidential Election Act expands on ECK functions stating that it deal with⁴:

- Matters related to registration of voters
- Regulations relating to the protocols on election procedures
- The code of conduct for campaigns (See previous chapter)
- Procedures related to elections after a vacancy
- Election expenses
- And dispute resolution

In theory the ECK is operationally independent from governmental structures in that it recruits its own staff all the way down to the grassroots level and does not depend on any existing local administration structures.⁵ The ECK deals solely in an administrative capacity when dealing with complaints regarding elections, going only as far as ordering recounts and retallies if requested by candidates or parties.⁶ See Table 2 in Appendix V for a breakdown of the institutional responsibilities for key electoral functions. The ECK currently has no capacity to deal with issues of the media except for being consulted for free airtime delegated to political parties. The Electoral Code of Conduct to which all parties subscribe is essentially unenforceable by the ECK based on its current capacities.⁷ These restrictions on the ECK's ability to perform the tasks assigned to it have made it a

⁴ Republic of Kenya, 16.

⁵ Ibid., 25.

⁶ Ibid., 26.

⁷ Ibid., 27.

relatively weak institution to date. The events of the 2007 elections have done nothing to strengthen this.

Section B- The Election: Where Was the ECK?

The 2007 elections were different from previous elections in one very distinct way: the violence that was triggered after the election was not about land, it was about rigged voting.⁸ Although there was perceived deception by the other political party, what made the 2007 elections slightly different was that this time the blame was largely placed on the perceptible collusion of the ECK with the incumbent party. Issues surrounding the ECK were wide spread from mishandling the vote count, to scattered voter registration, to the lack of ability to deal with the media and new technology, to poor electoral dispute management.

Conceivably the biggest issue that resulted from the 2007 elections was the resulting perception of the ECK: “neither political parties nor voters regard the Electoral Commission and the wider state administrative system as neutral.”⁹ This perceived loss of neutrality and institutional independence undermined the foundations and actions of the ECK. President Kibaki showed a blatant disregard for the institutional independence of the ECK by replacing some of the members just days before the election, conceivably a pre-planned approach to rig the elections if necessary.¹⁰ While this was within his power, the action looked very suspicious to the opposition party and outside observers.

⁸ Susan Kilonzo, "Ethnic Minorities Wedged Up in Post-Election Violence in Kenya: A Lesson for African Governments," *Critical Arts: A South-North Journal of Cultural & Media Studies* 23, no. 2 (07, 2009): 245.

⁹ Southall, 448.

¹⁰ Kilonzo, 245.

Kibaki placed 15 new members on the ECK in 2007 alone.¹¹ The damage done to the legitimacy of the ECK during the elections will impact its ability to perform its functions in elections to come and little has been done to restore its credibility in the intervening years.

The ECK was also undermined in the performance of its duties before and after the elections. One of the issues the ECK faced stemmed from the challenge to handle the large increase in voters. The ECK had to double the number of voting stations to 27,555 and organized around 20,000 polling centers.¹² This large increase in voting centers and voter registration responsibility in and of itself inundated the ECK. The Report on the Independent Review Commission (IREC) on the General Elections headed by Judge Johann Kriegler of South Africa (also known as the Kriegler Commission and referred to as such throughout the paper), found the ECK to be: “technically and administratively incompetent, disproportionately expensive, and incapable of undertaking the fundamental task of efficiently registering voters (for instance, an estimated 1.2 million deceased voters were still on the electoral list).”¹³ The inclusion of numerous dead in the voter register was far from the only numerical issue the ECK faced. Many constituencies experienced an abnormal voter turnout. It is considered statistically abnormal to have a voter turnout higher than 85% but in areas there was a voter turnout of over 100%.¹⁴ This was a clear indication of ballot stuffing, denoting collusion between polling staff and likely the members of political parties. The implications of such actions are in the Kriegler Commission Report which stated the “irrefutable conclusion that the ECK was

¹¹ Republic of Kenya, 31.

¹² Kilonzo, 245.

¹³ Southall, 447.

¹⁴ Republic of Kenya, 86.

not able to manage counting, tallying and results announcement processes in such a way that it secured the integrity of the electoral process at either the presidential or the parliamentary level.”¹⁵ The integrity of the whole electoral process was jeopardized when these results were made public. The ECK’s contribution to the ethnic political violence that resulted after the election results were announced can be seen in the manner in which the disputed electoral results were handled. It has been widely agreed that the ECK mishandled the vote counting, the ECK’s chair of the Electoral Commission, Samuel Kivuitu, even conceding that irregularities in voting had occurred.¹⁶ However, the larger issue of concern was Kivuitu’s “damning admission” just after Kinaki was declared president that “he had been subject to undue pressure, and that he could not say with certainty that Kibaki had actually won the poll.”¹⁷ This confession and poor vote counting practices undermined the ECK’s credibility.¹⁸

In addition, the ECK’s attempts at voter education actually brought ethnicity to the forefront of the voters’ minds through its anti-violence and leadership campaigns. Although these educational campaigns were intended to raise voter awareness about bad election practices (such as intimidation for votes) and what a leader should be, the campaigns did more harm than good by reinforcing old grievances between ethnic groups.¹⁹ The material reinforced the idea that ethnicity was the main basis for choosing a party/candidate. Ethnicity was also increasingly brought to attention with the increased role of independent media in reporting on the elections and candidates.

¹⁵ Southall, 447.

¹⁶ Kagwanja and Southall, 263.

¹⁷ Ibid.

¹⁸ See Table 3 in Appendix VI for a more detailed analysis of the electoral discrepancies and questionable results through the comparison of exit polls versus the results published by the ECK.

¹⁹ Republic of Kenya, 88.

The media played a large role in informing the people of the obvious injustices that had occurred. One of the biggest positives, and conversely negatives, stemmed from the increased coverage of the election via FM radio. This allowed people to listen to election coverage from a source other than the government and also allowed many people to listen to broadcasts in their native languages.²⁰ The major negative was the increased difficulty in controlling faulty information from reaching the public who were not always equipped to distinguish fact from fiction. It also harked back to Rwanda in 1994 and the use of the radio to incite violence. While the media can be a source of good information, it can also be a source that incites hate. The ECK did try to prevent negative situations by accrediting 2,964 local and international journalists to cover the 2007 elections.²¹ These journalists were not only given ECK election kits, which included Media Guidelines, but they were also briefed by the ECK. This training and orientation was carried out by the Media Council of Kenya (MCK) in consultation with the United Nations Development Programme's (UNDP) Media and Election Project.²² The Media Act of 2007 (established by the MCK) also sought to maintain the freedom of expression as well as the freedom to receive ideas and information, while at the same time promoting self-regulation of the media by emphasizing the code of conduct set out for journalists²³, however, accreditation and training only meant so much. Two of the ECK's media guidelines that were violated have direct correlation to the abuse of ethnicity. The first

²⁰ Republic of Kenya, 61.

²¹ Ibid.

²² Ibid.

²³ Ibid.

was that responsible media provides fair and impartial coverage to all contestants and the second was resisting bribery.²⁴

The Kenya Broadcasting Corporation (KBC) received a great deal of criticism during the 2007 elections. Widely regarded as an arm of the government, the station was accused of favoring the PNU.²⁵ Its establishment, management, operations, and funding were all constituted in the government. This biased source caused further outrage to the Kenyan people with its, and solely its, documentation of the swearing-in of the president.

However, the KBC was not the only media outlet that showed a bias towards certain candidates/parties/ethnic groups. The ECK could not monitor all sources of information and even if it could have, the current freedom of expression laws would have limited the amount of censorship the ECK could enforce. Opinion polls also played a large part in promoting division between parties and ethnic groups as results were often computed in a way to endorse the desired result. The biases of information through the media and the manipulation of the opinion polls further created ethnic hostilities as voters did not know what information to believe, thus, it was easy to fall back on the comfort and trust found in one's own ethnic group and the familiarity of past behavior.

Adding to the ensuing chaos was the ECK's denial that it was the credible mechanism to deal with electoral disputes, admonishing that the courts were/should be responsible.²⁶ The ODM, however, refused to take the issue to the courts, rightfully pointing out that the courts were controlled by Kibaki as he had nominated six judges (two to the Court of Appeal and four to the High Court) just a few days prior to the

²⁴ Republic of Kenya, 61.

²⁵ Ibid., 62.

²⁶ Kagwanja and Southall, 263.

election date.²⁷ The quick swearing-in of President Kibaki also promoted the eruption of violence and highlighted fraudulent actions that had occurred in the election.

Section C- Reform Options

The Kriegler Report identified three basic problems that confront those organizing elections: credibility, sustainability, and efficiency.²⁸ All three of these problems were encountered by the ECK as a result of the 2007 elections. By addressing institutional independence, management and implementation practices, the media, and electoral disputes, the ECK can begin the long road to recovery. The following paragraphs delve into these more deeply.

Institutional Independence

Currently, the members of the ECK are not only appointed by the President, but the President is not required to consult with any other institutions or people while considering nominees.²⁹ This must change. It is not the first time the issue of ECK presidential appointment has been raised. Prior to the 1997 election, pressures from both political parties and civil society helped create an alternative agreement known as the Inter-Parties Parliamentary Group (IPPG).³⁰ In the IPPG, the parliamentary opposition would provide the president with a list of nominees from which he would appoint ten to the ECK.³¹ During Kibaki's presidency, as ECK members concluded their terms or died,

²⁷ Kagwanja and Southall, 263.

²⁸ Republic of Kenya, 42.

²⁹ Ibid., 30.

³⁰ Ibid., 31.

³¹ Ibid.

he simply replaced them without reference to the IPPG accord.³² One available option is to re-implement the IPPG accord and enforce it through the law and court systems. Another option that would require working through the National Assembly would be the creation of a committee of MPs represented proportionally by the party numbers in the National Assembly who would appoint ECK members. This system would take the IPPG accord and expand it by putting all of the duty in the hands of MPs. Ideally it would promote the interests of all political parties in parliament, including smaller parties of the opposition, allowing all parties to have a say. A final option would be to remove the nomination of ECK completely away from the government by having an outside organization appoint members. The ultimate goal of each of these options would be to increase the independence of the ECK so that the public would not see it as a biased institution.

Management and Implementation

Recommendations by the Kriegler Commission covered many issues regarding management and application of electoral practices that fall under its current Constitutional duties. These included:

Upgrading the competence of the ECK or completely replacing it, provide for post-election audits of results (preferably by an independent body). It also recommended the establishment of an appropriately empowered dispute resolution court, a transition between a successful candidate's election and swearing in, safe electronic storage of election materials and results until a post-election audit has been conducted, inclusion of measures for the representation of underrepresented groups (notably women), and consideration of the merits of fixed terms of office for president and parliament.³³

³² Republic of Kenya, 31.

³³ Southall, 447.

While there are many options for reform, some of the focus for the ECK in the future needs to be on better training for its employees, especially temporary employees brought in during elections. There also needs to be new mechanisms for holding these employees accountable for their actions so they do not give in to practices of corruption such as bribery, however, these will likely prove difficult and will take time. The ECK can, however, immediately address some of the issues associated with voter registration, voter education, and the enforcement of electoral codes of conduct, and in fact must address them quickly in order to begin the process of repair with the public.

The ECK has previously used two main methods of registering voters, continuous registration and drive registration. Continuous registration is needed as new people become eligible to vote, people move, and others pass away. Drive registration typically occurs right before elections in attempts to increase the number of voters by seeking out people who have not yet registered. This is often done by political parties trying to gain as much support as possible before the election. 1.7 million new people were registered as voters during 2007 leading up to the elections³⁴ The problem with combining these two methods in Kenya is that the ECK lacks the capacity (or will) to continuously update Kenya's register to represent not only the influx of new people but the changes that have occurred in the voter registry since the last election. This has opened the door for corruption, allowing dead people to vote resulting in voter turnout over 100%. The ECK has a few options to help rectify the current chaotic voter registry. It could scrap its entire register and try to start by requiring people to register with their national ID cards. It could use the downtime between elections to go through and combine its registries to

³⁴ Republic of Kenya, 88.

ensure there is no overlap and remove people who are deceased or have moved. Or it can continue using its current system with black books and high probability of corruption.

An increase in the number of voters can have both a positive and a negative side.

Increased participation by the citizens is positive; however, if voter registration is a target for political corruption, then it is a negative, especially if it targets certain ethnic groups.

With the increased participation of Kenyan society in these past elections, the ECK needs to embrace its role as a promoter of voter education to help limit ethnicity from being the foundation upon which people vote. While the ECK attempted to do this with its anti-violence and leadership campaigns to discourage negative election practices, the reality was they brought many of these issues to the forefront of voters' minds. Eliminating such campaigns is one option, leaving civil society to educate voters, but this runs the risk of misinformation being distributed and it would be difficult to control any ethnic appeal these campaigns might make to the voters. If the ECK continues these types of campaigns, it will need to give examples that do not rely on ethnicity to portray the point. For example, a campaign showing parents, teachers, school administrators, and local and national government officials collaborating to develop new educational programs regarding youth participation in elections. The challenge lies exactly in what the principles behind elections are: "Elections are said to be free if the voters clearly understand the election process and are able to exercise their political rights free of threat from intimidation and in secrecy."³⁵ The word intimidation automatically brings about feelings around ethnicity since that has been the principle tool of violence and fear in the

³⁵ Republic of Kenya, 87.

past. While the past cannot be changed, ethnicity does not have to be a tool of political organizations in voter education.

Finally, ethnic hostilities have largely continued to be manifested in elections due to the lack of ECK enforcement of its current mandates presented by the Electoral Code of Conduct. The lack of mechanisms and resolve to enforce the code of conduct has perpetuated ethnicity as a campaign tool of political parties who face little chance of reprisal from the ECK. The ECK either needs to be given more resources and authority to pursue abuse of the code of conduct by political parties and also the media (see below) or a new institution or court system needs to be created. At this point in time, it would be unreasonable to assume that political parties and other institutions will monitor themselves and hold each other accountable since these abuses have become such common practice and frankly, highly effective tools that politicians do not want to give up.

The Media and Information

The increasing media component, evident in the 2007 elections, encouraging ethnic division will continue to get worse as the internet, cell phones, and social networks increase the quick and wide spread of information. As discussed in the previous chapter, the ECK's ability to monitor and curb media abuses that propagate ethnic tensions needs to be legally granted by Parliament. The media recommendations in this chapter focus on the role and responsibilities of the ECK beyond its role in monitoring hate speech as previously discussed.

Disputed Elections

The lack of an institution to deal with the disputed election results was a significant factor that led to the mass post-election violence. One of the key areas of electoral reform needs to be defining who is in charge of disputed elections from the primary level all the way to the national level. This is not an area that can be left unresolved. If it is the ECK's responsibility, then new mechanisms to deal with these issues quickly and impartially need to be established. If public trust in the ECK is too small at the moment to have it resolve disputes, then some kind of judicial court system needs to be created to deal with electoral disputes.

Mexico and South Africa provide two different examples for different approaches to handling electoral disputes. Mexico has established its own electoral tribunal that has exclusive jurisdiction in relation to elections.³⁶ One of the downsides of this approach is that establishing a separate tribunal is extremely costly as it requires a whole new set of administrative costs as opposed to if it worked within already established judicial or electoral structures. South Africa has taken a slightly different approach, establishing a special electoral court that works within its judicial system. The court is comprised of three senior members of the judiciary who do their routine work but are on standby in case an urgent electoral dispute arises.³⁷ The concern with this approach for Kenya is that the public is very leery of its judicial system which is largely seen to be controlled by the president, thereby being perceived as a biased institution. Whatever mechanism is established, it needs to ensure ethnic prejudices are absent so that it does not intensify hostilities.

³⁶ Republic of Kenya, 142.

³⁷ Ibid.

Section D- Recommendation

With the ever increasing importance of elections in Kenya, it is critical to have an institution that focuses specifically on elections, that is separate from other governmental institutions and is seen as a separate entity from the government in the sense that the people know it is ultimately promoting and keeping their best interests in mind. The promotion of truth and accuracy should be the ECK's top priorities. Ultimately success of the ECK lies in its ability to perform its functions according to these criteria³⁸:

- How transparent all its processes are
- How simple and accessible its procedures and service are to all
- How much it respects the principles of equity as a measure of ensuring free and fair elections
- How well it asserts its independence
- How well prepared it is for all its activities
- How well it anticipates and deals with any electoral disputes and hitches
- How well it keeps learning from its experiences for the improvement of its processes
- How well it can enforce or ensure enforcement of its decisions and processes

Each of these will help shift the focus from any ethnic or biased view of the ECK. From these observations, the following recommendations will be examined in regards to ECK reform: increased institutional independence of the ECK, improving current management practices already delegated to the ECK, new laws regarding the ECK's control and input

³⁸ Republic of Kenya, 33.

on media and technology, and finally, to better define the role of the ECK in election disputes and create new mechanisms to deal with electoral disputes post-election.

Institutional Independence

If the people are ever going to put their trust in the ECK, it needs to gain institutional independence from not only the government (specifically the president), but also from the pressures of other political institutions. This process should begin with repealing the President's ability to appoint the chairman and other commissioners of the ECK. There needs to be distance between powers of the president and the mechanisms that determine who will be the next president. By allowing the president to appoint members to the ECK, it is opening up the temptation for an already high existence of corruption to become even greater. This corruption impedes justice by increasing the likelihood that the ECK consists of members of the president's political party, which means that the president is likely appointing people he/she feels will support him no matter what, which means it is probably a member of the president's own ethnic group. This inbreeding will lead the public to doubt the ECK as a fair institution, thus undermining any of the results it produces. While it would be ideal for ECK members to be appointed by a non-governmental institution that does not have any sort of political aspirations, such an institution does not exist and would be difficult to create, maintain, and monitor. The next best option would be to have ECK members appointed by MPs based on a committee that is represented proportionally by the party numbers in the National Assembly. This would provide for an institution that is already established and already involved in the ECK (as it established laws for the role and conduct of the ECK)

to monitor its appointees in case of misconduct. Proportional representation would also help ensure that member of the ECK represented all/or at least a majority of political interests, thereby increasing equity, fairness, and hopefully trust in the ECK. These attributes would in turn limit corruption, facilitating decreasing tensions between ethnic groups; however, this would be rather complex to coordinate. Until the National Assembly is more representational of Kenya's populace, the best course of action for the time being would be to re-implement the IPPG accord, which was established before the 1997 elections, and put it into law so it could be enforced. The IREC's most recent recommendation was that only three to nine Commissioners would be appointed by the President and approved by Parliament.³⁹ It has limited the number of appointees as a result of what it perceives to be as an overly large commission; however, the following recommendations for expanding the ECK's role in elections would necessitate a large institution. Since elections are the cornerstone for nation-building, and the ECK is the institute that monitors these elections, it needs to be given the capacity to act effectively. As both political parties and civil society promoted the IPPG in 1997, public acceptance of this would likely be high, helping establish more legitimacy for the ECK.

In addition, another factor that needs to be evaluated in consideration of appointed members is the length of their term and status in the ECK. Renewable five year terms are worthy of continuation as it allows members to serve on the ECK for a full election cycle to experience the entire process and also expertise to develop which will help contribute to reform of the ECK over time. The timing of the introduction of new members, however, should be changed. New members should be brought in between elections not

³⁹ Republic of Kenya, 32.

right before or after them. Training new members should occur during a period that is not overly stressful or with high political activity. Learning while on the job is necessary but not in a period of such high tensions when mistakes can be very costly. This would also allow MPs to settle into their new terms before making appointment decisions. The practice of tenure also needs re-evaluation as the current practices aimed at establishing justice are missing the mark since removal is essentially impossible.⁴⁰ Like MPs or any other institution, members of the ECK need to be held responsible for their actions. If a member accepts bribe money or slanders an ethnic group, they need to be held accountable for their actions and removed so that trust in the ECK by the public is not lost. This would need to be provided for in a legal framework.

Even if ECK members are not appointed by the president, it will never truly be an independent institution until it is no longer financially dependent on the government.⁴¹ Financial dependence, especially through the president, can lead to control of the ECK by the president, who may force the ECK to comply with its donors' demands. One way to help with this situation would be to have political parties finance the ECK, each contributing the same amount of money. This would ensure that all political parties would be interested in the ECK running efficiently and fairly; however, this raises an issue for smaller parties or parties that do not have the financial means to contribute. Because of this, it might be beneficial for the time being that foreign governments/aid donors fund the ECK until a better system of taxation might be applied that would be designated for the ECK without conditions or strings attached.⁴² At any rate, the funding

⁴⁰ Republic of Kenya, 29.

⁴¹ Ibid.

⁴² However, the likelihood of getting a foreign donor to donate to any sort of electoral reform is very small.

for the ECK should not be controlled by one person or constituency in the government that could pressure members to act in an unscrupulous manner. While this is a function the government should cover the expenses for, getting other parties involved initially might help increase its legitimacy until a time comes when the government does not use money to apply pressure on these institutions. ECK institutional independence means that its members are concerned with the wellbeing of all members of society and thus pursue actions that will enhance the welfare of the people. By enhancing the independence of the ECK, it will limit accusations from political parties that the institution is biased, and thus supporting certain ethnic groups while suppressing others. It will also begin the process of decreasing the magnitude of presidential powers, helping Kenya to shift away from one person domination who is often ethnically motivated.

Management and Implementation

By improving the day to day processes of voter registration, voter education and outreach, and enforcing electoral codes of conduct, the ECK can instigate change in the electoral process away from ethnicity. Ethnic hostilities have become so embedded in Kenyan society that it will take work from the most basic principles of the electoral system to begin to create change in the whole system.

The simple act of voter registration is one area where the ECK can show that someone's ethnicity has no bearing. Everyone should and has the right to vote. The present chaos of the voter registry however makes this challenging. Between all the records from continuous registration and drive registration, it is difficult for the ECK to say that certain ethnic groups are not overly represented in the registrar. There needs to

be an overhaul of the system despite the costs associated with such an action. In order to get a hold on the voter registration, which has become a prime source of corruption by political parties (these political candidates using votes to promote ethnic hatreds), an accurate resemblance of the voter population needs to be recorded. One place to start this process would be using other national population databases to get information regarding the Kenyan population. For example, the national ID card has been proposed as a way not only to determine eligibility for voting, but to establish a method of verification when voting. The ECK can start by cross checking its current registry with a listing from the national database that issued the ID cards. The voting registers from all the constituencies need to be compiled into one list that the ECK can reference. While this is a huge undertaking, perhaps some of the temporary workers hired for elections could be hired to begin this process. That would provide jobs and help increase accountability of these workers (obviously there would need to be a background check of the workers to try and determine their trustworthiness). By having these people work in groups that represent a plethora of political parties, they would hold each other accountable to make sure the data is not manipulated. Having these different groups work together for the common good is just one step in promoting civic nationalism. Verification of the information acquired by the voter would need to occur, but the key for the ECK will be to go to the voters to get information instead of having voters come to the ECK. If the ECK shows an effort to obtain accurate information, without putting undue pressure or burden on voters, it will help initiate a foundation of trust and hopefully respect. An accurate voter registry will help solidify the results that the ECK posts enhancing its credibility in the eyes of the voters which will enable it to work with voters in other areas. It is in these

other areas that the ECK can start to shift voter focus away from ethnicity as the determinate of elections.

While the ECK has previously focused on voter education right before elections, there is a great deal that it can do in the downtime between elections. Civil society has increasingly taken an interest in educating voters with the rise of NGOs.⁴³ Because the ECK cannot handle voter education by itself, it would be important that it provide training for and accredit these civil organizations so that voters are not only getting accurate information but they also know who they can get trustworthy information from. The campaigns these organizations promote need to focus not only on the importance of voting or of presenting the issues to the people, but they need to do so in a way that emphasizes the importance of voting for community interests.⁴⁴ The key then is to connect these interests to national interests. The whole process needs to be seen as something that is good for everyone. This process could commence by teaching voting principles in primary and secondary schools.⁴⁵ Teaching the history of elections and the negative role that ethnicity played in the deaths and violence that occurred as a result to younger generations would hopefully take away the emphasis of ethnicity in elections in the future. By working with civil society, schools, and directly with people, the ECK could begin to build bridges with Kenyan society to increase its legitimacy and to begin the process of eliminating ethnicity from elections.

Through many acts, including the Electoral Code of Conduct and the Election Offences Act, the ECK already has mechanisms in place that state what appropriate

⁴³ Republic of Kenya, 66.

⁴⁴ Ibid., 109.

⁴⁵ Ibid.

behavior is during elections. Hate speech and practices regarding ethnic discrimination are clearly in violation of these acts. However despite the ECK's allowance to pursue courses of action against violators by having the Attorney-General prosecute them, the offences committed during the election went relatively unpunished.⁴⁶ By not stopping these practices, the ECK is only letting ethnic hatred practices to continue to prevail in elections. As such, the ECK needs to begin to enforce the acts that protect society from not only direct hate speech by political parties and the media but actions that prompt ethnic violence. Part of the ECK's staff needs to be focused and trained on dealing with the electoral code of conduct. This sector of the ECK should be the first step in penalizing parties that violate ethics of the electoral process. What these penalties would be needs to further research and would depend on the severity and situation, but the message that needs to be sent out is that any practices that purposefully put down, intimidate, or harass an ethnic group will not be tolerated. If punishment at the level of the ECK does not work then the next step would be sending the violating parties to the electoral disputes court (see section *Electoral Disputes* below). Without a system that penalizes political parties, the media, and other actors in authority positions for wielding ethnicity as a power tool, then the system will only perpetuate the cycle. The ECK can become one of the many institutions it will take to curb the use of ethnicity in politics in Kenya.

⁴⁶ Republic of Kenya, 17. Reference this text for the exact wording of these electoral offences and corrupt practices. Some of the electoral offences committed that are covered under The Election Offences Act include falsification by election officials of records during polling and deliberate miscount of ballots with the intent of influencing the final result.

The Media and Information

The ECK's increased involvement in the media and the dissemination of electoral information will be a key component in prosecuting parties that violate electoral codes of conduct. The 2007 elections saw the emergence of the information age in the election process as communication to the electorate through technology and the increased participation of youth resulted in information flooding.⁴⁷ As Peter Kagwanja and Roger Southall quoted: "Never before had Kenyan voters been privy to so much election-related information, and never had it been harder to sort facts from fiction."⁴⁸ While it would be impossible for the ECK to moderate all forms of media and technology, the first step to address these issues will be to form a close partnership with the MCK and the KBC. By increasing the number and scope of institutions that can monitor the abuse of ethnicity in the media, the ECK can work on its ability to enforce media abuse in elections. The Kenya Broadcasting Corporation Act, which holds there should be an equal allocation of expression of different political views in the media, should be amended so the ECK has the power to compel KBC to act in accordance with the law regarding elections. The KBC has a history of unfair allocation.⁴⁹ By working through legitimate mechanisms that give power to the ECK to enforce biased media practices, the KBC would have to comply if it wants public opinion to change. Since the KBC is a huge media outlet in Kenya, the ability of the ECK to work with it as opposed to against it eventually would help the ECK promote fair election practices.

⁴⁷ Kagwanja and Southall, 262.

⁴⁸ Ibid.

⁴⁹ Republic of Kenya, 73.

In coordination with the KBC and MCK, the ECK could also increase its accreditation of sources of information from newspapers to organizations, helping voters to distinguish between reliable and potentially unreliable sources of information. This would entail the ECK addressing corruption that may be present in such sources such as a government run newspaper or media broadcasting center. Such sources of information would need to be taken with a grain of salt and voters would need to be aware of this potential bias.⁵⁰ In order to reach people of all backgrounds and groups, part of the accreditation process should be accrediting a wide range of journalists and media personnel who speak a plethora of languages to cover as many regions of Kenya as possible. This might extend to the ECK providing a translation service or having the MCK provide translation services during elections in order to provide people from all over with accurate information. Lists of accredited journalists and translators would need to be circulated throughout Kenya with an ECK seal of acknowledgment and these members would need to have credentials when out in the field so their authenticity could be verified easily by the people. This would obviously be a huge undertaking, but the ECK has already shown its willingness to accredit and train media during the past elections. By working with the MCK, the ECK could increase its efficiency and effectiveness in this venture by limiting discrimination practices in providing and producing information regarding elections.

The publication of information throughout the 2007 elections caused much of the ethnic violence that occurred. The ECK should establish guidelines for verifying data before it is published in any capacity, including advertisements, polling results, and

⁵⁰ While the elite in society may be aware of such government control of information, the whole populous should made conscious of information bias.

especially election results.⁵¹ The elections saw an increase in the use of opinion polls as the independent polling industry grew.⁵² Based on politician and public use and reliance on opinion polls leading up to the election, the ECK needs to monitor polling companies to ensure the data is accurate and reliable. This could help voters make an informed decision, knowing that polls are not being manipulated. The ECK can do this, for example, by setting standards for sampling techniques to make sure that practices are consistent. This should help limit extreme variance in polls which has been argued to have contributed to political instability.⁵³ Like journalists and other media sources, the ECK can accredit polling agencies that follow the standards set by the ECK so the public can know it is viewing respectable information. Accreditation of any sort from media outlets to journalists to polling companies should be approached with caution by the ECK as bribery and corruption could easily come into play. With a history of political parties and candidates paying off people for votes, it would be easy for such groups to buy off members of the ECK in order to get accreditation. While there is no quick fix for this issue, it is something for the ECK to be aware of as it expands its role of monitoring and verifying other organizations involved in the electoral process to limit ethnic abuses.

Disputed Elections

The major reason people resorted to violence after the election results were revealed was because they lacked a legitimate institution to bring their quarrel to. The

⁵¹ Republic of Kenya, 73. The quick publication of election results by constituencies in order to be the first to announce the outcomes often led to bad information which played a large role in spurring ethnically motivated violence. As such, election results should only be announced after the ECK is certain of what it is providing the public.

⁵² Kagwanja and Southall, 262.

⁵³ Ibid.

ECK needs to be the first stop in dealing with any electoral disputes. One of the ways to avoid some of these disputes is to be very cautious in its publication of election results. Using concepts such as “partial” or “progressive” results from different constituencies can help limit disputes by not announcing results and then changing the results later.⁵⁴ This would have helped with the 2007 elections, but there still would have been a dispute as the issues went deeper than simply how results were given. When these matters cannot be resolved by the ECK or if matters involve the ECK, then per the recommendation of the IREC, it would be beneficial for a new law to establish an Electoral Dispute Resolutions Court to handle appeal matters.⁵⁵ Such a court would be very beneficial especially if the dispute was time sensitive. One of the main issues this court would handle would be post-election disputes including election petitions. These petitions would need to be filed in a timely manner and any current rules and regulations regarding procedures of election petitions would need to be repealed or replaced. The IREC made a recommendation of six months as plenty of time to file a petition post-election.⁵⁶ The financial implications of this action are obvious, but such an established system is necessary in order to deal with disputes in an orderly and productive fashion rather than resorting to violence as occurred after the 2007 elections when the ECK refused to take responsibility for dealing with contention. If Kenya were to take the South African route, of an electoral court within the judicial system, the question would become which justices would be chosen to serve? One of the main arguments for having Kenyan’s electoral court be separate from the judiciary is that: “in a highly politicized

⁵⁴ Republic of Kenya, 71.

⁵⁵ Ibid., 22.

⁵⁶ Ibid.

society such as Kenya, where judicial impartiality has already been doubted, the judiciary should not be unnecessarily exposed to the risk of being politicized, or being seen to be politicized, by its involvement in political disputes.”⁵⁷ There is also the issue that by pushing electoral dispute to the Judiciary, the ECK would only be moving justice farther away from the parties involved.⁵⁸ As such, it is in the best interest of the ECK to establish its own electoral disputes court to deal with not only election result disputes but abuses of electoral codes of conduct that cannot be addressed at lower levels of the ECK. The “justices” appointed to this court could come from members of the ECK who have experience with law in some capacity or they could be appointed by MPs. There is even the option of having the public vote for the justices on the national ballot in the future. For the time being, it might be simplest to have the Interim Independent ECK appoint people to the court. With the creation of this court would come a great deal of responsibility as it would be imperative to not lose its legitimacy in the eyes of the people because once it did it would be very hard to restore, especially based on how the ECK handled the disputes that resulted from the 2007 elections. With the new institution starting fresh, it would be crucial that it was viewed as independent of the government, political parties, and any particular ethnic group. The successful creation and implementation of a new electoral dispute court would help augment the ECK’s neutrality and ability to handle elections in a fair way that promotes equality amongst all ethnic groups.

In summary, it is crucial for the ECK to have the trust of the various stakeholders in Kenyan society. Its reform would define how people perceive elections in the future.

⁵⁷ Republic of Kenya, 142.

⁵⁸ Ibid., 27.

If the ECK is seen as a fair and unbiased institution, the threat of violence in closely contested debates would diminish substantially as there would be little question about the accuracy of the results. In this simple way an independent ECK could help mitigate ethnic hostilities.

Conclusion

While it may be considered a small step, addressing flaws in the electoral process provides a place to begin shifting the Kenyan culture away from ethnic centric institutions and practices to those with a unified, national focus. Simply establishing rules does not mean they will be followed (case in point, political parties following the Electoral Code of Conduct). However, as can be seen throughout Northern Africa, the Middle East, and most recently in Uganda, discontent can breed a change movement. The discontent with the procedures and results of the 2007 elections provides a foundation for electoral reform to take hold in Kenya. In this concluding chapter, the recommendations given in each of the core chapters will be presented as options that can immediately be implemented to address the role of ethnicity in political competition, then an examination of some of the challenges facing electoral reform will be addressed, and finally, some other future areas of reform will be discussed.

Changing incentives from ethnic to civic in political competition begins with changing the structures that allow ethnicity to thrive. As has been argued, changing the current voting system, the way political parties maneuver ethnicity, and the role of the ECK in elections are all ways that ethnicity in Kenyan society can be addressed. The recommendations presented throughout this thesis were proposed because they can be implemented in the short term. With the current FPTP system of voting, the losers will always challenge the results in elections since a majority of the vote is not required to win, resulting in doubt of who the Kenyan people actually want to represent them. The closed list PR system promotes inclusivity of all groups and relies on a majority principle

to determine results. If the current eight provinces are used in this system, there will be no need to draw new boundaries making its implementation immediate.

If political parties are allowed to continue to use ethnicity as a political weapon in elections, they will continue to undermine elections as a legitimate institution: "Elections involve high stakes. Their credibility is tied to national stability, and the winning and losing of elections is tied to political party power."¹ While it will take time to develop both the ECK and MCKs' abilities to monitor hate speech, the process can begin promptly by enhancing the laws that have already been established in the Electoral Code of Conduct. By working with mechanisms already in place, monitoring hate speech by outlawing obvious abuses such as "Kenyans versus Kikuyu" can be started now before the next elections. Beyond the promotion of ethnic division surrounding elections and the campaigning process, the basic structure of political parties creates concern for the future. As most political parties are created from coalitions of ethnic groups prior to elections, one of the dangers is that a loss may be perceived by an ethnic group as a result of desertion by an ally within the coalition "ethnic groups that had 'betrayed' them should be taught a lesson."² If members of the same political party are willing to turn on each other, the animosity towards opposition ethnic groups would only intensify the hostilities. By developing rules and regulations for political parties and campaigning that remove the emphasis from ethnic groups which incite division, reform begins the process of political parties finding common interests to garner support that endorse civic interests.

¹ Republic of Kenya, 2008a. "Report of the Independent Review Commission on the General Elections Held in Kenya on the 27th December, 2007," 32.

² Walter O. Oyugi, "Ethnicity in the Electoral Process: The 1992 General Elections in Kenya," *African Journal of Political Science* 2, no. 1 (1997): 53.

Changing the basic structure of political parties will take a little more time to develop but steps toward this end can begin now.

Finally, if the ECK is left unreformed it is very likely that the 2012 elections will produce similar results to that of 2007. The ECK needs to take control of elections instead of elections taking control of the ECK. The current instability of this institution to manage and organize elections contributes to the de-legitimization of elections as an institution. It is the current unpredictability of elections that often leads Kenyans to join political parties based on ethnicity as way to protect their interests and maintain security. Stabilizing the ECK by reform and increasing its power will facilitate the development of an electoral system based on rules that can help limit the role of ethnicity in political competition. The overarching electoral reform that needs to occur is changing the current electoral incentives that have lead to political mobilization around ethnic groups. Both the salience of ethnicity as a political resource and the utility of resorting to violence need to be addressed.³ Many of the roles of the ECK are already defined on paper; therefore, the ECK can begin to actually carry out these roles immediately. With the structure already in place, the steps for reform simply require courage and willingness to assume the authority already granted.

When considering possible electoral reform in Kenya, it is crucial to remember political institutions are only part of the problem. The role of culture in addressing ethnicity as a political tool is a key component with the issues deeply embedded in history. While common citizens are often victimized in electoral violence, it is important

³ Roger Southall, "Alternatives for Electoral Reform in Kenya: Lessons from Southern Africa," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 449.

to recognize they are not guiltless. The IREC emphasizes that the violence before and after the 2007 elections was not merely a result of the ECK, electoral institutions, or political leaders; the Kenyan people were just as implicit as they all engaged in:

- Vote-buying and selling
- Unapologetic use of public resources for campaigns
- Participation by public servants in campaign activities of certain camps
- Ballot-stuffing
- Organizing marauding gangs and bully-boys to ‘zone’ regions and electoral areas and intimidate opponents
- Using and cheering and uploading hate speech and ethnic sentiments
- Demonizing opponents and presidential candidates of opponent camps
- Using sexist tactics and violence to keep women out of the race.⁴

This is largely a result of the zero-sum mentality which has become associated with elections. The promotion of ethnicity is currently a key component in political strategy and there needs to a shift towards “inter-ethnic integration, pluralism, tolerance, and mutuality.”⁵ However, this is not an easy task:

Even as we recommend constitutional and legislative changes, it is important that Kenyans honestly assess all the activates relating to the 2007 general elections so as to distinguish those that can be attributed to anomalies, failures and malpractices traceable to gaps or provisions in the Constitution and laws of Kenya from those that can be attributed to a bad

⁴ Republic of Kenya, 23-24.

⁵ Aquiline Tarimo, “Politicization of Ethnic Identities: The Case of Contemporary Africa.” *Journal of Asian and African Studies* 45 (2010): 307.

culture encompassing impunity, disrespect for the rule of law and institutional incompetence.⁶

The Kenyan electoral system is built upon ethnic foundations that have been embraced at all levels of society resulting in deadly consequences. It is this infiltration of ethnic mindedness that will challenge some of the changes electoral reform creates.

The likelihood of electoral reform faces many challenges already and is severely limited by the current power sharing government. The power sharing government represents many dangers in and of itself:

The resulting power-sharing government, enforced upon the ODM by Kibaki's intransigence, while preferable to the possible alternative of a collapse of the state into civil warfare, has set a dangerous precedent for the rest of Africa. It has sent out the message that powerful losing parties need only to refuse to accept electoral outcomes by resorting to unconstitutional and violent action to ensure that the winning opposition is required to share power. Power sharing may be an attractive alternative to violence, but may encourage incumbent regimes to rely on coercion to resist the will of the people and the transfer of power to electoral winners.⁷

This power sharing arrangement is a temporary solution that needs to be remedied as quickly as possible or else instability in the next elections is likely to result in the same conflict. Electoral reform can potentially provide a way of deterring a power-sharing government from resulting again but the likelihood is small: "With Kibaki, Odinga, and Musyoka all in government, the absence of an opposition party undermines reform efforts."⁸ This is evidenced in the fact that the coalition government has yet to even

⁶ Republic of Kenya, 22-23.

⁷ Southall, 445.

⁸ Clark C. Gibson and James D. Long, "The Presidential and Parliamentary Elections in Kenya, December 2007," *Electoral Studies* 28, no. 3 (9, 2009): 501.

institute a new ECK.⁹ With internal motivation for electoral reform lacking, it may be up to some external pressure to get change started.

Historically, motivating governments to focus on electoral reform has been challenging. One of the major problems of promoting electoral reform over other areas of reform is the lack of desire to address such issues. Electoral reform does not receive the attention it should because it is not perceived as a significant change agent nor does it garner much press. One will not become a hero by promoting electoral reform. Internally there is little appeal and externally there is even less as “major actors (notably the African Union and Western governments) engaged in addressing the Kenyan crisis have [neither] the desire or stomach to pursue a far-reaching agenda.”¹⁰ Incentives need to show the current electoral system is a threat to the political class and that change will be beneficial.¹¹ Such a push for reform might only come if there is a repeat of the violence that was seen in 2007 in the next election in 2012.¹² This could threaten the integrity of the country enough to encourage the political classes to make a change. However, electoral reform now, before the next elections, can stop unnecessary violence from even occurring. What Kenya needs is a reason to make a change and embrace reform at this moment. That reason should come from an understanding that other areas of reform, such as cultural matters, will take a long time to implement while electoral reform can begin to limit the negative role of ethnicity now.

⁹ Susan Kilonzo, "Ethnic Minorities Wedged Up in Post-Election Violence in Kenya: A Lesson for African Governments," *Critical Arts: A South-North Journal of Cultural & Media Studies* 23, no. 2 (07, 2009): 249.

¹⁰ Southall, 458.

¹¹ Ibid.

¹² Ibid.

Other areas of Kenyan society that foster ethnic divisions should be addressed as reforming these areas will be key support to and build upon electoral reform: “it would be absurd to think that electoral reform alone would address the ills of an over-powerful presidency, curb extra-state violence, restore the integrity of state institutions, re-orient political parties away from ethnic clientilism and, at the very least, somewhat reduce corruption. Electoral reform could only be one step along a tortuous journey.”¹³ Some of the key areas that need to be reformed stem from Kenya’s unique colonial history, and thus there is no generic cultural reform that can be applied that will eliminate the negative uses of ethnicity. The issue of land and control has plagued Kenya for too long: “the land issue constitutes the major structural factor underlying ethnically driven electoral and political violence in Kenya.”¹⁴ This underlying dynamic has greatly increased ethnic divisions in Kenya and will continue to play a role unless addressed in a context that promotes the use of land as beneficial to all. Reform at the educational level alongside cultural organizations will also need to occur in order to completely erase the ethnic focus surrounding Kenyan society. These programs should focus on social cohesion where ethnic identities and cultural diversities are appreciated but do not dominate every aspect of life.¹⁵ The role of NGOs as well as churches will need to be relied on to implement change alongside the Kenya government.¹⁶ All of these areas are in need of further research.

¹³ Southall, 456.

¹⁴ Peter Kagwanja and Roger Southall, "Introduction: Kenya - A Democracy in Retreat?," *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 268.

¹⁵ Tarimo, 307.

¹⁶ Ibid.

While it is easy to say that all Kenya needs is “change” to halt the abuses of ethnicity in political competitions, change comes with difficulty. Electoral reform is simply a stepping stone for the substantial change that needs to take place in regards to Kenyan views on ethnicity: “Elections must ultimately be a nation-building exercise, rather than a divisive one. Since elections provide a means by which political power can change hands peacefully, they need to be managed in such a way as to deliver not only an arena for peaceful political contest but also to ensure general acceptance of outcomes and stability for other nation-building activities.”¹⁷ Elections provide a visible venue for the promotion of civic nationalism to begin. With the 2012 elections just around the corner, if the issues surrounding electoral reform are not addressed and the power-sharing arrangement continues to accomplish little, there will be a repeat of the 2007 election complete with violence, death, further division, and significant disruption to the Kenyan economy.

¹⁷ Republic of Kenya, 32.

APPENDIX I

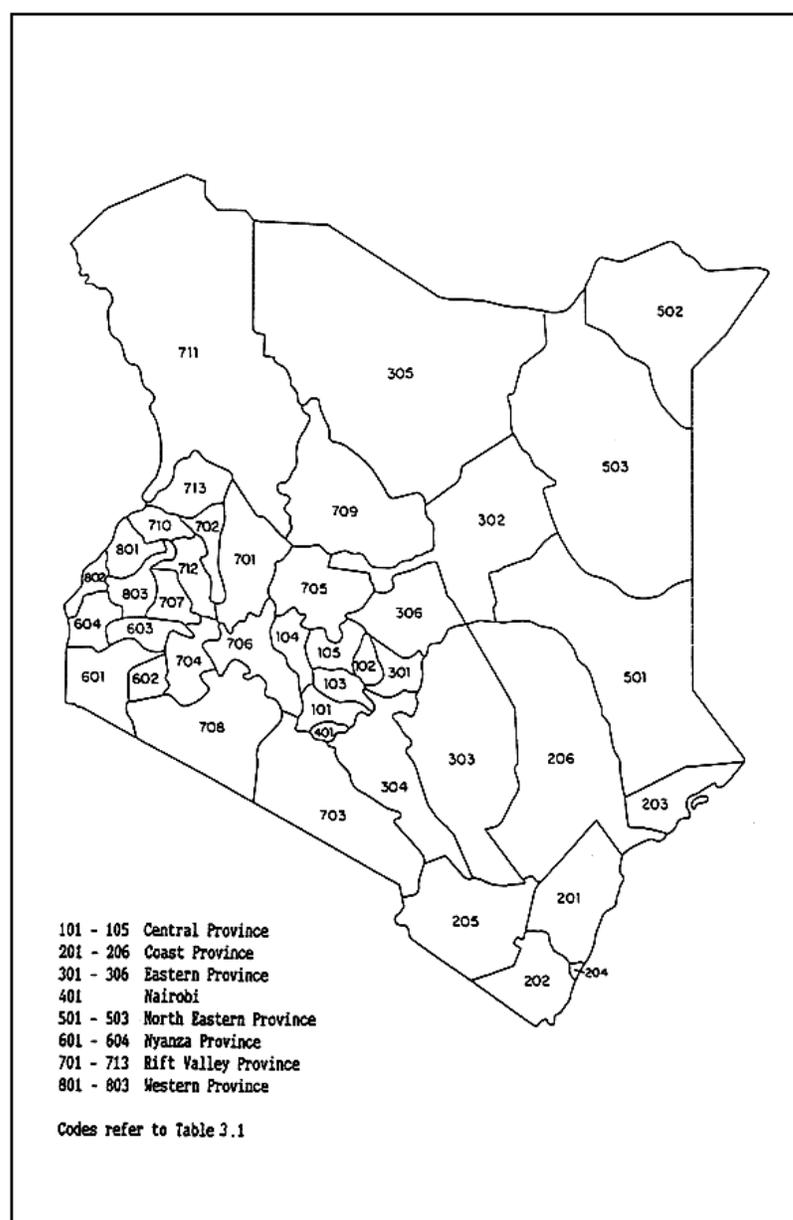
The eight Kenyan provinces: 1) Central, 2) Coast, 3) Eastern, 4) Nairobi, 5) North Eastern, 6) Nyanza, 7) Rift Valley, and 8) Western.



Webster's Online Dictionary, "Kenya," <http://www.websters-online-dictionary.org/definitions/Kenya?cx=partner-pub-0939450753529744%3Av0qd01-tdlq&cof=FORID%3A9&ie=UTF-8&q=Kenya&sa=Search#906> (accessed April 19, 2011).

APPENDIX II

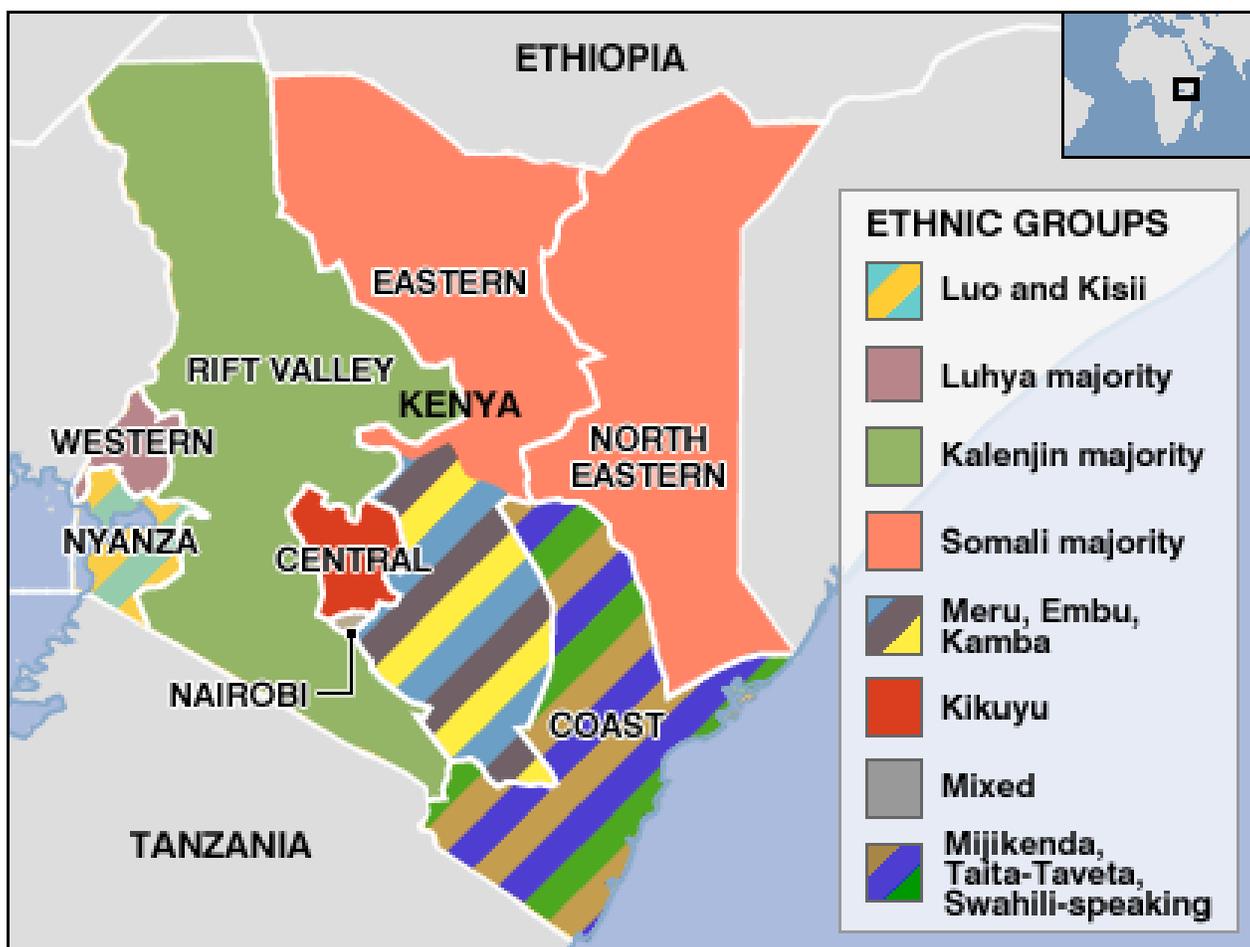
Map of the Kenyan Districts: This does not represent the constituencies for voting. The constituencies are currently in flux so a map would prove inaccurate. However, it does show the discrepancy in size of the districts.



FAO Corporate Document Repository,
<http://www.fao.org/docrep/009/t0737e/T0737E05.htm> (accessed April 19, 2011).

APPENDIX III

Breakdown of Kenyan provinces by ethnic group.



BBC News “Kenya diplomatic push for peace.”
 <<http://news.bbc.co.uk/2/hi/7167363.stm>> (accessed April 19, 2011).

APPENDIX IV

Table 1. Elections and multi-ethnic party coalitions, 1963–2007.

President	Election	Party and main ethnic coalitions	Impact on democracy/stability
Jomo Kenyatta	1963	KANU (Kikuyu and Luo)	Victory, relative stability
	1969	(Kikuyu, Kalenjin)	Authoritarianism,
	1974		relative stability
Daniel arap Moi	1979	KANU (Kalenjin, Kikuyu, Luhya)	Legitimacy and relative stability
	1983	KANU (Kalenjin)	Authoritarianism
	1988		and resistance
	1992	KANU (KAMUTUSA)	Post-election violence and instability
Mwai Kibaki	1997	KANU (KAMATUSA)	Election violence and instability.
	2002	NARC (Kikuyu, Luo, Luhya)	Victory over KANU and post-election stability
	2007	PNU (Kikuyu/Embu Meru, Luhya (Bukusu), Kisii)	Post-election violence and instability

Kagwanja, Peter and Roger Southall. "Introduction: Kenya - A Democracy in Retreat?" *Journal of Contemporary African Studies* 27, no. 3 (07, 2009): 267.

APPENDIX V

Table 2.

SUMMARY OF INSTITUTIONAL RESPONSIBILITY FOR KEY ELECTORAL FUNCTIONS			
Electoral activities/functions	Nature of function	Common international practice	Responsible agency in Kenya
• Registration of candidates	MANAGERIAL	Always assigned to EMB	ECK
• Organisation of the elections			ECK
• Registration of voters	MANAGERIAL	Frequently – but not necessarily – assigned to EMB	ECK
• Identification of voters			ECK
• Constituency delimitation			ECK
• Decisions on complaints	QUASI-JUDICIAL	Frequently two-tier arrangements	COURTS
• Civic and voter education	INFORMATIONAL	Frequently – but not necessarily – assigned to EMB	ECK, CIVIL SOCIETY
• Regulation of electoral campaigns	REGULATORY		ECK (weak powers)
• Regulation of political party funding			ECK (since 1 July 2008)
• Regulation of media during campaign			MEDIA COUNCIL
• Regulation of political party registration			ECK (since 1 July 2008)
• Regulation of candidate nomination			Rarely assigned to EMB (not considered good practice)

Republic of Kenya, 2008a. "Report of the Independent Review Commission on the General Elections Held in Kenya on the 27th December, 2007."
http://www.dialoguekenya.org/docs/FinalReport_consolidated.pdf (accessed April 19, 2011).

APPENDIX VI

Table 3.

Exit poll and ECK results for the presidential election in Kenya, December 2007.

		Total	Nairobi	Coast	North eastern	Eastern	Central	Rift Valley	Western	Nyanza
Odinga	Exit Poll	46.1	54.6	67.2	76	7.2	2.5	54.6	72.7	83.4
	ECK	44.1	44.0	59.4	47.2	5.0	1.9	64.7	65.8	82.3
	<i>Difference</i>	2	10.6	7.8	28.8	2.2	0.6	-10.1	6.9	1.1
Kibaki	Exit Poll	40.2	33.1	24.6	17.0	42.5	91.9	41.2	24.2	14.7
	ECK	46.4	47.7	33.1	50.3	50.3	96.9	33.5	32.2	16.9
	<i>Difference</i>	-6.2	-14.6	-8.5	-33.3	-7.8	-5	7.7	-8	-2.2
Musyoka	Exit Poll	10.2	6.6	7.2	7.0	46.9	3.5	1.9	2.5	1.0
	ECK	8.9	8.1	6.5	2.3	43.7	0.7	1.4	0.7	0.3
	<i>Difference</i>	1.3	-1.5	0.7	4.7	3.2	2.8	0.5	1.8	0.7
Other/RTA/Spoilt	Exit Poll	3.5	0.6	1.1	0	3.4	2.1	2.3	0.7	0.9
	ECK	0.6	0.2	1.0	0.1	1.0	0.5	0.4	0.3	0.5
	<i>Difference</i>	2.9	0.6	1.0	-0.1	3.3	2.0	2.2	0.6	0.8
	<i>Sample size</i>	5495	517	472	100	905	828	1285	604	784
	<i>Margin of error</i>	±1.32	±4.31	±4.51	±9.8	±3.26	±3.41	±2.73	±3.99	±3.5

Source: Exit Poll and Electoral Commission of Kenya (2008).

Notes: Totals may not sum to 100 because of rounding.

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