



"Peaceful Positive Change"

**OBSERVATION OF THE BY-ELECTIONS IN SHINYALU AND
BOMACHOGE CONSTITUENCIES**

PRELIMINARY OBSERVATION REPORT

Institute for Education in Democracy (IED)
Ground Floor, Jumuia Place, Lenana Road
P.O. Box 43874-00100
Nairobi
Tel: 2731125/7; 2722431; 0725954248
Fax : 2730165
E-mail : ied@iedafrica.org
Website: www.iedafrica.org

1. ACKNOWLEDGEMENT

IED would like to acknowledge and extend its special thanks to a number of partners and individuals who made the observation of the by-elections exercise possible. First and foremost, we are very grateful to the Embassy of Finland and the Australian Agency for International Development (AusAID), who generously funded the observation of the two by-elections. We are very grateful to IED Board of Directors, Members and the Secretariat Staff for their continued support and for participating in the observation exercise. We also acknowledge all our Constituency Monitors and Poll Watchers/Observers for their dedication, commitment and support during the observation exercise. Finally, we wish to thank the Interim Independent Electoral Commission (IIEC) for accrediting IED to observe the by-elections and for the support and cooperation we received during the exercise. We particularly wish to thank the Chairperson, Mr. Ahmed Issack Hassan, Commissioner Douglas Mwashigadi and Commissioner Hamara Ibrahim, the Public Relations Officer Mr. Andrew Limo and all the Returning and Presiding Officers and the District Elections Coordinators for their support and cooperation.

This is our Preliminary Report on our observation, findings and conclusions. We hope to prepare and disseminate a comprehensive observation report in the next one month as soon as we are through with analysing data and information submitted by our observers who were deployed to all the polling stations/streams in the two constituencies.

2. BACKGROUND

The Institute for Education in Democracy (IED) is a Non-Governmental Organization providing non-partisan leadership in the democratization and governance process in Kenya and Africa through programmes in the Electoral Process, Civic/Voter Education, Research and Dissemination, and provision of technical assistance and support. IED's focuses on provision of non-partisan and gender balanced information and skills to empower citizens especially those from the marginalized areas including women and youth, to enable them participate effectively and efficiently in governance and democratic processes and to contribute towards the creation of positive political behaviour and culture

IED is focused on the electoral process and undertakes among other things, participation in election observation and offering technical expertise in the region and the rest of the world. This has enabled IED to understand application of different electoral systems, laws and the structures of Election Management Bodies (EMBs).

IED has monitored and observed all general elections and most by-elections in Kenya since 1993. In addition, IED coordinated and hosted the observation of the 2005 Referendum on the Proposed New Constitution of Kenya. In 2007, we co-chaired the Kenya Elections Domestic Observation Forum (KEDOF).

Election observation is one of the cornerstones of the democratisation process. A successful observation is aided and preceded by focused and long-term monitoring and observation of the registration of voters, inspection of voters registers, maintenance of a clean and updated voters register, internal democratic processes of political parties, accountable and transparent nomination processes by the political parties and the Electoral administrators and authorities, campaign processes, pre-election activities, polling, counting of ballots and announcement of results. IED monitors and observes the electoral process for the following objectives:

- ☞ To determine the credibility of the electoral process and the elections
- ☞ To determine the freeness and fairness of the elections process
- ☞ To build credibility, integrity and confidence in the electoral process and elections
- ☞ To ensure that the conduct of the elections was transparent and professional
- ☞ To make proposals and recommendations to stakeholders in the electoral process aimed at enhancing positive political behaviour and democratic culture

The goal of monitoring the electoral process and observing elections is to determine that the democratization process is on-course and that every eligible person is accorded his or her political and civic rights. These include the right to fair and proportional representation¹, the right to good leadership and the right to effectively participate in democratic, governance and development processes in the country.

As part of IED's mandate, IED monitored and observed the two by elections in Bomachoge and Shinyalu Constituencies². IED's approach was based on its well established tradition and practice in observing elections, which involves recruitment, training and deployment of Poll Watchers and Observers to all polling stations/streams. As part of the preparations for the observation of the by-elections, IED recruited 4 Constituency Monitors, 2 each for the two Constituencies. The Constituency Monitors were trained and deployed on 1st and 2nd July 2009 to monitor, observe and report on the pre-election environment including the voter registration process in the two Constituencies. The reports from the Constituency Monitors informed the preparation of this pre-election assessment report, which IED shared with stakeholders in the electoral process.

As is IED's practice in observing elections, we recruited and deployed 252 Poll Watchers (for Bomachoge 149 and for Shinyalu 105). The deployment of these Poll Watchers ensured that we had 97% coverage of the polling stations and streams in the two constituencies. The recruited Poll Watchers were trained and deployed on the 24-25th August 2009 in the two constituencies. In order to ensure that the trainings took place concurrently, we sent two teams to the respective constituencies to facilitate the training/briefing of the Poll Watchers. The Poll Watchers were deployed to all the polling stations/streams to observe and report on the polling day events and activities.

In addition, IED staff members, Board of Directors and Members observed and coordinated activities in the constituencies on the polling day. A total of 65 polling stations in the two constituencies were visited randomly in this regard. We also held a briefing session for our development partners, collaborators, Board of Directors and Members on 19th August 2009 and 21st August 2009 at IED offices and on 26th August 2009 in the two constituencies.

In order to support the observation exercise, we launched a Short Message Service (SMS) System on 20th August 2009 to among other things provide Parallel Votes (Results) Tabulation (PVT). The PVT is an election observation methodology that is employed for independent verification of official election results. The poll watchers were responsible

¹ Miscellaneous Civil Application No 975 of 2001 Hon. John Michuki versus Attorney General, The Electoral Commission of Kenya and the Constitution of Kenya Review Commission, dealt with this issue and affirmed the right to equal and proportional representation.

² The by-elections in Bomachoge and Shinyalu Constituencies were occasioned by different factors. In Shinyalu Constituency, the by-election was occasioned by the death of the area Member of Parliament (MP), Hon. Charles Lugano Lilechi. The late Hon. Lugano Lilechi died on 4th May 2009 after a short illness. In Bomachoge Constituency, the by-election arose from a successful election petition, which nullified the election of Hon. Joel Onyancha as the area MP.

for recording the official provisional results declared at the polling stations and relaying them to the PVT centre via a short message using a mobile phone. The information was then processed, analyzed and posted to IED's website: www.iedafrica.org. By mid night on 27th August 2009, we had received all the provisional results from all Poll Watchers and posted them to our website.

3. SUMMARY FINDINGS

Having participated in the by-elections as monitors and observers, we wish to state that in general, the results of the by-elections reflected the wishes of the voters in the two constituencies of Shinyalu and Bomachoge. This statement is based on eyewitness accounts and evidence submitted to IED by the monitors, observers and poll-watchers who were present in most of the polling stations and streams in the two constituencies throughout the entire exercise. This is also based on our observation of the pre-election, which we began two months before the polling day. However, we wish to note that there were no fundamental changes in the management and conduct of elections as demonstrated by the use of old approaches and methods that are mostly manual and prone to human errors and manipulation. This is of concern given that it was at the core of the recommendations made by the Kriegler Commission. There is an urgent need for an overhaul of the legal and administrative framework for elections in Kenya to reform the way and manner in which elections are managed and conducted in order to avert a repeat of the challenges witnessed during the 2007 general elections.

During the observation period, we observed certain best practices as well as shortcomings, concerns and irregularities perpetrated by the IIEC election officials as highlighted below. We noted that the short-comings, concerns and irregularities were perhaps not so much by bad intentions but by lack of proper planning, consistency and uniform understanding of their duties and responsibilities.

(a) The performance of the IIEC in the administration and management of the electoral process

1. The IIEC is mandated by the Constitution to manage and conduct elections and by-elections in Kenya. As currently constituted, the IIEC has 8 Commissioners and a chairperson, appointed in accordance with the Constitution. The IIEC is yet to establish a secretariat and field offices. During the by-elections the IIEC engaged temporary election officials namely Registration Officials, District Elections Coordinators, Returning Officers and their deputies, Presiding Officers and their deputies and Election clerks. To assist in ensuring security of election materials, officials, candidates and their supporters, political parties' agents, voters, observers and others involved in the elections, a team of security personnel were seconded to the IIEC. These temporary election officials conduct and manage elections on behalf of the IIEC and were for the purposes of the by-elections employees of the IIEC. They are directly under the supervision of the IIEC Commissioners who should also play an oversight role over them.
2. However, during the by-elections and due to the short period of time that was available and lack of sufficient human resource capacity (lack of secretariat staff), we observed during the by-elections that the Commissioners were directly involved in the implementation processes before and during the by-elections in the two constituencies. Even though this can be understood on the basis of lack of staff, it meant that the Commissioners could not play their supervisory and oversight role

effectively as they could not watch over themselves. It also meant there was no clear demarcation of roles between the Commissioners and the few staff that were employed. This overlap may sometimes be unhealthy especially in a by-election where the Returning Officer is the one in-charge.

3. Never-the-less, the IIEC and its election officials were very supportive, cooperative and helpful. This is the kind of support that that will eventually enable the IIEC to build the required professionalism and integrity.
4. IED observed that given the short period of time that the IIEC had to deliver the two by-elections and the fact that it is yet to establish a Secretariat, the preparatory work that it put in place was commendable. First, the IIEC had to conduct fresh registration of voters and prepare new registers and then prepare for the conduct of the elections. In all these, the IIEC demonstrated very good intentions and a determination to do a good job. The IIEC also demonstrated a commendable degree of openness and transparency in the process. However, we observed that the IIEC did not carefully think through some of the consequences of the good intentions and in the end there was no balance between the good intentions and the consequences.
5. The IIEC demonstrated a very good intention with regard to the new registration of voters and creation of new registers for the two constituencies. This was very commendable given that it was recommended by the Kriegler Commission and indeed specifically provided for as one of the functions of the IIEC in the Constitutional Amendment Act No. 10 of December 2009 that created the IIEC. The IIEC also demonstrated very good intention when it made administrative decisions on who qualified to be registered as a voter in the two constituencies for the by-elections. However, the consequence of some of these very good intentions and administrative decisions was that the IIEC broke the law in many instances.
6. The registration of voters and the by-elections in the two constituencies were conducted under existing electoral laws, especially the Constitution of the Republic of Kenya and the National Assembly and Presidential Elections Act (Cap 7) and the Regulations made thereunder. There has not been any change to these laws at all since the last general elections in 2007. As regards the qualifications to register as a voter, the existing electoral laws are very clear. The law only prohibits multiple and double registration but permits voters to transfer from one constituency to another and from one polling centre/station to another. As part of its very good intentions, the IIEC prohibited what it referred to as transfers in a bid to ensure that outsiders did not swell the registers in the two constituencies. In certain instances, transfers were recorded, but the voters in this category, were not allowed to vote in the places they had transferred to, as we observed on the polling day. Therefore, although very well intentioned, the IIEC broke the law in prohibiting transfers and disenfranchising those who indeed were allowed to transfer.
7. In registering new voters in the two constituencies, the IIEC relied on the old 2007 national register of voters in determining who should be allowed to register. In fact, the exercise was more of a confirmation of the existence of a voter in the old 2007 register and transferring the voters' details to a new register. Based on the existing political environment and the high stakes that the by-elections attracted, this was a very good intention. However, the consequence was that the IIEC relied on a document which had been discredited by the Kriegler Commission and technically invalidated by the very law that created the IIEC and required it to conduct fresh registration of voters and create new registers. The IIEC also went a head to rely on

the old invalidated register to determine double and multiple registrations and to put up a case against transfers from one constituency to another. The old 2007 register was declared invalid and therefore the registration of voters in the two constituencies was the first new registration that the IIEC was undertaking in terms of its mandate. Therefore, there could not have been any other pre-existing register of voters which the IIEC could rely on. Hence utilizing and relying on the old invalid 2007 register of voters, even though well intended, was a misnomer.

8. For the first time in the history of elections in Kenya, transparent ballot boxes were used. This was very commendable on the part of the IIEC and promoted transparency and credibility in the process. We however, noted that the transparent boxes will require to be permanently marked with the logo of the electoral body to avoid being tampered with and for ease of identification.
9. We would like to commend the IIEC for the manner in which it conducted the recruitment of all elections official. We observed this process, including short-listing and interviewing was above board and transparent. We also observed training and deployment of election officials were done on time. We were not able to observe the training of the Returning Officers and the Registration Officials but we observed the training of the Presiding Officers, their deputies and clerks. We also noted that the security personnel did not undergo any training. While the training was generally good, we would like to urge the IIEC that in future, it should ensure that training of election officials, especially at the level of Returning Officers, District Election Coordinators and Presiding Officers and their deputies, is conducted by duly accredited BRIDGE trainers on the basis of the electoral cycle approach as recommended by the Kriegler Commission.
10. We would also like to commend the IIEC for the last minute swop of Presiding Officers, with those from Bomachoge being sent to Shinyalu and vice versa. This was very well intended and prevented them from being partisan or influenced by local politicians. We however observed that swopping was not well planned and managed thus resulting into these officers being disenfranchised and also delays in opening of the polling stations. We also noted that due to the swopping, there was confusion at the election distribution venues. The Presiding Officers were not familiar with the other officials with whom they were to work, especially the clerks and had to use placards to locate them. As a result the distribution of the election materials commenced late and ended late into the night. Consequently, some of the election officials arrived at their respective polling stations a few hours to the opening of the polling stations hence delaying the setting up and opening of the polling stations.
11. We noted that the IIEC introduced additional polling streams in the two constituencies. In our observation, this was intended to ensure that not more that 500 voters voted in a stream. However, we noted that the additional streams were introduced at the last minute and the information shared with stakeholders a few days to the polling day. This also meant that the additional polling streams were not gazetted. The re-introduction of streams, in our observation, was a claw back in efficiency at the polling stations. In the past each stream was in fact a polling station with its Presiding Officer and a Deputy Presiding Officer. In these by-elections, a Presiding Officer was in-charge of the entire polling station while the deputies were in-charge of the streams. When it came to counting, the ballot boxes from all the streams were moved into one of the streams for counting, yet each stream was still counted separately. This in our observation resulted into delays in the counting process.

12. Never-the-less, we observed that most of the materials necessary for the exercise (lamps, indelible ink, ballot boxes, ballot papers, stamps, voter register, and other necessary stationery) were adequate and delivered to the respective polling centres. We however, noted that in a number of polling stations, in both constituencies, the form 16A and the oath of secrecy forms were inadequate.
13. We recommend that in future, the IIEC should consider advance voting for the officials to be swapped so that they are not disenfranchised and also to manage the process well through proper planning and facilitation. Election officials require adequate knowledge of the area and sufficient time to settle and rest before the gruelling 11 and above hours for managing and conducting the voting and counting processes on Election Day.
14. We observed that in most polling stations, the election officials discharged their work professionally and in accordance with the law. Most of them were transparent in their work, shared information freely with the media and the observers. We observed that the voting procedures were generally well followed and the secrecy of the vote was generally well safeguarded in most polling stations. Parties' and candidates' agents were present in virtually all polling stations. We would like to commend the election officials, including the Commissioners who were in the field for demonstrating a high level of willingness to assist observers and voters whenever approached. However, we noted some glaring gaps and inconsistencies in the management of the voting, counting and tallying processes.
15. We observed that it was very difficult to identify the election officials. Best practice requires that election officials wear identifiable uniform or T-shirts and wear badges clearly indicating their names and designation. This was not the case in the two by-elections. In Shinyalu constituency, the election officials improvised by wearing badges which we were told they had used during their training. In Bomachoge constituency, it was just a name tag that was worn by the election officials. Similarly, we observed that most of the political party agents did not have proper accreditation to clearly identify them.
16. We observed that the IIEC made great efforts to enable voters to identify the location of the polling stations. We noted that there were clear directions to this effect. However, the demarcation of the polling stations was not properly done. The 400 meters radius of the polling station was not properly demarcated in most polling stations. What were demarcated with sisal twines were the areas leading towards the entry into the streams within the polling stations.
17. In a number of polling stations, we observed that the polling clerks were not calling out the names of voters as expected of them. Also, in a number of polling stations, the Presiding Officers and their deputies did not know what to do with voters who needed to be assisted and what constituted a spoiled or rejected vote.
18. We observed that most polling stations did not open on time (i.e. by 6. 00 am as required). The reasons cited for opening late included; late arrival of party agents, late setting up and in a few cases late arrival of election officials. We also observed in two polling stations in Bomachoge constituency there was lack of proper coordination and communication between IIEC and the owners of the premises where the polling stations were located. For example at Nyamonyo Farmers Cooperative Society Polling Station (034) the election officials had to break the door to the premises for the polling to begin. The second stream at this station was not opened at all and

therefore all the 700 registered voters at the centre had to vote in one stream. At Emesa Primary School Polling Station (019), the election officials had to set up afresh in a different classroom after the caretakers told them that the classroom where they had already set up was the wrong one.

19. During the actual voting process, we observed that the flow of voters in both constituencies was low in the morning. This was mainly due to farming activities that were taking place in the morning. But we also observed a pattern of voters hanging around the polling stations expecting to be facilitated with handouts before they could vote. These were mainly youthful voters. However, the over all voter turn in the two constituencies was above average. We also observed that most of those who turned out to vote were older voters.
20. Even though we observed a number of incidents of voters being turned away (barred from voting) for a number of reasons, this in our observation did not indicate any systematic disenfranchisement on the part of the IIEC. Never-the-less, it still remains a concern since it touches on the status and credibility of the register of voters. The reasons for turning away voters included; lack of proper and valid national identification cards; missing names from the register; misspelled names in the register, and; double registration. In Shinyalu constituency, we observed at least 310 voters turned away. In most polling stations, that we visited, the average figure of those turned away because their names were missing in the register was 5 voters. However, at Lunyu Primary School (037) 15 voters were turned away while at Shibuye Mixed Primary School, 42 voters were turned away. At Injira Primary School Polling Station, 9 voters were turned away. We also noted that at these polling stations, the election officials resorted to the use of the Black Book to enable some of those whose names were missing from the register to vote. Even though this was well intended, the Black Book is part of the discarded old register, which should not be used at all. It was not even used during the 2007 general elections.
21. We also observed cases where voters were turned away because they had the old generation ID cards. We found this to be conflicting because the IIEC registered these voters using the old generation ID cards and their names were in the registers. It was unfair for them to be turned away and disenfranchised yet it was not their fault that they were registered using the old generation ID cards. In fact in Bomachoge constituency, our observers brought this to the attention of Commissioner Hamara Ibrahim, who was in-charge, and upon consultation with the IIEC chair, the decision to disenfranchise these voters was rescinded and the Returning Officer instructed to allow them to vote. This decision, however came when a number of the voters had already been turned away at many polling stations. We also noted that the Returning Officer did not communicate this decision to all Presiding Officers in the constituency. Our observers had to prompt the Presiding Officers in the stations they visited to get in touch with the Returning Officer for authority to allow these voters to vote. In Shinyalu constituency, however, voters with old generation ID cards were not allowed to vote at all.
22. We were able to witness the closing of a number of polling stations. We established that nearly all polling stations closed after 5. 00 pm. Those who were still on the line at the time of closing were allowed to vote.

(b) Voter bribery, inducement and undue influence

23. Voter bribery, inducement and undue influence continue to feature in Kenya's electoral process. In our observation, all political parties that were involved in the by-elections were in one way or the other involved in voter bribery, inducement and undue influence. However, PNU, ODM and KADDU were very conspicuous in the vices. We observed cases of voter bribery before and during election day. For instance during the voter registration process cases of voter bribery involved party agents giving money to voters so that they could register and later vote for a particular party. A case in point was at Nyagesa Primary School registration centre, where Mr. James Agoro Angasa a supporter for Mr. Joel Onyancha the PNU candidate bribed voters with Kenya Shillings 200/- to register. There were also reports that Mr. Joel Onyancha gave out money to elders in his Bokione clan to induce registration clerks.
24. On election-day we observed widespread cases and allegations of voter bribery by politicians and political party agents in both Bomachoge and Shinyula constituencies. In most cases, politicians and party agents belonging to KADDU, PNU and ODM were implicated. Even though we could not verify many of these allegations, we came across instances which, strongly indicated that voter bribery and vote buying were taking place in the constituencies at a large scale.
25. For instance at Omosombwa Primary School in Bomachoge constituency we observed a vehicle registration number KAA 134X whose occupants were said to be ODM party agents including a former District Commissioner. The vehicle was moving from one polling station to another as the agent distributed money to voters. At Ikuywa Primary School Polling Station (036) in Shinyalu Constituency, we observed a vehicle registration number KAL 405X, Toyota Corolla whose occupants were alleged to be KADDU party agents were distributing money to voters as the vehicle approached the polling station. Another vehicle registration number KAP 228 P, Toyota Corolla, whose occupants were said to be KADDU agents was also observed going round the constituency with the agents giving out money to voters. At Shirulu Primary School Polling Stations, 5 women voters confessed that they had come to vote for the KADDU candidate because they had each been given Kshs. 100/= by KADDU agents. At Mukumu Primary School Polling Station, 2 people alleged to be KADDU agents were arrested on implication of voter bribery. At Musingu Primary School Polling Station, 1 person, who was alleged to be KADDU party agent was arrested on implication with voter bribery. The person was found in possession of Kshs. 4,300/= and a list of 207 voters. At Khayega Primary School Polling Station, 2 people alleged to be KADDU party agents and 1 person alleged to be ODM party agent were arrested on implication of voter bribery. At Injira Primary School Polling Station, a person who was alleged to be KADDU party agent was arrested on implication of voter bribery.
26. In Ritembu Primary School Polling Station (021) in Bomachoge constituency, we observed the Minister for Education, Hon. Professor Sam Ongeru and two others driving into the polling station in vehicles registration number KAJ 802X and KAC 260P, Toyota Prados. The Minister then proceeded into the polling station and conversed with the Presiding Officer despite not having any form of accreditation. Intimidation and influencing of voters could be inferred from this. In Shinyalu constituency, there were rampant allegations of voter bribery involving Hon. Cyrus Jirongo of KADDU and Mr. Stanley Livondo of PNU.

27. We observed involvement of public/civil servants and use of public/state resources, personnel and abuse of public office during the by-elections, especially the campaigns. This practice was effected with impunity during the by-elections campaigns in all the two constituencies. We observed that there were cases of use of state resources by the Prime Minister, the Vice President and Government Ministers to Campaign for their candidates. During these campaigns, the constituents were awarded with instant goodies including creation of a new division and promised better roads and improved infrastructure. It should be noted that involvement of public/civil servants and use of public/state resources, personnel, and abuse of public office during by-election and election campaigns is illegal and an offence under Section 17B of the National Assembly and Presidential Elections Act³ and Section 14 of the Public Officers Ethics Act.² This is because this practice is not only an abuse of office but also misappropriation of public funds.
28. We wish to commend IIEC for its attempt to stamp its authority in dealing with perpetrators of electoral malpractices by ordering the arrest of those who were caught violating electoral laws and the electoral code of conduct. However, we noted that although arrests were made, there was no follow up and in some instances the culprits were not charged in court. In other instances the Presiding Officers recorded the occurrence of electoral malpractices but did not order arrest of the culprits.

(c) Counting of votes and tallying of the results

29. Most polling stations were closed between 5.00 pm and 6.00 pm. Counting started few minutes after close of polling. We observed that during vote counting, a number of clerks and Presiding Officers did not know what amounted to a spoilt or rejected vote. For example, in Bomachoge constituency at Omosasa TCB Polling Station (126), the Presiding Officer accepted as valid a ballot paper that had a signature of the voter as the mark. On the other hand in Shinyalu constituency at Shibuye Mixed Primary School 5 ballot papers were rejected because they had voters' signatures as the mark. In the same Polling Station 5 ballot papers were rejected because voters had put a mark on the party symbol yet the intention of the voters were clear. At Tendere Primary School in Bomachoge, the Presiding Officer kept consulting with the observers and the party agents to confirm whether a vote was rejected or spoilt.
30. Based on the foregoing, we noted inconsistency in the manner in which the Presiding Officers determined spoilt and rejected ballot papers. We also noted that many disputed ballot papers were brought to the tallying centre in Bomachoge as a result. This may be a reflection of lack of adequate skills on the part of the by the Presiding Officers, their deputies and the election clerks on how to determine rejected or spoilt ballot papers.

³ Section 17B provides as follows:

- (1) No public officer shall:
- (a) engage in the activities of any political party or act as agent of any such party; or
 - (b) Publicly indicate support for or opposition against any party or candidate participating in an election under this Act or under the Local Government Act.
- (2) A public officer who contravenes any of the provisions of subsection (1) shall be guilty of an offence and liable to a fine not exceeding fifty thousand shillings or imprisonment for a term not exceeding six months, or to both.

31. We noted that in some polling stations with more than one stream, which were managed by one Presiding Officer, the Presiding Officer had to oversee the counting in one stream before s/he could proceed to the next. This resulted in delays in counting of the ballots.
32. We also observed that the Presiding Officers in all the polling stations were calling on the political party agents to verify the results from the polling station/streams before they could announce them out. The observers and the political party agents were always vigilant and made enquiries on any events that they did not clearly understand. The Presiding Officers always responded well and effectively to the enquiries. This, we noted was a very encouraging improvement in terms of conducting the tallying process in an open, transparent and accountable manner.
33. Vote counting went on peacefully in all the polling stations and ended without any hitches. In Bomachoge constituency, the tallying process started around 8.30 pm and proceeded fairly well. Tallying was done at Tendere High School and only accredited persons were allowed inside the compound. However, we noted that it was difficult to tell who was not accredited since most of the electoral official did not have accreditation badges. The hall was well organised with all accredited groups having designated sitting areas. There was adequate security which was visible and well organised. The entire process was manually done. In Shinyalu, the tallying process was conducted at Lirhanda Secondary School and it began around 9.00 pm. We observed that the tallying of results from various polling stations in both constituencies proceeded well and smoothly until around 3.00 am when the final results were read out. We noted that unlike in Bomachoge, the electoral results in Shinyalu were projected on a big screen. This a good practice, which is commendable as it reduces unnecessary anxiety usually witnessed during the tallying process and enhances credibility and transparency of the process.
34. We therefore would wish to particularly commend the Returning Officer and the District Election Coordinator and the Commissioners who were in-charge of Shinyalu constituency for taking the projecting the results from the polling stations and the initiative to develop a tallying sheet that captured data and information from each polling station on registered number of voters, votes cast per political party, rejected, valid and spoilt votes. This form was shared with all those present at the tallying centre and made the proceedings very easy to follow and understand.
35. We observed that even though the tallying process and final announcement of results were well and transparently conducted, we noted that the process took very long to begin and to complete. The tallying processes in both constituencies were very slow and tiring. In Shinyalu constituency, many Presiding Officers had to wait with their results as the tallying centre was prepared. Efficiency is also about speed with which the results are delivered, tallied and announced. There is no reason why the tallying centres could not be prepared early and made ready to begin the tallying process by latest 6.30 pm.
36. We wish to note that one of the key recommendation under the Kriegler report that is captured in the mandate of the IIEC under Section 41A (f) is the need for the IIEC to develop a modern system for the collection, collation, transmission and tallying of electoral data. We note however, that IIEC is yet to implement this recommendation since what they are currently utilising is the traditional manual method, which has been used in the past. The current system of collecting, collating, transmitting and tallying of electoral results is manual and creates room for

manipulation as was witnessed in the 2007 general election. The IIEC must move away from the traditional manual method and adopt modern and efficient IT based methods.

(d) Forms 16A and 17A

37. We established that most of the Presiding Officers did not have adequate forms 16A. In the Polling Stations we visited, many of them had only two forms and this meant that the forms could not be shared with party agents and observers. In a number of stations, the Presiding Officers asked the party agents and observers to make photocopies of the form 16 A for themselves but in others the part agents and observers were not given a copy of form 16 A. Lack of adequate forms 16 A in a number of stations we visited also meant that the results were not posted outside the polling station as required. In terms of tallying results we wish to commend the RO in Shinyalu constituency for taking the initiative to develop a tallying sheet that captured data and information from each polling station on, registered number of voters, votes cast per political party, rejected, valid and spoiled votes. However, forms 17A were not shared with observers.

(e) Voter turn-out

38. We observed quite comparable and slightly above average percentage voter turn-out in the two constituencies. In Bomachoge, out of 56,188 total registered voters, 35,773 voters turned out to vote. This represents about 64 percent voter turn out. In Shinyalu, out of 39,187 registered voters 25,277 turned out to vote which represents 65 percent voter turn out. Based on the total number of registered voters, the voter-turn out in the 2 constituencies was therefore comparatively higher as compared to previous by-elections. Never-the-less, the bigger concern for stakeholders relates to the gap between the potential voters in the two constituencies and the actual number that was registered. The IIEC had targeted 70,000 voters in Bomachoge and 69,000 voters in Shinyalu during the registration exercise. The focus now should be on why the targets were not met and what should be done about it especially in order to address the widespread voter apathy. Answers to these questions are very critical as they will inform the IIEC in its effort to conduct the expected massive country-wide voter registration.

(f) Assisted voters

39. We observed a number of cases of assisted voters in both constituencies. The main reasons for being assisted were illiteracy and old age. Majority of the assisted voters were women. In the 32 polling stations that we randomly visited in Shinyalu constituency on the election day, we came across a total of 347 cases of assisted voters. Although in some instances we observed that Presiding Officers and their deputies followed the procedures and were always very ready to lend a hand to the voters who needed assistance in terms of ensuring that that they voted their candidates of choice, we noted that the secrecy of the ballot was compromised in many instances. In some instances, it was not clear to the Presiding Officers on who was supposed to assist a voter and the procedure to be followed. For instance at Nyamesocho Primary School Polling Station (117) in Bomachoge constituency, we noted that an elderly woman voter who sought assistance to vote was asked by a clerk who she wanted to vote for. The clerk then directed her to the Presiding Officer who then called on a PNU party agent to assist her.

40. In a number of polling stations in Shinyalu particularly Shirulu (013) and Shianyinya (044), the voters were asked to loudly indicate the candidate/party they wanted to vote for then the agent of that party would go and assist the voter. In other instances, the Presiding Officers would call the party agents randomly to witness a voter being assisted to vote. One peculiar case was noted at Cherobani Primary School Polling Station (066), where the Presiding Officer was only calling upon ODM agents to witness voters being assisted. This in our observation raised questions as to the impartiality of the Presiding Officer. At Lirhanda Primary School (027), voters were assisted without the party agents witnessing. The Presiding Officer at this station indicated that voters did not want the party agents to witness when they were being assisted.
41. At Shigalagala Polling Station (008), we came across an interesting pattern where young voters aged below 30 were seeking assistance claiming that they were illiterate. This was very suspicious and could be an indication of voters confirming to the agents that they were indeed voting for the candidate who had bribed them. At St Philips Mukomari Polling Station (040), which we noted had the largest number of assisted voters (over 50), the Presiding Officer was sending those who needed to be assisted away insisting that they should bring their own people to assist them. Some of those who were sent away never came back. In a number of polling stations, the Presiding officers did not have adequate oaths of secrecy forms and therefore did not swear those who assisted voters to vote as required. In other instances, those who assisted voters to vote did not have their thumbs dipped in indelible ink as required.

(i) The role and conduct of the media

40. During the by-elections for Shinyalu and Bomachoge, the media acted very responsibly and always reported balanced news with regards to the by-elections. There were no incidents of media bias from any quarters or competing parties and this is once again, a big plus on the part of the media houses which covered the by-elections. The media houses demonstrated impartiality in coverage of all the candidates in both constituencies.

(j) Civic/Voter education

42. Based on the number of rejected and spoiled ballot papers and the number of voters who were disenfranchised due to lack of proper documents, the widespread voter bribery, the number of assisted voters, we concluded that the civic/voter education was inadequate and not effective. In Shinyalu constituency, Partnership for Change was conspicuous in disseminating civic/voter education and even held a. In Bomachoge constituency, it was not clear who was conducting civic/voter education. We urge the IIEC to review the strategies and methodologies that were adopted for civic/voter education for the by-elections as they were inadequate and ineffective. The methodology of using public announcement and posters, which were only visible during the polling day is very limited and in some instances intimidating. For example, the IIEC's poster on the voting procedures although well meaning, had a conspicuous warning, which was intimidating and furthermore was cluttered with the name and identity of the IIEC.

Conclusions and Recommendations

- The by-elections were the first for the new Interim Independent Electoral Commission (IIEC) to conduct after the Electoral Commission of Kenya (ECK) was disbanded in December 2008. Therefore, the by-elections in the two constituencies were in a way a test for the IIEC in terms of its preparedness, competence and capacity to discharge its constitutional mandate. Based on our observation we wish to note that the IIEC made great and well intentioned efforts to ensure that the by-elections were conducted and delivered in a credible manner. We also noted the determination and dedication of the IIEC to ensure that the by-elections were managed and conducted credibly. In our observation, the IIEC has proved that that it can do an even better work given time and sufficient capacity to match. The mistakes that the IIEC made and the negative consequences of some the IIEC's decisions notwithstanding, the IIEC did a commendable job and managed the by-elections in a credible and transparent manner.
- The IIEC should draw lessons from the by-elections and seek to strengthen itself and address the mistakes that it made. We believe that with improved planning and sufficient capacity, especially human resource capacity through an established and well functional secretariat and field officers, the IIEC is on the right path towards giving Kenyans the change and reforms that they desire to see in the electoral processes. The new dawn in the electoral processes that Kenyans yearned for and which the Kriegler Commission recommended is however, yet to be effectively felt. The IIEC must focus all its attention and energy towards this end.

We therefore make the following recommendations:

- The letter and spirit of the recommendations made by the Kriegler Commission are very crucial to the success of the IIEC's work. We therefore urge the IIEC to maintain fidelity in implementing the recommendations made by the Kriegler Commission.
- The IIEC is mainly a reform commission and as such should dedicate a lot of its time and energy in delivering electoral reforms. Most importantly, the IIEC should focus on the reform of the electoral laws, which still remain as they were in 2007. In this way, some of the good intentions which the IIEC demonstrated during the by-elections will be legally cushioned.
- Registration of voters is a very significant component of the electoral cycle. The hall mark of credible elections is a good register of voters, which must be complete, current, accurate, inclusive and responsive to local conditions. The by-elections revealed that some of the strategies and methodologies the IIEC has adopted to register voters a fresh and create a new voters register are wanting and require to be carefully thought over. We urge the IIEC to quickly work with stakeholders for the adoption of an enabling legal framework that can support some of the good intentions it has to facilitate a modern voter registration system. This will address the issues of disenfranchisement, omission of names, misspelled names and details that do not match, which we observed. We also wish to urge the IIEC to work with stakeholders, dialogue and consult more in order to develop a modern voter registration system that is more inclusive, acceptable and owned by citizens. The IIEC should also closely work with other government departments such as the Registrar of Persons so as to develop a comprehensive register of voters.

- We also wish to note that the time that was provided for voter registration and inspection of the registers was inadequate. Inspection of the registers for example ordinarily requires at least two weeks. Although we take note of the efforts by the IIEC to announce the voter inspection process through local fm radio stations and making the registers available at the registration centers, there is a need for the IIEC to adopt other methods such as use of SMS and the internet as means of enabling voters to verify their details in the register. Other reliable methods include use of the local barazas, churches, temples and mosques to reach out to voters not just for the inspection but also for registration.
- We urge the IIEC to widely consult with other key stakeholders in order to develop a comprehensive strategy and standard curriculum and manuals for civic/voter education. This should be based on a prior detailed needs assessment. We also urge the IIEC to develop a clear criteria for accrediting NGOs and CBOs that conduct/disseminate civic/voter education. This would ensure impartiality and avoid a situation like we observed where Partnership for Change (Mars Group of Mwalimu Mati) conducted civic/voter education and at the same time endorsed and campaigned for the Safina party candidate in Bomachoge constituency, Mr. Cyprian Onyamwamu.
- The by-elections provided an opportunity to assess the level of democracy within political parties. The by-elections were held after the operationalization of the Political Parties Act. The Political Parties Act was enacted to mainstream the management and financing of political parties, enhance democratization and sanity within the political parties sector. Therefore, the by-elections provided an arena to observe the practical application and efficacy of the new Political Parties Act and how the IIEC dealt particularly with defections and party-hopping by candidates. However, political aspirants and candidates violated this Act with impunity. For instance in Bomachoge constituency Mr. Zephaniah Nyang'wara defected to UDM after he lost in the ODM party nominations. The IIEC however, went ahead to clear him to vie in the by-election. In the same constituency, Mr. Ferdinand Obure defected from NARC Kenya to The Independent Party (TIP). However since he had not met all requirements for IIEC nomination, he was not cleared.
- The by-elections were an opportunity to establish whether the IIEC adopted new strategies and approaches in dealing with electoral violence and other malpractices, especially in enforcing electoral laws and the electoral code of conduct. For the IIEC, the by-elections were an opportunity to stamp its authority over the management and conduct of elections in order to regain confidence and credibility from the public, and also to indicate that it is a reform institution with different approaches, strategies and style in delivering peaceful and credible elections. We noted that in some instances, the IIEC exercised due diligence and stamped its authority to ensure that the aspirants and political party agents adhered to the electoral laws and electoral code of conduct. We observed that a number of arrests were made at the behest of the IIEC and perpetrators charged in court during the voter registration exercise, the campaigns and on the polling day. We also observed the IIEC's authority during the nomination exercise when it refused to nominate certain candidates who had failed to comply with relevant electoral laws.
- However, we wish to note that senior government official, including the Prime Minister, the Vice-President and Cabinet Ministers continued to use state resource to campaign for candidates with impunity. No action whatsoever was taken to address

this issue. We also noted that although some people were arrested there was reluctance on the part of the security agents to follow up and prosecute them. While we commend the IIEC for making efforts to assert its authority in dealing with electoral malpractices and violators of electoral laws and the electoral code of conduct, we urge the IIEC to implement the electoral code of conduct in totality, without fear or favour and not to treat politicians as sacred cows. In particular, we urge the IIEC to firmly and scrupulously enforce the Political Parties Act in order to reign in on errant politicians and political parties. We also wish to urge the IIEC to put in place a committee that follows up on the issues of violation of the code of conduct.

- We also wish to note that the process of collecting, collating, transmission and tallying of the result was very slow. The IIEC relied on manual computing of results by the clerks and election officials, a process that is very slow, prone to mistakes of human error, and generally archaic. A good and reliable alternative would be to use computers in adding up results right from the time they are being announced at the polling level to the final tallying point. IIEC can significantly improve this process if, for instance, it came up with a Results Analytical Program custom-made to receive raw data, automatically add them up and instantly display running totals for each candidate complete with percentage performance at every interim level of results announcement. This process need not be such a complicated task for the IIEC as it is already in use by several other institutions dealing with data management right here in Kenya, and IIEC could borrow a leaf from them. Secondly, the IIEC needs to recruit computer proficient staff as recommend by the Kriegler Commission. We noted that computer proficiency was not one of the criteria for recruitment of electoral officials. This would greatly enhance their work and improve the entire process of tallying election results as recommended by the Kriegler Commission.
- We noted that a number of electoral officials did not fully understand their roles and responsibilities. As a result, issues of how to set up the polling station and demarcation, who should assist voters and how, to determine a spoilt or rejected vote etc emerged. There is need therefore for the IIEC to effectively address these shortcomings to enhance the effectiveness and credibility of the voting and counting processes. The IIEC should therefore ensure that election officials are adequately trained to enable them effectively understand and discharge their roles and responsibilities. Similar training should be given to political party agents to enable them to fully understand their role and to effectively discharge the same.
- The IIEC should quickly set up a professional secretariat and field offices with defined roles and responsibilities. There should be a clear demarcation of roles and responsibilities between the secretariat and field staff on the one hand and the Commissioners on the other. This will enable the Commissioners to play a supervisory and oversight roles and not that of implementation as was observed during the by-elections. We recommend that the IIEC should review the role and responsibilities of the District Elections Coordinator (DEC) vis-a-vis that of the Returning Officer (RO) in relation to elections. The DEC's role, as it stands today, appears relegated to that of a logistics officer and seems to have very little to do with direct coordination and management of elections in the constituency that falls within his/her jurisdiction yet they are employed on permanent terms by the IIEC and therefore have more motivation to deliver and deeper understanding of the electoral dynamics in the constituency unlike a RO who is a temporary official. There is need

for the IIEC to streamline the management and coordination of elections at the constituency level.

- Participation of the government officials in the electoral process should not be used to undermine the rule of law and if this happens it not only undermines democracy but also sets a very dangerous precedent because it may lead to uneven playing field. Although the Prime Minister, the Vice President and Cabinet Ministers can campaign in their individual capacities for their candidates, this is permissible so long as they do not use public resources and do not use the campaigns to unduly influence voters by dishing out goodies.
- We observed a serious problem of clannism and clan rivalry in Bomachoge constituency especially during the registration of voters, which was fuelled by local leaders. This was quite a headache for the IIEC and suggested that there was a deliberate incitement of a clan nature by the leaders. This calls for serious efforts at peace building and conflict management to enable the various clans in Bomachoge to live in peace and harmony with their neighbours. This also calls for effective and functional Peace Committees at the constituency levels to manage conflicts and build peace during elections.

Peter Aling'o
Executive Director
Institute for Education in Democracy (IED)
Nairobi.

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