



Unfinished Business

A FULL MONTH AFTER THE INDEPENDENT Review Commission investigating the 2007 General Election released its report, the dust is yet to settle over the findings.

After the publication of the report, KPTJ members restrained themselves from making comments about it without subjecting it to rigorous analysis and debate. This issue of Truth & Justice attempts to interpret the Kriegler report by pointing out its strengths, weaknesses and how to use it to move Kenya forward.

If the bi-partisan commission, headed by South African Judge Johann Kriegler hoped to avoid controversy by making ambiguous statements and generalised conclusions, it has unwittingly walked into the eye of the storm. There is open disagreement on how to deal with the Electoral Commission of Kenya, which was found to be so fatally flawed that it enjoys neither public confidence nor credibility.

Although the commission adopted many recommendations Kenyans have been making on the kind of electoral system they would like to have, a keen reading of its report shows that it went off the tracks as soon as it began the search for truth.

KPTJ monitors note that after successful countrywide visits, in which its investigators identified 114 potential witnesses, the Kriegler commission chose not to record their statements or summon them to give evidence. Based on the information and evidence that KPTJ had received even before the commission was set up, there were complaints about the results from 49 constituencies.

IREC chose not to summon the returning officers to explain alleged anomalies that ranged from alteration of documents to filing improper election returns.

The commission chose not to summon all or many of the 32 ECK commissioners and staff who were at the nerve centre of the discredited tallying system that produced a presidential result even IREC does not believe. Instead, the commission chose to listen to the ECK chairman, one commissioner and 10 staff. For corroboration, it took evidence from only one domestic observer, and then closed shop.

No heed was paid to allegations of a break-in at the Kenyatta International Conference Centre between December 31, 2007, which is recorded at the KICC police station as OB NO. 7 of January 2, 2008.

No attention was paid to issues raised that required further investigation, such as local administration officers issuing identity cards to schoolchildren so they could vote. Or presiding officers neglecting to accompany ballot boxes. Or fake ballot papers floating around, or even parallel ballot papers being printed.

No inquiry was made into the allegations that security agents were deployed to rig elections, despite the fact that two police officers lost their lives because of such information reaching the public.

In sum, KPTJ finds that the Kriegler report is an inadequate job that attempts to cover up offences committed by people who deserve no such protection. The case is made in the pages that follow.

From the mandate of the Independent Review Commission, it appeared that an answer to the key question - who won the presidential elections - was forthcoming. At the very least, Kenyans hoped that the commission would uncover whether or not, and how, intentional fraud was perpetrated and by whom.

Missing the truth by a mile

Just as a doctor diagnoses a disease by observing the symptoms of a sick patient, the commission was expected to examine a large body of primary evidence in detail, looking for patterns that suggest the causes of the failed election process. Unfortunately, the commission's approach failed to meet the challenge confronting them.

Their failure is rooted in two key aspects of how they carried out their investigation.

First, the commission either did not know of or chose not to employ the right statistical tools for conducting a forensic analysis of elections. Such methods are neither new nor untested in analysing problematic electoral results.

Second, the commission did not think critically about why and how fraud could have been committed at the Kenyatta International Conference Centre. As a result, the methods it employed to investigate the occurrence or non-occurrence of electoral fraud at KICC were insufficient. Here are the main problems with those methods:

1. The Kriegler investigation - specifically its analysis of the numbers - was not sufficiently robust to enable it to draw the conclusion that all of the ECK's results were wrong.
2. The commission failed to apply modern methods in attempting to understand ECK's numbers, thus excluding potentially important evidence from what the commissioners and the Kenyan people could use to form an opinion.
3. The decision to only examine 19 problematic constituencies ensured that the commission could not determine whether rigging occurred at KICC.
4. The decision to only examine 19 problematic constituencies ensured that the commission could not determine whether rigging occurred at KICC.
5. Given its resources and the time on its hands, the commission could have conducted research capable of answering the questions at hand. It appears that it either did not know about the proper methods to use, or deliberately chose not to use an effective analytical strategy.

a. Sampling problems

After looking at the results of 19 constituencies - chosen because of complaints about them - the commission concluded that one could not rely on any figures from the ECK.

This claim implies that the rest of the constituency results are equally flawed. It cannot be supported with the

methods that the commission used, and demonstrates a basic misunderstanding of simple concepts, like random sampling, as well as an ignorance of more sophisticated statistical election forensics. The commission's logic on why not to do electoral statistics proceeds in two steps.

First, IREC states that "[a]lmost all parliamentary and presidential election results for the constituencies sampled are erroneous, which means that very few of the officially published figures are actually accurate". The claim here is that because the ECK's results in the 19 "sampled" constituencies contained many errors, most of the other 191 constituencies contain similar. This claim is false. The mistake the commission made lies in the way it chose its sample of 19.

Because IREC's sample focuses on disputed constituencies rather than a random sample of all constituencies, its findings from that sample cannot be generalised to all 210 constituencies. Suppose a farmer has 100 chickens, and he wants to estimate about how much he will earn if he takes them to market and sells them.

He knows that different sized chickens fetch different prices, and he is not sure how many large and how many small birds he has. Our farmer decides that he is going to catch 10 chickens, and use those 10 to generalise about the larger flock. He does so, and finds that the 10 birds he caught are rather lean, with little meat on their bones. Crest-fallen, he sends his wife with the chickens to market, telling her not to expect too much given the sorry state of their flock.

That evening, she returns, her purse bulging with money, and tells him that they did quite well at the market with all the large chickens. What had the farmer done wrong when estimating the value of his flock? His "sample" contained the weaker, sicker chickens, since they were easier to catch than healthy chickens. As a result, his estimate of the nature of the flock was not accurate, and he should not have concluded that his flock was full of small birds.

The choice to focus on problematic constituencies is understandable, but it precluded the possibility of drawing general conclusions about the results in all 210 constituencies.

As a result, we cannot conclude, as IREC does, that "very few of the officially published figures are actually accurate". Demonstrating that IREC's sample is not representative of the 210 constituencies is quite easy. If their sample is representative of all constituencies, then the average of constituency-level characteristics in the sample, give and

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take the standard deviation, should be very similar to the averages of those variables for all 210 constituencies.

This is simply not the case. In IREC's sample, Kibaki received, on average, 62 per cent of the vote, whereas his average for all constituencies is only 41 per cent. In IREC's sample, constituencies tended to have much lower population densities, and many more registered voters.

In IREC's sample, the average percentage difference between presidential and parliamentary votes cast is 7.1 per cent, while the average over all constituencies is a mere 2.5 per cent.

b. Cursory dismissal of statistical modeling

The commission claims that because "the official ECK election results (published on the website and elsewhere) have not been cleaned of mistakes of a purely arithmetical nature", they should not be analysed. The decision not to use any more advanced statistical tests on the election results, alleging them to be all faulty was clearly wrong. Statistical tools exist to deal with messy, problematic numbers like those produced by the ECK. Thus, the commission missed an important opportunity to investigate the results for fraud in a more detailed manner.

A number of statistical methods have been developed to assess this kind of data, even when it is as unreliable as ECK's are. The aim of such methods is to reduce the influence of anomalous data-points when estimating a statistical relationship between different variables, and to uncover the true relationship between variables, and thus separate anomalous data points from "normal" data points. By achieving these two goals, these methods can enable one to estimate the actual relationship between two variables (e.g., parliamentary vote counts and presidential vote counts), while filtering out the impact of data points containing gross errors. Statisticians and political scientists have applied these methods to electoral data in the past. Recently, scholars have developed a method that identified abnormal votes for a third-party candidate in the 2000 US presidential election. IREC did not attempt to apply this family of methods to Kenyan electoral data. Moreover, the Electoral Commission still has not released the polling centre level results needed for such an analysis.

c. Failure to examine statutory forms using appropriate statistical tests

The commission claims that because there were many allegations of changes in statutory forms, statistical tests could not be used to catch the culprits. Yet, statistical tests exist that can detect electoral fraud resulting from changes made in statutory forms. Unlike other approaches that rely on assumptions about past or concurrent voting behaviour, or set arbitrary thresholds for "unlikely" voting behavior (like high turnout), these tests rely on the tried-and-true patterns that appear in numerical data like vote counts. If an official commits electoral fraud by changing a candidate's vote count on a statutory form, these tests are likely to detect deviations from that pattern. IREC appears not to have considered these methods nor applied them to the data from the 1702 polling centres that they examined in detail. Scholars have used these techniques on electoral data from Sweden and Nigeria, and found very little evidence of fraud in the former and significant evidence in the latter.

In the process of their investigations, IREC examined in detail the form 17A's, which contain numbers such as those that these scholars have examined. The numbers were not subjected to these kinds of analysis, which could have helped differentiate results arising from a normal electoral process, results arising from simple, unintentional "human error" - like that emerging from mis-transcription or incorrect arithmetic - and results arising from intentional falsification. Unfortunately, even though they examined data from 19 constituencies in detail, they did not apply these simple tests to the results.

Given IREC's reluctance to rely on any source of data as an "objective" benchmark against which to compare numbers reported by ECK or other parties, one would have hoped that they would employ "industry-standard" electoral forensics. They could do this by relying on well-established statistical facts to examine the veracity of vote counts and turnout numbers at the polling station and form 17A levels. This kind of statistical evidence, combined with an examination of the inconsistent nature in which many statutory forms (specifically forms 16A and 17A) were filled out, would have provided a much clearer differentiation between fraud and incompetence.

d. Improper research design relative to the mandate

For IREC to make effective recommendations on how to reform Kenya's electoral system and processes, the commission needed to establish where and why vote counting went wrong. The finding that the results were "materially defective" adds nothing to what Kenyans already know about what went wrong with the ECK - and provides no advantage in terms of what reforms make the most sense. Without trying to find the truth about what went wrong and why, IREC cannot diagnose the specific problems with the ECK.

At least two problems plague attempts to detect electoral fraud. First, differentiating between "human error" and intentional fraud can be a difficult task. Using several types of evidence on the same area or polling station, however, can go a long way towards telling one from the other. Second, fraud can occur at many different levels, either independently or simultaneously.

For instance, a presiding officer at the polling station might falsify electoral returns submitted on a form 16A. A returning officer might do something similar on the constituency-level form 17A. And a supervisor at KICC might adjust votes between constituencies at the province-level. A suitable research design should be able to tell the difference between an honest mistake and intentional fraud, as well as differentiate fraud on one level from that on another.

These requirements for a suitable research design have a practical purpose. Even if we accept IREC's assertion that figuring out who won is not in their mandate, without a suitable

research design, IREC would not be able to fulfill another key part of its mandate: to make substantive recommendations on the reform of the Electoral Commission of Kenya.

Because it did not develop a convincing approach to understanding what problems occurred where and at what level during the elections, IREC could not effectively differentiate human error from attempts at fraud, nor locate either of these phenomena at the polling-station, constituency, or national levels. As a result, Kenyans received a report telling them much of what they already know:

e. IREC's errors in research design may lie at the root of its unnecessarily vague findings.

Was IREC's statistical research design capable of adjudicating whether or not there was rigging at KICC or at any other level, for that matter? To do so, their design would have to achieve two goals. First, it would have to differentiate between human error and fraud. In the report, human error is generally associated with a stressful and complex voting environment.

However, these claims are simply theories. If difficult voting environments caused more discrepancies, then discrepancies should be correlated with factors we think cause "difficult voting environments." IREC did not examine these theories using even the most basic statistical tools at the polling station or constituency level.

The second flaw in IREC's research design lies in its inability to attribute errors - fraudulent or otherwise - to a specific point in the counting process. Given IREC's reluctance to believe analyses based on ECK data, it seems odd that their "analysis relied only on official documents and results submitted to IREC by ECK."

One could argue that, since the ECK may have felt threatened by IREC's mandate, documents coming from ECK could have been manipulated to aid in their absolution with respect to fraud. We have no evidence of this hypothesis. However, if IREC finds other analyses using ECK data unconvincing, why should IREC's own analysis of documents that had been in the possession of the ECK since the elections be credible? Speculation aside, if we assume that the documents provided to IREC by the ECK are genuine, could their analysis determine whether or not fraud took place at KICC? Again, the answer appears to be "no". A basic point of departure for many criminal investigations is "cui bono?" - who benefits? Unfortunately, IREC's unorthodox sampling procedures prevent any meaningful inference about who may have benefitted from the changes made at KICC, i.e., differences between the results on form 16 and the official ECK final results.

Moreover, IREC did not recognize and test ECK's opportunity to commit a kind of fraud at KICC that is uniquely different from fraud occurring at lower levels. Only at the national tallying centre could a coordinated transfer of votes between constituencies, into rejected votes, or between candidates have been carried out. In order to detect such subtle changes, IREC would have had to examine the results of an entire province or even multiple provinces, a task they were clearly unwilling to undertake.

Conclusion

A few simple changes in IREC's research design would have enabled them to diagnose the various problems that occurred, without a significant increase in the cost or effort required.

This approach would have allowed us to detect indications of fraud at the polling station and constituency-level, though not to differentiate between the two, since vote re-counts would be required to verify the results of a given polling station. In addition, the approach would have allowed a clearer understanding of exactly how changes made at KICC affected the outcome, after correcting for human arithmetic error on the form 17A's.

This approach would have been superior to the one chosen by IREC, in terms of both diagnosing problems within the structure of ECK (presiding/returning officer, KICC, etc.) and the spatial location of likely fraud. And, this approach would have obviated the need for time- and effort-consuming re-tallies from the form 16A's at the constituency level. These criticisms notwithstanding, engaging a document management firm to re-tally all form 16A's was likely well within the budget and timeframe of IREC, and would have provided the most comprehensive understanding of how and where fraud and human error affected the results of the 2007 General Election. IREC chose not to.

SPECULATION ASIDE, IF WE ASSUME THAT THE DOCUMENTS PROVIDED TO IREC BY THE ECK ARE GENUINE, COULD THEIR ANALYSIS DETERMINE WHETHER OR NOT FRAUD TOOK PLACE AT KICC?

Dodging the tough tasks

EVEN BEFORE IREC WAS SET UP, KPTJ RAISED FOUR concerns with regard to the 2007 elections: (a) anomalies in election results documents; (b) discrepancies between official results and those published by the media; (c) suspiciously high voter turnout in some areas and (d) discrepancies between presidential, parliamentary and civic vote totals.

The main problems with the IREC report arise from two connected issues -- anomalies in Forms 16A and discrepancies between presidential, parliamentary, and civic voter turnout. There was no standard way of filling these documents. Some were hand written; others were typed. Some had the totals crossed out. Some had the returning officer's stamp; others did not.

Results announced by KTN in almost half of the constituencies - 93 out of 210 - differed from those announced by the ECK. KTN's figures are the closest to the most complete media record. Nation Media Group's results database, together with its backup inexplicably crashed and lost the results. The differences between KTN and ECK results total 208,208, with all three major presidential candidates registering both gains and losses.

Using the 2002 General Election as a benchmark, the average voter turnout is 70.7, and this could swing either way by 12.4 percentage points. This gives a maximum of 83.05 per cent and a minimum of 58.29 per cent as 'normal' turnout. In Coast and Nairobi provinces, constituencies registering under 50 per cent voter turnout-that is, unusually low -give a total of 14,242 possibly subtracted votes. In Central, Nyanza and Rift Valley provinces, however, constituencies registering over 80 per cent voter turnout-that is, unusually high-give a total of 150,212 possibly added votes.

Using the 1992, 1997 and 2002 General Elections as benchmarks, any variances between the total votes cast for the three polls within constituencies is usually 1.2 per cent, almost entirely accounted for by spoiled ballots. This is to say that almost all voters tend to vote for all three levels. This, however, was not the case last year, where the total anomalous vote between presidential and parliamentary votes cast was 455,667. The total anomalous vote between presidential and civic votes cast was 377,816. As the winning margin announced by the ECK was 231,728, both comparisons show inflations of the presidential votes sufficient to have altered the presidential outcome-given that the differences benefited Kibaki more than Odinga. The discrepancy in the results announced by ECK is large and, in many cases, suspicious - a fact IREC agrees with, but explains away by claiming that there really were no discrepancies at all.

While IREC puts all contradictions down to addition errors that, by and large, disappear once the calculation is done correctly, such a conclusion would depend on all the Forms 16A being accurate. There is no guarantee -- or even likelihood -- that the ECK figures and forms that IREC examined were not tampered with. It is evident from the report that the commission did not examine the truthfulness of Forms 16A. A report that says it is impossible to say who won the elections because the results were "irretrievably

polluted" cannot at the same time rule out the possibility of rigging at the Kenyatta International Conference Centre. It is not clear why the answer to that question should be "irrelevant", especially since the commission concludes and emphasises that there was no evidence of rigging by ECK at KICC. If one relies on the ECK figures, one should be able to say who won.

IREC constantly assumed that all errors were a result of incompetence rather than fraud. Why should that be the more credible interpretation? Twelve out of 13 people who gave evidence under oath were from the ECK. Why did the commission not question more witnesses, including all the Returning Officers from 19 constituencies that were closely examined? Why did it rely largely on ECK testimonies?

The glaring discrepancy the commission displays when it comes to the standards for "evidence" is appalling. While it sets rigorous standards for proving fraud at KICC, it nevertheless uses sweeping generalisations as a basis for other conclusions. The whole report's methodological treatment of sources is uneven.

When it comes to the role of civil society organisations in civic education, for example, the report uncritically reproduces critical voices from meetings around the country without going into a discussion of how many people said so, who these might have been, where, on what basis and with what credibility. The same goes for the critique directed at international observers. Rather than substantiate and qualify the information it collected during the meetings, the commission's report is full of "some/many... claimed/thought".

In Annex 4A of its report, the commission works hard in an attempt to disprove every statement made by KPTJ in "Countdown to Deception". KPTJ welcomes scrutiny and challenge. However, IREC should have applied the same standards to the ECK and other witnesses. That IREC had KPTJ's material available contradicts Judge Johann Kriegler's public claim that civil society was reluctant to come forward with evidence.

Another example is the exit poll commissioned by the International Republican Institute. In the absence of reliable ECK data, the exit poll is an important source of information for discussing conclusions about the results. However, IREC dismisses the relevance of the exit poll with very general statements about the need to be methodologically cautious.

While the commission takes note of abuse of state power and resources during the campaigns, there is only limited discussion of the role of the security agencies before, during and after the elections.

More generally, the inescapable conclusion is that while the commission may be competent to carry out electoral analysis in a technical sense, it falls short of expectations in its political analysis. The commission fails to answer the more fundamental questions about power and responsibility.

THE MAIN PROBLEMS WITH THE IREC REPORT ARISE FROM TWO CONNECTED ISSUES -- ANOMALIES IN FORMS 16A AND DISCREPANCIES BETWEEN PRESIDENTIAL, PARLIAMENTARY, AND CIVIC VOTER TURNOUT.

IREC shies away from any discussion of these burning issues, and there is, therefore, no convincing political context for interrogating the integrity of the elections. More precisely, perhaps, the context provided in the report is highly selective. The IREC chairman has, in his public statements, alluded to a widespread culture of tolerance towards rigging. In line with this, the report states: "Kenyan society has long condoned, if not actively connived at, perversion of the electoral process".

The troubling implication of such a description according to which everyone, from the bribed voter in the village to the ECK, is more or less equally guilty, is the way in which it tends to blame the victim and to remove most aspects of power and responsibility. It suggests that nobody is really more responsible than the next person.

There seems to be a story about the politics of the commission and how powerful actors may have influenced its work. Kriegler gave a clue of the interests at work when he was quoted in the Daily Nation of August 30 saying:

"I'm not sure it is in anybody's interest today to find out who won the election. The Government is functioning and the people have moved on. We had people who were enemies in the electoral contest, who seem to be getting used to working with one another, and the awkwardness is wearing off. I don't think it's in anybody's interest to open the Pandora's Box."

**KPTJ CANNOT,
HOWEVER, SHARE
THE COMMISSION'S
CONCLUSION THAT NO
RIGGING TOOK PLACE BY
ECK AT KICC.**

Such a statement throws considerable doubt on whether the commission actually sought the truth.

It would not be accurate or fair to say that Kriegler's team did not do any work, or that their work has no value. Many of their

recommendations are sound and echo Kenyans' demands for a reformed electoral system over the years. Indeed, there is a need for a timetable and clear benchmarks for the rapid and full implementation of the recommendations.

KPTJ cannot, however, share the commission's conclusion that no rigging took place by ECK at KICC. In addition to the recommendations in the report, the Attorney General needs to start criminal investigations against the ECK commissioners.

However unpopular it currently may be, it is morally and politically necessary to search for the truth about the elections. Some may consider it prudent and wise to "look forward and move on", but it is highly irresponsible and dangerous to dodge the issues of electoral truth and justice.

By sweeping truth and justice under the carpet in the name of stability, Kenya will be embracing continued impunity, continued conflict and loss of faith in the democratic process. This may turn out to be the most damaging effect of the Kriegler report.

10 Questions Kriegler did not Answer



1. Why were previous demands for electoral reforms ignored?
2. Why did President Kibaki choose to ignore the IPPG in appointing new commissioners?
3. Why was the mandate of the experienced deputy chairman of ECK not renewed and why was he replaced by Kibaki's former family lawyer?
4. Why did ECK choose not to utilise the IT equipment it had access to?
5. Why did ECK recruit staff who lacked competence, and not give them adequate training?
6. Why were ECK staff posted to work in their home areas?
7. Why did the Nation Media Group's database crash on the evening on December 28 and why did KTN management around the same time tell their newsrooms to only broadcast ECK data?
8. Why did the ECK chairman, on the morning of December 29, 2007, complain that he couldn't reach his commissioners in PNU strongholds on phone and hint at "cooking of figures"?
9. Why was the counting and tallying marred by "massive arithmetical errors by returning officers" when mobile phones are widespread and have a calculator function?
10. Why did the Commissioner of Police disallow the public from coming near KICC?

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The good, the bad and the inadequate

The Independent Review Commission deserves praise for making some constructive recommendations in its report.

It is important to point out, however, that the report suffers from two major shortcomings :

1. On witnesses, the investigation appears to have largely relied on the evidence of the prime players, that is the ECK, and failed to look for evidence to corroborate their testimony. In addressing complaints about constituency results issues, taking evidence not just from the returning officers in question but also others who were present during the process would perhaps have shed more light on things. The total number of people who testified under oath and their spread is too thin to have given the commission the evidence required to arrive at credible findings.

2. On the statutory forms and the allegations surrounding the tallying process, the approach adopted by the commission at KICC was also limited. A more thorough forensic analysis would have determined whether it was error or fraud that occurred during the tallying of results and filling of statutory forms.

This audit could have included examining documents, such as selected Forms 16, 16 A and 17A. In addition it might have helped to conduct a physical inspection and recount of ballots in a random select number of ballot boxes. No ballots were checked.

The commission's full report is analysed below along thematic lines drawn from its terms of reference.

1. Constitutional and Legal Framework

The good

The report admits that there is need to provide expressly for the right to vote in the constitution. It also recommends merging all electoral laws into one, with provision included to set up a court to resolve disputes over elections. Kenya, the report also says, must undergo societal change and develop a culture for tolerance, fidelity to the law, honesty and transparency.

The bad

Although the report indicts the ECK for incompetence and cites institutional collapse, it fails to assign individual responsibility for critical lapses.

The inadequate

Although the report points out the shortcomings of the current First-Past-the-Post system and deficiencies in those proposed in the Bomas and Wako draft constitutions, its attempts to highlight the shortcomings of a mixed member representative system seem unconvincing.

The report also fails to discuss the law governing presidential elections .

2. The Electoral Commission of Kenya

The good

The President's unilateral appointment of Commissioners, the ECK's unwieldy structure and the lack of separation of functions between Commissioners and the Secretariat are identified as problematic, as are the lack of specific qualifications and qualities needed in Commissioner and the poor training of electoral staff.

The bad

The report is thin on the role the appointments played in ECK's loss of credibility and performance. A more robust analysis of this issue would have been useful.

Although the report recommends clear lines of individual responsibility for service delivery among Commissioners and staff, it does not identify instances of the Commissioners or staff failing to be accountable.

The inadequate

Due to the inept manner in which ECK conducted the



elections, IREC should have suggested how to hold individuals and the institution accountable to their mandate and actions.

What measures can be used to review the performance of the institution and of the individuals in it and how do you hold them accountable?

3. Organisation and Conduct of the 2007 Elections

The bad

The finding that ECK did not perform its role adequately with regard to redrawing constituency boundaries is misplaced. The current number of constituencies is the maximum allowed by the constitution. ECK had called for changes but partisan politics ensured that the review of constituencies never took place.

The inadequate

The discussions on party nominations are also conservative. The high number of irregularities, incidents of violence and outright manipulation during the party nominations is markedly graver than the report paints it.

4. Tallying

The good

The report says it is impossible to know who won the presidential election since the results and the process of recording them were heavily polluted. ECK failed to guarantee that the results accurately reflected the votes cast. There were many problems in the tallying at the polling station and at the constituency level.

The bad

The report adds that there was no evidence of crime or irregularities at the national tallying centre, an assertion which is unsupported by evidence.

The inadequate

The most important aspect of the election cycle requiring utmost integrity is the counting and tallying. The report shies away from making a definite conclusion on the integrity of the tallying process at KICC.

Failing to address this question adequately is a negation of IREC's mandate. A more thoroughgoing and factual

analysis was needed to determine whether the pollution of the results was due to errors from the field, errors at KICC, or both. Were these errors deliberate and schematic or were they accidental?

5. Announcement of Results

The good

The report reveals that provisional results announced at KICC differed from actual results captured in the original Form 16. In some cases, the errors were corrected, while in others they were not. The report indicates, however, that changes continued being made to the results even after the declaration of the winner, some of these evident in the published results of January 9, 2008 and after.

The bad

The officials at ECK seem to disagree on whether it was permissible to make changes once the provisional results had been announced. The results announced by ECK are, therefore, not accurate. The issue that IREC should have answered is the reasons for these anomalies. This it fails to do.

The inadequate

Although IREC concludes that there was no evidence of fraud or rigging at KICC it was unable to arrive at a unanimous verdict on the accuracy and integrity of the national tallying process. Some Commissioners dissented. Normally, dissenting minority opinion is noted as the position of the majority is adopted. In this instance, the totality of unanswered questions and errors documented by the commission are such that the Commission should have earnestly attempted to conclusively determine which of the two positions was correct.

Glaring omissions

The report discusses the hurried and low-key swearing in of the president and the reported unhappiness of the ECK chairman with this. If the ECK chairman says he was not happy yet played along, does it suggest that ECK was fully in control of the elections? If the evidence was that ECK was not in control, then who was?

The report says that it is unnecessary to reach a verdict on whether the stated complaints and irregularities result from human error or fraud. The report only says that the conduct of the 2007 elections was so materially defective as to make it impossible to determine the true and reliable results for the presidential election. What does this mean in practice and in law? The commission needed to answer this question.

After determining that ECK is structurally and functionally defective, the commission should have proposed a way forward. What steps are required to ensure that the ECK is reconstituted?

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