

# Independent Candidates and the Constitution

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# Contents

Summary .....	i
Elective offices under the Constitution .....	1
Why Independent Candidates? .....	3
Issues about ICs.....	5
The Constitutional and Legal Framework for being an IC in Kenya .....	8
Supporters.....	8
Other qualifications .....	9
ICs and disappointed party people.....	12
The election process.....	13
Crossing the floor.....	13
Deposits .....	14
Expenditure limits .....	14
Public funding.....	15
Private funding .....	17
Taxation.....	18
Publicity and fairness .....	18
Access to voters list .....	20
Ballot papers, names and symbols.....	20
Agents at polling stations.....	21
Role of an independent member (IM) .....	22
Standing Orders.....	25
Independent candidates: international experience .....	26
Independent candidates in Africa .....	30
How can independent candidates and members be assisted?.....	31
Reflections on Kenya and the prospects for ICs .....	33
The new government system.....	33
Why might Kenyans vote for ICs?.....	34
Why might Kenyans not vote for ICs?.....	35

Women .....	37
Money politics.....	38
Can ICs be supported by a group without its being a “party”? .....	41
Issues to think about.....	43
Appendix 1 (from the Independent Network) The Bell Principles.....	45
Appendix 2 Electoral reform: the poor man’s right to contest elections .....	46
Appendix 3 A few useful sources.....	49



## Summary

1. The 2010 Constitution of Kenya reintroduces the possibility of candidates standing for election not on a party “ticket” (not possible since the introduction of the one-party state) – ICs (independent candidates) who may succeed in being elected as IMs (independent members).
2. The Constitution creates a large number of elective offices, most of which would be open for contest by independent candidates – excluding “list members” under the system used for “special interest” seats in the National Assembly, 16 women, and youth and persons with disability in the Senate, and the extra seats for gender balance in the county assemblies as well as “marginalised group” and youth members of those assemblies.
3. The paper reviews arguments against the whole idea of ICs, and the responses to those arguments, including some observations on how these arguments would play out in the situation in Kenya.
4. It then reviews the constitutional and legal framework for being an IC in Kenya, in terms of qualifications (the same as for party candidates), supporters required (though not required for party candidates). It observes that to prevent party members from being supporters for ICs is perhaps unfair, and maybe unconstitutional.
5. There are potentially two types of ICs: those who genuinely do not want to be party candidates (either because they reject the idea of parties altogether at present, or because they think that they cannot find a ‘home’ in any of the existing parties but are not ready to set up their own) and those who wanted to be candidates for a party but could not make it). There may be rather more of the latter if it continues to be the case that some parties are unable to obtain registration.
6. If elected as an independent member of Parliament or a County Assembly, a person may not join a political party while in office without losing their seat and having to stand for election afresh – Article 103(1)(e)(ii). There may be some room for disagreement as

to what amounts to “joining” another party.

7. It is not yet clear what the level of deposit will be that must be made by candidates; this will presumably be provided for in Regulations to be made by the IEBC. High levels of deposit may make it hard for ICs to stand. In fact an Irish judge found a deposit equal to about KShs47,000 unconstitutional because it precluded ordinary citizens from standing.
8. Legislation will also probably deal with limits on the amount that can be spent by a party or a candidate in an election campaign, and also with the allocation of air time by public media. There is also the matter of buying air time from private broadcasters: if there is no limit this may disadvantage ICs.
9. Another financial issue is that of the Political Parties Fund. This does not allow for public funding to ICs. However, the draft Campaign Financing Bill does provide for a special fund to give some reimbursement to ICs.
10. Some countries limit the amount that ICs as well as parties may receive by way of donations, while it is also common to require declaration of donations of more than a certain amount. In Kenya the draft Campaign Financing Bill would provide for disclosure. All such funding regulations should be carefully scrutinized for fairness to ICs.
11. Unlike some countries, Kenya does not allow donations to political parties to be deducted for tax purposes. Tax deductions are allowed only for donations to charities, and political activity falls outside the classic definition of charity.
12. Careful thought should be given to ballot papers design and related issues. It seems that independent candidates cannot have symbols that resemble either those of parties, or those of other candidates, so a grouping of ICs could not have the same symbol.
13. Presumably an IC would be described as “independent” on the ballot paper. In some states in Australia ICs are allowed to have 5 words after their names describing themselves – where a party candidate would have their party name.
14. There is at least one political party in Kenya of which “Independent” forms part of its name; this is not prohibited in Kenya, though it is in some other countries.

15. What will be the role of an IM as opposed to a member of a legislature who is a party nominee? They will not be limited by party discipline of course. Some IMs think they ought to vote as their constituents want; it is suggested that this may not always be the right course of action. Some think of their role as being primarily to keep a check on the executive – being more able to do this in some ways than party members.
16. Being an IM is hard work, because the member does not have a party to fall back on to tell him or her what policy to follow. How effective IMs have been is something on which it is not possible to generalise. It depends on the political culture of the country among other things.
17. Apart from some countries without developed party systems, IMs are relatively rare at the national legislative level, though far more common in many countries at local government level. Where there are significant numbers, it seems that the reasons are a mixture of alienation from parties and a tradition of focussing on local issues especially in rural areas. There may be particular local factors, such as resentment of compulsory voting in Australia. There are some African countries that have had experience of IMs, though of course many have had periods of one party rule, and some now have systems that essentially require membership of a party such as the list proportional representation system in South Africa.
18. In many countries ICs are linked in a sense to political parties or at least to the ideology associated with a party. It is hard to see this having any appeal in Kenya.
19. In a number of countries, at least in recent times, various organisations and networks have been set up to assist ICs.
20. In a number of countries, organisations have been set up to encourage and support ICs, and IMs if elected. They may offer advice on campaigning, codes of practice, even endorsement schemes, link arrangements with existing IMs. A support group in Kenya would have to be careful to avoid a charge of being really a political party (but the definition of acting as a political party, which cannot be done unless registered, is not very clear).
21. Finally the paper considers the circumstances in Kenya as they might affect the likelihood of individuals standing as ICs and of

their being elected, including the nature of political parties in Kenya and their absence of ideology.

22. The fact that the make-up of the National Assembly will not affect directly who forms or is in government is likely to be a positive from the perspective of ICs. Voters may be convinced that in a divided house (where maybe no one party has overwhelming dominance) IMs might have bargaining power when being courted for their votes on the President's policies or bills. Hopefully they will, if elected use this power responsibly and not just for their own benefit.
23. The Senate will be required to assent to Bills that relate to counties. And it will also make the proposal for the distribution of money between the counties of the money allocated to the counties. The amount of pressure on Senate members will be very great; the temptations likewise.
24. Whether Kenyans will vote for ICs it is hard to predict. Though they may profess to be "fed up" with parties, parties are really a way to vote for a leader (all too often a tribal leader). On the other hand, they do have the option to vote for that leader for President and an IC for MP.
25. There is little party democracy at present so people may often feel that party candidates are thrust upon them by the party or its leader. They might feel that an IC who is really local is their choice and not the parties'.
26. Women often have a hard time being selected as candidates. This may be an argument for women standing as ICs. Unfortunately, in the women-only seats for the NA they will have a hard time campaigning because they will have large constituencies. In other constituencies will women be able to build a profile?
27. Money politics may be the biggest challenge facing ICs, perhaps even more so for women. So far it has proved very hard to curb blatantly illegal behaviour by candidates. And even legitimate expenditure may be prohibitively high for many – this will depend partly on the law to limit expenditure. Election violence may also be a serious deterrent.
28. Clearly ICs are going to have to develop novel ways of campaigning on a shoestring. Facebook and Twitter have become much more

popular since the last election, and Kenyans' use of the internet and mobile phones is high.

29. Mobile phone and internet usage is significantly less among women, which is a point worth bearing in mind especially for those who would wish to appeal particularly to women voters.
30. The paper concludes with some issues for reflection:
  1. Will Kenyans be prepared to vote for a non-party person?
  2. In what circumstances would they be more likely to vote for a non-party person?
  3. Will the voting pattern be different at national and county level so that significantly more independents get elected at county level?
  4. How can people try to ensure that there is a "level playing field" for ICs – thinking about the issues raised in this paper like public funding, deposits etc?
  5. How can the Election and Boundaries Commission help candidates especially in ways useful to ICs – and how can people persuade or assist the IEBC to do this?
  6. Will the law on campaign expenditure be effective in reducing the money element?
  7. Will the law on broadcasting be fair to ICs – and how can input be made into the law making process?
  8. In what ways can ICs be supported (especially without setting up something that runs the risk of being barred as an "unregistered" party)?
  9. Is it possible to set up a useful training programme for ICs?
  10. Is it worth aiming for a small number of ICs or would it be important to have a "critical mass" – and what would that be?
  11. How could ICs be supported once they became IMs (independent members)?
  12. And the major question must be "Does it make sense to aim for IMs, or should you really be operating within existing parties, or even forming a new party"?

## Independent Candidates and the Constitution

1. The 2010 Constitution of Kenya has a possibly important innovation – or more accurately a reversion: reintroducing the possibility of candidates standing for election not on a party “ticket”. Though the one-party state came to an end in 1992, with the introduction of Section 2A of the Constitution – “multiparty democracy” was taken literally: a candidate had to be supported by a party. Anyone in Kenya who decides to take this opportunity is unlikely to suffer the fate of the Chinese Yao Lifa who won a municipal seat having self-nominated (been an independent candidate) in 1998: “...has not been given a teaching post since, has been beaten up several times, had his bones broken twice, has been repeatedly arrested, and is now under 24 hour police surveillance.”<sup>1</sup>

### Elective offices under the Constitution

2. The Constitution creates a large number of elective offices, most of which would be open for contest by independent candidates. In the following chart, an asterisk (\*) indicates opening(s) for independents.

#	Office	No.	Elected by...	Role	Qualifications
1	Member of National Assembly – constituency MP	190*	Voters in constituency	To represent a geographical constituency; play national role as legislator	Chapter 6 (integrity) Registered voter Some dis-qualifications Not dual national
2	Member of National Assembly – county woman member	47*	Voters in county	To represent a county; play national role as legislator	Woman Chapter 6 Registered voter Some dis-qualifications Not dual national
3	Member of National Assembly – representing special interest:	12	In theory by voters- in reality chosen by parties (number for each party depends on results of elections in lines 1,2)	To represent the particular special interest; play national role as legislator	As for constituency MPs; + presumably to be a member of the special interest group Party member or

<sup>1</sup> According to the *Christian Science Monitor*, quoted in Damon Eris, “An Independent Movement Takes Root in China” <http://azivn.org/content/independent-movement-takes-root-china>.

	Youth, disability, workers and others?				supported by party
4	Senator for County	47*	Voters in county	To represent a county; play national role as legislator, representing interests of counties generally	Chapter 6 Registered voter Some dis-qualifications Not dual national
5	Woman Senator	16	In theory by voters-in reality chosen by parties (number for each party depends on results of election in line 4)	To represent women; play national role as legislator, representing interests of counties generally	As for constituency MPs; + party member or supported by party
6	Youth senator	2	In theory by voters-in reality chosen by parties (number for each party depends on results of election in line 4)	To represent youth; play national role as legislator, representing interests of counties generally	As for constituency MPs; + party member or supported by party + one of each sex
7	Senator for persons with disability	2	In theory by voters-in reality chosen by parties (number for each party depends on results of election in line 4)	To represent persons with disability; play national role as legislator, representing interests of counties generally	As for constituency MPs; + party member or supported by party + one of each sex
8	President	1*	Directly elected by voters nationally	Head of state, head of government, Commander in Chief	As for MP + citizen by birth
9	Deputy President	1*	Directly elected by voters nationally – as part of a team with President	Assistant to, and deputy to President; act or takes over in some circumstances	Presumably as for President
10	Member of county assembly (CA) for ward	?*	By voters of ward	Represent ward and play role as county legislator	As for MP – and may be other qualifications fixed by law
11	Special [woman] county member	? to ensure gender balance	In theory by voters-in reality chosen by parties (number for each party depends on results of election in line 10)	Represent women and play role as county legislator; is part of county delegation, for most matters vote cast by delegation leader	Woman/man as required for balance; as for other CA members + party member or supported by party

12	County marginalised group and youth members	TBD by law	In theory by voters- in reality chosen by parties (number for each party depends on results of election in line 10)	Represent special interest and play role as county legislator; is part of county delegation, for most matters vote cast by delegation leader	Member of particular group; as for other CA members + party member or supported by party
13	Governor	47*	By voters of county	Heads county executive	As for county assembly member
14	Deputy Governor	47*	By voters of county – as part of a team with Governor	Deputises for governor	As for county assembly member

- It is unclear whether there will be elected officers at any other level. The Urban Areas and Cities Act does not provide for directly elected councillors and mayors, but for boards whose members will either be “appointed through a competitive process by the county executive committee, with the approval of the county legislative assembly” or nominated by various groups, and they will elect a chair and vice-chair from among themselves. It seems also that there is no intention to keep other local government bodies, (which are hardly contemplated by the constitution).

## Why Independent Candidates?

- Obviously for anyone who is thinking about getting involved as an independent member (IC) or working for one or a group of ICs, an important question – the most important– must be Why?
- A recent article in an Indian magazine put some of the arguments in favour:

Present parliamentary system is actually party-crazy, not democracy. The MPs ... cannot vote as per their own thinking or directives of the constituents. They have to dance to the tune of the party leaders in order to obtain party ticket in the next election. ... MPs are really rubber stamps for the party leaders. Governance cannot be reformed in this circumstance through the existing MPs. ... Concerned citizens have to find a way that controls corruption without depending upon the Government in any way. One possibility is for such honest persons to contest the elections as Independent candidates. Target should be to get 100 Independents into the [lower house of Parliament]. These candidates must commit not to join any Party or

government; and to cast their votes as per their own understanding. Effort must be to force the ruling government-of whatever party-into a minority that is ever dependent upon support of these independents to get a bill passed in the [lower house]. It is likely that the vote cast by these Independent MPs will reflect will of the people rather than that of party leaderships.<sup>1</sup>

6. There has been some serious interest in the idea of ICs in Kenya. One commentator suggested, “independent candidates will be a breath of fresh air in our politics, these individuals will not have to toe party lines and submit to hero worship they will have their eyes on the ball; serving those who elected them.”<sup>2</sup>

7. A blog (dated March 28 2011) observes:

The NIC [Network of Independent Candidates] would therefore have members who have only one loyalty ... directly to the Kenya Citizen individual voter. In essence, as political parties compete on who will form the next government, Independent Candidates would be building themselves as individuals capable of checking National or County Government, should they succeed in getting into County Assemblies or the Senate. In addition, such networks can certainly partner with progressive candidates for Government positions (President &/or Governor), whilst ensuring they leave enough space between them to check them should they decide to run rogue.<sup>3</sup>

This reflects similar ideas to the Indian author. In other words there is an idea that IMs can perform more effectively in what the Constitution describes as “exercising oversight” of the executive (Articles 95 and 96) , than members who are closely tied to the executive through party membership. That oversight role can also be performed by a member when considering proposed laws and also budget proposals.

8. This is only part of the role of an MP. He or she is, especially under the electoral system we have with geographical constituencies each with “their” MP to represent them, the specific representative of the people – all the people whether they voted for the member

1 “MPs are rubber stamps” *Frontier Weekly* Vol. 44, No. 2, Jul 24- 30, 2011 <http://frontierweekly.com/past-issues.htm>

2 Ledama Olekina, “Independent Candidates Will Change Kenya’s Political Culture” *The Star* April 20 2012.

3 <http://walalahoi.ning.com/profiles/blogs/network-of-independent>

or not. It is appropriate for an MP to make inquiries of the bureaucracy about issues that affect his or her constituency or even specific constituents. Sometimes, as we see later, there is sometimes an assumption that an IC may have closer connection with, and better understanding of, local issues.

## Issues about ICs

9. One British organisation picked up various arguments against the whole idea of independent members of Parliament (IMs) and tried to show that they are not valid or not always valid. Some of them at least are worth exploring in the Kenyan context.<sup>4</sup>

1. *Independents are often mavericks and inexperienced do-gooders.*

Response included: Political parties, however, are more concerned about loyalty to their own interests and often define as 'mavericks' purposeful, angular, skilful people who might 'rock the boat'.

► **In Kenya:** how experienced in any relevant sense are most first term MPs? And each time most MPs are first-timers.

2. *Independents are not properly accountable.*

Response included: Election after election has seen a few hundred people (and sometimes fewer) in a local political party select the candidates to stand in the General Election. These candidates are often in safe seats where there is little accountability. Independents, however, depend upon their local reputations and cannot rely mainly on party votes or national swings.

► **In Kenya:** there has been very little accountability for MPs – though many do not get re-elected. Certainly parties have not been means to hold MPs accountable to the people, though the Political Parties Act is supposed to make parties more democratic.

3. *Independents are ineffective within parliamentary and council settings because they have no power base.*

Response included: Party MPs rarely rebel against their parties' programmes, which many would say makes them compliant and ineffective. Those without a party are much freer to represent their constituents' concerns – or like Richard Taylor MP<sup>5</sup>, to take up wide

<sup>4</sup> Simon Barrow, "The State of Independents: Alternative Politics" *Ekklesia* [http://www.ekklesia.co.uk/research/independent\\_politics](http://www.ekklesia.co.uk/research/independent_politics). The list of arguments and counter-arguments that follows is largely in the words of this item.

<sup>5</sup> The one independent MP to have been elected more than once in recent years.

public concerns about something like the health service.

► **In Kenya:** it is true that power base is important – in fact it has been the only factor, policies playing so little part. But what has “effectiveness” meant?

4. *Independents tend to be single-issue focused.*

Response includes: Some may be elected due in large part to a local issue on which they have campaigned. But often this will have been a concern of local constituents which party politicians have neglected. Once in Parliament, however, independents will deal with a range of issues just like any other MP.

5. *Independents are ‘all over the shop’ [unfocussed] politically*

Response includes: Why should every member of a political party have exactly the same position on drugs, transport, climate change, ...? Independents are far freer to be honest and make realistic decisions, rather than be pushed in many votes by a party whip.

► **In Kenya:** In the absence of any real party platforms and sets of policies, how “focussed” have Kenyan MPs been?

6. *The thirst for independents is a protest with little substance or future.*

Response includes: It may be a protest, or start out as one, but at the same time be a sign of hope that people care about their political system and want to be engaged. Protest has been the crucible for most of the important political and social changes of the last century and a half, ....

7. *Independent politics is really anti-politics. It is demoralising people.*

Response includes: The idea that ‘real politics’ is what is done for or to us rather than by us is patronising and partial. It is also what alienates people from politics! Politics is not exclusively or primarily about parties, though no-one is arguing that they do not play a significant role. It is about how power is used and made accountable. People are politically de-motivated and demoralised by a system and parties which are resistant to their needs, concerns and input.

► **In Kenya:** [points 6 and 7 are related]; at this point in Kenya’s history maybe a chance for a protest vote is what is needed to act as a spur to changing the party system.

8. *Only the relatively prosperous and educated can afford to run as independents – the whole thing is biased toward the middle class and the already enfranchised.*

Response includes: There seems little evidence for this. The long history of working-class involvement in politics, both through the

labour movement and through civic association as well as through parties, suggests that something different is possible. Rather than funding parties, what about a small fund for supporting independents in restricted circumstances?

► **In Kenya:** there may be some truth in this; but it is a poor argument for depriving people of a choice of someone new and perhaps embracing a new style of politics.

9. *A whole parliament of independents would make Britain ungovernable*

Response includes: The idea behind this accusation seems to be either that supporting more independents means wanting to do away with parties (it does not; we do not have to indulge a zero-sum game), or that it is somehow likely that independents would quickly become a majority. This is unlikely at the moment but if the public started to elect different kinds of people, then the system would need to adapt. Democratic institutions are there to facilitate democratic participation and representation, not to keep those who currently hold the reins of power in position whatever people say or want.

► **In Kenya:** the dynamics would be different from in Britain with its parliamentary system. Of course, in the new presidential model, it would be hard for a President to have to negotiate with very many independents rather than a small number of parties. In fact it would be harder than in a parliamentary system where at least some of the MPS would be tied in loyalty to the head of government because they are Ministers. On the other hand, in Kenya where parties have fragmenting tendencies, it may prove very hard for the President to negotiate with a few party leaders to get legislation through anyway!

10. *We don't need 'do-gooders' getting elected to parliament.*

Response includes: The idea that only those motivated by money, status or position can be really trusted (because "at least you know what they're in it for"), whereas those who want to pursue a notion of public good, non-corruption or the needs of particular groups of people are virtually automatically "self-righteous" and "irritating" – as some critics have suggested – moves cynicism beyond a rightful suspicion of power interests (which is what it used to mean) to a generally corrosive disdain for anyone we fear may expose our own comparative failings.

11. *Parties and political ideologies have their faults but we cannot do without them.*

Response includes: The party system has now largely abandoned

the principles that once defined it and the ruling parties have almost become modified versions of a dominant neo-liberal economic ideology. Breaks in the dominant order are necessary for the re-introduction of genuine choice.

► **In Kenya:** parties don't have ideologies anyway.

12. *Independents feed a cynicism about professional politicians which further widens the gaps between governors and governed.*

Response includes: Disillusionment is fed by 'business as usual' or by a lack of genuine opportunities for involvement. Alternative politics can help to rectify these problems. A large number of people do not have a party affiliation or strong association and feel disconnected from 'party politics'. If they are to be re-engaged in public life, it may take people from outside 'the system' to do so

## The Constitutional and Legal Framework for being an IC in Kenya

10. Apart from the requirement not to have been a member of a party in the preceding three months, there are not many other special qualifications.

### Supporters

11. Every candidate who is not nominated by a party,<sup>6</sup> has to have a certain number of supporters, whose names are submitted to the Independent Elections and Boundaries Commission (IEBC). The numbers of such supporters for the various positions are:
- to stand for election as Member of the National Assembly: 1000 registered voters in the constituency
  - to stand for election as county woman Member of the National Assembly: not separately specified, so presumably is 1000 registered voters in the county
  - to stand for election as Senator: 2000 registered voters in the county
  - to stand for election as member of county assembly: 500 registered voters in the ward
  - to stand for election as Governor: nothing specified, so it is left to law, and oddly the Elections Act says nothing about it (an oversight?).

<sup>6</sup> The Constitution was not entirely clear on whether this requirement applied only to non-party candidates, due to poor drafting, but this is probably what was meant and it is how the drafters of the Elections Act read the Constitution.

12. To stand for election as President a candidate must be supported at least 2000 registered voters from each of at least half the counties (or a total of at least 48,000 voters) even if also nominated by a political party (Article 137 and Elections Act s. 23). A running mate for Deputy President does not have to have separate supporters.
  
13. The Elections Act says that an independent candidate may not have as one of his or her supporters – in the formal sense of those who support the nomination – anyone who is a member of a party. This seems unfortunate. A party may object if its member supports another candidate – but should this be a problem for anyone else? If a party member is not satisfied with the candidate offered by their own party, or as a matter of principle would like to help expand the range of democratic choice, why should this be objectionable? In fact the Constitution does not require this, merely that the supporter be a registered voter, and it has been suggested that this additional requirement may be unconstitutional.<sup>7</sup> It also seems to restrict a person right to make political choices, under Article 38 of the Constitution, and to be a valid limitation would have to satisfy the requirements of Article 24 about being justified in a democratic society, and also state expressly in the Act that it was intended to limit this right, which is not done.

## Other qualifications

14. Other qualifications (and disqualifications) for standing for office applicable to all candidates for election are:
  - Being registered as a voter
  - Being a Kenyan citizen, and having been so for at least 10 years preceding the election and not holding any other nationality.
  - Holding a “post-secondary school qualification recognised in Kenya” (Elections Act s. 22)
  - Not holding another state or public office (but a member of either house of Parliament may stand for either house and for President or Deputy President)
  - Not having been a member of the Independent Electoral and Boundaries Commission within the preceding 5 years – membership

<sup>7</sup> See Ongoya and Otieno, *Handbook on Kenya's Electoral Laws and System* (EISA) available on the IEBC website, para. 6.2

of its predecessor(s) is not included.

- Not being of unsound mind (this would presumably require a certification by doctors and a possibility of appeal<sup>8</sup>).
- Not being an undischarged bankrupt (this requires that a person has been declared bankrupt by a court)
- Not under sentence of imprisonment for 6 months or more at the date of registration or of election
- Not having been found, under a law, to have been guilty of abuse of public office, or breached Chapter 6.

15. What exactly is meant by “post-secondary school qualification recognised in Kenya”?<sup>9</sup> It cannot mean only a university degree; a professional course such as accountancy would qualify, but many people do short courses of all sorts. “Recognised in Kenya” is not the same as being recognised by the Government! At the time of writing, a Bill that spells out this qualification is before Parliament<sup>10</sup>. It provides that the qualification must involve “at least three months study, recognized by the relevant Ministry ....”

16. The Elections Bill as it went from the Commission on the Implementation of the Constitution to the Attorney-General provided:

- 22. (1). A person may be nominated as a candidate for an election under this Act only if that person—

...

- (b) has been issued with a certificate of clearance by the Ethics and Anti-Corruption Commission;
- (c) has been vetted by a body authorised to do so;
- (d) holds a degree from a university recognised in Kenya or its equivalent.

These have not survived in the Elections Act – though there is an educational requirement as we have just seen, and one of a degree for certain posts.

8 The National Assembly (Powers and Privileges) Act says “adjudged to be of unsound mind” but the old Constitution said “adjudged or declared”.

9 The Election and Boundaries Commission opened up some public debate in this on their website – see <http://www.iiec.or.ke/index.php/Air-Your-Views/qualifications-for-an-mp-interpreting-post-secondary-school-qualification.html>.

10 This is the Statute Law (Miscellaneous Amendments) Bill.

17. But the draft Ethics and Integrity Bill does provide for a vetting system for those seeking state office.
18. A presidential candidate must satisfy three further requirements:
  - being a citizen by birth
  - holding a degree from a university recognised in Kenya
  - not “owing allegiance” to a foreign state
19. It is not clear how far the last means anything different from not having “dual nationality” (a disqualification for all state officers). It is a rather antiquated, not to mention imprecise, expression. Under the old Constitution (s. 35) no-one could be even an MP if they were “under any acknowledgment of allegiance, obedience or adherence to a foreign state”. In Australia, their Constitution has a similar prohibition and one author has concluded that:

An ‘acknowledgment’ for the purposes of this first limb would appear to cover: acceptance of a foreign passport; service in one of the foreign armed forces; taking an oath of allegiance to a foreign power (not a subject or citizen of that state); seeking the protection of a foreign state; or even describing oneself in an official document as a citizen or subject of a foreign state. But this limb appears not to extend to an appointment as an honorary consul or the acceptance of a foreign award or honour, nor to owing a ‘local allegiance’ which arises by virtue of temporarily residing in a foreign country.<sup>11</sup>

But the current Constitution of Kenya does not require the ‘acknowledgement’. This may make no difference. The whole thing might seem marginal – but remember that allegations of not being a citizen have been used in some countries as a tactic to debar candidates.<sup>12</sup>

## ICs and disappointed party people

20. There are potentially two types of ICs: those who genuinely do not want to be party candidates (either because they reject the idea of parties altogether at present, or because they think that they

11 Carney, Gerard (1999) “Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification,” *Bond Law Review*: Vol. 11: Iss. 2, Article 8. Available at: <http://epublications.bond.edu.au/blr/vol11/iss2/8>

12 See <http://nationality.tumblr.com/post/11571005306/zambia-and-the-politics-of-citizenship> and <http://blog.soros.org/2011/10/abusing-citizenship-in-zambia-again/>.

cannot find a 'home' in any of the existing parties but are not ready to set up their own) and those who wanted to be candidates for a party but could not make it). The first category will presumably be prepared to aim to start working towards being elected as IMs as soon as possible. The others will wait until they have to recognise they are not going to be given a party 'ticket'. In the past people would sometimes move from one party to another or even start a new party very late in the day.

21. Now that some existing parties have failed to get registered, some people may decide not to bother with being a party member but stand as ICs. This may be something to watch out for: if you would like to think that a person who stands as an IC is somehow more independent minded than a party member, would this be true of a person who is just someone who belonged to a party that failed to get registered?
22. The Constitution tried to prevent the phenomenon of the failed candidate – someone whose party refused to adopt them as a party candidate – standing as IC. For this reason a person may not stand as an IC if they have been a member of a registered political party within the three months before the election date (Article 85). What is a "registered political party"? The phrase does not seem to be defined anywhere for this purpose. The question is worth asking because registration under the Political Parties Act usually has two stages: provisional registration and full registration (without the latter a party cannot put up candidates for election).
23. These provisions should make it less likely that rejected potential candidates for parties will decide at the last minute to stand as independents. To get credibility as an IC, it might be necessary to make a decision that one is not going to get adopted as a candidate some weeks and even months before the moment when a decision ("Am I going into this election as a party member or not?") must legally be made. Under the Elections Bill the process of election begins "at least 60 days" before the election (30 days after a person who wishes to stand as an IC would have to have left the party). In other words, it is perfectly possible that a party will not have

decided who it will put up as candidates before the deadline for individuals to decide whether they are going to stand as a party candidate or an IC.

## The election process

24. All these elections must take place on the same day. If an “implementation failure” election (see Article 261(7))<sup>13</sup> should take place, presumably county and parliamentary elections would no longer be on the same schedule (this is not dealt with explicitly).
25. A candidate for President may have to face more than one election: if no candidate receives both (i) more than 50% of the votes cast and (ii) at least 25% of the votes cast in at least 24 of the counties there must be a second election between the top two candidates – meaning the candidates with the highest numbers of votes.
26. There is also the vexed question of when the next elections must be (assuming no premature dissolution of Parliament). Many people take the view that it must be on the second Tuesday in August 2012. But the High Court, constitutional bench, decided (correctly in my view) that Parliament will be dissolved automatically on January 14<sup>th</sup> 2013, and the elections must be held within the following 60 days.<sup>14</sup> The court also decided (incorrectly in my view) that the President and Prime Minister could precipitate an earlier election by dissolving Parliament, in writing. An appeal has been filed. Meanwhile the IEBC has declared March 4<sup>th</sup> 2013 as election day.

## Crossing the floor

27. It is also important to note that, if elected as an independent member of Parliament or a County Assembly, a person may not join a political party while in office without losing their seat and having to stand for election afresh – Article 103(1)(e)(ii). But though the Constitution says there must be law defining “resigning from a party” it does not say there must be law saying what “joining a

<sup>13</sup> That is that Parliament is dissolved because of failure to pass Bills required by the Constitution according to the constitutional deadline and also having failed to meet a later deadline imposed by a High Court order.

<sup>14</sup> *John Harun Mwau & 3 Others v Attorney General & 2 Others* [2012] eKLR

party” is! Would agreeing to vote with a party amount to joining a party? Probably not - but campaigning in elections for a party member might.

## Deposits

28. There is no mention in the Constitution of any requirement to make a financial deposit when standing for election. The Elections Bill provides for regulations to deal with this issue. The existing law has the following requirements:

- Presidential elections: KShs100,000
- National Assembly elections: Kshs5,000.

This would probably not be treated as a qualification but as a procedural matter. In some countries deposit requirements are very tough: in the Netherlands it is over \$US15,000 (or about KShs1.26 million) and in Turkey over \$US 30,000! In Ireland a deposit of £300 (which would be about KShs47,000 today) was found unconstitutional in 2002.<sup>15</sup> The Judge in that case said:

In my judgment, in the absence of some reasonable alternative route to the ballot paper, such as the nomination and signatures system, to which reference has already been made, the fact that the deposit system, on the evidence, has the effect, even if unsought, of excluding from the ballot paper a considerable percentage of the adult citizens of this State who would be otherwise eligible to stand for membership of Dail Eireann [Parliament] and the European Parliament renders that system unjust, unreasonable and arbitrary.<sup>16</sup>

## Expenditure limits

29. It is common for law to limit the amount that candidates and parties may spend on election campaigns. The Constitution provides that the IEBC is responsible for “the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election”. How this is done must be carefully monitored.

30. The draft Campaign Expenses Bill provides for a Committee of the

<sup>15</sup> Dawn Brancati, “Winning Alone: The Electoral Fate of Independent Candidates Worldwide” *The Journal of Politics*, Vol. 70, No. 3, July 2008, Pp. 648–662.

<sup>16</sup> *Redmond v. Minister for the Environment* [2001] IEHC 128

IEBC to set limits on expenditure by parties and candidates.<sup>17</sup> Independent candidates, according to the Bill, would have to establish their own Campaign Expenditure Committee, of three members, with the responsibility to advise the candidate and manage his or her election expenditure and prepare a report for the Commission's Committee.

31. A candidate would have to set up a special bank account for the elections expenses.
32. These various requirements will add considerably to the expense of being a candidate.

## Public funding

33. There is no requirement in the Constitution now for the political parties fund (it was removed by the PSC). The previous Political Parties Act provided for funding for parties, and the new, 2011, Political Parties Act has similar provisions. Allocation of the Political Parties Fund is to be for parties only "ninety five per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election" (s. 25).
34. There are countries that provide funding for ICs as well as parties. Australia is one example<sup>18</sup>, as is Hong Kong, but I think the US does not. Rwanda does provide funding during election years to both parties and ICs – but during non-election years there is another government source of funding for political organisations.
35. Since the political parties fund is not recognised in the Constitution, there would be a good case for arguing that to exclude ICs from public funding would be discriminatory and unconstitutional. However, the Draft Campaign Financing Bill does make some provision for funding for ICs: clause 23 provides for a "Campaign Expenditure Reimbursement

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<sup>17</sup> The Bill as at November 18 is available on the website of the Commission on the Implementation of the Constitution ("as received from the Law Reform Commission").

<sup>18</sup> See the Election Commission website at [http://www.aec.gov.au/about\\_aec/publications/reports\\_on\\_federal\\_electoral\\_events/2010/funding.htm#table1](http://www.aec.gov.au/about_aec/publications/reports_on_federal_electoral_events/2010/funding.htm#table1)

Fund” which is to be used to reimburse ICs for printing of campaign literature and media coverage. The allocation is to be fixed by the Commission’s Committee and based on:

- (a) the number of candidates;
- (b) the categories of candidates;
- (c) the difference in the size of the electoral constituency;
- (d) population in the electoral constituency;
- (e) the number of votes received in the election by the candidate or the political party; and
- (f) the number of seats secured in the election.

The last is rather odd: one candidate can only get one seat. And “or the political party” has evidently crept into (e) by mistake. The purposes for which the fund may be used are much narrower than those for which the political parties fund may be used.<sup>19</sup>

36. Public funding in principle can take the form of money but also other things like free mailing during election times. A US court said,

The vital role played by third parties and independent candidates in changing the political environment; the constitutional rights such parties have to communicate programs, goals and candidacies; the monopoly that is enjoyed by the Postal Service; and the very real burdens denial of preferred postal rates places on small or new political parties, require that the plaintiffs enjoy access to the mails equal to that of the Democrats and Republicans.

The plaintiffs were small parties but the statement of the court applies to independent parties also.<sup>20</sup>

<sup>19</sup> See s. 26 of the Act:

(1) Moneys allocated to a registered political party from the Fund shall be used for purposes compatible with democracy including—

- (a) promoting the representation in Parliament and in the county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities;
- (b) promoting active participation by individual citizens in political life;
- (c) covering the election expenses of the political party and the broadcasting of the policies of the political party;
- (d) the organisation by the political party of civic education in democracy and other electoral processes;
- (e) bringing the political party’s influence to bear on the shaping of public opinion; and
- (f) administrative and staff expenses of the political party which shall not be more than thirty per cent of the moneys allocated to the political party.

<sup>20</sup> *Greenberg v Bolger* 497 F.Supp. 756 United States District Court, Eastern District of New York (1980). However, it is not clear that even now individual candidates can have the benefit of this concession.

## Private funding

37. It is also common for countries to limit the amount that candidates/parties may receive by way of private donations, to require disclosure of private funding, and to prohibit funding from certain sources. Examples include:
- Canada limits the amount that anyone may contribute in a year to parties or ICs (same limit)<sup>21</sup>; the same is true of the UK, Ireland and various other countries.
  - The USA prohibits foreigners (except green card holders) and trade unions and companies from contributing at all.<sup>22</sup>
  - Many countries require the declaration of political donations, of more than a certain size, including Singapore, Taiwan, Ireland and many others.
  - Ireland requires that a political donation of more than a certain size must be deposited in a state financial body – and future donations of any size must also be put there.<sup>23</sup>
38. However, the US ban on corporate contributions was declared unconstitutional in 2010, on the basis of the first amendment. The court was divided. President Obama commented “a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans”.<sup>24</sup>
39. All such funding regulations should be carefully scrutinized for fairness to ICs.<sup>25</sup> In Australia, for example, the limit above which donations must be declared is lower for ICs than for parties. And also in Australia organisations may be able to hold fund-raising raffles while individuals cannot.
40. The Draft Campaign Expenditure Bill provides for limits on

21 <http://www.elections.ca/content.aspx?section=res&dir=ces&document=part3&lang=e>

22 <http://www.fec.gov/pages/brochures/citizens.shtml>

23 <http://www.sipo.gov.ie/en/Reports/AnnualDisclosures/DisclosurebyPoliticalParties/160506-DonationStatementSFurnishedbypoliticalpartiesfor2005/Name,5124,en.htm>

24 See *New York Times* [http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?\\_r=1](http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?_r=1)

25 For an example paper from the Australian “Greens” see <http://leerhiannon.org.au/greens-dissenting-report-2013-public-funding-of-election-campaigns-inquiry/?searchterm=dissenting%20report>

donations, but these are not laid down in the Bill – regulations would be needed. No donation could be received from “a foreigner, a foreign government or organisation or a foreign inter-governmental organisation”.

## Taxation

41. A final sort of financial provision relates to taxes. On the one hand, in some countries donations to political parties are tax-deductible (e.g. Canada permits this for cash donations, not donations in kind). This applies equally to donations to ICs.<sup>26</sup> In Australia donations to both parties and ICs/IMs may be deductible,<sup>27</sup> but from 2010 deductions were permissible only for individuals, not for businesses.<sup>28</sup> Some countries permit only donations to parties to be tax deductible.<sup>29</sup> Some countries have a very low limit.
42. Some countries do not permit deductions for donations to political parties at all. Kenya seems to be one of those: there is the possibility of deduction for donations to charities, but the law has always drawn a clear distinction between charity and political activity.
43. Another tax situation applies to whether candidates can reclaim sales tax/VAT on items used for election purposes. In Australia parties but not candidates can reclaim sales tax.

## Publicity and fairness

44. The Constitution includes the requirement for law to provide for:
  - (a) the reasonable and equitable allocation of airtime, by State-owned and other specified categories of broadcasting media, to political parties either generally or during election campaigns;
  - (b) the regulation of freedom to broadcast in order to ensure fair election campaigning;

The first seems to deal only with parties, but the latter might also affect ICs. The Election Act envisages regulations that would

<sup>26</sup> There is a simple explanation of the Canadian system at <http://www.hrntaxtalk.ca/blog/political-contribution-tax-credit-provides-a-big-incentive-to-make-political-donations/>.

<sup>27</sup> See on the tax authority website: <http://www.ato.gov.au/content/61195.htm>.

<sup>28</sup> <http://www.ato.gov.au/content/00232950.htm>.

<sup>29</sup> The UK exempts donations to parties (provided they have MPs or a certain number of voters voted for them at the previous election) from inheritance tax.

provide for the Commission to allocate “in a just and equitable manner” the use of public air time during any election period.<sup>30</sup>

45. This covers only government controlled media – unless “controlled” can be read as including “regulated” – which would cover anything regulated by the CCK (this could be very controversial). There should also be obligations of fairness upon privately owned media also (a particular problem since several broadcasting media have been acquired by politicians).
46. The Elections Act seems to assume that only state owned media are affected.

108. All candidates and political parties participating in an election shall be allocated reasonable airtime on state radio and television broadcasting services during the campaign period.

This leaves a great deal to be answered, and regulators, and, those obliged to police the regulations, will not find it easy. What is “reasonable airtime”? It will be hard enough to decide in relation to parties, if there are many that did not contrast the last election, as seems likely. It will be harder to allocate time to candidates.

47. The freedom of expression NGO, Article 19, has the following (slightly weak) recommended standard:

Public broadcasters should be required to grant political parties and/or candidates direct access airtime, on a fair, equitable and non-discriminatory basis, for political broadcasts. Commercial and/or community broadcasters may also be required to grant parties and/or candidates direct access airtime for political broadcasts. The term ‘fair, equitable and non-discriminatory’ applies to the amount of airtime granted, the scheduling of the broadcasts and any charges levied. Public broadcasters should, and commercial/community broadcasters may, be required to provide technical assistance to parties and candidates for purposes of production of direct access political broadcasts.<sup>31</sup>

<sup>30</sup> By May 2012 the Commission did not seem to have produced any regulations under the Elections Act.

<sup>31</sup> *Access to the Airwaves: Principles on Freedom of Expression and Broadcast Regulation* (2002) <http://www.article19.org/pdfs/standards/accessairwaves.pdf>. See also their *Guidelines for Election*

*Broadcasting in Transitional Democracies* (1994) <http://www.article19.org/pdfs/standards/election-broadcasting-in-transitional-democracies.pdf>.

48. Many countries limit how much air time parties can buy (Australia does not, which disadvantages ICs). This whole topic will require further thought and investigation.

## Access to voters list

49. The electoral roll, names and symbols must generally be available for public inspection. Apparently in Australia parties have access to the electronic version and ICs only to a printed version – clear discrimination.<sup>32</sup>

## Ballot papers, names and symbols

50. There are a few issues about ballot paper design. The most obvious is the question of symbols. Clearly individuals as well as parties will have to have symbols. More candidates will mean more symbols – and greater problems in achieving “neutral” symbols. An interesting question might be whether candidates in different constituencies could have the same symbol and if so whether candidates working together could have the same one? The Elections Act suggests not:
- (3) The Commission may refuse to approve the symbol of an independent candidate if the symbol—
- (a) is obscene or offensive;
  - (b) is the symbol of another candidate or of a political party; or
  - (c) so nearly resembles the symbol of another candidate or political party or any other legal entity registered under any other written law.
51. In some states in Australia ICs are allowed to have 5 words after their names describing themselves – where a party candidate would have their party name. Some countries would put “Independent” where the party name would come.
52. There is at least one political party in Kenya of which “Independent” forms part of its name. In some countries this would be prohibited. In Canada, under the Canada Elections Act
368. A political party whose leader has made an application under subsection 366(1) becomes eligible for registration if

<sup>32</sup> Much of the Australian information is from by Marian Sawer, Norman Abjorensen, and Philip Larkin, *Australia: The State of Democracy* (Federation Press, 2009).

- (a) its name, short-form name, abbreviation or logo does not
  - (ii) include the word “independent” or a word that so resembles “independent” that it would, in the Chief Electoral Officer’s opinion, likely be confused with it...

There is similar provision in the Australian law (s.129 of the Electoral Act), while in New Zealand (Electoral Act 1993) a ground of refusal is that the name is “likely to cause confusion or mislead electors”. However, in Kenya there is no such provision, and an attempt by the Katiba Institute to persuade the Registrar of Political Parties to refuse to register a party with the words “Independent Candidates” in its name was unsuccessful.<sup>33</sup>

53. A final, minor, point is the order of names on the ballot paper. What is the order and who decides it? The UK Election Commission concluded that there is no evidence of discrimination against people lower down the list (alphabetical order) in single vacancy election which would be the case in Kenya). But in Kenya people will probably be less familiar with the alphabet and therefore not look right down the list for names they expect to see?

## Agents at polling stations

54. It is normal for parties to have agents at polling stations. But it must be clear in the law that independents may have their representatives at polling stations etc. The Elections Act says:
- 30. (1) A political party may appoint one agent for its candidates at each polling station.
  - (2) A candidate nominated by a political party may appoint an agent of the candidate’s choice.
  - (3) An independent candidate may appoint his<sup>34</sup> own agent.

The drafting is a little odd: the phrase “at each polling station” applies only to parties, but presumably is intended to apply to all agents.

<sup>33</sup> Correspondence on file with the Institute.

<sup>34</sup> It is regrettable that the drafters are not yet persuaded to use gender neutral language like the Constitution.

## Role of an independent member (IM)

55. The role of a party member may be more obvious than of an independent. Of course they should both strive to be “good constituency members”. When it comes to voting, especially, party members will be more constrained by party discipline than IMs. I do not believe it is right for ICs to say – as I have seen one in his campaign literature – that he or she will vote as the constituents want (unlike party members, the candidate said). This is a departure from the usual principle of representation: that an MP is a representative not a delegate of the constituents. Although he or she ought to be sensitive to the wishes of constituents, the member ought to exercise his or her own judgment as well. Making policy and passing laws should not be a matter of public opinion surveys – the history of law making is full of hastily passed and mistaken laws as a result of moral panics. People can react to some particular incident and support changes in the law that are later shown to be misguided, but may be hard to change.
56. In reality IMs take a variety of views. One is quoted as saying that he voted “with my conscience and nothing else, because when I go back to my electorate I do not have the privilege of hiding behind the old excuse that it was the party line.”<sup>35</sup> But another Australian (Queensland) MP said that “when there was a contentious piece of legislation before parliament he tested public opinion by conducting a phone poll of his electorate, and ‘sometimes [the] feeling is against my personal opinion but I will still vote on behalf of my constituents and I believe that’s true democracy.”<sup>36</sup> As suggested earlier, the latter MP may be to some extent abdicating his responsibility.
57. IMs in other countries may think of their primary role as representing their constituents – keeping close contact with them, and not leaving feeling their member is now subsumed into a larger party identity and role. “An independent has no baton in his haversack to

35 Rory McEwen, quoted Brian Costar and Jennifer Curtin, “The independents: rebels with a cause” on Crikey.com Friday, 27 August 2010 <http://www.crikey.com.au/2010/08/27/the-independents-rebels-with-a-cause/>. This article is based on the same authors’ book *Rebels with a Cause: Independents in Australian Politics* (Sydney: New South Wales University Press, 2004), available (in part) on Google books.

36 Ray Hopper, *ibid.*

be anything else but a good representative of that electorate."<sup>37</sup>  
Others focus on accountability "That's what we're there for ... to keep the bastards honest."<sup>38</sup>

58. Someone who was an independent member in the UK parliament wrote:

I found there really is a useful place for independents in the House of Commons because [for them] every vote is a free vote, and you're much more influential than the lobby fodder of the backbenchers of the main parties because you have to think things through. People come to you for support on the things that matter, and you are listened to.<sup>39</sup>

A person would have to be thoughtful and competent to get this sort of respect, of course.

59. There is a sense in many countries that IMs cannot make much of an impact. In terms of law making, if there is really no tradition of private members' Bills, they may not be able to do much in terms of getting their own idea passed into law unless they can persuade a party to adopt it. But in Kenya there has been some private members' legislation in recent years.

60. The author of the *Frontier Weekly* article quoted earlier also says: "Problem is that performance of Independent candidates during that last 60 years has been rather dismal." He/she goes on to say:

Most MPs fight elections as Independents only because there is some malfunction within the Party. The few truly Independent candidates have no strategy as to what they will do as lone MPs in the parliament. In contrast, the proposed Independent candidates will contest elections on the platform of 'controlling the Government.' [They] should contest the elections with the avowed objective of controlling the Government and not being part of the Government.<sup>40</sup>

37 Peter Andren, *ibid.*

38 David Barr, *ibid.*

39 Martin Bell in the *Guardian* newspaper, see "Election 2010: Can independent candidates change the political landscape?" April 2 2010 at <http://www.guardian.co.uk/politics/2010/apr/02/general-election-independent-politicians>

40 The author is setting his/her sights high in terms of the honourable individuals envisaged! Three are mentioned: national hero Anna Hazare who went on hunger strike in favour of a stronger anti-corruption law at the time of writing and has the support of huge numbers of people. The second is an immensely popular Hindu tv guru who also went on hunger strike on corruption (Baba Ramdev). The third is a woman (Kiran Bedi) who rose to head the

61. An interesting study on South African small party and independent local councillors says that they have a hard time in various ways<sup>41</sup>:

- it is hard for them to organise to get their issues on the agenda for discussion
- they can only serve on one committee so may miss the chance to put over their view in other committees
- the administration may be dominated by ruling party loyalists who will deliberately not implement programmes in wards held by opposition (including independent) members
- they lack resources, which party people have, to maintain links with their constituents.

62. Being an independent member is hard work. As one member of the Legislative Assembly of Ontario put it in 1993

I think an independent member has a terrible cross to bear in terms of having to formulate a position on basically all of the issues that his constituency asks him about..... As an independent member, number one, you don't have those resources to ask somebody, "Where do we stand on this?" or, "Where do we stand on that?" If somebody asks you a difficult question on a complex issue, you might not have any interest or any knowledge about that issue, but in answering your constituent, when you have a good research department, which my party has and I presume other parties have, you can go to them and ask them, "Where do we stand on this?" or, "Give me a position on it," and that kind of thing.<sup>42</sup>

63. With a new system of government it is not easy to see quite what the role of the two houses will be, and therefore how the IM's might differ from that of the party MP or Senator. But presumably there will still be some efforts at party discipline – from which the IMs will be free.

64. In parliamentary systems IMs can actually be important in forming

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Indian Police, and is now an activist.

41 Malachia Mathoho, "Analysing Participation by Minority Parties and Independent Candidates in Municipal Council Processes" <http://www.afesis.org.za/Local-Governance-Articles/analysing-participation-by-minority-parties-and-independent-candidates-in-municipal-council-processes-by-malachia-mathoho>.

42 Committee Transcripts: Standing Committee on the Legislative Assembly of Ontario - September 14, 1993 - Role of the Independent Member (Norman Sterling) [http://www.ontla.on.ca/committee-proceedings/transcripts/files\\_html/1993-09-14\\_m005.htm](http://www.ontla.on.ca/committee-proceedings/transcripts/files_html/1993-09-14_m005.htm)

government – especially if otherwise there would be a hung parliament. If they agree to support the government they lose quite a lot of their independence. But in the new Kenyan system, the National Assembly will not affect the make-up of government – and no MP can be rewarded by being made a Minister (Cabinet Secretary)<sup>43</sup>.

65. It seems that in Kenya party discipline is anyway not strong – if it were there would not be so many stories about MPs being bribed. IMs will be subject to just the same temptations! They will need to be prepared for this auction house element.

## Standing Orders

66. The existing Standing Orders of the National Assembly will have to be redrafted (and the Senate will have to draft theirs).<sup>44</sup> In Ontario (in 1992) independent members of the Provincial Assembly were disadvantaged in various ways.<sup>45</sup> There is no reason to suppose this will happen here, but care will have to be taken to ensure that rules are fair to IMs. At present the following rules assume only parties are in the house:
- In nominating the Members of the Speaker's Panel, the Speaker shall have regard to the relative party majorities in the House (Order 10(3))
  - the Leader of the Official Opposition Party or the designated opposition spokesperson, when submitting the official position; a

<sup>43</sup> Or at least if made a Cabinet Secretary they cannot remain an MP.

<sup>44</sup> It is reported that this process is under way.

<sup>45</sup> Tony Rizzo, MPP, quoting a letter from the Clerk's office, [http://www.ontla.on.ca/committee-proceedings/transcripts/files\\_html/1992-06-03\\_m005.htm](http://www.ontla.on.ca/committee-proceedings/transcripts/files_html/1992-06-03_m005.htm) June 3 1992. IMs could not:

1. Request the deferral at a division in the House.
2. Make a statement during members' statements.
3. Comment on a ministerial statement during statements by the ministry and responses, nor are they entitled to an advance copy of a ministerial statement before it is made in the House.
4. Ask a question during oral questions.
5. Receive, as of right, a compendium of background information or, if it is an amending bill, a consolidation of the act to be amended when a government bill is introduced.
6. Receive, as of right, background material when a minister presents a statutory report.
7. Select a matter for debate on an opposition day or participate in an opposition day debate.
8. Move a want of confidence motion or participate in deciding when the motion will be debated.
9. Participate in a debate on a motion for discussion of a sessional paper.
10. Serve on a standing or select committee.

maximum of sixty (60) minutes [debate on public bills] (Order 87)

- House Business Committee, consisting of not less than fifteen and not more than twenty-one members, who shall be nominated by each parliamentary party (Order 158)
- in the event that any member of a Committee is absent or otherwise unable to attend the sittings of the committee, the party whip of that Member's party may appoint another Member to act in that Member's place (Order 174)

## Independent candidates: international experience

67. The percentage of IMs varies enormously. In some Pacific island states political parties barely exist, so most MPs are IMs. In most developed democracies parties have become the main vehicles for politics. In 1996 an Australian political scientist wrote "Politics just is the game played out by rival parties, and anyone who tries to play politics in some way entirely independent of parties consigns herself to irrelevance."<sup>46</sup>

68. But there are some countries with significant numbers of IMs (and more with significant members of ICs who do not get elected). Among the countries where IMs cannot be ignored are now Australia, Canada, Ireland, the Czech Republic (at least at local levels). In the small (largely unrecognised) enclave of Abkhazia within Georgia about 26 out of 35 members elected to Parliament this year were ICs.<sup>47</sup>

Since 1990 an unprecedented 66 independents have served in the lower houses of Australian parliaments; 22 of them are still there. This is more than six times the number of independents sitting during the 1970s. New South Wales has been the most productive jurisdiction during that time, with 17 independent members, and Tasmania the least, with only one. Size of state is not, however, of great significance. Nine independents have served in South Australia since 1990 – three times as many as have come from Victoria.<sup>48</sup>

69. However, though in the 2011 Canadian federal election a number of independent candidates stood, none was elected – though in

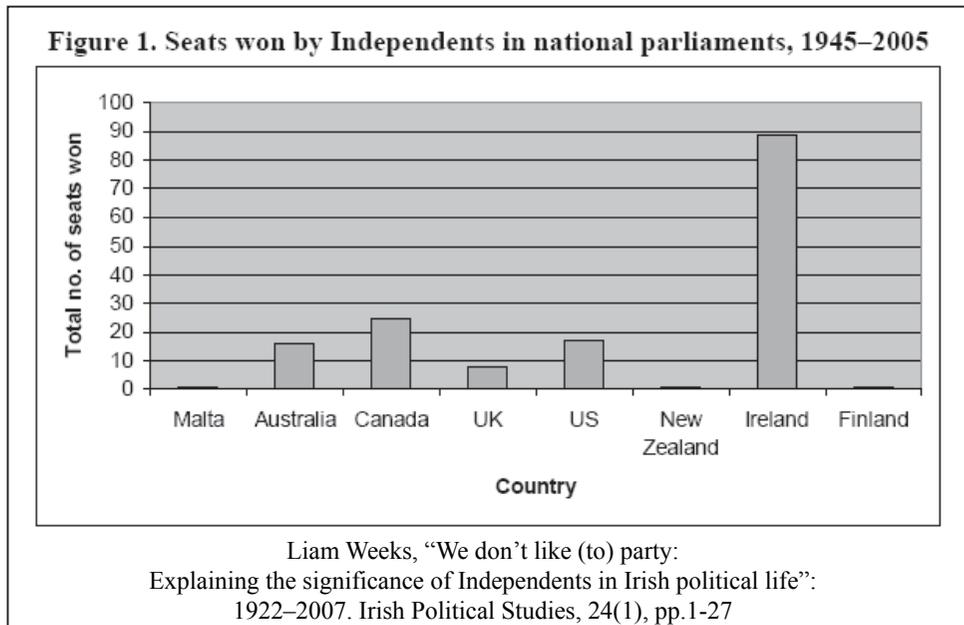
<sup>46</sup> Gerald Brennan quoted in Brian Costar and Jennifer Curtin.

<sup>47</sup> See <http://www.unpo.org/article/14083> (Unrecognised Nations and Peoples).

<sup>48</sup> Costar & Curtin.

2008 there had been two. Interestingly ICs have begun to emerge in China, at the local level. A country in which it is surprisingly difficult to be an IC is the USA – where small party/independent candidates often have to collect far more supporting signatures than candidates from the two main parties.

70. The reasons for ICs – and their being elected - vary. Many explanations will not be relevant for Kenya. For example in Australia the existence of compulsory voting, the voting system, and the fact that parties have compelled their members to adopt policies unpopular with conservative rural constituencies<sup>49</sup> are identified as factors. The last may not be relevant: the latter because Kenyan parties do not have much in the way of policies. Australian rural areas tend to feel that “their” parties have moved away from them. In China the move is a response to one party dominance.
71. Research on Irish voters suggests that those who vote for ICs are concerned about local issues (especially health), and it seems to be that Irish voters have a candidate-centred, as opposed to a party-



centred, political culture. The extent of localism – focus on local issues – means that ICs are not at a great disadvantage. Research

also showed “the strength of support for a candidate being directly related to how close voters lived to him/her”. As many as 70% of Irish voters do not feel any attachment to a political party; over 50% feeling it makes no difference what party is in power, and there is some hostility to the traditional parties. The voting system may help – because voters can vote for party people and independents (it is a single transferable vote system so people have to rank their preferences).

72. There was a great increase in the number of ICs in the most recent Irish election (February 2011). This may be partly related to the strong reaction against the previously ruling party, Fianna Fail – which got 58 fewer seats (out of 166 in the Dail) than at the last election. In the event 13 were elected – but this was the same as in 2002! One constituency elected two ICs, and others no more than one independent. It is interesting to note that those ICs who were elected mostly had considerable experience as politicians. At least 2 had recently resigned from a major party. In 2 constituencies an IC was top; generally they were the last to get in.
73. In the UK a, rare, recent example of an IM in the House of Commons was elected as the result of campaigning on a single, though major, local issue. This campaign had previously produced independent local councillors.<sup>50</sup> There was a big push by ICs for the 2010 election – buoyed up by the disgust many British people were feeling with politicians after the expenses scandal. And ICs were better organised than ever before. An article in a UK newspaper before the election was very accurate. Some of its points were:
- estimates – among enthusiasts for independent candidates – of how many independents might be elected ranged from 6 to 25
  - independents face a dilemma: to be more effective they arguably need to be better organised and collaborative, but this goes rather counter to their philosophies
  - the main parties had worked hard to deal with the worst offenders among the MPs during the expenses scandal, so perhaps defusing some of the anger that might have worked in favour of independents

50 Colin Copus, Alistair Clark, Herwig Reynaert and Kristof Steyvers, “Minor Party and Independent Politics beyond the Mainstream: Fluctuating Fortunes but a Permanent Presence” *Parliamentary Affairs* Vol. 62 No. 1, 2009, 4– 1.

- it suggested that “The impetus to change is considerable, yet despite all that has happened in the past two years and the anger generated among the electorate, on May 7 [day after the election] we are likely to wake up with a parliament in which the usual suspects still hold sway.”<sup>51</sup>

The *Guardian* was right: not a single IC was elected – one Green Party member was (the first time). Not even the man who had been twice previously elected as an IM was returned. The last time there were any significant number of IMs in the British Parliament was 1945 (11).

74. In many countries ICs are linked in a sense to political parties. They describe themselves as “independent Labour” for example. This indicates that they have ideological links with a party. This is less likely here because parties really do not have ideologies. Anyway I should have thought that in the Kenyan context ICs might want to distance themselves from parties. Precisely what would it mean for a candidate in Kenya to describe him- or her-self as “Independent KANU” or “Independent ODM”?

Small political parties and independent politicians serve to fill a gap in political representation; a gap which occurs because the mainstream, major national parties increasingly appear to fail to aggregate and represent adequately the diverse range of views and interests that make up the political dynamic at national, regional and local levels....Thus, major party failure stimulates the development of small party and independent political alternatives from which the voter can select.<sup>52</sup>

Can this happen in Kenya?

75. In many countries it is far more common to have ICs elected at more local levels. This goes along with the idea of local support – because one would expect even more local issues to be important in such elections, and even more local candidates also, and that such candidates may well be best known, where electorates are small. In fact in the UK 2011 local elections many ICs were elected: the Independent Network (see below) reported that 391 of the 449

51 The *Guardian*, see above.

52 See fn. 50 above.

candidates it had endorsed for the local government elections were successful.<sup>53</sup> And in South Africa where the only way into the national parliament is through party lists, there are significant numbers of IMs at the local level; there were 748 ICs standing in the 2011 local elections.<sup>54</sup>

## Independent candidates in Africa

### **10 Reasons for Independent Candidate participation in Elections in Cameroon (extracts<sup>55</sup>)**

**(i)** Article 2.1 of the 18 January 1996 Constitution prescribes that *"National Sovereignty shall be vested in the people of Cameroon (... ) no section of the people shall arrogate to itself the exercise thereof"*.

**(iv)** The OAU during its 38<sup>th</sup> session in Durban on 8<sup>th</sup> July 2002 resolved that:

- Individuals and political parties shall have the right to freedom of movement to campaign and to express political opinions with full access and information within the limits of the laws of the land.

**(v)** Article 21(1) of the United Nation Declaration on Human Rights states that *"everyone has the right to take part in the government of his country, directly or through freely chosen representatives"*.

...

**(vi)** A candidate – based electoral system would enhance competition and expand the democratic space that is already being narrowed by party-centered system in Cameroon.

**(vii)** In addition to a party – based system, a candidate – centered election would permit the electorate to focus on individual merit and independent philosophical or political opinions.

**(viii)** Independent Candidature would act as a buffer to party candidates who, out of their veiled personal interest or contradictory party ideology are obliged to defect from one party to another.

**(ix)** So far party – centered elections have only favoured an old generation that has monopolized the political arena in Cameroon. Independent candidature would therefore provide the young

53 <http://www.independentnetwork.org.uk/news/huge-success-endorsed-candidates-english-local-elections>

54 See Malachia Mathoho, "Analysing Participation by Minority Parties and Independent Candidates in Municipal Council Processes" <http://www.afesis.org.za/Local-Governance-Articles/analysing-participation-by-minority-parties-and-independent-candidates-in-municipal-council-processes-by-malachia-mathoho>.

55 Taken from "A Memorandum to the President of the Republic"

generation with the opportunity of bringing a new vision and fresh agenda to the body-politic of our country. Indeed Independent candidature is now regarded as an antidote to gerontocratic politics and a rite of passage to generational democracy.

(x) Through Independent Candidate participation, the process of building a consociational democracy based on power – sharing not only among political parties, regions and ethnic groups, but also between the state society and the civil society will be enhanced.

76. There are a number of African countries with experience of ICs and IMs – “Independent candidates have run and won legislative elections in countries like Mauritania, Central African Republic, Cote d’Ivoire, Ethiopia, Gabon, Zambia, Zimbabwe, Egypt, Mauritius<sup>56</sup>, Ghana, Algeria, Congo Republic, Madagascar etc.”<sup>57</sup>

## How can independent candidates and members be assisted?

77. In a number of countries, at least in recent times, various organisations and networks have been set up to assist ICs. In the recent Irish election a group calling itself “New Vision” was formed not long before the election. “Their” candidates were committed to vote, if elected, en bloc on: “the separation of bank debt and sovereign debt; a viable strategy to create jobs; the overhaul of politics and the public service; and “a better deal” for the country’s natural resources.” It seems that 20 candidates committed themselves to the New Vision approach.<sup>58</sup> But none seemed to be elected!
78. There is an “Independent Network” (IN) in the UK; it describes itself as “a non-profit organisation that promotes and supports

56 There is a suggestion that a report prepared by a French Professor in 2011 on the electoral system from Mauritius proposes the abolition of ICs – Peter Chellen, “Electoral Reform: Will independent candidates no longer be allowed to stand for election?” *Le Mauricien* Dec. 20 2011 <http://www.lemauricien.com/article/electoral-reform-will-independent-candidates-no-longer-be-allowed-stand-election>, a fear that seems to be borne out by the summary of the Report at <http://www.lalitmauritius.org/viewnews.php?id=1325> (it proposes a list system of proportional representation); the report itself, in French, is available on the Government website at <http://www.gov.mu/portal/site/Mainhomepage/menuitem.cc515006ac7521ae3a9d9bea5e2b521ca/>.

57 “A Memorandum to the President of the Republic” (Cameroon) [http://www.postwatchmagazine.com/2006/06/campaign\\_for\\_in.html](http://www.postwatchmagazine.com/2006/06/campaign_for_in.html)

58 <http://newvision.ie/wordpress/>

independent candidates and non-party politicians.”<sup>59</sup> It says that it is assisted by IMs, ICs and members of the public who no longer feel represented by parties. Its activities seem to include:

- guidance on campaign strategies, election material etc. (see box)
- tips on electioneering
- propagating the Bell Principles (developed by Martin Bell, former TV journalist and then independent MP) – a code of practice for ICs and IMs (see Appendix 1)
- an endorsement scheme “to provide a mark of quality for Independents; that these candidates will make excellent elected representatives”.<sup>60</sup>

79. Similarly there is The Independent Candidate Advisory Network ICAN in Australia.<sup>61</sup> It has similar advice on strategy, and offers contact with existing IMs.

## CAMPAIGN PLAN

(from the IN website)

If you're planning to stand for election, you need to create a campaign plan. Campaign plans are essential; they will focus your resources and time. You should consider the following:

**Budget** – Can you afford the deposit? How will you fundraise?

**Timescale** – When will you send out election literature? When will you hold public events? Postal votes? Electoral Commission deadlines?

**Target Audience** – As the famous saying goes, if you market to everyone, you market to no-one. Which age group? What kind of voter (floating voter/ex-labour voter/trade unionists)? How many constituents?

**Message** – Why are you different from the other candidates? What's unique about your policy? Why should people vote for you? Manifesto?

**Promotion** – How will you get yourself known? Media (print and online)? Social networking? Public appearances. Local community groups? Hustings?

**Opponents** – Negative/positive campaigning. What are your opponents' strength/weaknesses? What's the current majority? How is your campaign different?

**Supporters** – How will you identify people who will vote for you? How will you involve volunteers? On Election Day how will you get people out to vote?

<sup>59</sup> <http://www.independentnetwork.org.uk/>

<sup>60</sup> See also the Politically Independent Candidates website at <http://www.picx.co.uk/frame.html>, which is set up to encourage ICs at local government level. It has specimen leaflets, and links to relevant groups.

<sup>61</sup> <http://www.icanonline.net.au/>

80. A number of independent candidates have used the social media, such as Facebook and Twitter. Some blog (IN warns about careless use of blogs – presumably Facebook would run similar risks).
81. Election Commissions in many countries provide quite full advice on how to nominate oneself and the other formalities required for being a candidate. Examples are:
  - The Australian Electoral Commission <http://www.aec.gov.au>
  - Elections New Zealand <http://www.elections.org.nz>
  - UK Electoral Commission <http://www.electoralcommission.org.uk/>
  - Elections Canada <http://www.elections.ca>

## Reflections on Kenya and the prospects for ICs

82. Many of the factors that affect ICs and IMs in other countries will be irrelevant for Kenya – but at least they stimulate thought about the prospects and challenges here.

## The new government system

83. The fact that the make-up of the National Assembly will not affect directly who forms or is in government is likely to be a positive from the perspective of ICs. Parliamentary election will no longer be elections to form a government – this is decided by the presidential election. The only implication of a vote cast for an independent constituency candidate might be an effect on how many of the “list members” (the 47 women, and the 12 “special interest” members) a party gets.<sup>62</sup> If the Constitution is amended to include extra seats for women, on the lines already provided for counties, the number of extra women a party receives would also depend on the votes for individual constituency candidates.
84. However, voters may be convinced that in a divided house (where maybe no one party has overwhelming dominance) IMs might have bargaining power when being courted for their votes on the President’s policies or bills. What they might seek in return for that

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<sup>62</sup> The extra seats including the 12 in the National Assembly, to ensure representation of youth, persons with disability, workers, and (in the Senate and county assemblies) no more than two-thirds of the same gender, will be distributed between parties on the basis of how many seats they have won in constituencies – not on the basis of the percentage of votes.

vote is a different matter! Not individual bribes hopefully. How about “pork barrelling” – getting benefits for the constituency of the member? This is common – its morality is a question of debate: if an MP is convinced that a particular policy is good for the nation should he or she abandon that in return for some, perhaps short-lived, benefit for his or her own constituency?

85. Party members will in theory be subject to some sort of party discipline – and if it breaks down there may be more use of the provisions about members losing their seats. At least IMs will be immune from this party discipline – unless they “join a party” of course (see above).
86. Another issue is the role of the Senate and its relationship to the National Assembly. The Senate will be required to assent to Bills that relate to counties. And it will also make the proposal for the distribution of money between the counties of the money allocated to the counties (Art. 217). The amount of pressure that will be on Senate members especially (because they are few) will be horrendous. The temptations likewise – outright bribery no doubt. Though there is some reference to seats won by parties in the Senate – on this basis the extra seats for women, youth and persons with disability will be allocated – it is hard to believe that party discipline will be easy to maintain in the Senate.

### Why might Kenyans vote for ICs?

87. While it is true that people are fed up with parties, there is a problem that parties are not really parties – they are a way of people supporting a leader. While on the one hand it seems that people expect that having “their person” in parliament or even in government will benefit their constituency (or even their group within a constituency), those MPs who do a good job as constituency members do not necessarily get re-elected; party is more important than individual member.
88. Things may change to some extent under the new system. Clearly there is some feeling at present that it is even better to have “our person” as Minister than just as MP (though there may be little

empirical evidence that this is actually true). In future electing “our person” as MP will not affect who are Ministers (or not do so as directly)<sup>63</sup>. That may free people to vote for people they feel will do a good job as MPs.

89. The CDF is a liberating factor – if it survives (some people have said the country cannot afford devolution and the CDF), all MPs including IMs will have the same possibilities.<sup>64</sup> But, of course, there are moves towards disconnecting further the MP and the CDF – quite rightly.
90. There is little party democracy at present so people may often feel that party candidates are thrust upon them by the party or its leader. They might feel that an IC who is really local is their choice and not the parties’ – the same approach as the writer in *Frontier Weekly* quoted earlier.
91. Another unknown factor in Kenya is devolution. How will people vote for their county members (other than the ones that must be on party lists)? Will local concerns be more important, to the extent that people vote for individuals with local connections and track records? Will the situation resemble the tradition more common in many countries of few IMs at the national level, or more resemble the patters of local government, where there are often far more IMs?

### Why might Kenyans not vote for ICs?

92. The answer to this question probably depends on a deeper knowledge of Kenyan voter psychology and behaviour than the writer would claim. But if voting for a candidate of a particular party is seen as a vote of support for an individual who leads that party, maybe to vote for anyone else, of another party or no party, would seem to the voter to be a betrayal.
93. If the main focus of the Kenyan voter is on the direct benefit to the

<sup>63</sup> This is complicated: a Minister cannot be a member of Parliament. The President does not have to restrict his or her choice of Ministers (or Cabinet Secretaries as they will be called) to MPs. On the other hand, the President may wish to “reward” active members of his or her own party by making them ministers (if they are MPs they will have to resign) to may wish to cement alliances by the same strategy.

<sup>64</sup> The press reports say that the Commission on Revenue Allocation is not proposing its abolition but realignment with the new system.

constituency that are hoped for, the voter may believe that chances of constituency benefit are enhanced by their MP being a member of the same party as the leader they hope will win.

94. Habit on the one hand – voting for a party – and unfamiliarity on the other – with the whole idea of ICs – may combine to deter voters. One prospective candidate has informed the writer that voters are unimpressed by the idea of the person being an IC, suggesting that the candidate is confused, and even not a sufficiently community minded person.<sup>65</sup>
95. Some of these attitudes stem from a lack of knowledge of how government and parliament work, which is not surprising (how many electorates do have any such understanding?). Unfortunately there is likely to be even less understanding, certainly for the next elections, about how the new system will work. But candidates, and civil society, should try to explain what MPs do, what they should do, what the relationship between executive and Parliament will be under the new system.

## Women

96. Women often have a hard time being selected as candidates. This may be an argument for women standing as ICs. Unfortunately, in the women-only seats for the NA they will have a hard time campaigning because they will have large constituencies. At least in those constituencies all women will have the same disadvantage – but ICs will not have important party officials to come and campaign for them.
97. Is there likely to be a problem for women in other constituencies – namely that it is harder for women to build a local profile? On the other hand there may be women who really have better local profiles than men because the men have been away in Nairobi. Many women do face a problem in that they are thought not to “belong”: they do not belong in their home constituency if they

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65 See Yash Ghai's article attached (Appendix 2).

have married a person from somewhere else, and they do not belong in their husband's constituency either. This "orphan" status will perhaps be worse for women who do not even have a party to belong to.

## Money politics

98. This may be the biggest challenge. The significance of money works in several ways:

- MPs are paid so much that one might expect large numbers of people to express an interest in standing. It will be very important to have clear criteria for who would be suitable candidates. Parties have election mechanisms or even primaries (or party leader dictat); a network of ICs would need some sort of filtering (though the UK Independent Network is prepared to support more than one candidate for a constituency).
- The high cost of elections (coupled with the high expectations of financial bliss by candidates which invites corruption, or at least potentially compromising arrangements) poses major hurdles for new parties or ICs.

99. In other countries election expenses are mainly a matter of how much one can spend on posters, leaflets and radio and TV advertising. In Kenya the same may not be true. The following extract from the Standard about recent by-elections suggests a variety of techniques – some improper but others less so (though it depends on what was promised):

In Juja, the former MP, William Kabogo, known for his sky campaigns as seen during the 2002 hotly contested parliamentary seat, is expected to employ the same tactics. Mr Kabogo caused a rare spectre in Kenya's political landscape by throwing money from the skies to his constituents as he tried to woo voters in 2002.

His latest campaign strategy has been focused on Facebook where rival groups from various political wings have been engaging in campaigns while some have been following the latest developments of the upcoming Juja by-election on twitter and blogs. In April this year, Mr Kabogo successfully petitioned the election of Mr George Thuo as Juja MP.

And in Makadara, a new entrant billed as the only Narc-Kenya candidate, Mike MbuviKioko, has pulled a stir to a once silent constituency. The youthful aspirant has employed sophisticated tactics that has seen him attract majority of the youth in the constituency using the popular mode of transport in Eastlands- 'Mathrii' (matatu) to propel his message.

Besides using the super model pimped vans, Mr Mbuvi recently launched a website as part of his campaign strategies in Makadara that is majorly used for reaching out to the youths. The site [www.mikembuvimunga4makadara.com](http://www.mikembuvimunga4makadara.com) features a parallel Constituency kitty, funeral costs, school fees among others. It also contains interactive question frame soliciting views from the constituents' on how they want Makadara governed.

Confident of a triumph in the Makadara by-election, Mr Kioko, also famously known as 'Sonko' has also mounted massive billboards along the busy Jogoo-road, a move that shows shift in campaigns as this was a preserve of the presidential contest in 2007.

The youthful aspirant in Makadara has also begun campaigns in earnest which has seen him also pull out a fleet of his vehicles plying route '58' with the latest development being plans to procure a chopper which could start roaring in the skies of Makadara in the next few days.

Facebook etc. are not expensive – helicopters and giant billboards are another matter.

100. How much is actually spent on Kenyan elections? One study

Category	Average per candidate
Direct benefit to voters	3,000,000
Campaign personnel	100,000
Travel and logistics	900,000
Personal security	100,000
Rallies	1,000,000
Campaign agents	200,000
Polling station agents	300,000
Publicity	500,000
Campaign materials	900,000
<b>Total</b>	<b>7,000,000</b>

suggested the following figures for individual candidate expenditure for the 2007 elections (they also give party expenditure for ODM and PNU (less relevant to the situation of ICs) :

The report recommends disclosure requirements as the best way to deal with the problem/ But, expenditure limits may not help much – after all, bribing the voters is already illegal so we must assume that no-one is going to declare it!

101. Clearly ICs are going to have to develop novel ways of campaigning on a shoestring. Facebook and Twitter have become much more popular since the last election. Numbers are not huge but are growing. Estimates of numbers of internet and social media users tend to vary. Some recent figures suggest about 10.4 million internet users or about 25% of the population at the end of 2011, and 1.3 million Facebook users.
102. Mobile phone coverage is also very high. Though the use of SMS is also great and has been used in elections, it is not so easy for individual candidates – as they do not have numbers for people in their constituencies. But a generic “don’t just vote for party people” on behalf of all the ICs might be feasible. And an IC with a band of volunteers might be able to build up a bank of voter number (and technology now permits many SMSs to be send out simultaneously and at small cost.
103. Mobile phone and internet usage is significantly less among women, which is a point worth bearing in mind especially for those who would wish to appeal especially to women voters

Can ICs be supported by a group without its being a “party”?

104. The *Guardian* asked, in the article quoted earlier, “How can independents pool their resources without becoming a party?” Other people might ask the same. ICs cannot be party members, nor can their nominators (supporters). Collaboration between ICs seems to be a sensible idea – but there is a risk that party members

might challenge forms of organisation and argue that they are in fact parties.

105. The Political Parties Act says:

4.(1) An association of persons or an organization shall not operate or function as a political party unless it has been registered in accordance with the provisions of this Act.

So when does a group, an alliance, a network, become a party? The Act tells us that a party “has the meaning assigned to it in Article 260 of the Constitution” but actually this is not a great deal of help – it says that a political party is an organisation “contemplated” in the relevant part of the Constitution. But that part (mainly Article 91) does not really make it clear what political parties do. The old Political Parties Act was clearer:

“political party” means any association or organization of persons which has for its objects or purposes or one or more of its objects or purposes the proposing or supporting of candidates for national or local authority elections, with a view to forming or influencing the formation of the Government of Kenya or any local authority within Kenya.

This focuses on the proposing or supporting of candidates.

106. A network would not “propose” candidates but it might be viewed as “supporting them” (especially if it “endorsed” them like the Independent Network in the UK). But anyway the old definition is no longer part of the law. If it came to a legal case on the subject, the court would have to rely upon a combination of dictionaries and common sense. Clearly not every act of “supporting” a candidate makes one a political party; a newspaper that tells its readers that it will support a particular candidate does not become a party thereby.

107 However, the Campaign Financing Bill does envisage the possibility of an organisation supporting a candidate without being itself a party. It says that any organisation that intends to “support” a candidate must channel that support through the candidate’s account (which assumes support is a matter of finance). And any such organisation, and one that intends to campaign for a

candidate, must register with the Commission's Committee (see above) and inform it about the support it intends to give.<sup>66</sup>

108. The Canada Election Act defines a party as:

an organization one of whose fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election.

Similarly US law says:

The term political party means "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee or organization."<sup>67</sup>

The Party Law of Ethiopia talks of a party having the objective of achieving political power thorough the democratic process.

109. A network supporting ICs might argue that it does not have a particular shared ideology (assuming that is true), and that it does not exist for the purpose of putting forward candidates for election, though it may support candidates by training programmes (but there are plenty of organisations that do that without being parties). In the end the answer to the question "Is it a party?" would probably depend on the whole range of activities of the group.

## Issues to think about

110. This section summarises the issues, including dilemmas that might face an individual or group thinking about the idea of ICs in a practical sense.

1. Will Kenyans be prepared to vote for a non-party person?<sup>68</sup>

<sup>66</sup> Clause 20 of the Bill. It includes the following:

(3) For purposes of subsection (2)(b), an organization, shall disclose to the Committee at least three days after the nomination of the candidate the organization intends to support, the amount of—

(a) funds deposited in the election campaign account;  
 (b) in-kind donations towards the support of a candidate or a party; and  
 (c) pledges to the candidate or to the political party, in cash or in-kind.

This leaves a good deal to be desired: what does "at least three days" mean? And how far can an organisation know in advance the support it intends to give?

<sup>67</sup> 2 USCS § 431

<sup>68</sup> See a complaint from Colombia: "Any country in the world, even industrialized nations, would be proud to have

2. In what circumstances would they be more likely to vote for a non-party person?
3. Will the voting pattern be different at national and county level so that significantly more independents get elected at county level?
4. How can people try to ensure that there is a “level playing field” for ICs – thinking about the issues raised in this paper like public funding, deposits etc?
5. How can the Election and Boundaries Commission help candidates especially in ways useful to ICs – and how can people persuade or assist the IEBC to do this?
6. Will the law on campaign expenditure be effective in reducing the money element?
7. Will the law on broadcasting be fair to ICs – and how can input be made into the law making process?
8. In what ways can ICs be supported (especially without setting up something that runs the risk of being barred as an “unregistered” party)?
9. Is it possible to set up a useful training programme for ICs?
10. Is it worth aiming for a small number of ICs or would it be important to have a “critical mass” – and what would that be?
11. How could ICs be supported once they became IMs (independent members)?
12. And the major question must be “Does it make sense to aim for IMs, or should you really be operating within existing parties, or even forming a new party?”

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some of the candidates currently running for the Colombian presidency. Yet this unprecedented situation will amount to little more than an anecdote, since there are not enough independent-minded and critical thinking voters.” <http://colombiareports.com/opinion/117-cantonese-arepas/9138-presidential-elections-independent-candidates-but-not-independent-voters.html>.

## Appendices

### Appendix 1 (from the Independent Network) The Bell Principles

#### *We will*

- abide wholeheartedly by the spirit and letter of the Seven Principles of Public Life set out by Lord Nolan in 1995: *selflessness, integrity, objectivity, accountability, openness, honesty and leadership*
- be guided by considered evidence, our real world experience and expertise, our constituencies and our consciences
- be free from the control of any political party, pressure group or whip
- be non-discriminatory, ethical and committed to pluralism.
- make decisions transparently and openly at every stage and level of the political process, enabling people to see how decisions are made and the evidence on which they are based
- listen, consulting our communities constantly and innovatively
- treat political opponents with courtesy and respect, challenging them when we believe they are wrong, and agreeing with them when we believe they are right
- resist abuses of power and patronage and promote democracy at every level
- work with other elected independents as a Group with a chosen spokesperson
- claim expenses, salaries and compensation openly so the public can judge the value for money of our activities.

## Appendix 2

### Electoral reform: the poor man's right to contest elections

Yash Ghai (published in the *Star*)

In the electoral reform agenda, an important issue has been overlooked. The emphasis on the right of all citizens to contest for office in free and fair elections has ignored the enormous disparities of wealth and resources between the rich and well established on one hand, and the poor and marginalised on the other. The widespread wish of the people for a fundamental change in political leadership will come to naught unless we create a genuinely level playing field. Then only will new social and political movements be able to participate fully in the electoral process and challenge the candidates from established political elites.

Kenyans seek several objectives from the electoral system. We do not want it to be the major cause of corruption in public and private life. We know that the leading faction in the first Kibaki government engaged in massive corruption because it wanted to build up an election war chest. In this regard, Kenya is not exceptional. Everywhere elections have become extremely expensive for contestants, and the easy way, readily available to governments and other powerful interests, to accumulate the resources to fight and influence elections, is through corruption. Nothing destroys confidence in the political process and public institutions so much as corruption.

We also want the fair representation of all sectors of society, including the marginalised. The legislature in particular should be able to speak for the various groups and interests in the country. A great deal of attention was given to this objective by the CKRC and Bomas. Although various devices have been used to achieve this objective throughout the world, such as reservation of seats, proportional representation, special constituencies, nomination of minorities, a primary hurdle still remains the disparity of funds—and the interests of the marginalised continue to be ignored.

Elections, justified in the name of democracy, often undermine democratic values and practices. Access to political and state power is, as seems to be becoming the fashion in Africa, determined less by the choice of the people, than the ability of political parties to intimidate

and bribe. Then power is either effectively usurped, or negotiated as part of a “peace process”, in both cases negating democratic choice. Kenya, under the auspices of Eminent African Personalities, has pioneered this approach,.

Nothing threatens national unity or communal harmony so much as elections, even as we pass laws to try to make political parties non-ethnic. Huge election rallies are held, as if they are national festivals. People are bussed to the rallies, given money both to attend and disperse, to sing and shout, and listen to, speeches, devoid of policy content but not without empty promises or abuse of opponents. But predominantly rallies are about mobilising the ethnic vote, to considerable extent by stirring up hostility against other ethnic group, and conjuring up dreadful scenarios for the community if it loses the election. The traffic is one way, with no time for questions from the audience.

Consequently there is no real discussion of problems facing the country and policy options to tackle them. There is no room for public debate and deliberation which are central to democracy—nor to nation building.

What is the way out? The starting point is to restore the right of the poor to contest elections, intimately connected to finance and security. A basic condition is “cost free” elections for political parties and candidates. But how? An election trust fund, with contributions from the national revenue and other acceptable sources (like UNDP), would be administered by a genuinely independent electoral commission and used to finance all reasonable costs of election campaigns. Expenditure by political parties and candidates would be prohibited. The commission would print and distribute manifestoes of parties and candidates as submitted by them (vetted only to eliminate ethnic incitement), would organise, in consultation with the candidates, constituency election meetings with all the candidates participating. It would ensure that the meeting was chaired by an independent person who would give all candidates equal time and encourage the audience to ask questions. The commission would also negotiate airtime for political parties, and promote debate among party leaders on TV and other forums, on the basis of equal opportunity. This would greatly assist the voters to make informed choices.

The electoral commission would ensure that the campaigns follow the

law, including by supervising party primaries, and that candidates are fully qualified, including meeting integrity criteria. The commission or committees set up for this purpose would promote public discussion of national issues, the exposure of candidates to questions from the electors, and the policing of rules against appeals to ethnicity or religion. This would help to strengthen democracy, and hopefully develop a Kenyan identity.

## Appendix 3

### A few useful sources

*How to Win Elections:* "The purpose of this site is to de-mystify the electoral process so that independent candidates or inexperienced candidates in smaller parties can have equal access to the methods use by the major parties who have built up a wealth of experience doing similar things over the years. This should provide more of a level playing field between the established parties and the independents, encourage democratic participation and improve diversity in our elected representatives." <http://www.howtowinelections.co.uk/>

*Local Victory* "This website exists for one purpose: to teach candidates, campaign staff, political organizations, volunteers and activists how to win political campaigns. The articles and information on Local Victory are non-partisan in nature, and can be used by any candidate of any party to learn how to run a successful political campaign." <http://www.localvictory.com/>.

*E-democracy* page on "Promoting candidate and election websites" at <http://www.e-democracy.org/us/promote.html>

*Politically Independent Candidates* "How to Run a Successful Election Campaign" at <http://www.picx.co.uk/frame.html>.