INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

ELECTORAL LAW REFORM IN KENYA: THE IEBC EXPERIENCE

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

1 Contents

FOREWORD

Since its inception, the Independent Electoral and Boundaries Commission has played a central role in the electoral reform process through consultations with stakeholders to ascertain their views on required reforms and making proposals to the government and legislature on desired electoral reforms. The Commission is mindful of the gains that have been made since the promulgation of the Constitution and the reforms in the electoral field that followed. However, it also recognizes the challenges that still persist, and in particular on the adequacy of the existing electoral laws.

Therefore, I am pleased to present, on behalf of the Commission, the Report on Electoral reforms in Kenya. The report sets out proposals for reforms of the electoral laws with the aim of enhancing their integrity, relevance and adequacy; as well as institutional reforms to enable the Commission itself perform its functions as outlined under Article 88 of the Constitution, more effectively, efficiently and sustainably.

This report is the culmination of nearly two years of dialogue that began with a series of engagements between the Commission and various stakeholders. The Commission acknowledges that stakeholder relations forms a vital and primary function for the Commission itself. These engagements helped to lay a solid foundation for the inclusion and participation of all key role-players in ultimately ensuring the report secured the views and ideas that informs the reforms that affect election operations.

The Commission would like to express its heartfelt appreciation to all stakeholders for their contributions, guidance, assistance and for taking time to consult with the Commission. Among those stakeholders who deserve special mention include the leaders of all represented political parties, Political Party Liaison Committees, Office of the Registrar of Political Parties, Task force on review of political party primaries, Parliamentary Caucus Group, Political Parties Dispute Tribunal, Office of the Attorney General and the Department of Justice and the Law society of Kenya

The Commission is pleased to share this report with its stakeholders, notably, both Houses of Parliament together with the accompanying draft Elections Bill and the Election Laws (Amendment) Act.

WAFULA CHEBUKATI

CHAIRMAN

Acronyms and Abbreviations

AV	Affirmative Vote
BV	Block Vote
BVR	Biometric Voter Registration
CORD	Coalition for the Restoration of Democracy
CRMS	Electronic Candidate Registration Management System
DCR	Directorate of Immigration and Registration and the Department of Civil Registration
EC	Electoral Commission
ECG	Electoral Commission of Ghana
ECK	Electoral Commission of Kenya
EMB	Electoral Management Body
ERSV	Electoral Related Sexual Violence
EVI	Electronic Voter Identification
FPTP	First Past The Post
ICT	Information and Communication Technology
IEBC	Independent Electoral and Boundaries Commission
IEC	Independent Electoral Commission
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IREC	Independent Review Commission
KIEMS	Kenya Integrated Election Management System
KLR	Kenya Law Reports
KPMG	Peat Marwick International and Klynveld Main Goerdeler
LPR	List Proportional Representation
LV	Limited Vote
MCA	Member of the County Assembly
MMP	Mixed Member Proportional
NASA	National Super Alliance

NAL	National Land Commission
NRB	National Registration Bureau
ODM	Orange Democratic Movement
ODPP	Office of the Director of Public Prosecutions
ORPP	Office of the Registrar of Political Parties
PBV	Party Block Vote
PPDT	Political Parties Dispute Tribunal
PR	Proportional Representation
PPERA	Political Parties, Elections and Referendums Act
RENEC	National Registry of Identification of Civil Status
ROK	Republic of Korea
RTS	Results Transmission System
SNTV	Single Non-Transferable Vote
STV	Single Transferable Vote
UK	United Kingdom
USA	United States of America

EXECUTIVE SUMMARY

In the modern era, elections are the hallmark of democracy: generating public debate, shaping the policy agenda, selecting representatives, determining the composition of parliaments, and influencing the distribution of power in government. A free, fair and successful democratic election largely hinges on a clear, consistent and comprehensive legal framework.

The existing legal framework governing elections in Kenya stems from an overhaul of the electoral regime that existed prior to the enactment of the Constitution in 2010. The Constitution initiated a wave of electoral reforms, one of which was the revision and consolidation of all election management laws into one statute – the Election Act of 2011. The Election Act, a principal legislation governing elections, has been amended repeatedly and declared unconstitutional more than any other statute in Kenya's legislative history. The remaining statute is incomplete and fails to regulate certain aspects as required by the Constitution; such as the monitoring or evaluation of elections.

Therefore, the main aim of this report is to examine whether the existing electoral code complies with the general principles of the electoral system as provided under Article 81 and the minimum threshold spelt out in Articles 82 and 86 of the Constitution. The overall objective of the report is to set out reform proposals that will enable the Commission to conduct elections that meet the Constitutional threshold of simplicity, accuracy, verifiability, security, accountability and transparency.

In this regard, the report examines the election regime with regard to two aspects: -

Firstly, it analyses the entire legal regime contained, largely in the Elections Act, Election Offences Act (No. 37 of 2016), Independent Electoral and Boundaries Commission Act (No. 9 of 2011) and Election Campaign Financing Act, together with all other ancillary pieces of legislation with a view to address policy, legal and institutional gaps existing therein.

Secondly, the report studies electoral systems in other jurisdictions and present good practices, fundamental principles and structures that guide democratic elections.

The report identifies 14 specific thematic areas that encompasses the electoral system in Kenya. For each thematic area, the report sets out the constitutional and legislative framework applicable, identifies the legal and policy gaps and where relevant, provides a comparison with other jurisdictions. Each thematic area concludes by making proposals and recommendations on the proposed reforms.

In the preparation of this report, the Commission engaged various stakeholders through extensive consultations with civil societies, Parliament, Judiciary and the Political Parties Dispute Resolution Tribunal, Office of the Registrar of Political Parties among other key stakeholders. The report also employed a mixed methodological approach encompassing doctrinal and qualitative research methods.

In the end, a consolidated Election Bill and an Election Laws (Amendment) Bill will be generated based on the identified areas for reform. The Commission further recommends a review of existing regulations, the Commission's internal policies as well as the creation of a new national policy governing elections.

MARJAN HUSSEIN MARJAN

AG. CEO/ CS

2 METHODOLOGY AND APPROACH

In the course of generating this report, the Commission adopted various methodologies as set out below:

2.1 Methodology

The Commission used a social legal methodological approach encompassing doctrinal and qualitative research methods. The doctrinal methodology focuses on the law as a doctrine. It involves exploring legal doctrines through analysis of statutory provisions and cases to describe and understand the present law. It further entails interpretation and analysis of existing legislative frameworks in order to make conclusions. In line with this approach, the Commission interpreted and analyzed legal concepts, principles and existing legislative frameworks and deciphered legal and policy gaps and loopholes in the existing legal regime governing the electoral systems in Kenya.

Doctrinal research focuses on law as a separate doctrine that should be analyzed by itself. However, law is a "function" of society, hence it should be considered in relation to other contexts such as gender, economy, class and culture. Consequently, it was necessary and important that the report incorporate a qualitative approach. The combination of the doctrinal and qualitative approach assisted the Commission in highlighting the gaps between 'legislative goals' and 'social reality' and thereby depict a true reflection of 'law-in-action'.

By the qualitative approach, the Commission interacted personally with the people, organizations and state agencies and drew from their experiences and thoughts which were illuminative and which provided in-depth insights on the electoral systems together with a realistic view on the issue under investigation. The Commission was mindful of the national value of *"participation of the people"* espoused under Article 10 of the Constitution.

The Commission undertook a desktop literature review of scientific and grey literature to determine the fundamental principles underpinning the electoral process and the ingredients of a good and effective system. A comparative analysis of other similar electoral systems and electoral management bodies was also undertaken to understand the basic threshold that all systems must meet.

In addition, we reviewed the international conventions, declarations and treaties in relation to elections as applicable to Kenya.

2.2 Legal Framework

Flowing from the above, it behooves us to examine the applicable statutes and the regulations made thereunder, which affect and/or give effect to the administration and delivery of elections, referenda and delimitation of electoral units. These are:-

1) Constitution of Kenya, 2010.
2) Appellate Jurisdiction Act (Cap. 9).
3) County Governments Act (No. 17 of 2012).

4) Election Offences Act (No. 37 of 2016).
5) Elections Act (No. 24 of 2011).
6) Election Laws (Amendment) Act, 2016.
7) Independent Electoral and Boundaries Commission Act (No. 9 of 2011).
8) Leadership and Integrity Act (No. 19 of 2012).
9) Public Officer Ethics Act (No. 4 of 2003).
10) Publication of Opinion Polls Act (No. 39 of 2012)
11) Political Parties Act (No. 11 of 2011).
12) Supreme Court Act (No. 7 of 2011).

2.3 Relevant International Treaties and Conventions

This report also looks at the principles set out in international treaties, conventions, agreements and declarations to which Kenya is a signatory. These contain the minimum thresholds that are inherent to every person in the exercise of their civil and political rights. Such international documents include:

1. The Universal Declaration of Human rights, 1948.
2. The International Covenant on Civil and Political Rights, 1966.
3. African Charter on Human and Peoples' Rights, 2005.
4. African Charter on Democracy, Elections and Governance (2007).
5. The Convention on the Political Rights of Women (1952).
6. The Convention on the Elimination of All Forms of Discrimination against Women (1979).
7. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003).
8. The Solemn Declaration of the African Union on Gender Equality in Africa (2004).
9. East African Community Principles for Election Observation and Monitoring (..)

These instruments recognize the centrality of the people in the constitution of government. They posit that democratic elections represent the free will of the people which serve as a basis for the legitimacy and authority of the government. Regular and periodic elections thus serve a means by which the people establish their government. These instruments further urge the integration of the principle of equality, inclusiveness and non-discrimination into legal frameworks governing electoral processes and related laws.

2.4 Review of Judicial Decisions

This report also studies the decisions of the Courts in Kenya with regard to pronouncements on electoral matters. The report has taken a critical look at judicial precedent spanning the entire election cycle and made recommendations, some of which would require operational and administrative action, while others have been included in the draft Bill.

2.5 Public Participation

In the Course of preparing this report and generating the proposals for reform; and in compliance with the provisions of Articles 10 and 118 of the Constitution of Kenya 2010, the Commission has held several consultative meetings with various stakeholders, including:

1) Consultations with the Office of the Registrar of Political Parties on Electoral reform and review of laws regulating political parties.
2) Task force on review of political party primaries in April 2018.
3) County forums with candidates and Political Party Members-March 2019.
4) Parliamentary Caucus Group Engagement-May 2019.
5) Political Parties Dispute Tribunal-June 2019.
6) Civil Society Engagement-June 2019
7) Political Parties Leaders engagement -June 2019.
8) Workshop Discussions on implementation of HCC Petition No. 19 of 2017 Katiba Institute –Vs- IEBC- June, 2019
9) Legal Review of Political Parties Act-Sawela Naivasha- March, 2020
10) Political Party Liaison (PPLC) Engagements.
    - PPLC Meeting-29th January -1st February 2019 in Mombasa to review establishment of County PPLC's.
    - PPLC Meeting held on 13th March 2019 in Nairobi to discuss various PPLC issues.
    - PPLC National Steering Committee pre-election meeting held on 8th April, 2019 in Nairobi
    - National PPLC Plenary Meeting -15th April, 2019 in Nairobi
    - PPLC Steering Committee Meeting- 2nd-5th September 2019 in Nakuru
    - National PPLC Consultative Committee Meeting-11-12th July-Mombasa
    - National PPLC Committee Meeting-17th-19th September 2019 in Kisumu
    - National PPLC Committee Meeting on Party Primaries-20th-21st 2019 September in Kisumu
    - 20th September 2019- The Vic Hotel, Kisumu-Consultative Workshop on Political Parties Primaries Reforms and Strategies for Political Party dispute resolution.
    - 2nd – 5th September 2019 -Eastmark Hotel-PPLC Workshop.
    - 26th November 2019-Brakenhurst Conference, Kiambu to Sigona Golf Club
11) Consultative workshops with Judiciary and the Political Parties Dispute Resolution Tribunal.
    - 28th-31st August 2019- Election Dispute Resolution Workshop at Sawela, Naivasha.
    - 5-6th –December 2019, Election Dispute Resolution Workshop from the lens of the Bar and the Bench at Concorde Hotel Westlands, Nairobi.
12) Meetings with the Commission's external lawyers, Law Society/Judiciary/PPDT/ORPP on Review on Election Petition Management, 5th-6th December 2019
13) Consultations with Parliament on:

- Participation in the law making function of parliament for purposes of review and development of electoral laws 17th-20th March 2019 at Sarova Whitesands, Mombasa :
- Electoral Reform Workshops with JLAC on Referendum Law; Boundary delimitation Law and Election Campaign Financing Act 6th-8th March 2020 at English Point marina, Mombasa.

14) Public Participation/Views and Comments with: Parliament: 13th June 2019 on review of IEBC Act on Appointment of Commissioners.
    - SENATE: 9th July 2020-Webinair on the Constitution of Kenya (Amendment) Bill (Sen. Bills No. 16 of 2019); and the Representation of Special Interests Groups Laws (Amendment) Bill (National Assembly Bills No. 52 of 2019).
    - 24th October 2019 Sitting held at KICC-Shimba Hall on the Independent Electoral and Boundaries Commission (Amendment) (No.3) Bill, 2019; the Elections (Amendment) Bill 2019 (Kenya Gazette Supplement No. 8 (Senate Bills No. 18);the Constitution of Kenya (Amendment) Bill, 2019 (Kenya Gazette Supplement No. 8 (Senate Bills No. 2);the Constitution of Kenya (Amendment) Bill, 2018 (Kenya Gazette Supplement No. 152 (Senate Bills No. 40)and the Constitution of Kenya (Amendment) Bill, 2019 (Kenya Gazette Supplement No. 142 (Senate Bills No. 16).
    - Committee Implementation of the Constitution: 24th June 2020 at main Chamber of Parliament on the Referendum Bill, 2020- Kenya Gazette Supplement No. 71 (National Assembly Bills No. 11); and the Constitution of Kenya (Amendment) (No.5) Bill, 2019-Kenya Gazette Supplement No. 158 (National Assembly Bills No. 67)
    - 20th-30th May 2019-Validation Workshop at Pride Inn Mombasa on Article 100 legislation.
15) Meetings with the State Law Office to discuss the Electoral Law Reform Agenda. 5th March 2020 Roundtable Meeting to discuss issues and challenges undermining discharge of IEBC Mandate.
16) 7th April 2020 Follow-up meeting to detail immediate issues that were to be addressed

3 ELECTORAL SYSTEM

Electoral systems can be equated to the human skeleton in that they provide the structural support around which nations rally in a bid to create institutions of governance. They speak to the desires, culture, strategies and aspirations of people in the pursuit of national goals and objectives.

Article 81 of the Constitution of Kenya 2010 sets out the principles guiding the electoral system in Kenya. The requirements set out therein include the recognition of the citizen's political rights as provided for in Article 38, compliance with the two-third gender principle, fair representation of persons with disabilities, universal suffrage based on the aspiration of fair representation and equality of the vote and lastly, free and fair elections whose ingredients are set out in Sub-Article (e). The mechanisms of implementation of the set principles are contained in the Constitution, the Elections Act Number 24 of 2011 and the County Governments Act Number 17 of 2012.

The dominant electoral system set up in the Constitution is a FPTP system with a small variation in respect of the Presidential seat. Proportional Representation (PR) by way of party list has been applied in respect of special interest seats in the Senate, the National Assembly and the County Assembly. In all other cases, the seat is contested for purely on a FPTP, that is, in respect of single member electoral areas in the Senate (47), National Assembly (290 from each Constituency and 47 County Women Members to the National Assembly) and County Assembly from each of the Wards.

With respect to the Presidential election, a candidate must in addition to garnering a majority of the vote also garner a 50% +1 vote to be achieved by the winner of the presidential race, and at least 25% votes cast in each of more than half of the 47 counties.

While the electoral system as currently set up was the subject of intense negotiations during the writing of the Constitution, recent debate in the country reveals that this discussion is not yet settled. Kenya's democracy is a work in progress. Kenyans are within their right to renegotiate their electoral system and agree on a workable proposal to suit their aspirations and political desires. However, a consideration of a new electoral system should result in certain attributes consistent with best practices such as fairness, simplicity, functionality, ability to address gender, ethnicity and minorities' issues.

It is the failure of the system that led to the violence post the 2007 general election. It demonstrated an internal post-election conflict whose resolution gave rise to external involvement.

3.1 Criteria for Assessing the Electoral Systems

Electoral system designers would basically assess the quality of a proposed electoral system based on one or more of the following criteria:

3.1.1 *Accountability*

Indicative factors for assessing how well an electoral system promotes accountability include responsiveness to public opinion including the ability of the public to dismiss a government.

3.1.2 *Representativeness*

Does the electoral system produce governments that are broadly representative of the voters?

3.1.3 *Fairness*

Indicative factors for assessing performance for this criterion include participants believing that the electoral process is not systematically or in implementation biased against them, and hence they accept election results.

3.1.4 *Equal Rights for Each Voter*

3.1.5 Indicative factors to be considered under this head include that each voter's vote has the same value in the election process.

3.1.6 *Promotion of Relatively Effective and Relatively Accountable Government*

Does the electoral system promote a sufficient stability in government that allows effective management of the state? Does the electoral system also support and compromise with political forces?

3.1.7 *Development of Relatively Strong Parties and Relatively Strong Local Representatives*

Does the electoral system promote the balance between the cohesion of parties and the amount of control voters have over their representatives' actions.

3.1.8 *The system provides accountability through simplicity and a relatively precise reflection of citizens' preferences.*

3.1.9 *How well does the electoral system allow the voters to express their choices precisely in a manner that is simple enough for all voters to understand?*

Electoral systems are a tradeoff between various conflicting principles. No principle singly fulfils the requirements of an ideal electoral system. However to concentrate on satisfying only one principle e.g. the accountability of the elected representatives to voters, will limit the effectiveness of the chosen system. The question as to which principles are more important needs to be determined by reference to each particular country's socio-political environment. There is no single universal electoral system that fits all environments.

No electoral system is neutral. All have a specific political or social bias. The question as to which bias is most acceptable can only be determined in relation to a specific country's circumstances, needs and popular acceptance.

There are major practical issues that should normally be considered when designing an electoral system. An electoral system should: -

a) Ensure a representative parliament;
b) Not be overly complex, so that elections are meaningful and accessible to the average voter;
c) Provide incentives for conciliation, cooperation and mutually beneficial action between political participants;
d) Promote the public's perception of the legitimacy of the parliament and the government;

e) Assist in facilitating stable and efficient government;
f) Promote the accountability of the government, and elected representatives, to the public;
g) Encourage the growth of political parties that are inclusive of a broad range of social groups;
h) Assist in promoting a parliamentary opposition; and
i) Be realistic with regard to a country's financial, technical and administrative practices.

3.2 Reconciling Inherent Contradictions

Choosing or designing an appropriate electoral system is an exercise of reconciling conflicting requirements to the greatest degree possible, for example:

a) Keeping the system simple, yet not being afraid to innovate and understand the capacities of the voting population;
b) Balancing the need for short term solutions against long term stability considerations;
c) Building on past electoral systems without being restricted by their historical parameters; and
d) Not understanding the influence of electoral systems on society, yet recognizing that electoral systems are not a solution to all socio-political problems.

3.3 The Effect of Political Systems

Electoral systems are not passive, neutral factors in the process of choosing representatives. The type of electoral system chosen will have significant effect on issues such as:

a) Consensus or conformation in the legislature and government;
b) Links between the public and their elected representatives;
c) The number of political parties;
d) The internal structure of political parties;
e) The structure, sustainability and functions of election management bodies.

Additionally, the way in which an electoral system deals with the matter of voter representation and the effects it has on other aspects of the social and political process must be taken into account[1].

3.4 IEBC Submissions on the Electoral System

The Commission made submissions on 7th March 2019 to the Building Bridges to Unity Advisory Taskforce and reiterates the same in this report as its recommendations for review of the electoral system. These are:

[1] Election Systems Briefing Paper, Alan Wall, file:///C:/Users/ADMIN/Dropbox/My%20PC%20(ADMIN-PC)/Documents/GLOBAL%20LAW%202/M7R/IEBC%20LEGISLATIVE%20REVIEW/DOCUMENTS%20FOR%20ELECTORAL%20REFORM%20PROCESS/ELECTORAL%20REFORM%20INDEX%20OF%20RESOURCE%20MATERIALS/ELECTORAL%20SYSTEMS%20BIREFING%20PAPER%201.pdf, 17th September 2020, pp 1-6.

a. The electoral system applied in Kenya is principally First Past the Post. This type of electoral system is one in which the voters indicate the candidate of their choice on the ballot, a practice adopted from the colonial regime. It is opined that it is the root cause of the highly divisive nature of Kenyan elections. This gives rise to campaigns that are personality based and ethnically charged leading to a break-down in the social fabric of the country.

b. The First Past the Post systems are used most widely in the world. A little more than half (114, or 54 percent of the total) of the independent states and semi-autonomous territories of the world which have direct parliamentary elections use plurality-majority systems. Another 75 (35 percent) use PR-type systems and the remaining 22 (ten percent) use semi-PR systems, all but two of which are Parallel systems[2]

3.5 Recommendation

1. As the EMB for the Republic of Kenya, the Independent Electoral and Boundaries Commission ("IEBC" or "Commission) is of the opinion that the cure to the current divisive electoral system is to explore other options such as Proportional Representation (PR) and Mixed Member Representation (MMR) models as they are more inclusive and result in fair representation (*For more insight into these systems, kindly refer to Annex One).* The Commission recommends that Parliament should enact legislation to give effect to the two-thirds gender representation rule provided in Article 81 of the Constitution. It is a requirement that the system must ensure that not more than two-thirds of the members of elective bodies should be of the same gender. Article 27 requires legislative and other measures to be taken to implement this principle. Under the current FPTP, it is difficult to realise this Constitutional requirement. Application of MMR and PR with suitable adjustments will result in a more inclusive and representative electoral system

[2] Statistics obtained from the Electoral Knowledge Network, https://aceproject.org/main/english/es/esh.htm. 30th September 2020.

4 ELECTORAL MANAGEMENT BODY IN KENYA

4.1 Introduction

In order for an electoral system to comply with the principle of free and fair elections, it must, in addition to being by secret ballot, be transparent, free from violence, intimidation, improper influence or corruption. It must be administered by an independent body that is impartial, efficient, neutral, accurate and accountable in its conduct of matters concerned with the election cycle. Article 81 (e) (iii) sets out this principle clearly.

4.2 Background of the Electoral Management Body in Kenya

Kenya's EMB has evolved over time and is the result of numerous electoral reforms. The country's first EMB at independence was the Electoral Commission, established under Section 48 of the then Constitution of Kenya, 1963. It was mandated to manage elections and demarcate constituency boundaries,.[3] However, the re- introduction of multi-party politics in 1991 brought a need to establish an autonomous EMB. This led to the Constitution of Kenya Amendment Act, 1991 that established the (ECK).

Following the 2007-2008 post-election violence, the IREC was appointed as part of the 2008 post-election settlement to inquire into the general election held on 27th December 2007.

In its report, it concluded that the institutional legitimacy of the ECK and the public confidence in the professional credibility of its Commissioners and staff had been gravely and irreversibly impaired. It therefore recommended radical reform to the ECK, or the creation of a new EMB composed of a lean policy-making and oversight board, selected through a transparent and inclusive process. The new EMB was to have a properly structured professional secretariat.[4]

This was followed by the Constitution of Kenya (Amendment) Act, No. 10 of 2008 which disbanded the ECK and created IIEC for an interim period of two years, pending the conclusion of the Constitutional review process. The IIEC not only had fewer commissioners than its predecessor, but also commissioners appointed through a competitive process that was tailored to stimulate public trust. The Amendment also created IIBRC whose mandate was to revise the electoral boundaries.

The electoral reforms received fresh impetus following the promulgation of the 2010 Constitution. The new Constitution established the Commission as the EMB.[5] The Commission is established under Article 88 of the Constitution. It is responsible for organizing and conducting referenda and elections to any elective body or office as

[3] The Kenya Independence Act, 1963.
[4] Election Management Bodies in East Africa - A comparative study of the contribution of electoral commissions to the strengthening of democracy; Accessed from https://reliefweb.int/sites/reliefweb.int/files/resources/AfriMAP%20EMB%20East%20Africa%20Text%20WEB.pdf on 30th May, 2020.
[55] Articles 248 - 251 of the Constitution of Kenya, 2010.

established by the Constitution and any other elections as prescribed by an Act of Parliament in Kenya. This was followed by the enactment of the Independent Electoral and Boundaries Commission Act No. 9 of 2011 (IEBC Act)

Like any other Constitutional Commission, IEBC is an independent state organ subject only to the Constitution and not to the direction or control of any person or authority.[6]This institutional independence is also enforced by Section 25(2) of the IEBC Act, which stipulates that every individual member and employee of the Commission shall perform the functions and exercise the powers provided for in the Act, independently and without direction or interference from any state officer, public officer, government organ, political party or candidate, or any other person or organization.

4.3 Functions of the Commission

The functions of the commission can be grouped into three broad categories, based on a typical electoral cycle: pre-election, election and post-election periods. In the pre-election period, the commission is responsible for:

i. The continuous registration of citizens as voters;
ii. The regular revision the voters' roll;
iii. The delimitation of the constituencies and wards;
iv. The regulation the process by which political parties nominate candidates for the elections;
v. The settlement of electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to the declaration of election results;
vi. The registration of candidates for elections;
vii. Voter education;
viii. The facilitation of the observation, monitoring and evaluation of elections;
ix. 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;
x. The development of a code of conduct for candidates and parties contesting elections; and
xi. The monitoring of compliance with legislation required by Article 82(1) (b) of the Constitution relating to nomination of candidates by parties.

During the election period, the Commission is responsible for conduct and supervision of Election Day operations such as voting, counting, verifying results, announcing results, and handling complaints and appeals by candidates. In the post-election period, the

[6]Shumbana Karume, Kenya: The Independent Electoral and Boundaries Commission, The Electoral Knowledge Network, http://aceproject.org/ace-en/topics/em/electoral-management-case-studies/kenya-compromised-independence-of-the-emb/mobile_browsing/onePag.

Commission is responsible for evaluating and auditing its operations, organizational assessment and strengthening and promoting electoral reform.

4.4 Appointment of Commissioners

In addition to the requirements under Article 250 of the Constitution relating to independent commissions, Article 88 sets the basic qualifications for one to be a member of the Commission in that, a person is not eligible for appointment as a member of the Commission if the person has, at any time within the preceding five years, held office, or stood for election as a member of Parliament or of a county assembly; or a member of the governing body of a political party; or holds any State office. Additionally, a member of the Commission shall not hold another public office.

Currently, the Commission comprises of a chairperson and six (6) members supported by a secretariat. The IEBC Act requires that the process of appointment and replacement of the Chairperson or a Member to commence at least six months before the lapse of their term.[7]Section 6 of the said Act, sets out the qualifications of the Chairperson and members of the Commission. For a person to hold the office of the Chairperson, he must be qualified to hold the office of Judge of the Supreme Court while a member of the Commission is required to be a holder of a degree from a recognized university with experience in any of the following fields; electoral matters, management, finance; governance; public administration or law. This is in addition to meeting the requirements of Chapter Six of the Constitution.

4.5 Procedure for Appointment

The First Schedule to the Act provides for the process of appointment of the Chairperson and members of the Commission. The schedule creates a Selection Panel consisting of: four persons nominated by the Parliamentary Service Commission and five persons nominated by religious groups (Kenya Conference of Catholic Bishops, Supreme Council of Kenya Muslims, Evangelical Alliance of Kenya, and Hindu Council of Kenya). Paragraph 3 of the Schedule requires the Selection Panel to commence recruitment within seven days of its appointment.

The Selection Panel selects nine persons qualified to be appointed as members of the Commission and forwards the names to the President for nomination of six persons for appointment. In the case of the Chairperson, the selection panel selects two persons qualified to be appointed as Chairperson and forwards the names to the President who nominates one person for appointment.

Whenever a vacancy occurs the President is required to publish a notice in the Kenya Gazette within 7 days and to appoint a Selection Panel within 14 days.

[7] Section 5 of the Independent Electoral Commission Act No. 9 of 2011.

However, it should be noted that by law the above procedure only applied to the appointment of the Chairperson and members of the Commission in the year 2017 and does not apply to subsequent appointments.

4.6 Quorum in Commission Meetings

The conduct of the business of the Commission is provided in the Second Schedule. With respect to quorum, half the membership is sufficient to enable the carrying out of its activities. Initially Clause 5 of the Schedule provided for a quorum of five members. Parliament amended the Schedule to reduce the number from five to three. However, Mwita J, in *Katiba Institute & 3 others v Attorney General & 2 others [2018] eKLR declared the amendments a nullity finding that* only a majority decision can bind the Commission.

Article 250 (1) of the Constitution provides that each commission shall consist of at least three, but not more than nine, members.

However, in *Isaiah Biwott Kangwony v Independent Electoral & Boundaries Commission & another [2018] eKLR,* the court stated that quorum is a practical issue to be determined by the number of commissioners in office. In conclusion, the Act is deficient in relation to quorum.

4.7 Financing of the Commission

Part III of the IEBC Act provides for financing of the Commission. Although the Constitution in Article 249 (3) obligates Parliament to provide adequate funding to each Commission, the practice has not been rosy. The Commission is currently funded through GJLOS which includes other related arms of government. The proposals from the sector are verified and approved by the National Treasury for submissions to the National Assembly through the Justice and Legal Affairs Committee.

The Act anticipates a single line Treasury Account hosting the IEBC Fund. Despite the Commission having published the Regulations to govern the operationalization of the Fund Account, the Fund has not been operationalized to date.

Generally, Kenya has an EMB that is, by design and in law, intended to be free of undue influence from the executive and other electoral actors; Its commissioners are appointed in a competitive process that is intended to inspire public confidence in the EMB's top leadership; the commissioners have security of tenure and as a constitutional commission, the EMB has operational and functional independence from the Executive. Therefore, the absence of secure and guaranteed funding for IEBC is of particular concern: financial and logistical dependence on the Executive and the Legislature undermines effective completion of critical electoral activities in Kenya.

4.8 Institutional Challenges

i. The Commission is grappling with the issue of vacancies following resignations. The President is required to cause the appointment process for new members in

accordance with the timelines in the IEBC Act. However, he has not yet done so two years since the vacancies arose.

ii. The Government directive in Circular Number 8 of 2018 dated 20th August 2018 directed that all matters concerning the procurement of ICT for all government agencies is to be consolidated under the Ministry of Information, Communication and Technology. This interferes with the functional and operational functions of the Commission.

iii. The Independent Electoral and Boundaries Commission Fund Regulations, 2012 provide the Commission with legitimate means of administering monies accruable to the Commission for purposes of elections. The lack of operationalization of this Fund impedes the Commission from effectively carrying out its mandate. The actualization of this Fund is imperative for operational integrity and efficiency of the Commission.

4.9 Comparative analysis

We have undertaken a comparative analysis on the questions of appointment, composition, funding and operations of selected EMBs within the Commonwealth countries namely the Republic of South Africa, Australia, Canada, and the UK to establish best practices. All the EMBs the Commission studied operate along a dichotomy of a partisan political process and a professional electoral governance and administration process. The level of interaction between these two regimes differs among the countries[8]. The analysis concentrates on the major governance components in the different countries taking into consideration local content and practice, and outlining matters that are deemed beneficial for adoption in the current situation in Kenya. We have picked the salient features, which are presented below.

4.10 EMB in South Africa

In South Africa, the IEC is established by the South Africa Constitution and its independence as an autonomous body is established by the Electoral Commission Act.[9]It comprises of five members, one of whom must be a judge. Members of the IEC are appointed by the President on the recommendation of the National Assembly, following nominations by an inter-party committee. A Commissioner is appointed for a period of seven years unless the President, on the recommendation of the National Assembly, extends the term for a particular period. The IEC appoints the Chief Electoral Officer and he/she functions as the head of administration and is the IEC's accounting officer.[10]

[8] Dr. Paul G. Thomas et al, 'Comparative Assessment Of Central Electoral Agencies: A Report Commissioned By Elections Canada' https://www.elections.ca/res/rec/tech/comp/comp_e.pdf, 28th May 2020.

[9]Constitution of the Republic of SA, Article 190-191; South Africa Electoral Commission Act 51 1996, Section 3(1), (2).

[10] South Africa Electoral Commission Act 51 1996, Sections 7 (1) and 12.

The IEC receives its financial support from parliamentary appropriations.[11] The Chief Electoral Officer being the accounting officer of the IEC is responsible for all accounting and financial record keeping and these accounts and records are audited by the Auditor-General.[12]The IEC is required to submit its audited financial reports to Parliament at the end of each financial year.[13] The accounting related information shall consist of; all monies received or accruing to the Funds; all allocations and payments made; all expenditure arising from the allocation of money from the Funds; and the current record of the capital and liabilities of the Funds during that year.

4.11 The Australian Electoral Commission

The Australian Electoral Commission is established under the Commonwealth Electoral Act of 1918 through substantial amendments in the legislation in 1984 (Section 6 thereof). The Commission consists of a Chairperson who is non-executive and holds office on a part-time basis, the Electoral Commissioner who doubles up as the accountable authority for the Commission/Chief Executive Officer and one other member who is a non-judicial appointee who also holds office on a part-time basis. Thus, the officials of the Commission comprise the Electoral Commissioner, a Deputy Commissioner, an Electoral Officer for every state/territory and the secretariat or staff. There are eleven Commissioners, nine of whom are from the states/territories.

The Governor-General of Australia appoints the Chairperson of the Commission from a list of three eligible Judges submitted to him by the Chief Justice of the Federal Court of Australia. The Commission is considered functional even in the event of one vacancy in its membership.

Section 10 of the Commonwealth Electoral Act provides that a person appointed Commissioner may resign by delivering to the Governor-General a signed notice of resignation. It is envisaged that this presentation of a duly signed notice renders the office of Commissioner vacant. In this case, the Governor-General is duty-bound to appoint, in acting capacity, a person to the office of Chairperson or non-judicial appointee. This acting appointment is triggered by the Governor-General's receipt of a notice of resignation.

4.12 The EMB in Canada

The EMB in Canada is established under the provisions of the Canada Election Act's Section 13 (1). It provides that *"There shall be a Chief Electoral Officer who shall be appointed by resolution of the House of Commons to hold office during good behavior for a term of 10 years.*" The method of appointing the Chief Electoral Officer reflects the search for an appropriate balance. Following consultation with the opposition parties in Parliament, the government forwards to Parliament the name of a nominee for the position. Appointment

[11] *ibid.,,* Section 13.
[12] *ibid.,,* Section 12(2) (b) and 13.
[13] *ibid.,* Section 14.

takes place after a resolution of the House of Commons is passed, a method that differs from that of other officers of Parliament, who are appointed by the Cabinet.

He or she may be removed for cause by the Governor General on address of the Senate and House of Commons." The Chief Electoral Officer is the Chief Executive Officer of the EMB, which is known as Election Canada. In case of the death, incapacity or negligence of the Chief Electoral Officer while Parliament is not sitting, a substitute Chief Electoral Officer shall, on the application of the Minister, be appointed by order of the Chief Justice of Canada or, in the absence of the Chief Justice of Canada, by the senior judge of the Supreme Court of Canada then present in Ottawa. This system does not permit a prolonged vacancy in the Office. The mechanisms exist in the Act to ensure that the Office does not remain vacant at any given time.

The Chief Electoral Officer does not have a Board or Council to report to within the auspices of the organization. He is a unitary head and runs six operational divisions for the purposes of administering its statutory obligations: The Office of the Chief of Staff; Electoral Events; Integrated Services, Policy and Public Affairs; Legal Services, Compliance and Investigations; Political Financing; and Human Resources. These sectors, as they are called, handle all of the agency's various administrative, policies, technical, operational and human resource functions.

Election Canada has adopted a system of funding that has produced sufficient funding for its operations. While based on a two-pronged approach wherein there are annual and statutory allocations, this system is sustainable for the country due to its ample resource base. This system poses a challenge in local application.

The Chief Electoral Officer runs a Secretariat/office and conducts what is generally internationally accepted as the duties of an EMB and is deemed to be independent. Elections Canada is funded by an annual appropriation, which covers the salaries of permanent full-time employees, and by a statutory authority contained in the Canada Elections Act, the Referendum Act and the Electoral Boundaries Readjustment Act, which draws on the Consolidated Revenue Fund. The statutory authority covers all other expenditures, including the cost of preparing and conducting electoral events, maintaining the National Register of Electors, redistribution of electoral districts and continuing public information and education programs. The salary of the Chief Electoral Officer and contributions to employee benefit plans are also statutory items[14]. New Zealand shares the same structure where the Chief Electoral Officer is also the Chief Executive Officer of the country's EMB.

4.13 The EMB in India

India is a constitutional democracy with a parliamentary system of government. The Election Commission of India (ECI) was established under Article 324 of the Constitution of India 1950 The ECI's constitutional authority includes preparing electoral rolls and exercising control over elections to the national Parliament, to the offices of the president

[14]Elections Canada, 'The Electoral System o Canada' https://www.elections.ca/content.aspx?section=res&dir=ces&document=part3&lang=e,27th May 2020.

and vice-president and to state legislatures. The Constitution (in Part XV) also provides for the appointment of commissioners, the conditions of their tenure and removal from office and the availability of staff for the ECI to carry out its functions. If further establishes the primacy of the Chief Election Commissioner [Article 324 (2)] and provides the ECI with the authority needed to carry out its mandate.

The president shall appoint a Chief Election Commissioner and may also determine the number of, and appoint additional, commissioners with relevant expert knowledge. There is no legal requirement to consult with other parties on presidential selections, and, thus far, the advice of opposition parties has not been sought before appointing a new commissioner. Only the prime minister and the government's Council of Ministers provide input into the selection process.

The ECI Secretariat's budget is not a charge on the Consolidated Fund of India, but is a voted allotment approved in Parliament. According to an agreement between the central government and state governments, the Secretariat's administrative expenditures are wholly met through budget grants of the central government's Ministry of Law and Justice. This budget is used for commissioner and staff salaries and the Secretariat's operating expenses, including the cost of some centrally supplied equipment, such as electronic voting machines.

4.14 The EMB in the UK

Before 2001, all elections in the United Kingdom were overseen and coordinated by a central government department called the Home Office, which was led by a Minister of the Crown. However, electoral registration and the running of elections was the responsibility of local authorities. The tradition of local control allowed the diverse circumstances across communities to be recognized, but it also gave rise to inconsistencies in the procedures and standards of electoral administration. The United Kingdom Electoral Commission was established by the Political Parties, Elections and Referendums Act 2000 (PPERA), and in November 2000. In April 2002, the Boundary Committee for England (formerly the Local Government Commission for England) became a statutory committee of the Commission.

Section 1 (3) of this act provides for nine or ten Commissioners who are appointed by Her Majesty the Queen in accordance with Section 3 of the Act. Out of the appointed commissioners, one is selected to be the Chairman of the Commission. The commissioners hold office for a period of ten years[15] They are recruited and nominated by the Speaker's Committee on the Electoral Commission (henceforth referred to simply as the Speaker's Committee), which consists of members of the House of Commons[16]. The principle of a strictly non-partisan commission was changed somewhat by an amendment to the PPERA in 2009, which provided for three of the ten commissioners to be nominees of the largest political parties (Conservative, Labour and Liberal Democrats) and one to be a nominee of

[15] Political Parties, Elections and Referendums Act 2000 of the UK.
[16] *Ibid*.,p 50.

the minor parties represented in the House of Commons[17]. A professionally recruited person then leads the Secretariat of the Commission as Executive Director.

However,there are risks involved in moving to a mixed member commission. The mixed membership of having persons appointed after a rigorous process sitting alongside members fronted by political parties whittles away at the perception of an independent and therefore credible commission.

The EC is directly funded by a vote of Parliament. Its budget is divided into three categories: core funding, event-related costs and policy development grants, which are paid to political parties[18]. Thus, its funding is affected by government-wide budgetary policy.

4.15 Commonalities Cutting Across the Electoral Commissions in the Countries Studied

The study has drawn the following common features in the commissions studied. They are:

i. The Commissions have challenges in securing legislative change necessary to improve and modernize electoral processes. Reviews are often contentious.
ii. The sufficiency of funding is a prime challenge in these Commissions (save for Election Canada) since they have to compete with other government budgetary planning processes. This tends to affect their operations adversely with regard to matters such as maintaining current and complete electoral rolls, as well as in the preparation for and running of elections.
iii. In Cabinet-parliamentary systems, the constitutional principles of ministerial responsibility and the dynamics of power mean that EMBs are basically dependent on government decisions, although some safeguards exist to avoid political interference. One such safeguard is to have two budgets: one is an annual appropriation for its staffing and operating expenses, and it is approved by government and voted by Parliament; and the second is statutory authority to spend the money needed to stage elections and referendums. The practice in Australia, India and New Zealand is for the commissions to negotiate the amount of the annual appropriation with the Treasury or the finance department. In the UK, the Electoral Commission previews its budgetary requirements with the all-party Speaker's Committee before government, and then Parliament approves the budget[19].
iv. The Commissions do not have powers to make regulatory changes on their own (with regard to their core functions).
v. Among the EMBs examined in this study, Elections Canada has the longest history of operation as an independent body led by a professional, impartial administrator. The other countries have all chosen to create multi-member commissions to oversee the electoral process, adopting a variety of different legal, structural and procedural

[17] Section 3A of Political Parties, Elections and Referendums Act 2000.
[18] (n 18), p 54.
[19] Comparative Assessment of Central Electoral Agencies. A Report Commissioned By Elections Canada, p 23, May 2014

arrangements to achieve what is seen in each country as the appropriate balance between independence and professionalism and accountability and responsiveness.

vi. The balance between, on the one hand, independence and professionalism and, on the other, accountability and responsiveness to the political process depends on a number of factors in the governance arrangements: how the mandate of an electoral body is set and modified, how the members of each body are appointed and removed, and how an electoral body obtains its budget and staffing.

vii. Some measure of autonomy in determining the budget and staffing of a commission or agency is often seen as a critical factor in achieving independence. The requirement for an EMB to negotiate its budget with the political executive and/or central budgetary agencies in government runs the risk of underfunding and interference in internal decision-making.

4.16 Recommendations

The Commission upon review of the legal and regulatory framework, and international best practice governing the EMB, proposes the following recommendations:

4.16.1 *Recommendations Relating to Appointment of Commissioners*

2. Amend Section 5 of the IEBC Act on the '*composition and appointment of the Commission*' to reduce the number of Commissioners from seven to five inclusive of the Chairperson. This proposal will increase the efficiency and effectiveness of the Commission and reduces the potential for factionalism within.
3. Amend Section 5 of the IEBC Act to provide that the appointment of Commissioners should be staggered to ensure continuity, institutional memory and succession at the Commission.
4. Amend Section 6 (2) of the IEBC Act to provide:

    a) For one other member of the Commission (other than the Chair) who is qualified to serve as a Judge of the High Court of Kenya. This is important for two reasons. Firstly, from a corporate governance perspective the committees of the Commission report to the Commission in plenary. The Chair of the Commission would then not be in the unenviable position of chairing a committee(s) and then being the same person to receive reports. Secondly, the legal nature of, say, the Legal Reforms, Enforcement of the Electoral Code of Conduct and Compliance and Electoral Dispute Resolution of necessity require stewardship from a legal practitioner.

    b) For one member of the Commission to be a member with expertise in ICT in view of the central role it plays in the electoral process.

    c) Consideration may be given to one member being a Human Resources expert.

5. The proposal by the BBI to introduce political parties in the selection panel for IEBC Commissioners or indeed to allow political parties to directly nominate Commissioners is a claw back the gains made to make the Commission an independent entity. Political party's interests are sufficiently catered for in the

vetting process since the selected Commissioners are approved by the National Assembly.

6. Amend the First Schedule of the IEBC Act to provide that the Selection Panel for the appointment of Commissioners should be altered to accommodate other professionals and other institutions as opposed to the existing one which is predominantly constituted by religious leaders.

4.16.2 *Recommendations on the Question of Quorum in Commission Meetings*

7. Clause 5 of the Second Schedule of the IEBC Act should be amended to provide that the quorum shall be a simple majority of commissioners present and in any case shall adhere to the Constitutional thresholds in Article 250 (1) of the Constitution.

4.16.3 *Recommendation on Financing of the Commission*

8. An amendment to the Constitution in similar terms to Article 173, creating an IEBC Fund to ensure that the appropriation to the Commission is assured and adequate for the proper conduct of electoral processes.

   The IEBC is, by design and in law, intended to be free of undue influence from the executive and other electoral actors. To ensure the EMB has operational independence from government, it is key that the Fund is operationalized as proposed.

4.16.4 *Recommendations on Institutional Challenges*

9. Amend Section 11A of the IEBC Act:
   a) So that the roles and responsibilities of the Chairperson and Commissioners can be delineated from those of the Chief Executive Officer and Commission Secretary. The policy-making remit of the commissioners needs to be clearly delineated and the administrative remit of the secretariat should be outlined in the policy documents of the IEBC.
   b) To define what amounts to oversight by the commission over the secretariat and the parameters thereof.
      i. To separate the roles of the Commission Secretary/Chief Executive Officer(CS/CEO) from those of the Accounting Officer. This would necessitate the creation of a different office which will perform accounting officer responsibilities leaving out the functions reposed in the CS./CEO
      ii. To separate the roles of the CS/CEO from those of the Accounting Officer. This would leave the Secretary/CEO free to attend to matters of the Commission while the other officer (probably to be designated Chief Operations Officer) shall be the Accounting Officer.
10. An amendment by way of introduction of a new section to the Leadership and Integrity Act, Number 19 of 2012 to establish the IEBC as the enforcement / responsible agency with respect to integrity issues in election matters and self-declaration forms to be administered by IEBC for election purposes. Additionally, this amendment would assist in the vetting process of candidates for elective political positions to ensure compliance with the Leadership and Integrity Act and Chapter 6

of the Constitution. Further and related to this, provide for the vetting process to be followed by IEBC.

5 BOUNDARY DELIMITATION

5.1 Introduction

The democratic right of Kenyans to choose their political representatives is espoused in the Constitution which determines three key pillars attendant to this right, namely, universal suffrage based on fair representation and equality of the vote.[20]Article 81 (b) requires that the electoral system should comply with the tenets of fair representation and equality of the vote. Equality of the vote is achieved by ensuring that electoral units are delimited in such a manner that the population in each unit is as uniform as possible. The way electoral units are divided is of significance to both the political class and the voters. It may influence political dynamics of any country and thus there is a high risk of manipulation of electoral boundaries for political gain. Democracies have overtime established their unique ways of shielding the delimitation process from abuse.

As in many countries where majoritarian democracy is practiced, larger groups in Kenya for example, have historically enjoyed a distinct advantage in delimitation of electoral units since the main basis for establishing population units is population sizes. This is commonly referred to as gerrymandering, where constitutional boundaries are intentionally drawn to advantage one political group at the expense of others.[21] It is therefore critical that the legislative framework governing delimitation guards against this eventuality whose effect is to advantage one political segment against the rest.

Boundary delimitation refers to the process of mapping out voting areas or electoral district boundaries. It is necessary to carry out boundary delimitation periodically to curb the negative effects of population inequities. The delimitation of electoral districts is most commonly associated with plurality or majority electoral systems.[22]

The Commission has the sole mandate to define electoral boundaries for constituencies and wards under the Constitution,[23] the IEBC Act[24] and the County Governments Act No.17 of 2012.[25]

5.2 Guiding Principles

Equality of the vote denotes equality in the weight of every voter's vote so as to ensure effective representation.[26] To ensure equality, an electoral system must define electoral units that allow voters to elect representatives whom they feel will adequately and effectively

[20] Article 81 (d) of the Constitution of Kenya.
[21] Open Election Data Initiative, 'Key Election processes: Electoral Boundaries (Districts),' Available at https://openelectiondata.net/en/guide/key-categories/electoral-coundaries/ Accessed on 26th May 2020.
[22] International Foundation for Electoral Systems, 'Electoral Systems and Delimitation of Constituencies', Available at https://www.ifes.org/publications/electoral-systems-and-delimitation-constituencies
[23] Art. 88 (c) of the Constitution of Kenya 2010.
[24] Section 4 Independent Electoral and Boundaries Commission Act No. 9 of 2011.
[25] Section 26 (3) County Government Act No.17 of 2012.
[26] International IDEA, 2002 *International Electoral Standards: Guidelines for reviewing the legal framework of elections.*

advocate for their common aspirations. The process of delimitation of boundaries is guided by the principles of:

i. Representativeness – electoral units should be determined on the basis of community of interest, physical or administrative boundaries, ethnic and cultural backgrounds[27];
ii. Equality of voting strength – the vote of every voter should be equal in weight to other voters' who cast their ballots for the same representative or party.[28] Voter equality in this context implies that each voter's vote has an equal chance of influencing the outcome of an electoral process as another voter's vote.[29]
iii. Reciprocity and non-discrimination – electoral units should be defined in a way that each unit has approximately the same population to ensure equal suffrage. In this regard, the process should be non-partisan and equitable.[30]

In determining constituency boundaries, the Commission should ensure that the inhabitants of the constituency is equal to the population quota to the best extent possible taking into account geographical features and urban centres, community of interest, historical, economic and cultural ties and means of communication[31]. Population quota represents the number of citizens in Kenya as determined by the most recent national census results[32] against the number of constituencies and wards.[33]

The Constitution determines the number of constituencies to be two hundred and ninety while the County Government Act determines the number of wards in every county to be not more than one thousand four hundred and fifty. Consequently, these are the number of seats available for contention by candidates and political parties.

5.3 Comparative Analysis

To establish international best practices with respect to parameters to be considered in boundary delimitation, the Commission undertook a comparative analysis of the practice, principles and parameters in the following countries; UK, USA, Ghana and Germany.

5.4 The UK

The UK is a Common Law jurisdiction comprising of four countries Scotland, Wales, Northern Ireland and England. Parliaments of the respective countries however report to the English Parliament at Westminster which retains the overall power over the State. Even though the countries are not independent, Parliaments of the different countries have the power to pass primary legislation relating to their specific countries. It follows that each

[27] *ibid.*
[28] Pukelsheim, Freidrich, (2017) *Proportional Representation: Apportionment methods and their applications* 2nd Ed.
[29] Still, Jonathan W. "Political Equality and Election Systems." *Ethics*, vol. 91, no. 3, 1981, pp. 375–394. *JSTOR*, www.jstor.org/stable/2380792. Accessed 27 May 2020.
[30] International IDEA, 2002 *International Electoral Standards: Guidelines for reviewing the legal framework of elections.*
[31] Article 89 (2) (3) & (5) of the Constitution of Kenya 2010.
[32] Section 36 (2) (d) (iii) Independent Electoral and Boundaries Commission Act No. 9 of 2011.
[33] Article 89 (12) of the Constitution of Kenya 2010.

country has an independent boundary commission charged with reviewing constituency boundaries[34] with the effect of redistributing voter population.

The UK redistribution strategy has remained largely unchanged with minor alterations since after the Second World War when the war-time coalition government established a committee[35] to consider various aspects of the electoral system and principles of redistribution. The committee came up with principles for redistribution which guide the process to date commonly known as Vivian Committee Recommendations for Redistribution and they include:

i. The need for a quota constituency;

ii. The need for a limit toleration;

iii. The need for continuity of constituencies; and

iv. The need for constituencies to conform to local government boundaries.

There are special considerations that ultimately determine the success or otherwise of the delimitation process. These conditions facilitate the efficient delimitation of boundaries and are specific to certain aspects of the process. They are: -

Authority for delimiting voting areas

In the UK, as earlier on discussed, each country has a separate and independent Boundary Commission responsible for determining boundaries of constituencies for elections to the House of Commons and respective house. The Speaker of the House of Commons, who is an ex-officio member and chairs each Commission, is deputized by a Judge who then takes charge of the Commission's activities. Each Commission has a total of four members. The authority that is mandated to conduct delimitation should be as autonomous as possible. This autonomy is achieved by the state granting the authority the freedom to exercise their mandate with the least control. The four members of the commission are appointed by the Crown and shall cease to hold office if they take up any political role or office. The Commission shall not be regarded as an agent of the Crown or holding property on behalf of the Crown[36]. These measures reinforce the independence of the commission because their work directly impacts the political class and the influence thereof.

Criteria for boundary delimitation.

This describes the principles that guide the manner and determination of how delimitation shall be done. It begins with the calculation of the population quota which is the result of dividing the total population by the total number of constituencies. The Second Schedule[37] of the Parliamentary Voting System and Constituencies Act places the total number of

[34]Parliamentary Constituencies Act, 1986 (c.56), S.2 retrieved from legislation.gov.uk.
[35] Handley, L., Grace, J., Schrott, P., Boneo, H., Jonston, R., Maley, M., Watson, P. (2006). Delimination Equity Project. London: Chatham House Publishers.
[36]Political Parties, Elections and Referendum's Act, 2000 (c. 41) Schedule 1 Clause 1.
[37]Parliamentary Voting System and Constituencies Act 2011 (c.1) Schedule 2 Clause 1.

constituencies in the UK at six hundred and stipulates the manner of calculating the population quota.

Clause 2 of the Second Schedule permits a constituency electorate variation of 5% below or above the calculated population quota. This is a very intentional move to equalize the worth of every single vote in the UK regardless of where it was cast. The provision on permissible variation does not include protected constituencies[38] and constituencies with an area of more than twelve thousand square kilometers and those that satisfy the Commission that such compliance is not reasonably possible[39].

Clause 5 of the second Schedule lists the factors that may form the criteria for the Commission to redistribute constituencies. These factors include;

1. Geographical factors such as the size, shape and accessibility;
2. Most recent local government boundaries as used in the last council elections;
3. Existing constituency boundaries;
4. Local ties that might be affected by boundary review and
5. Consequences attendant on the adoption of the review.

Section 10 of the Parliamentary Voting System and Constituencies Act 2011[40] places a duty on the Commission to submit reports periodically, being before 1st October of every fifth year after 1st October 2013. In the past, these boundary reviews would take five years before Members of Parliament raised concerns over redistributing constituency boundaries just after formation. This saw the amendment of the Redistribution Act of 1958 extending time for reviews between eight to twelve years[41]. This is because voting population always has new entrants each and every year. If the delimitation process were to take inordinately long, the intended equality in the worth of different votes would be watered down substantially.

Each of the four commissions decides when to initiate the periodic review and announces its intentions. The commission calculates its electoral population quota using data from an agreed election date known as the "qualifying date". The Commission then comes up with an 'entitled' number of seats which can either be merged or further divided if the results are smaller units relative to the quota and contiguous units for greater quality of governance, or larger than the quota respectively. The Commission comes up with a number of optional schemes for constituencies using local government unit boundaries as blocks.

[38]Parliamentary Voting System and Constituencies Act 2011 (c.1) Schedule 2 Clause 6.
[39]Parliamentary Voting System and Constituencies Act 2011 (c.1) Schedule 2 Clause 4(2).
[40] Retrieved from retrieved from legislation.gov.uk.
[41] Handley, L., Grace, J., Schrott, P., Boneo, H., Jonston, R., Maley, M., . . . Watson, P. (2006). 'Delimination Equity Project'. London: Chatham House Publishers.

5.5 The USA

Boundaries delimitation in the USA is referred to as redistricting. It is the process in which each state creates new electoral districts corresponding to how many seats in the House of Representatives it receives. One of the most basic aspirations of the American Constitution is the principle of equality, the notion that in a free and democratic society, no person or class of persons is to be favored over another.[42] District lines are redrawn every 10 years following the completion of the USA census.

The United States adopted the federal system of government and redistricting is done at each of levels established. This categorizes the districts into two, namely:

i) Congressional districts
ii) State Legislative districts

In apportioning Congressional districts, Article 1, Section 2 of the United States Constitution requires that all districts be as nearly equal in population as possible.[43] These means that if two districts are each electing one seat in parliament, the districts should have a similar numbers of voters so that all voters have a fair say in who governs them.

There are 435 seats in the Unites States House of Representatives. Each state's representation in the House of Representative is based on its population.[44] Therefore, the representation is proportional in that, a state may gain seats in the House if its population grows or lose seats if its population decreases, relative to population in other states. For instance, the State of Pennsylvania had 19 seats after the 2000 census but due to reduction in population the seats were reduced to 18 in 2010 while Florida got two more seats as a result of population increase.[45]

Every state gets at least one seat, then states with higher populations get additional seats. After each state gets one seat, the states are ranked in order of priority to get additional seat based on the Equal proportions formula. The goal is to get every seat to represent the same number of people as far as possible.

With respect to State Legislative districts it is worth noting that the states are allowed to adopt their own redistricting criteria and they vary from state to state. All the same, states must comply with the federal constitutional requirements related to population and non-discrimination. Thus each legislator represents approximately the same number of people.[46]

The redistricting can be done by either of the following entities:[47]

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[42]Leyle Denniston, 'Constitution Check: How Can Voter Equality Be Made A Reality', 2015 Available at http://constitutioncenter.org/blog/constitution-check-how-can-voter-equality-be-made-a-reality Accessed on 26th May 2020.
[43] The Constitution of the United States of America 1787, Article 1 Section 2.
[44] 14th Amendment to the Constitution of the United States of America, 1873.
[45] United States Census Bureau, Congressional Apportionment, 2011.
[46] William Earl Maxwell et al. 'Texas Politics Today, Cengage Learning, 2010.
[47] Available at https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting.

i) State Legislatures

In most cases the legislature passes redistricting plans as regular legislation. Some seek the assistance of advisory commissions, which draw the maps, and then the legislature has the final say in approving them by using majority or supermajority vote. In some states these plans are subject to gubernatorial veto.

ii) Commissions

Some states use independent Commissions which are composed of members who are neither public officials nor current law makers and are selected by an independent entity after thorough screening. The commissioners are responsible for drawing and approving the final maps.

Other states use political commissions which are comprised of elected officials or politically appointed persons. Backup commissions are used by some states when the legislature is deadlocked or when the governor vetoes the proposal.

The United States is unique in its adherence to the doctrine of equal population. No other country requires deviations as minimal as the "one person, one vote" standard that has been imposed by U.S. courts since the early 1960s. [48]In the 1983 court case *Karcher v. Daggett*,[49] the U.S. Supreme Court held that there is no point at which population deviations in a congressional redistricting plan can be considered inconsequential.

The United States is strongly committed to individual rights, so perhaps it is not surprising that it developed the strictest population deviation standards of any country using single-member districts.[50] Canada, like the United States of America, uses the population quotient in determining its electoral unit boundaries[51]

5.6 Ghana

The Electoral Commission of Ghana (ECG) has the Constitutional duty and authority to determine the number of single member constituencies and demarcate their boundaries under Article 47 of the Constitution.[52] The principles underlying the demarcation of boundaries are also established in the Constitution according to which each constituency should be located in a single region and the population of a single constituency should be as equal as possible but with geographic and demographic considerations provided for.

There is no set number of constituencies under the Constitution, which then allows the Electoral Commission the liberty to determine the number thereof based on the population of the country against the number of constituencies available taking into account means of communication, geographical features, density of population and area and boundaries of

[48] Ace, Electoral Knowledge Network, 'Boundary Delimitation', Available at https://aceproject.org/main/english/bd/bdb05a.htm
[49] 462, U.S. 725.
[50] Supra (n.11).
[51] The procedure is guided by Section 5 of the Constitution of Canada and Sections 3, 9 (2) and 15 of the Electoral Boundaries Readjustment Act. For a further in-depth appreciation of this, kindly refer to the mentioned statutes in the Index of the Report.
[52]Constitution of Ghana, 1992, Article 47.

the regions and other administrative or traditional areas.[53] Electoral units are reviewed at intervals of not less than seven years, or within twelve months after the publication of the enumerated results of a population census.[54]

Article 48 provides that Appeals from decisions of Commission in respect of a demarcation of a boundary are filed to a tribunal consisting of three persons appointed by the Chief Justice; and the Electoral Commission shall give effect to the decision of the tribunal. Subsequently, if a person aggrieved by a decision of the tribunal may appeal to the Court of Appeal whose decision on the matter shall be final.[55]

The comparative analysis above establishes other key parameters for boundary review apart from population size and thus the Commission emphasizes the importance of implementing other criteria under Article 89(5) of the Constitution together with the consideration of population size.

5.7 Recommendations

11. The Commission through the stakeholder engagement and proposals submitted to it therein recommends that the delimitation of boundaries should be customized to encompass parameters other than marginal quotient of populations in the spirit of Articles 88 (3) (c) and 89 of the Constitution. This will ensure that every voter within each electoral unit not only exercises their right to suffrage but also that the weight of their vote is equal to that of another voter casting their ballot for the same seat in the electoral contest. Though the margin of deviation from the quota provided for in Article 89 is a product of a contested past, it may be prudent to narrow that margin in order to ensure the votes of all Kenyans are treated equally. Parliament should provide a framework for the progressive implementation of the constitutional imperative in this direction.

12. The Commission recommends that Section 26 (3) (a) of the County Government's Act should be repealed having been declared unconstitutional in the case of *Rishad Hamid Ahmed &Anor v Independent Electoral and Boundaries Commission* for usurping the Commission's discretion to determine and review boundaries of the County Assembly Wards as mandated by Article 89(7) of the Constitution and premised on parameters stated in Article 89 (5) thereof.

[53] Article 47 (4) Constitution of Ghana, 1992.
[54] Article 47 (5) Constitution of Ghana, 1992.
[55] Article 48 Constitution of Ghana, 1992.

6 REGULATION OF POLITICAL PARTIES

6.1 Introduction

The Political Parties Act, Number 11 of 2011 defines a political party as an association of persons, the primary object of which is to secure the election of one or more of its members to an office in the Executive or a legislative assembly.[56]

The Constitution provides that every citizen has a right to be involved in the formation of political parties and a right to participate in the activities of political parties.[57] Political parties in Kenya are required to have: a national character; a democratically elected governing body; to promote national unity; to advance democratic principles of good governance; to promote democracy through regular, fair and free elections within the party; to promote respect for every person's right to participate in the political process, including minorities and marginalized groups; to promote human rights and fundamental freedoms, and gender equality and equity; to promote of the objects and principles of the Constitution and the rule of law; and to require subscription to and the observance of the code of conduct for political parties.[58]

The objectives of political parties in Kenya should not be rooted in any of the following: advocacy of hatred founded on a religious, linguistic, racial, ethnic, gender or regional basis; encouragement of violence by, or intimidation of, its members, supporters, opponents or any other person; establishment or maintenance of a paramilitary force, militia or similar organization; bribery or other forms of corruption and except as is provided under the Constitution or by an Act of Parliament.[59]

Parliament enacted[60] the Political Parties Act, which provides for the formation of Political parties, requirements of political parties, registration, deregistration, membership and organization, rights and privileges of political parties, funding of political parties, and offences, prescription of their code of conduct and the establishment of the National Consultative Forum. It also establishes the ORPP, as a state office responsible for registration, regulation, monitoring, investigation and supervision of political parties to ensure compliance with the Act.[61]

6.2 Character and Funding of Political Parties

Political parties are valuable and essential institutions of modern democracy. They serve as a point of reference to their supporters and voters, giving people a key to interpreting the

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[56] Section 2 of the Political Parties Finance Act of Zimbabwe (Chapter 2:11), 2002 <https://zimlii.org/zw/legislation/num-act/2001/4/POLITICAL_PARTIES_ACT_2_11.pdf> accessed on 28th May, 2020.
[57] Article 38 of the Constitution of Kenya, 2010.
[58] Article 91(1)(a)–(h) of the Constitution of Kenya, 2010.
[59] Article 91 (2) (a)-(e) of the Constitution of Kenya, 2010.
[60] Article 92, Constitution of Kenya, 2010.
[61] The Post Election Evaluation Report for the August 8, 2017 General Election and October 26, 2017 Fresh Presidential Election, p. 3, <https://www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf> accessed on 27th May, 2020.

complicated political world.[62] Political parties are the core foundation of the democratic political systems.[63] They enable the people to exercise their sovereign power through their democratically elected representatives.[64] Political parties are private entities whose internal affairs and external activities are subjected to government regulation due to the necessary, special and indispensable role they play in representative democracies. In view of that critical role, some countries have deemed it prudent to provide government funding.

We shall proceed to consider a few aspects in relation to political parties, notably; the administration of the political parties' fund, the nomination of candidates, the inclusivity of marginalized groups in political parties and the multiple dispute resolution avenues available to resolve electoral disputes.

6.3 Challenges in Regulation of Political Parties

1. There is a conflict of interest inherent in Section 31 (2) of the Elections Act No. 24 of 2011 wherein the Commission is expected to conduct and supervise party primaries at the behest of political parties on the one part, and act as arbiter to those very disputes under the provisions of Section 74 (1) of the Act.
2. Under Section 31 (2D) of the Elections Act, it is provided that a candidate for a presidential, parliamentary or county election shall be selected by persons who are members of the respective political parties and whose names appear on the party membership list as submitted to the Commission under section 28. A number of political parties do not strictly adhere to this provision as persons other than members of the respective political party participate in the primaries.
3. Party membership lists are required to be submitted to the Commission under Section 28 of the Elections Act for purposes of managing party primaries and nominations. The ORPP on the other hand is the custodian of the Political Party Membership Lists continuously updating and verifying them for compliance. Equally ceased of mandate to confirm that independent candidates are not members of any political party. To undertake the verification, the ORPP uses the party membership list in its custody. The commission's experience is that these lists are often incongruent. It is imperative that the lists are sourced from the ORPP for purposes consistency. (The same applies to Nomination Rules submitted to the Commission under Section 27 of the Elections Act).
4. Section 28 (2) of the Elections Act requires the Commission to publicize the membership lists as received from political parties. However, it is unable to independently verify the accuracy of the lists submitted for publication.

6.4 Recommendations

To better regulate the political party space in Kenya, the Commission proposes:

[62] Political Parties to be Funded by the State by Centre For Governance and Development (CGD) Issue 01/03 March 2005 <https://www.ndi.org/sites/default/files/1881_ke_cgdpolicybrief_5.pdf> 25th May, 2020

[64] Article 1(2), Constitution of Kenya.

13. An amendment to Sections 27 and 28 of the Elections Act to require the Commission to receive Political Party Membership Lists and Nomination Rules from ORPP to ensure consistency and authenticity.

14. An amendment to Sections 13 and 31 (2D) of the Elections Act compel political parties to conduct primaries using the political party membership registers.

15. Delete Sections 31(2E) and (2F) of the Political Parties Act to remove mandate of Commission to conduct party primaries.

7 ELECTIONS BY WAY OF PARTY LIST

7.1 Introduction

Elections by way of party lists are a new phenomenon introduced by the Constitution. Being an election, the guiding principles for the electoral system contained in Article 81 of the Constitution apply. These include the requirement that the election be free and fair[65] transparent, be conducted by secret ballot, is free from violence, intimidation, improper influence, corruption, and is administered in an impartial, neutral, efficient, accurate and accountable manner.

Proportional representation as envisaged under Article 90 of the Constitution of Kenya 2010 requires elections by way of Party list for the seats in Parliament established under Articles 97(1) (c) and 98 (1) (b)(c) & (d) and for the members of County Assemblies under article 177(1)(b) and (c).

The Elections Act is the substantive legislation governing the nomination of party list members, timelines for submission of the party list, allocation and reallocation of special seats from party list and settlement of disputes[66]. The Political Parties Act[67] under section 19 gives political parties autonomy to nominate candidates to political party lists. The Elections (General) Regulations, 2012 together with the Elections (General) (Amendment) Regulations, 2017[68] provide for guidelines on the conduct of nomination of members to the party list. Further, the Elections (Party Primaries and Party Lists) Regulations, 2017[69] offers a guide in the conduct of party primaries and nomination of party lists.

The Elections (Party List and Party Primaries) Regulations 2017 provides a definition of a "party list" and read together with provisions under Article 90 of the Constitution and Elections Act proceeds to provide a description of how a party list should appear like, its contents and the manner and time of presentation to the Commission. The High Court in *Marthlida Auma Oloo v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR* described a party list to be: the members contemplated under these provisions

[65] Article 81 (e) of the Constitution of Kenya.
[66] Sections 34 -37 and 74.
[67] The Political Parties Act No. 11 of 2011.
[68] Legal Notice No. 72.
[69] Legal Notice No. 69.

of the law Article 90 (and 177 (b) (c). In respect of Members of a County Assembly nominations are made by political parties proportionately to the number of seats garnered in a ward election. Those members can only be 'drawn' from a list which is prepared by the political party, presented to the Commission and eventually published in the Kenya Gazette by IEBC. That list is what is referred to as 'the party list"[70].

7.2 Submission of Party Lists

The process of submission of party lists by political parties is often marred with fraudulent and incessant last-minute changes leading to inconsistencies[71]. This process is left to the autonomy of each political party and the Commission cannot interfere with the priority within the list as identified by the political. In *Moses Mwicigi & 14 Others vs IEBC Election Petition No. 1 of 2015,* the Court held that the role of the Commission is to receive the list in question and process it in accordance with the Act. The role of the Commission is limited to ensuring the persons appearing on the submitted party list are duly qualified for election and does not therefore extend to directing the manner in which the lists are to be prepared.

Further, the ambiguities in the law governing political party lists do not provide for additional time for the Commission to review post-submission amended party lists[72] to determine actual compliance with the prescribed guidelines. In light of these few highlights, there is a need to re-look the dispute resolution process.

7.3 Review of Party Lists

Section 34 (6A) of the Elections Act, obligates the Commission to review a party list to ensure compliance with the Constitution and the Act before publishing it and may require the political party to amend the party list. The published list is final and cannot be altered after elections. The sole responsibility of the Commission with regard to review of party lists is to confirm that the candidates proposed are qualified to be elected. In ascertaining the qualification of the candidates, the party list submitted must be in compliance with the constitution and nomination rules of that particular political party[73] and that the candidates meet the statutory and constitutional threshold to be elected into office. Candidates should be registered voters and satisfy all educational, moral and ethical requirements. Further, the candidates must be members of the political party submitting the list. The Commission is also required to confirm that the list submitted alternates male and female candidates in the priority in which they are listed and the lists submitted for purposes of Article 177 (1) (c) shall prioritize persons with disability, youth and marginalized group[74]

[70] http://kenyalaw.org/caselaw/cases/view/153468/http://kenyalaw.org/caselaw/cases/view/153468/
[71] Independent Electoral and Boundaries Commission, Post-Election Evaluation Report for the August 8, 2017 general election and October 26, 2017 fresh presidential election.
[72] *Supra.*, note 27.
[73] Section 34 (5) of the Elections Act No. 24 of 2011.
[74] Section 25 (1) (a) (b), 36 (2) and 36 (3) of the Elections Act No. 24 of 2011.

7.4 Publication of Party Lists

Publication of party lists is meant to allow persons who are dissatisfied with the list to invoke the dispute resolution process provided for under Article 88(4) (e) of the Constitution, as read with section 74 of the Elections Act. The High Court in *National Gender and Equality Commission versus IEBC and Another (2013)* Constitution Petition No. 147 of 2013 held that failure by the Commission to publish the party lists denied the public an opportunity to challenge the list submitted by the political parties.

The law is silent on what constitutes final party lists given that parties affected by disputes are required to submit amended lists after the completion of the dispute resolution process. Electoral laws do not anticipate publication of Party Lists after invoking Regulation 54(8) of the Elections (General) Regulations, 2012 on dispute resolution.

7.5 Allocation of Special Seats

Composition of the marginalized group party list as envisaged under section 36(1) of the Elections Act requires the party list to contain eight (8) candidates at least two (2) of whom shall be persons with disability, two (2) shall be the youth and two (2) shall be persons representing a marginalized group.

However, during allocation of special seats, Section 36(8) requires the IEBC to draw from the list four special seat members in the order given by the Political Party. The silence of Article 177 (1) (c) of the Constitution and Sections 36(1) (f) and 36(3) of the Elections Act means that the order of priority of these categories is left to the discretion of the political parties and the allocation would be based on the order submitted by the parties. Clarity is thus needed on the determination of ethnic minorities in the context of the elections. Absence of laws giving effect to Article 100 of the Constitution gives political parties autonomy in the determination of regional diversity and representation of marginalized groups.

Further, unlike the county assemblies[75], where the two-third gender rule has been met, the Constitution does not provide a clear means through which the gender rule can be complied with in respect to Parliamentary positions.

7.6 Party List Formula

The formula for allocation of special seats contained in Regulation 56 of the Elections (General) Regulations is not exhaustive in terms of indicating the procedure to be used in the event there is a tie in the allocation of seats among qualifying political parties.

[75] Article 175 (c) of the Constitution of Kenya 2010.

7.7 Hare Quota

Though there are many formulae developed by electoral experts. Currently IEBC has used the Hare Quota principle as informed by international best practice[76]. This is a formula that calculates the total number of valid votes divided by the number of seats at stake in a constituency. The denominator is the number of seats contested. This is a formula under the Single Transferable Vote (STV) and the largest remainder method for party list proportional representation[77]. This formula is more beneficial for smaller parties and diminishes the supremacy of larger parties.

To illustrate, using the above example of an election with 4 party lists, 176 total votes and 8 seats to be filled, we see that the quota is 22 (176 / 8). Next, we divide the number of votes won by each party by the quota, which will give us a number to two decimal places for each party:

- List 1 = 85/22 = 3.86
- List 2 = 35/22 = 1.59
- List 3 = 44/22 = 2.00
- List 4 = 12/22 = 0.54[78]

Each party list is then awarded the number of seats corresponding to the integer part of this calculation.

7.7.1 *Droop (or Hagenbach-Bischoff) Quota*

This formula calculates the total number of valid votes divided by the number of seats plus one. This is a formula adopted by South Africa. This is also a variant of the single transferable vote system[79]. The Droop quota is used to determine the minimum number of votes that an individual candidate must get in order to be awarded a seat. Any votes a candidate receives above the quota are transferred to another candidate[80]. By way of illustration, should the party list have 5 candidates ranked in order of first choice i.e. from 1 to 5, then, the allocation of seats is pegged on the first candidate to reach the Droop quota. Subsequently, the surplus votes are then transferred to the next-choice candidate[81]

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[76] Independent Electoral and Boundaries Commission, 'Post-Election Evaluation Report for the August 8, 2017 general election and October 26, 2017 fresh presidential election.'

[77] L van Eck, SE Visagie and HC de KockFairness of seat allocation methods in proportional representation Volume 21 (2), pp. 93–110 http://www.orssa.org.za.

[78] *Ibid.*

[79] Jonathan Lundell& I.D. Hill, Notes on the Droop Quota, Voting Matter, Issue 24 http://www.votingmatters.org.uk/ISSUE24/I24P2.pdf.

[80] https://www.fairvote.org/

[81] Charles King, Electoral Sytems, GeorgeTown University, https://faculty.georgetown.edu/

7.8 Imperiali formula

This formula allows an electoral body to divide the total popular vote by the number of seats plus two[82]. This modification increases the legislative representation of small parties but leads to a greater distortion of the proportional ideal. Prior to 1994 Italy used this special variant of the greatest-remainder formula.[83].

7.9 Comparatives across the world

The Commission explored international best practices with respect to party lists and undertook a comparative analysis of the practice, principles and parameters in the following countries; Germany and South Africa.

7.10 Germany

Germany's electoral system is two-fold; that is, election of constituency candidates (first votes) and proportional representation on the basis of votes for the parties' *Land* lists (second votes)[84]. Accordingly, each voter casts two votes; first vote, allows voters to elect their local representatives to Bundestag from the constituencies and the second vote is cast for a party list that determines the relative strengths of the parties represented in the Bundestag. These votes are converted into seats and the calculation of these seats is in two tiers;

a) The number of seats to be allocated to each *Land* is calculated, based on the proportion of the German population living in a *Land* (in the Kenyan context that is similar to a constituency). Then the seats in each *Land* are allocated to the party lists in that Land, based on the proportion of second votes each party received; and
b) The minimum number of seats for each party at federal level is then determined by calculating, for each party *Land* list, the number of constituency seats it won on the basis of the first votes, as well as the number of seats to which it is entitled on the basis of the second votes.

The party list seats are distributed based on a party's percentage of the popular vote i.e. if a party wins ten (10) percent of the popular vote; it receives ten (10) percent of the seats at Bundestag[85].

7.11 South Africa

South Africa employs a closed-list proportional representation system, allocating seats in direct proportion to the number of votes a party received. In South Africa's national

[82] Supra note 33.
[83] Roger Gibbin, Paul David Webb, Heinz Eulau, Elections https://www.britannica.com/topic/election-political-science/Plurality-and-majority-systems#ref416875.
[84]DeutscherBandestag, Election of Members of the German Bundestag, 2013. https://www.bundestag.de/en/parliament/elections/electionresults/election_mp-245694
[85] The Electoral Knowledge Network, "Germany: Delimiting Districts on a Mixed Member Proportional Electoral System" http://aceproject.org/ace-en/topics/bd/annex/bdy/bdy_de/mobile_browsing/onePag

elections, citizens cast a vote for a single party of their choice; the country is divided into ten (10) large multi-member district regions: nine (9) corresponding to the nine (9) provinces (with a total magnitude of 200 seats, ranging from 5 to 48 seats in each region)86, and one (1) national district for the country as a whole (with a magnitude of 200 seats).

7.12 Operational Challenges in Conducting Party List Elections in Kenya

1. Limited time for uploading lists by political parties.
2. System down time owing to enhanced much activity at the same time by many parties.
3. Irregular and unauthorized changes in lists during upload by Political Party Officers authorized to upload the lists.
4. Incessant changes to the lists through the system once uploaded resulting in differences between the lists uploaded electronically and those earlier submitted physically.
5. The law is ambiguous on what constitutes 'final party lists' given that parties affected by disputes are then required to submit amended lists after the dispute resolution process, leading to incessant requests from Political Party to the Commission on amendments to the lists resulting in inconsistencies.
6. The Electoral laws do not anticipate publication of Party Lists after invoking Regulation 54(8) of the Elections (General) Regulations, 2012 on dispute resolution.

7.13 Recommendations

16. Each political party is required to formulate their own nomination rules. To this end, the rules vary from party to party, lacking in uniformity and in some instances leading to discrimination. It would thus be prudent to review the Political Parties Act to develop standard political party nomination rules to avoid inconsistencies;
17. On the backdrop of Article 100 of the Constitution on promoting marginalized groups, Parliament should enact legislation to govern representation of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities.
18. Allocation of party list seats needs regulations that clearly define a formula of proportional representation of these special seats in the interest of transparency and accountability;
19. Review of Regulations 54(8) of the Elections (General) Regulations 2012 on dispute resolution to provide delineation between publication of the first list and the second list after the dispute resolution processes and to provide delineation between publication of the first list and the second list after the dispute resolution processes.

[86]https://www.gov.za/documents/download.php?f=210704.

20. Review of processes post-dispute resolution to provide for a mechanism and period of reviewing lists to ensure compliance with court orders without re-opening a series of disputes by aggrieved persons noting that party list processes are required to be completed before the date of the general elections.
21. Upon receipt of the party lists, the Commission is required to either issue certificates of compliance to political parties or require the parties to review the lists to ensure compliance failing which the Commission shall reject the list. Given the significance of the provisions of Section 34 (6A) of the Elections Act, it is worth noting that the laws do not provide for a subsequent period of review post-submission of the amended party lists to determine actual compliance with the prescribed guidelines.
22. Noting that a party's leadership cannot vouch for details submitted through the CRMS save for the fact that they have authorized their officers to upload the said information, there is need to have a control function introduced in the CRMS to ensure that either the chairperson or the secretary general has rights to approve the information uploaded to the system before submission to the Commission.
23. The process of physical submission to be reviewed to ensure that it is the role of either the party chairperson or the secretary general to submit the hard copy report generated from the CRMS to the Commission. These checks and balances will ensure that the list is not manipulated by elements within the political party.
24. Review of Section 34(6A) of the Elections Act to provide for further vetting of lists after publication where disputes have been heard and decisions issued that alters the party list.
25. Legislative reform agenda that seeks to subject the Hare Quota principle to public scrutiny and have it legislated in the interest of transparency in the Commission's processes. A greater understanding of the application of the formula will also decrease the number of election petitions filed challenging the Commission's decisions.
26. Review the law on mandate of the Commission to address errors in Gazettement of nominees on allocated seats by way of corrigendum against positions taken by court that upon Gazettement, allocation is complete and the Commission is *functus officio (Constitutional Petition No 456 Of 2017 RahmaIssak Ibrahim v Independent Electoral & Boundary Commission & 2 others [2017] EkIr).*
27. Review of the law to address existing ambiguities, flaws and inconsistencies in the selection of nominees from party lists and allocation of special seats at the County Assemblies.
28. Review provisions of Sections 34-38 of the Elections Act against the County Government Act to address the composition of the marginalized groups for purposes of harmonizing the provisions under the two Acts on number of seats to be allocated.

8 VOTER REGISTRATION

8.1 Voter Registration

Article 88(4)(a) and (b) of the Constitution as read together with Sections 4, 5, 6, 6A, 8 and 8A of the Elections Act; and Section 4(a) & (b) of the IEBC Act, provide that the IEBC shall, as part of its mandate and functions respectively register voters, as well as compile and update the register of voters. Indeed, the credibility, legitimacy and success of the electoral process largely depends on the credibility of the voter registration process.

8.2 Challenges in Updating the Segregated Register of Voters

Section 2 of the Elections Act defines a Register of Voters to mean a current register of persons entitled to vote at an election prepared in accordance with Section 4 and includes a register that is compiled electronically. On the other hand, Section 4 of the Election Act dictates that there be a register in respect of every polling station, ward, constituency, county and voters residing outside Kenya.

Prior to the amendments introduced to the Elections Act in 2016, there was confusion as to the status of the Register of Voters. In the cases of *Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others [2013] eKLR* and *Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others (2013) eKLR,* the court recognized that the register of voters is not a single document, but is an amalgam of several parts prepared to cater for diverse groups of electors.

The segregated nature of the register of voters has caused challenges especially when it comes to updating of the same taking into consideration the fact that, under Section 5(1) of the Elections Act, voter registration is a continuous process. Pursuant to this Section, persons are allowed to register as voters without limitation to any electoral area, however, a challenge is posed when a candidate stands for election in an electoral area where he is not registered as a voter.

This was the case in *MacDonald Mariga Wanyama v. The Returning Officer Kibra Constituency & Another IEBC (Dispute Resolution Committee Complaint No. 3 of 2019).* The complainant presented his nomination application as the duly nominated candidate for the position of Member of Parliament for Kibra Constituency by-election. His application was rejected by the Retuning Officer on account that the he was not registered as a voter in Kibra and therefore did not meet the requirements for qualification as a Member of Parliament as set out under the law. The complainant contended that he had registered as a voter in Starehe Constituency; however, his details did not appear in the KIEMS kit. The IEBC Dispute Resolution Committee (DRC) noted that the complainant's name was missing due to failure to update the register.

Similarly, in in *Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR*, at Paragraph 321, the court noted that: *"voter registration therefore brings eligible citizens into the electoral process, ensures quality of the vote and prevents ineligible people from voting thus ensuring that political rights are free from fraud and manipulation".* A more accurate and reliable voter register is therefore inevitable for

purposes of elections, and it is the registration exercise that results in the compilation of entirely new voters register.

As discussed earlier, Section 4(2) of the Elections Act as read together with Regulation 12(3) of the Elections (Registration of Voters) Regulations, 2012 requires the Commission to compile the register of voters comprising of components under Section 4 of the Act. However, the law does not assign a name to the compiled register.

8.3 Auditing the Register of Voters

Section 8A of the Elections Act provides for audit of the register of voters at least six months before a general election for the purpose of verifying the accuracy and updating the register. This section further calls on the Kenya Citizens and Foreign Nationals Management Service to make available to the Commission the information held by it in the national population register.

However, in *Okiya Omtatah Okoiti v Independent Electoral and Boundaries Commission & 2 others Petition no. 129 of 2017 [2017] eKLR* it emerged that there is no clear methodology for conducting audit of voter registration. The Petitioner contended that the ultimate objective of the audit as set out under section 8A of the of the Elections Act, is to verify the accuracy of the register and update it, which objective cannot be realized in the absence of an agreed methodology, criteria and or benchmarks for the audit of the register of voters. It was further argued that audit of the register of voters is clouded with opaqueness, secrecy and lack of accountability since no methodology or criteria for the audit has been disclosed to ensure the objective set out in law is realized.

Though the case was dismissed, it pointed to the larger problem of sensitization of the public on the audit process and the need to publicize the methodology or criteria to be used in the audit processes which is largely absent in Section 8A of the Elections Act.

8.4 Recommendations

29. Synchronize the databases for the register of voters, the civil register as well as the register of births and deaths. This will not only save on costs for data collection, but also assure the accuracy of the register.
30. Amend the Elections Act to prohibit prospective candidates from vying in electoral areas other than those in which they are registered as voters.
31. Amend the Elections Act to obligate the Commission to set up electronic systems to facilitate special registration and voting by Kenyans in prisons and those out of the country.
32. Develop suitable mechanism for the sensitization of the public on the methodology and criteria of auditing of the register of voters.
33. Amend Sections 6 and 6A of the Elections Act to provide for inspection and verification of biometrics to run concurrently.

9 POLITICAL PARTY PRIMARIES

The Elections (Party Primaries and Party Lists) Regulations, 2017 define party primaries as the process through which a political party elects or selects its candidates for an election. This definition is mirrored verbatim by the Elections (General) Regulations, 2012. Nomination is however defined by the Elections Act as; *"submission to the Commission of the name of a candidate in accordance with the Constitution and the Elections Act.*[87] The Elections Act does not define party primaries nor does it make any reference to this term.

The Political Parties Act defines party primaries as the process through which a political party elects or selects its candidates for a forthcoming general election or a forthcoming by-election.

9.1 Party Nominations and Party Primaries

Article 38 of the Constitution sets out the political rights that all Kenyans enjoy. Article 38(3) (c) further stipulates that every adult citizen has the right, without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and, if elected, to hold office.

The constitutional anchor for nomination is found at Article 82(1) (b) of the Constitution, which mandates Parliament to enact legislation to provide for the nomination of candidates. Article 88(4) (d) directs that the Commission is responsible for the regulation of the process by which parties nominate candidates for elections while, Article 88(4) (k) mandates the Commission to monitor compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.

"Nominations" in its general usage refers to the mechanism by which political parties select or elect candidates to participate in elections. There are various forms under which a political party can select its candidates including direct selection, party primaries, electoral college, delegates' conventions amongst others. The intention of conducting nominations is to accord party members the opportunity to exercise their democratic right envisioned in Article 38 of the Constitution. Party nominations are an important and indispensable phase of the electoral cycle. They are not an option.

Nominations are an integral part of the electoral process which has, unfortunately, been left to the discretion of poorly organized political parties.[88]Ideal party primaries should be free, fair and transparent just as it is envisioned by the Constitution.[89] If party primaries are conducted properly, they would promote the institutionalization of political parties and initiate the shift away from their personalization around specific elite individuals.

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[87] Section 2 of the Elections Act, Act No.24 of 2011.

[88]Merete BechSeeberg, Michael Wahman&Svend-ErikSkaaning (2018) Candidate nomination, intra-party democracy, and election violence in Africa. Accessed on 31st May 2020 from https://www.tandfonline.com/doi/full/10.1080/13510347.2017.1420057?src=recsys.

[89] Kenya National Commission on Human Rights (2013) Break from the Past? A Monitoring Report of the 2013 Political Party Nominations. KNCHR: Nairobi. Assessed on 28th May 2020 from https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Break%20from%20the%20Past.pdf.

Party nominations, especially in party strongholds, can translate to automatic victory in the general elections for the nominated candidate.[90]The implication of this is that the candidate who wins the ticket in the party stronghold more often than not goes on to win in the general election. The procedure for nominations is now contained in the Elections (Party Primaries and Party List) Regulations, 2017.

9.2 Statutory and Regulatory Environment

9.2.1 *Application for Nomination*

The procedure for application is set out in Regulation 15 of the Elections (Party Primaries and Party Lists) Regulations, 2017. The application form for nomination is Form 3 as set out in the schedule to the Regulations. Aspiring candidates may appoint an agent to represent their interest during the exercise.

Applications for nomination are accompanied by a non-refundable nomination fee. The amount of this nomination fee varies depending on the position being contested for. It is also dependent on the age bracket, gender or disability of the candidate. This differentiation is a concerted effort to encourage diversity and representation of marginalized groups and to promote the actualization of the two-thirds gender aspiration as envisioned by Article 81(b) of the Constitution. As per Regulation 14, political parties have varying nomination fees which are in some cases five times the amount envisioned and set by the Commission. This is likely to lock out youth and other marginalized groups who may not afford the high nomination fees.

9.2.2 *Conduct of Party Primaries by the Commission*

A political party may request the Commission to supervise party nominations in accordance with the Commission's mandate under Article 88 of the Constitution. When this happens, the Commission's role is limited to supervision, conduct, announcement and declaration of the result of the party primaries on the day set aside for the primaries. Under no circumstances does the Commission undertake preparatory work such as preparation of lists of aspiring candidates in the party primaries or designing and production of ballot papers.[91]On announcement and declaration of the results of the party primaries, the Commission shall submit the results of the primaries to the Election Board of the party.[92] The Election Board of the party certifies that the list of nominees and the party authorized official shall formally submit the list to the Commission.

9.2.3 *Independent Candidature*

The Constitutional right of persons to vie in elections should not be unnecessarily curtailed by insisting that they should have political party affiliations. Article 85 of the Constitution provides that any person is eligible to contest as an independent candidate if the person is

[90] Kenya National Commission on Human Rights (2017) The Fallacious Vote: A Human Rights Account of the 2017 Political Parties Primaries, May 2017, Page 10.KNCHR: Nairobi. Accessed on 27th May 2020 from http://www.knchr.org/Portals/0/OccasionalReports/Party%20Nominations%20%20Report%20-%20KNCHR.pdf?ver=2017-05-15-110816-540.

[91] Regulation 23, Elections (Party Primaries and Party Lists) Regulations, 2017.
[92] Regulation 25, Elections (Party Primaries and Party Lists) Regulations, 2017.

not a member of a registered political party and has not been a member for at least three months immediately preceding the date of the election.

Articles 99(1) (c) (ii) and 193(1) (c) (ii) of the Constitution set out the minimum number of registered voters who should support an independent candidate to contest elections. For an independent candidate vying for the position of member of the National Assembly they should be supported by at least 1000 registered voters, 2000 registered voters for a senate seat, and 500 registered voters for membership to the county assembly.

Section 29 of the Elections Act has introduced the additional requirement that a person who is vying independently should be supported by persons who are not members of any political party. This is an additional burden which is not envisioned by the Constitution.

9.3 Party Hopping Phenomenon

The purpose of Section 28 of the Election Act is to tame party hopping. It is also meant to allow the Commission enough time to print ballot papers and make other logistical arrangements before the election. However, there have been instances where the Commission has cleared candidates to vie even though their names are not on the party membership lists submitted by political parties pursuant to section 7 of the Political Parties Act. This was the case in *Jane Njeri Kamande v Anthony Njomo Mania & 3 others [2017] eKLR.* This has been occasioned by the political parties' failure to submit correct and updated party membership lists.

Curtailing of party hopping has led to a dramatic increase in the number of independent candidates. This defeats the purpose of independent candidacy which was fashioned to cater for persons who have no political affiliations and not persons who have lost at the party primaries and are now looking for alternatives to ensure that their names are on the ballot paper on the Election Day.

9.4 Presentation of Names

The party delivers to the Commission the names of those contesting in the nominations twenty-one days before the date of the nominations, (in the context of registration of candidates by the Commission) together with the date on which the nominations will be held. These shall be published by the Commission in the Kenya Gazette within seven days of receipt. Upon completion of the nomination, the party's duly authorized representative will present the names of the nominated candidates to the Commission. This must be done sixty days before the election.[93] It is accompanied by a statutory declaration to the effect that the party has complied with its nomination rules and procedures in the conduct of the primaries.[94]

9.5 Power to Nominate

This power is dependent on whether the candidate belongs to a political party or they are independent candidates. A person who is vying independently is nominated by persons who are not members of any political party. A person who belongs to a political party shall

[93] *Ibid.,* Regulation 31.
[94] Regulation 18 of The Elections (Party Primaries and Party Lists) Regulations, 2017.

be nominated by members of the political party to which they belong.[95]Ideally, the nominating persons must be those whose names appear in the party membership list as submitted to the Commission in accordance with section 7 of the Political Parties Act and section 28 of the Elections Act. In practice however, political parties have allowed any person having their national identification card to vote at the party primaries. This is because parties do not have credible party registers. In the run up to the general election of 8th August 2017, both Jubilee and ODM parties initially attempted to use the 2013 Commission register and finally, to salvage the situation, ended up allowing anyone who had a national identification card to vote.[96] As a result, persons voted at multiple party primaries.

9.6 National Election Boards

Each party appoints a National Election Board consisting of not more than seven members and not less than three members.[97] This election board is responsible for conducting or supervising party primaries, nomination of party lists and any other related activities for purposes of selection of candidates to participate in an election. Each party bears its own costs for the nominations.

9.7 Nomination Period

Nomination period is governed by section 13 of the Elections Act. This section directs political parties to nominate their candidates at least ninety days before a general election. In conducting the nominations, parties should adhere to the Constitution, the Elections Act and their party constitutions and nomination rules. The party nomination rules must be submitted to the Commission at least six months before the nomination of its candidates. If these rules are amended, the amended rules must be submitted to the Commission at least seven days before the nomination of its candidates.[98] The rules as submitted must be made accessible to the party members with copies placed at the party head office as well as its branches and publication on the party website.[99] In the case of any other election (that is an election which is not a general election), the Commission issues a notice in the prescribed form specifying the day or days upon which political parties shall nominate candidates.

Once the nomination has been received by the commission, the party can only change its candidate under specific circumstances. These are: death, resignation, incapacity of the

[95] *ibid.,* Regulation 29.

[96] Kenya National Commission on Human Rights (2017) The Fallacious Vote: A Human Rights Account of the 2017 Political Parties Primaries, May 2017, Page 30.KNCHR: Nairobi. Accessed on 27th May 2020 from http://www.knchr.org/Portals/0/OccasionalReports/Party%20Nominations%20%20Report%20-%20KNCHR.pdf?ver=2017-05-15-110816-540.

[97] Regulation 8 of (Party Primaries and Party Lists) Regulations, 2017.

[99] Regulation 6 of The Elections (Party Primaries and Party Lists) Regulations, 2017.

nominated candidate or the violation of the electoral code of conduct by the nominated candidate.

9.8 Gaps in the Existing Framework and Proposed Models

a) While the Elections Act does not use the term Party Primaries at all, the Election Laws (Amendment) Act of 2016 and 2017 use the term party primaries. It uses the term party nomination to mean registration of candidates for election. This calls for harmonization of the laws to cure the incoherence and uncertainty.
b) Nomination rules should be standardized to ensure ease of monitoring.[100]
c) Section 31(2) D provides that the Commission shall conduct political party primaries upon request from a political party. It is inherently conflicting for the Commission to conduct political party primaries and at the same time require it to resolve disputes arising therefrom.
d) Further, Section 31(2E) of the Elections Act dictates that in the event that the Commission is requested by more than one political party to conduct their party primaries, the primaries shall be conducted on the same day, in the same polling centers and in different polling streams for each of the participating political parties. This is likely to cause logistical nightmares for the Commission.
e) Lack of strict adherence to the laid down format to submit list of aspirants by some political parties to the Commission.
f) Fraudulent and irregular duplication of candidates in various parties.
g) There is no clarity on the audit trail of the political party candidate registration system in terms of determining the identity of the personnel that logged into the system (i.e. who had access to the system).

The Elections Act is deficient in certain key aspects, which necessitates the amendments of several other sections of the Act to cure the gaps incidental to the issues raised above. These deficiencies may be remedied as recommended hereunder.

9.9 Recommendations

34. Repeal Section 31 (2) of the Elections Act to remove the conflict of interest where the Commission conducts, and supervises party primaries, then sits thereafter later to determine disputes arising in the said primaries.
35. Review of the amendments under Sections 2, 13(1) and 13 (2A) of the Elections Act may provide a proper framework for dispute resolution. Dispute Resolution maybe enhanced further by legislating timelines for different stages of determination of the disputes. And to cure the overlap created by the various dispute resolution bodies,

[100] Kenya National Commission on Human Rights (2013) Break from the Past? A Monitoring Report of the 2013 Political Party Nominations. KNCHR: Nairobi. Assessed on 28th May 2020 from https://www.knchr.org/Portals/0/CivilAndPoliticalReports/Break%20from%20the%20Past.pdf.

36. Amend Section 33(1)(c) and repeal of Section 32(2) of the Elections Act to remove the requirement for independent candidates to submit symbols as a condition for registration as candidates and only require photographs of themselves.
37. Amend Section 28 of the Elections Act to reduce the number of days of submission of party membership list from 120 days to 90 days to coincide with the period within which an independent candidate should not have been a member of a political party.
38. Amend Section 30 of the Elections Act to require that where a coalition participates in an election, they shall present one agent per coalition at each polling station and further provide for a mechanism where the Commission is informed the willingness of the party to appoint an agent for the candidates.

10 REGISTRATION OF CANDIDATES BY THE COMMISSION

The mandate of candidate registration is vested in the Commission.[101] The Constitution, the Elections Act and the Leadership and Integrity Act set out the qualifications which must be met by prospective candidates to enable them be registered to participate in the elections. They also set out the circumstances under which candidates can be disqualified from participating in the elections.

The Elections Act sets out the following qualifications which must be met by the candidate: Kenyan citizenship, relevant academic qualification and registration as a voter. There is also the requirement of proof of support by a stipulated number of registered voters. The number as well as the distribution of these registered voters is dependent on the elective position in question. These members' names must be in the party membership list which is submitted to the Commission under Section 28 of the Elections Act.

The main disqualifications are insanity, undischarged bankruptcy, and imprisonment for at least six months as at the date of registration of a candidate or at the date of election, abuse of state office or public office, and holding office as a member of the Commission within five years immediately preceding the election date.[102]

The Elections Act additionally disqualifies any person who directly or indirectly participates in any manner in any public fundraising within eight months preceding a general election or during an election period unless such fundraising is for an election candidate or for a political party.[103]

The qualifications have to be verified by the Commission before the candidates are cleared to contest. This verification is done in partnership with chapter 6 institutions such as the ORPP, Kenya National Police Service, ODPP, EACC among others.

There is a lack of clarity on implementation of Chapter 6 of the Constitution in relation to clearance of candidates to contest in an elective position and the manner in which the Commission should treat a candidate whose name has been presented as duly nominated but does not meet the requirements of the Chapter.. In order to ensure that all candidates who participate in elections are duly qualified to participate in the electoral process, it is imperative that the State agencies concerned share the requisite information with the Commission to enable the Returning Officers register only the qualified candidates. The qualifications and disqualifications criteria required by law and whose data is held by other agencies include:

a. Dual citizenship
b. Bankruptcy
c. Academic qualifications

[101] Article 88(4)(f) of the Constitution of Kenya and Section 4(f) of the IEBC Act.
[102] Section 23-25 of the Elections Act No. 24 of 2011.
[103] *Ibid.,* Section 26.

d. Sanity
e. Imprisonment for over six months
f. Findings of breach of Chapter Six of the Constitution

The disqualification set out above is not final until all possibility of appeal or review has been exhausted.[104] The Commission has faced challenges in obtaining data from the relevant state agencies to enable it verify compliance with the qualification criteria.

The Elections Act is deficient in certain key aspects in relation to registration of candidates by the Commission. The Commission consequently recommends as follows:

10.1 Recommendations

39. Introduce a new provision to the Elections Act to obligate all agencies which host data which can be used to verify whether the candidates are qualified to share such information with the Commission. These agencies include EACC for purpose of chapter 6 generally, the Chief Registrar of the Judiciary for purposes of data on convictions, the Director General for Health for purposes of data on insanity, the Official Receiver for purposes of data on bankruptcy, the Secretary to the Commission for University Education for purposes of verifying recognition of university and the authenticity of the academic credentials, the Director of Immigration Services for purposes of confirming dual citizenships and citizenship generally.
40. Amend the Elections (General) Regulations, 2012 by introducing a new regulation to require all prospective candidates to secure clearance from the respective agencies before presenting their names for electoral registration, including an amendment of the prescribed Form to encompass the recommended parameters.
41. Amend Sections 24 and 25 of the Elections Act to require all candidates to submit a confirmation certificate from the ORPP confirming that the candidate is a member of the nominating political party.
42. Amend Section 15(1) of the Elections Act to provide for substitution of deputy president candidates before and after nomination.
43. Amend Section 16(3) A to make an additional proviso allowing the Commission to conduct the by-election in the event that the respective speaker does not issue the notice within the 21 days of the actual occurrence of the vacancy.
44. Amend Sections 15 and 17 of the Elections Act to require the respective speaker to issue a notice within seven day of the occurrence of a vacancy in the office of the President or County Governor.
45. Amend the Elections Act by deleting Section 21 and introducing it in the County Governments Act and provide for qualifications for the County Assembly Speaker.
46. Amend Sections 23, 24 and 25 of the Elections Act to provide that candidates renounce dual citizenship prior to their registration as candidates by the Commission.

[104] Article 99(3) and 193(3) of the the Constitution of Kenya.

11 IDENTIFICATION OF VOTERS AND VOTING

11.1 Background

Admission of eligible voters to the polling stations is a key factor that affects the integrity of any electoral process. In Kenya, one is eligible to vote only after his/her name has been entered in the register of voters in a particular polling station and has been identified as a duly registered voter. Notably, on the polling day, one is required to produce an identification document which should be the same identification document that he/she used at the time of registration as a voter.

Technology played a vital role in the 2017 General Election and the subsequent fresh presidential election in Kenya. Specifically, in voter registration, verification of voter registration details, nomination and registration of candidates, identification of voters on polling day and transmission of results.[105]The Elections Act established KIEMS that integrates BVR, EVID, CRMS and RTS[106].

In the 2017 general election, the Commission deployed the integrated electronic electoral management system. The system was used to register voters, identify them on the polling day and transmit results on the polling day.[107]

The integrated electronic electoral management system is designed to eliminate impersonation and to ensure that only those who are registered to vote would cast their vote. In addition, the system keeps track of the number of voters identified to ensure integrity and verifiability of the electoral results. Through the KIEMS, the total number of voters identified for the 2017 General Election was 14,641,973 and 7,575,806 for the Fresh Presidential Election.[108]

11.2 Legal Framework Governing Voter Identification in Kenya

The Elections Act was amended in 2016 to Legislate ICT in voter identification and results management processes, with the objective of ensuring transparency. The use of technology in voter identification was introduced to curb double voting and voter impersonation. The Constitutional yardstick for voting is set out in Article 86 of the Constitution. The Article mandates the Commission to ensure that the system of voting used is simple, accurate,

[105] Kenya 2017 General and Presidential Elections Final Report prepared by the Carter Center Accessed through https://reliefweb.int/sites/reliefweb.int/files/resources/kenya-2017-final-election-report_0.pdf 29th May, 2020;
[106] Election Laws (Amendment) Act, 2016;
[107]https://www.iebc.or.ke/election/technology/?Electronic_Voter_Identification_System Accessed on 30th May, 2020.
[108] European Union Election Observation Mission FINAL REPORT – Kenya General Elections 2017 Accessed through http://www.epgencms.europarl.europa.eu/cmsdata/upload/3b5497ff-d53b-4bc1-86c4-0cbca18c16fe/Kenya-general-elections_2017_EU-EOM-report.pdf on 30th May, 2020

verifiable, secure, accountable and transparent. In addition, the commission is required to put in place appropriate structures and mechanisms to eliminate electoral malpractices.

Sections 39 (1) (C) and Section 44 of the Elections Act as amended in 2016 makes provision for the adoption and use of technology in Kenya's electoral process. It establishes an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. Additionally, the commission is required to develop a policy on the progressive use of technology in the election process; procure the necessary technology at least 120 days before the date of elections,; test, verify and deploy such technology at least 60 days before the date of elections;. Further, Section 44 (A) of the Election Act as amended mandates the Commission to put in place voter identification complementary mechanism that is simple, accurate, verifiable, secure, accountable and transparent.[109]

Pursuant to the provisions of Section 44(5) of the Election Act the Commission was required to develop Regulations to govern the use, maintenance and substance of electoral technologies. Consequently, the Commission developed the Elections (Technology) Regulations, 2017 which came into effect in April 2017.

Currently the complementary voter identification system is a manual process as set out under Regulations 69 and 83 of the Elections (General) Regulations and as interpreted by the *Court of Appeal in National Super Alliance (NASA) Kenya -v- The Independent Electoral and Boundaries Commission & 2 others Civil Appeal No. 258 of 2017.*

In the said case, there was an attempt to define the complementary system as being one that is electronically based. However, the Court ruled that, the complementary mechanism need not be similar, same, akin or parallel to the electronic mechanism. Further the Court indicated that all that is required of the complementary mechanism is that it should add to or improve the electronic mechanism provided under Section 44. At the same time, the mechanism has to be simple, accurate, verifiable, secure, accountable and transparent. It should allow eligible voters to fully exercise their political rights under Article 38 of the Constitution. That the complementary mechanism only sets in when the integrated electronic system fails.

Section 44A of the Elections Act sought to provide an alternative to voters to exercise their franchise in the event of technology failure either during identification of voters or transmission of results.

In order to effectively implement Section 44A of the Elections Act, the Commission vide Legal Notice No. 72 of 2017, and by dint of Regulation 69 of the Elections (General) Regulations introduced the procedure to be followed in case there was failure of the technology on voter identification. Regulation 69 provides that incase a voter could not be identified by biometrics after producing an identification document used during

[109] The Elections Act 2011 as amended.

registration, then a complementary mechanism involving one-to-one matching and/or the alphanumeric search in the presence of the agents and the voter is to be employed.

The process of identification with the KIEMS contains ample safeguards to ensure that every voter can be identified by the system. In instances where the KIEMS completely fails the Commission is required to invoke the complementary mechanism.

11.3 Comparative Analysis

11.3.1 *Voter Identification in the USA, Peru and South Africa*

The strength and weakness of the United States of America's electoral administration system stems from its decentralized nature. Different states have different voter identification laws. However, it is imperative to note that all states require some form of voter identification for individuals to cast ballots. The strictness of the requirements for voter identification varies from state to state. Some states like Massachusetts and Wyoming only require registrants to provide their names and sometimes their addresses and birthdates. Other states require registrants to provide an identification document with a photo on it, whereas other states do not require a photo identification document. Imperatively, all states allow unexpired driver's licenses, state-issued identity cards, and unexpired US passports.[110]

In states where the identification requirement is not strict, voters may be permitted to cast a ballot after signing an affidavit of identity, or they may be permitted to cast a provisional ballot where the election officials would subsequently determine whether the individual was an eligible and registered voter.[111]

In Peru, the voter registration list is based on the civil registry. All citizens registered in the civil register are automatically included in the voter register once they turn eighteen years old. Therefore, citizens do not need to do anything to register to vote as long as they are in the civil register. The National Registry of Identification and Civil Status (RENIEC) is responsible for updating the register. In order to vote, Peruvians must present their national identity card (DNI) and it is the only document accepted for the purposes of voting.[112]This has worked well in the country and has made the task of compiling and maintaining the electoral register a lot easier for the EMB.

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[110] https://www.annualreviews.org/doi/full/10.1146/annurev-polisci-051215-022822

[111]https://www.britannica.com/topic/voter-ID-law

[112] European Union, Peru Final Report Second Round of the Presidential Election, June 2011, European Union Election Observation Mission, p. 13, available at: http://eueom.eu/files/pressreleases/english/EUEOM_Peru_2011_Final_Report.pdf. 360 European Union, Peru Final Report, 2011, p. 13.
REPÚBLICA de PeRÚ, Law No. 26497, Ley Orgánica del RegistroNacional de Identificación y Estado Civil ("Organic Law of the National Registry for Identification and Civil Status"), article 42, available at: http://www.miraflores.gob.pe/gestorw3b/files/pdf/5192-1344-135-80-ley26497.pdf. 362 PeRÚ, Law No. 26859, Ley Orgánica de Elecciones, article 260.
PeRÚ, Law No. 26497, Ley Orgánica del RegistroNacional de Identificación y Estado Civil, article 26.

In South Africa, The Electoral Commission launched an Elections Mobile app known as IEC South Africa that enabled users/voters to view their registration details, locate their voting stations on a map, view the latest Elections news, and Electoral results as and when they are availed by the Commission.

At the voting stations, the Commission uses hand-held scanners which are used to scan the Bar coded identification document. This brings up the profile of the voter. To participate in the voting process, one needs to be a registered voter. Upon arrival at the voting station one needs to present the bar-coded identification book or special identity card which is then scanned. After confirmation by the IEC officials that one is indeed registered in the voting station and has not voted yet, the Identification book is stamped. Such identification documents that are in a form of book and resembles most passports provides sustainability, transparency and credibility since it is stamped only once for each election that a voter has participated in. Further it has unique code which cannot be copied.[113]The IEC regularly compares its voter registration records against the population register to identify unqualified or 'phantom' voters for removal.

11.4 Challenges in The Kenya Electronic Voter Identification System

The voter identification system experienced some challenges in the 2017 General Elections and the ensuing fresh presidential election. It was observed that in some instances, voters could not be identified by their fingerprints at the first instance. Where a voter could not be identified through the KIEMS, they were identified through the complementary mechanism by identification of voters from the printed register of voters. The presiding officer would then complete a Voter Identification and Verification Form (Form 32A) to document the use of the manual procedure and the voter's identity. The complementary mechanism should be reviewed to determine its efficacy and necessity.

11.5 Recommendations

47. With respect to voter identification the Commission recommends the staggering of elections by holding the National elections and County elections on different dates.
48. Amend the Elections Act to obligate the Commission and other handlers of the Register of Voters to put in place Regulations which ensure compliance with the Data Protection Act of 2019.
49. Amend the provisions of Section 44A of the Elections Act so as to limit the application of the complementary mechanism of identification only to instances where the KIEMS device has failed and cannot be replaced without undue delay.
50. Amend the provisions of section 44 of the Elections Act to provide a mechanism for result transmission where there is no sufficient network to transmit from the polling stations.

[113]https://www.khrc.or.ke/mobile-publications/civil-political-rights/148-observation-of-the-2014-south-african-national-and-provincial-elections-1/file.html; accessed on 3rd June, 2020

51. Review the provisions of Regulations 26 and 27 of the Elections (Technology) Regulations, 2017 to create a seamless mechanism on the use of technology in the electoral process.
52. Develop the legal and regulatory environment to permit the adoption of new technologies in the electoral environment.
53. Amend the Elections Act and the Regulations to permit the use of technology to facilitate the conduct of elections by electronic means in particular the out of the country voting.
54. Amend Section 55 B of the Elections Act and Regulations 64 of the Elections (General) Regulations to provide the threshold within which the Commission can exercise its powers to postpone an election or to move polling stations in instance of violence and natural disasters.
55. The KIEMS kit should be reconfigured so as to capture more parameters of identification than it does now including the iris, ear lobe or voice.

12 MANAGEMENT AND DECLARATION OF ELECTION RESULTS

Electoral results transmission, especially in respect of presidential election results, has proved to be a thorny issue in recent times. This report delves into this issue by interrogating the legal framework governing the transmission of election results and the challenges emanating therefrom as manifested in the emerging jurisprudence in Kenya.

12.1 Legal framework

Articles 81(e) and 88(4)(k) of the Constitution, Section 4(m) of the IEBC Act, Sections 44 and 44A of the Elections Act underscores the need to have simple, accurate, verifiable, secure, accountable and transparent system for result transmission in compliance with law. The system envisaged by the Constitution and statute has been established through KIEMS.

Furthermore, the Constitution sets out a clear and simple manner of voting, counting, tallying and declaration of results in a Presidential election. In terms of Article 86 (a) and (b) of the Constitution, IEBC is required to among other things to ensure that the votes cast are counted, tabulated and the results announced promptly by the Presiding Officer at each polling station which results, are openly and accurately collated and promptly announced by the Returning Officer.

In addition, Article 138(3) (c) of the Constitution requires that after counting the votes in the polling stations, the IEBC shall tally and verify the count and declare the result. Voting, tallying and transmission of results are further governed by various subsidiary legislations under the Elections Act. Tallying and collating of votes are done by way of prescribed forms in the regulations. The primary statutory form in respect of Presidential election is Form 34A which is filled by the Presiding Officer at the polling station. Form 34As are then collated into Form 34Bs at the constituency and subsequently into Form 34C at the National Tallying Centre.

In the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR,* the Court of Appeal held that results declared by constituency returning officers are final and that such declaration is not subject to alteration by any person or authority other than an election court. This position was reiterated by the Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another [2017] eKLR.* The Supreme Court further stated that verification requires a comparison of Forms 34A with Forms 34B.

Therefore, it follows that Forms 34As from the polling stations, once scanned and results therein keyed in by the Presiding Officer into the KIEMS, shall be transmitted to the National Tallying Centre for verification and declaration of the result in a presidential poll in keeping with Article 138(3) (c) of the Constitution. In the event of a discrepancy between keyed in results and the results in the scanned Form 34A, the latter shall prevail.

12.2 Complimentary System

Given the constitutional and statutory requirements, the Commission is mandated under Section 44 A of the Act to put in place a complimentary mechanism for identification of voters that is simple, accurate, verifiable, secure, accountable and transparent to ensure compliance with Article 38 of the Constitution.

The complimentary system contemplated under Section 44A was considered in the Court of Appeal in *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR* where the Court held that the complementary mechanism need not be similar, same, akin or parallel to the one set out in Section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in Section 44 of the Act. But at the same time, be simple, accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under Article 38 of the Constitution.

The complementary mechanism only sets in when the integrated electronic system fails. As to whether the complimentary system should be electronic or not, the Court in *National Super Alliance (Nasa) Kenya v Independent Electoral & Boundaries Commission & 2 others (supra*) held that: the particulars of the mechanism, whether electronic, manual, or any other mode was not expressly provided in Section 44A. If that were the intention of Parliament, nothing would have been easier than to specify so.

The Court further added that the Constitution has not specified the type of mechanism, whether electronic or manual that should be put in place. That duty was well within the province of the legislature which has spoken through Sections 39, 44 and 44A of the Act and the Regulations there under. (Paras 83 and 91)

The issue of complimentary system was also a matter for judicial consideration on numerous occasions, more particularly in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & Another [2017] eKLR w*here the Court stated that: *"we note in the above regard that even where Parliament found it necessary to make provision for a complementary system, it would not escape from the dictates of Article 86 of the Constitution. Article 86 (a) of the constitution requires that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.*" (para 297)

The Court in *Raila Odinga case* further pronounced itself as follows: *"when called upon to explain why all the Forms 34A had not been scanned, transmitted and published on an online portal, in line with Article 39 of the Elections Act, the 1st respondent, through counsel, alluded to some form of complementary mechanism. However, the description of such a mechanism did not appear to us to meet the yardsticks of verifiability inbuilt in the Constitution and Section 44A of the Elections Act."* (para 298)

From the above discussion, it is manifest that the main bone of contention is the nature of the complimentary system of voter identification and result transmission. Therefore, the

report concentrates on options which may be available for exploration in terms of voter identification and result transmission.

The grand question is, should the complimentary system be electronic? It is not clear from wordings of Section 44A of the Elections Act. This has been affirmed by the Courts in the various cases discussed above.

Further to the foregoing, Regulation 26 of the Elections (Technology) Regulations, 2017 allows the Commission to invoke a complementary mechanism for election technology if the reliability of a system cannot be assured according to the requirements of the law.

12.2.1. Complimentary System on Result Transmission?

The legal framework for transmission of election results for purposes of a presidential election was reviewed through amendments to Section 39(1C) of the Elections Act which provides that the Commission shall;

(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying center and to the national tallying center;

(b) tally and verify the results received at the national tallying center; and

(c) publish the polling result forms on an online public portal maintained by the Commission.

In compliance with this provision, the Commission collaborated with network service providers to ensure sufficient network coverage at every county, constituency and polling station. Transmission of results requires an optimal level of 3G network coverage which was not attainable for all polling stations. It is based on this that the Commission informed the public of areas without adequate network coverage for purposes of transmission of results and publicized the procedure to be applied as a complimentary mechanism to enable transmission of results outside the polling stations.

The Court in *Raila Odinga Case,(supra)* suggested that where there is insufficient network coverage at a particular polling station, the Commission must arrange for immediate transport to areas with 3G and 4G network. The Court, at paragraph 271 opined as follows: *"It is important to note that once the POs, who were off the network range, scanned the results into Forms 34A and typed the text messages of the same into the KIEMS and pressed the —SUBMIT key, a process IEBC told the country was irreversible, all that remained was for the POs to move to vantage points where 3G or 4G network would be picked and the details could automatically be transmitted in seconds."*

Therefore, there is need to anchor in law the procedure to be applied as a complimentary mechanism on result transmission.

12.3 Election Result Path

In the run up to the 2017 General Election there was a perception in the minds of a cross section of political players that the election result path was hazy and unclear and thus provided fodder for manipulation and adulteration of election results.

Parliament sought to cure this perception through Election Laws (Amendment) Act, No. 34 of 2017 (ELAA 2017) which sought to amend Sections 39, 44, 44A, 83 and 86A of the Elections Act. The aforementioned sections deal with transmission of election results, voter identification, declaration of election results, annulment of election results and holding of fresh presidential elections under Article 140(3). Of great interest was Section 39 as amended by Section 6 of ELAA, 2017. The Section was amended by adding a new Subsection (1A) and (1C).

Pursuant to this and for purposes of a presidential election, the Commission is expected under section 39 (1A) of Elections Act, to appoint constituency returning officers to be responsible for;

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and

(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

As discussed earlier, the court in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017]eKLR* held that the result declared at the constituency level is final and cannot be varied. On the other hand in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another [2017] eKLR* , the Court stated that the result at constituency level (Form 34B) must be verified as against the results declared at the polling station(Form 34A).

Consequently, following the delivery of the reasons for the judgment in *Raila Amolo Odinga case (2017)* (Supra), the Chairperson of the IEBC approached the Supreme Court seeking a correction or clarification of the judgment in the following issues:

i. Which results between those declared in Form 34A at the polling station and Form 34B at the constituency tallying Centre should be relied on in declaring the result of the presidential election; and
ii. Whether the IEBC Chairperson can, in verification of results as required by the Constitution, vary results in Forms 34B where there are inconsistencies between Forms 34A and Forms 34B.

The Supreme Court held that the Chairperson of IEBC has a duty to verify accuracy of the results in form 34B against the figures in form 34A before generating Form 34C. The Court further stated that the Chairperson has a duty to bring to the attention of the public, any inaccuracies discovered by the verification of Forms 34A and Forms 34B even as he declares the results as generated from Forms 34A to generate Form 34C. The Court reiterated that the Chairperson has no legal mandate to alter the results in Form 34B, in spite of the inaccuracies that may be manifest.

In essence, the Supreme Court restricted the role of the Chairperson to exposing the discrepancies and leaving the resolution of any issues to the Supreme Court as the relevant election Court. This poses a number of challenges. It compels the Chairperson of the IEBC to acknowledge the existence of erroneous results and then proceed to knowingly declare those results and leave the resolution of the dispute to the Supreme Court.

This creates dissonance within the electoral laws framework since Section 6(a) the Election Offences Act No. 37 of 2016 makes it an offence for an officer of the Commission to make an entry which they know, or have reasonable cause to believe to be false, or do not believe to be true. To require the Chairperson to fill out Form 34C, knowing an entry to be false, is to sanction the commission of an offence. It is also illogical to compel the making of such an entry, where the Chairperson is fully aware that he will be a Respondent in a subsequent dispute.[114] This appears to be what the Chairperson was avoiding when he sought a clarification of the judgment.

It is further posited that the ruling of the Supreme Court created more questions than it provided answers. It has further obfuscated the role of the Chairperson of the IEBC, rather than providing the much-sought clarity as to how to handle discrepancies. The ICJ posited that the ruling also undermines the much touted finality of presidential election results and it is difficult to reconcile it with the recommendation made by IREC.[115] IREC recommends that ample time be allowed for verifying provisional results, so that they are declared final/official only once there is no risk that errors may still be found or non-frivolous objections raised. IREC further recommends that there must be sufficient time to check the provisional results, which are given status as final results only when all objections have been considered, all checks and rechecks conducted and the final verdict issued by the proper authorities.[116]

Further, as seen earlier, an issue arose as to what Section 39(1C) required the presiding officers to do in transmitting election results as against the format required by law. The Commission's presiding officers upon tabulation of results were required to take a photographic image of the form 34A and transmit to the national tallying center where reconciliation was done by verifying and keying in confirmed results which were then projected on the election displaying screen. Section 39 (1C) of the Elections Act provides

[114]E Ongoya 'Protecting the Integrity of the Electoral Process, or Obfuscating the Electoral Process?' (2018) 3 Journal of Law and Ethics page 16
[115] ICJ Kenya Compendium OF 2017 Election Petitions – Volume 4 at page 304, p 138.
[116] ICJ Kenya Compendium OF 2017 Election Petitions – Volume 4, page 304.

that the Commission shall "*electronically transmit, **in the prescribed form**, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre."*

The question arising is what is the prescribed format and who defines the format?

In the run up to the Fresh Presidential certain amendments to the electoral laws were passed touching on quorum of the Commission, deputy presidential returning officer and the results path.

The Section was amended by deleting section 39 (1C) and introducing a new subsections (1C), (1D), (1E), (1F) and (1G). The previous subsection (1D) was renumbered subsection (1H). The amended section39(1C) now states;

> *For purposes of a presidential election, the Commission shall-*
> *(a) **electronically transmit and physically deliver** the tabulated results of an election for the President from a polling station tovthe constituency tallying centre and to the national tallying centre;*
> *(b) tally and verify the results received at the constituency tallying centre and the national tallying centre;*
> *(c) publish the polling result forms online public portal maintained by Commission*
> *(ID) The Commission shall verify that the results transmitted under this section are an accurate record of the results tallied, verified and declared at the respective polling stations.*
>
> *(1E) **Where there is a discrepancy between the electronically transmitted and the physically***
>
> ***delivered results,** the Commission shall verify the results and the result which is an accurate record of **the results tallied, verified and declared at the respective polling station shall prevail.***
>
> *(IF) **Any failure to transmit or publish the election results in an electronic format shall not invalidate the result as announced and declared by the respective presiding and returning officers at the polling station and constituency tallying center, respectively.** (emphasis added)*

In essence the amendment sought to establish a complimentary system when KIEMS fail to transmit election results from the constituency level. The complimentary system was to the physically delivered Form 34As and 34Bs, which would supersede any result. These amendments were declared unconstitutional in the case of *Katiba Institute & 3 others v Attorney General & 2 others Constitutional Petition No 548 OF 2017[2018] eKLR.* The reason for the Court's decision can be summarized as follows:

a) there is no requirement for the electronic and physical results to be transmitted in any prescribed form which was an essential safeguard that guaranteed verifiability,

transparency and accountability of the election results transmitted from polling centres to the constituency and national tallying centres. This not only opens the results to possible adulteration and manipulation but also mischief. The amendment obviously reverses the gains the country had made in electoral reforms including results transmitted in a particular form.

b) the amended sections 39(1D) and (1E) were crafted is not only vague and ambiguous but also creates a conflict between the two modes of transmission of results thus opens a window for tinkering with election results.

The enactment of section 39(1F) is clearly a drawback on the very principle of accuracy, transparency and accountability of election results enshrined in Articles 10, 81 and 86 of the Constitution.

c) section 39(1G) is faulted for providing that the live streamed election results from the polling station are merely provision while constitution provides such results are final.

12.4 Challenges

The following challenges emerge with respect to management and declaration of presidential election results:

i. There is no clearly defined complimentary system for presidential results transmission following the court's decision in *Katiba Institute & 3 others v Attorney General & 2 others Constitutional Petition No 548 OF 2017[2018] eKLR.*

ii. The role of the chairperson of the commission in declaring election results faces legal challenges as he/she is required to declare results which may be false (whenever there are discrepancies between Forms 34As and 34Bs) hence opening the possibility of committing an election offence.

iii. The path governing the flow of presidential election results from the polling stations to the national tallying centre and the place of Form 34B remains undefined following court's decision in both *Raila Odinga* and *Maina Kiai* (supra) cases as discussed above.

12.5 Recommendations

57. Amend the Elections Act and the regulations to clearly provide the complimentary mechanism(s) to be adopted by IEBC in case KIEMS fails.
58. Amend the Elections Act to:
    a) Provide for the flow of election results right from the polling station to the national tallying centre and the efficacy of Forms 34A, 34B and 34C in the declaration of presidential election results.
    b) Provide for and state the role of the National Returning Officer in tallying and verification of presidential election results.
    c) Review the place of Form 34B with respect to presidential election results.
    d) Provide mechanisms to be employed in rectifying numerical errors that may cause discrepancies between forms 34A and forms 34B.

59. Review Sections 39, 44 and 44A to clarify the results management pathway, in light of the decision in *Katiba Institute case.*

13 ELECTORAL DISPUTE RESOLUTION

Disputes arise in the course of electoral processes. These may occur pre, during or post elections. The law has created a number of fora where such disputes can be adjudicated. These include the Political Parties' Internal Dispute Resolution Mechanisms (IDRM), the Political Parties Disputes Tribunal, the Commission's Dispute Resolution Committee, the Commission's Leadership and Integrity Vetting Committee, the Electoral Code of Conduct Enforcement Committee and Courts of law.

The disputes could take various forms ranging from:

a. a challenge to the party primaries conducted by a political party,
b. Registration of candidates by the Commission,
c. Claims arising from the voter registration process,
d. Political party disputes,
e. Violations of the electoral Code of Conduct and
f. Election petitions challenging the election of Members of Parliament, County Governments and the Presidency.

13.1 Nominations and Pre-Election Dispute Resolution

The jurisdiction to hear and determine disputes relating to or arising out of nominations is bestowed on the IEBC by Article 88(4) (e) of the Constitution, Section 4 of the IEBC Act, Section 74 of the Elections Act, and the subsidiary legislations thereof. Article 88(4) (e) of the Constitution mandates the Commission settle electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

The above constitutional provision is replicated under Section 74 of the Elections Act and Section 4 of the IEBC Act which establishes the Commission's Dispute Resolution Committee. The role of IEBC in pre-election dispute resolution has been considered and affirmed by the court in several cases such as *Diana Kethi Kilonzo & another v Independent Electoral & Boundaries Commission & 10 others [2013] eKLR, Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* and *Ahmed Ali Muktar (Interested Party) [2019] eKLR.*

Additionally, the PPDT is established under 169 (1) (d) of the Constitution and Section 39 of the Political Parties Act, 2011 to hear and determine political parties disputes and resolve pre-election disputes arising from the activities of political parties in Kenya. Section 40(1) Political Parties Act empowers the Tribunal to settle the disputes of the following nature:

(a) disputes between the members of a political party;
(b) disputes between a member of a political party and a political party;
(c) disputes between political parties;
(d) disputes between an independent candidate and a political party;
(e) disputes between coalition partners; and
(f) appeals from decisions of the Registrar under this Act;

(fa) disputes arising out of party primaries.

It is further provided in Section 40(2), that the PPDT shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

The role of the PPDT in pre-election dispute resolution has equally been affirmed by the Court in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* and *Ahmed Ali Muktar (Interested Party) [2019] eKLR,* where the Court, in paragraph 68 partly stated that all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the Commission or PPDT, as the case may be, in the first instance.

As discussed above, the Constitution, Elections Act and the IEBC Act, empowers the Commission to resolve pre-election disputes *"including disputes relating to or arising from nominations*". On the other hand, PPDT is mandated to resolve pre-election disputes arising from the activities of political parties. Indeed, Regulation 4(1) of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 provides that: *"the object of these Regulations is to set out the procedure to facilitate just, expeditious and impartial determination of disputes affecting political parties."* It is therefore apparent that there is jurisdictional overlap between the two institutions.

This issue was discussed in *Jubilee Party of Kenya v Farah Mohamed Manzoor [2017] eKLR, w*here the court was invited to determine whether it is the Commission or PPDT which is vested with jurisdiction over disputes arising from party lists. The Court held that there is a distinction that can be drawn between nomination for elections in its general sense in which the Commission exercise direct mandate, and nomination to the Party List for which the political parties have control pursuant to Regulation 55 of the Elections (General) Regulations, 2012 provided that they are prepared pursuant to the party rules. Accordingly, when it comes to the compilation of Party Lists, the role of the Commission is not that of "conducting" that process, but is limited to a supervisory role.

Further to the above, in order to facilitate clarity of jurisdiction between the two bodies in the run-up to the 2017 General Election, two measures were taken. The first was a legislative measure: the amendment to Section 40(1) of the Political Parties Act to include a sub-section (fa) which expanded the jurisdiction of the PPDT to include hearing and determination of disputes arising from party primaries. This was bolstered by the amendments to Section 2 of the Elections Act defining nominations as the process by which the Commission registers candidates for election. A party primary is defined in the Political Parties Act as 'the process through which a political party elects or selects its candidates for an election but does not include a party list'. This separates the process from that of nomination which is defined by the Elections Act and Elections (General) Regulations, 2012 as the submission to the IEBC of the names of a candidate in accordance with the Constitution and the Elections Act. This measure assisted in delineating the scope of the PPDT's jurisdiction from that of the Commission.

The second measure was an administrative one: the signing of a Memorandum of Understanding between the Commission and the PPDT. The MoU was aimed at providing clear guidance to political parties and candidates on the respective legal mandates of the two institutions in respect to hearing and determination of pre-election disputes arising from party list nominations. As a result, PPDT heard and determined disputes relating to political parties and their members while the Commission heard and determined disputes in respect of constitutional and statutory requirements for nomination by use of party list.

Therefore, it would appear that the only time that the Commission would assume jurisdiction over nomination dispute is when the party nominations are over and the nomination papers are presented before Commission's Returning Officer for nominations as held in *Edick Omondi Anyanga v Orange Democratic Movement & Another [2017].* At this point if the Commission finds that such nomination does not meet the stipulated legal requirement, the Returning Officer may reject such a nomination. In *Edick Anyanga case (supra)* the Court overturned the PPDT's finding on jurisdiction and found that under section 13 (2) of the Elections Act, the dispute was removed from the purview of the PPDT once nomination had occurred.

In conclusion, it is worth pointing out that despite the amendment to Political Parties Act, which was meant to delineate the extent of jurisdiction of Commission and PPDT, the definition of nomination and the broad mandate donated to Commission by the Constitution, IEBC Act and the Elections Act may still cause jurisdiction overlap between the two bodies hence the need for further clarity.

13.2 Enforcement of Electoral Code of Conduct

Article 84 of the Constitution of Kenya demands that in every election, all candidates and all political parties must comply with the code of conduct prescribed by the Commission.

The electoral Code of Conduct is found in the second schedule of the Elections Act and operationalized by Section 110 of the Elections Act. The Code applies to applies to elections and referenda. Its objective is to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals.

Section 110 of the Elections Act requires that every political party and every person who participates in an election or referendum under the Constitution and the Elections Act signs the electoral code of Conduct. During the 2017 General Election period, disputes arising from breach of the Electoral Code of Conduct were filed with the Commission. These cases were heard before the Commission's Electoral Code of Conduct Enforcement Committee established under the Second Schedule of the Elections Act.

Paragraph 15 of the Second Schedule to the Election Act provides for the establishment and composition of Electoral Code of Conduct Enforcement Committee. It comprises of not less than five members of the Commission and shall be chaired by a member appointed by the Chairperson. A member of staff is the secretary to the Committee. Though the membership is at least 5 members, the quorum in not clearly provided for in that it is not clear whether the Committee must have at least five members in order to conduct business.

Challenges on enforcement of the Electoral Code of Conduct

i. **Conflicting Jurisdiction:** Whereas the Elections act empowers the commission to investigate and prosecute breaches to the electoral code of conduct the election offences act creates the offence of breach of the code and gives power to ODPP to order investigations and prosecute the same.
ii. **Appointment of the Chairperson of the Committee:** The Elections Act empowers the Commission Chairperson to appoint the Chairperson of the Electoral Code of Conduct Committee who shall be a Member qualified to hold the office of Judge of the High Court. A challenge abounds when there is no member qualified as such.
iii. **Membership of the committee:** the membership of the Committee as prescribed by law is at least five members who must all sit to hear and determine a dispute at any instance. A challenge arises when the members in post are less than the required minimum of five.

13.3 Election Petition arising from declaration of Results

13.3.1 *Member of County Assembly Election Petitions*

The procedure for determining the validity of an election is by way of an election petition. By dint of the provisions of Article 105, the validity of an election of a Member of Parliament is to be determined by the High Court. Sections 75 and 75 1A of the Elections Act provide for County Election Petitions and require that a petition challenging the election of a County Governor is to be filed in the High Court while a petition challenging the election of a Member of the County Assembly is to be filed in the magistrates' Court.

Section 75 (4) of the Elections Act provides that an appeal in the case of a Member of the County Assembly shall lie to the High Court and must be filed within thirty days and heard and determined within six months from the date of filing of the appeal. It is worth nothing that there is no mention of a second or third appeal from the decision of the High Court under Section 75 (4) of the Elections Act. Does this allow the petitioner to prefer subsequent appeals to the Court of Appeal and possibly to the Supreme Court?

This question was fully addressed and finally settled by the Court of Appeal in the case of *Isaac Oerri Abiri v Samwel Nyang'au Nyanchama & 2 others [2014] eKLR.* The Court in dismissing the appeal, stated that the failure to mention a second or further appeal was done on purpose.

Further to the foregoing, the Court held that the jurisdiction of the Court of Appeal in electoral disputes is governed by Section 85A of the Elections Act wherein second appeals from the determinations of electoral disputes by the Resident Magistrate's Court are not mentioned at all.

The above position has been upheld by the Supreme Court in *Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission [2019] eKLR* where it was held that in the absence of an express statutory provision, no second appeal lies to the Court of Appeal, from the High Court, emanating

from an election petition concerning the validity of the election of a Member of County Assembly.

It is clear that Section 75(4) of the Elections Act still poses an interpretational challenge which may be a subject of future litigation unless an amendment is made to finally set the record straight on whether one can prefer an appeal against the decision of the High Court.

13.3.2 *Presidential Election Petitions*

Article 140 of the Constitution provides that a petition challenging the election of the President- elect has to be filed in the Supreme Court for determination within seven days after the date of the declaration of the results; and to be heard and determined within 14 days after the filing of the petition. The law governing the conduct of such petition is contained in the Supreme Court Act and the Rules made thereunder.

The Commission notes that the 14 days provided for hearing and determination of the petition are not sufficient for parties involved to adequately prepare.

Determination of Disputes Arising from the First Round Presidential Election Results

The Constitution in Article 140 only envisages disputes relating to challenges to the election of a president- elect and provides that they have to be heard by the Supreme Court. That jurisdiction conferred on the Supreme Court is restricted to challenges to the election of a president-elect. However, the Constitution and the Elections Act are silent on the mode of resolving disputes arising from the first round of presidential elections. This situation may occur when the conditions set under Article 138(4) are not met. The said Article states as follows:

A candidate shall be declared elected as President if the candidate receives—

i. more than half of all the votes cast in the election; and
ii. at least twenty-five per cent of the votes cast in each of more than half of the counties.

It is not clear as to which forum a petition challenging the results of a presidential election when no candidate has met the required threshold as stipulated under Article 163 (3)(a) and 140 (1) of the Constitution.

13.3.3 *Scrutiny of Electoral Material in Custody of the Commission*

The legal basis for scrutiny is grounded on Section 82(1) of the Elections Act which provides as follows: *"an election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine."*

Further to the above, Rule 31 of the Elections (Parliamentary and County Election) Petition Rules, 2017 provides that the parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

In *Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission [2019] eKLR it* was held that denying a person the right to scrutiny, results in

violation of the right under Article 35(1) (a) and (b) of the Constitution and Section 4(1) (b) of the Access to Information Act No. 31 of 2016.

However, it is important to note that the law as elaborated above does not specifically provide for scrutiny of electoral materials in digital form, that is, materials domiciled in Commission's servers, a scenario which arose in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another [2017] eKLR*. Where the petitioner sought to scrutinize the servers containing the digital election results. The Court at paragraphs 277 and 278 ordered for a *"read-only-access"* which included copying where the petitioners so wished.

Lack of requisite legislation in this area has resulted in scenarios where Courts have made orders as against the Commission which are onerous to implement in practice.

In addition, the Supreme Court (Presidential Election Petition) Rules 2017 is silent on scrutiny; therefore, the Court had to totally rely on the Elections Act and The Elections (Parliamentary and County Elections) Petition Rules.

13.4 Challenges

i. In Presidential petition, the time frame provided for lodging petitions, filing responses, hearing and determination is rigid. The fourteen-day period is not adequate to ensure substantive justice to all parties; and neither did it provide sufficient time for the Commission to prepare adequately for representation and to gather evidence country wide, draw and file the necessary pleadings in its defense. The same challenges were identified by the complainants and by the Court itself.
ii. In other election petitions, the Petitioner is granted 28 days to file the Petition and a further fourteen days to serve the Respondents. The Respondents are then required to file response within seven days from the date of service of the petition which was not sufficient for the Commission to adequately respond. In some instances, the Commission and other parties were forced to request for more time from the court to enable it to file responses.
iii. Limited timelines to supply election materials and results to Court: The short period within which the Commission is required to comply with Court orders requiring it to furnish election materials is manifestly unjust.
iv. Production of Secure Digitial Cards (SD Cards) installed in the KIEMS device and which carries the poll data for a particular polling station contains information/data for all the 6 elective positions. In instances where there are several petitions in respect of those elective petitions and filed in different courts production of the SD cards proved a challenge.
v. **Recount and scrutiny** – There is no uniformity in the process of conducting recount and scrutiny hence each court conducted it in their own way and style. In some instances, the court barred the Commission's officials from taking part in the exercise and some courts also did not accord the Commission an opportunity to respond to the scrutiny/recount report filed in court denying the Commission a chance to interrogate the report, challenge it and make any necessary clarifications.

vi. **Storage of election materials** - There were cases where the Courts would order for production of election materials in Court while they had no facilities for storage.

vii. **Recovery of costs** - parties may decline to pay costs willingly which necessitates commencement of another process in court which in itself costly and time consuming and may not guarantee recovery of the costs in the end. In other instances, it may be difficult to trace the individuals whom the Commission is supposed to recover the costs from.

13.5 Recommendations

60. Amend Section 75(4) of Elections Act to make appeals on MCA elections petitions to be finalized at the High Court and equally appeals on MNA election petitions to be finalized at the Court of Appeal to provide parity.
61. Amend Section 82(1) of the Elections Act and the Elections (Parliamentary and County Election) Petition Rules, 2017 to provide for the parameters and procedure of scrutiny of digital materials held by Commission. This amendment must take into consideration the need to protect the security and integrity of the Commission's servers.
62. Amend the rules to ensure standardization of the scrutiny process pursuant to Court Orders. This is informed by the haphazard manner with which scrutiny processes were conducted by the various Courts in past elections.
63. Harmonize the definition of nomination disputes, party primaries, party lists, Commission nomination between Elections Act and Political Parties Act to clearly distinguish the disputes to be handled by the Commission and disputes to be handled by PPDT.
64. Modify KIEMS to facilitate prompt generation of reports when required by the Courts during election petitions.
65. Amend the Supreme Court (Presidential Election Petition) Rules 2017 to provide for the issue of scrutiny as the current rules are silent.
66. Amend the rules to provide for timelines for which a party may apply for scrutiny.
67. Amend the rules to ensure standardization of the scrutiny process pursuant to Court Orders.
68. Amend Article 140 of the Constitution and increase the time for determination of presidential election petition. The period for hearing and determining a presidential election petition should be extended to at least 30 days.
69. Amend the Constitution to provide for mechanism for addressing resolving disputes that may arise from first round of a presidential election.
70. Amend the Election Act to increase the security for costs in election petitions.
71. Amend the electoral statutes where the Court has declared various sections to be unconstitutional.
72. Amend the Election Offences Act to empower the Commission power to investigate and prosecute breaches to the code of conduct under Section 20 of the Act.
73. Amend Election Offences Act to oblige the ODPP to provide Commission with information on status of pending or prosecuted election cases so as to enable the Commission enforce the Electoral Code of Conduct and other provisions of the

elections act e.g. removal of persons convicted of electoral offences from the Register of Voters as provided for under Section 87 of the Elections Act.

74. Amend the second schedule of the Elections Act to clearly provide for quorum and composition of the Electoral Code of Conduct Enforcement Committee and to align it with the minimum requirements of the Constitution which provides for minimum of three members in order to conduct business of the Commission.
75. Amend the IEBC Act to empower the Chairperson of the Commission to appoint/co-opt persons with requisite qualifications to be the Chairperson/Member of the Electoral Code of Conduct Enforcement Committee.
76. Election Offences Act should be left as a stand-alone statute but with enhanced provisions from some offences provided for under the Penal Code[117] and Public Officer Ethics Act which relate to elections.

[117] Penal Code, Chapter 63, Laws of Kenya.

14 ELECTION OFFENCES ENFORCEMENT

14.1 Introduction

The Constitution under Article 252(1)(a) grants the Commission the power to conduct investigations on its own initiatives on a complaint made by a member of the public on any violations, malpractices or offences committed during the election. Currently, the Election Offences are provided for under the Election Offences Act. On investigations and prosecution of electoral offences committed by candidates, political parties, their agents or voters the Commission worked with the Director of Public Prosecutions, National Police, Judiciary and other relevant agencies.

Further, Article 81 (e) (ii) of the Constitution expresses the norms of a free and fair election to be one which is free from violence, intimidation, improper influence or corruption. Article 83(1)(c) of the Constitution disqualifies a person who has been convicted of an election offence during the preceding five years to be registered as a voter. Finally, the Commission is tasked with ensuring appropriate structures and mechanisms to eliminate electoral malpractice.

It is important to note that there are immediate consequences which befall a voter or candidate who is convicted of an election offence. Such a voter is immediately ineligible to remain on the Register of Voters or vote or contest in an election. While the law is clear about the consequences of a conviction, its implementation in practice has proven challenging.

One of the challenges which has hampered the application of the law is the lack of synergy between the Courts, the ODPP and the Commission. This has been occasioned by the dearth of information flow from the Courts to the Commission on the outcomes of the criminal cases involving election offences. It is proposed that the law be amended to require the Court to submit the outcome of the criminal trial for the Commission's records and further action where necessary.

14.2 Exhaustiveness of offences provided for under the Election Offences Act

The elections act provides a number of election offences broadly classified as offences by voters, elections officials, political parties, candidates, agents including responsibility by public officers.

Kenya has no express provision under the Election Offences Act, or the Alcoholic Drinks Control Act[118] restricting and or prohibiting selling or distributing of liquor on the day of the polls. This gives room to a number of candidates and their agents to wittingly purchase liquor for the opponent's supporters so that they may make the wrong choice at the a

[118] No. 4 of 2010

ballot, or even fail to turn out to vote if they are perceived ardent supporters of the opponents.[119]

In India, Representation of the People Act[120] provides that no spirituous, fermented or intoxicating liquors or other substances of a like nature shall be sold, given or distributed at a hotel, eating house, tavern, shop or any other place, public or private, within a polling area during the period of forty-eight hours ending with the hour fixed for the conclusion of the poll for any election in that polling area.

To mitigate against disturbance and chaos witnessed at polling stations as a result of distribution of alcohol on election day there may be justification to legislate against distribution of alcohol on polling day.

14.3 Enforcement of Section 14 Election Offences Act

Under this Section, the Act prohibits the use public resources for the purpose of campaigning during an election or a referendum unless where authorized under the Act or any other written law. Consequently, the Commission is enjoined to require, in writing, that any candidate, who is a Member of Parliament, a County Governor, a deputy County Governor or a Member of a County Assembly, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office. The targeted individuals are then required to supply the information required within a period of fourteen days from the date of the notice.

This provision has proved difficult to enforce since the Commission lacks investigative and prosecutorial powers under Election Offences Act. The said powers are vested in the Director of Public Prosecutions under Section 21 which grants the DPP the power to order investigations and to prosecute offences under this Act. Consequently, there has been blatant disregard of the Commission's efforts to have candidates comply with the provisions of this Act.

The Commission proposes that for purposes of implementation of Section 14 of the Act there is need to move this requirement under the second schedule of the Elections Act. Alternatively amend the Elections Offences Act to enhance the Commission's mandate in implementing section 14 of the said act.

[119] https://www.businessdailyafrica.com/news/MPs-pass-Bill-restricting-beer-marketing-despite-key-loophole/539546-1656388-8u94pmz/index.html
[120] Sec. 135C

14.4 Recommendations

77. Amend the Election Offences Act to include a provision that bans the sale of alcohol at 48 hours before the date of elections.
78. Amend Sections 14 of the Elections Offences Act and move the offences thereof to electoral code of conduct under the Elections Act. This will empower the Commission to effectively issue sanction under Section 14. Further, the Leadership and Integrity Act which prohibits misuse of state resources should be replicated in the electoral code of conduct for enforcement by the Commission during campaigns.
79. Alternatively amend the Elections Offences Act to enhance the Commission's mandate in implementing Section 14 of the said act.

15 RECALL PROCEDURES

15.1 Introduction

Recall is described as a means by which the electorate can remove an elected official from office before that official's term in office expires. The process is initiated by a petition calling for the recall of a particular elected official. What then follows is the collection of the required number of signatures from the electorate of the elected official and verification of the same. A poll is then initiated where the voters vote to establish whether the elected official should be recalled or not. If a majority vote in favour of the recall, this will result in a by-election.

The Recall process is based upon two theories-

a) The first theory is that elected officials are merely agents for the voters and hence they must exercise their vote in Parliament in a manner consistent with the will of the people.[121] William Munro elaborated this theory as follows;

> *"Officeholders stand in the same position to the public as the agent does to the principal. They are simply the instruments for carrying on the business of the public and if they are faithless in performing their duties the law should provide adequate means for getting rid of them and putting others in their places."*[122]

b) The second theory rationalizes that there must be a way to remove corrupt, incompetent or lazy officials especially where they have a fixed term of office and that term extends for a significant period. Often when this theory is the basis for recall, the grounds for recall are corruption, misconduct, incompetence and failure to perform duties.

Thus, a recall process captures the essence of the provisions of Article 1 of the Constitution which bestows on the people all sovereign power which the people may exercise either directly or through their elected representatives.

15.2 The legislative framework in Kenya

The right to recall Members of Parliament is enshrined in Article 104(1) of the Constitution and Sections 45-47 of the Elections Act while that of the Members of the County Assembly is provided for in Sections 27-29 of the County Governments Act.

The Election Act and the County Governments Act sets out the procedure and grounds for recall as follows:

a) Where a Member after due process of the Law is found to have violated the provisions of Chapter 6 of the Constitution of Kenya;

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[121] Joseph Zimmerman, *The Recall – Tribunal of the People* (Praeger, 1997) 5
[122] William Munro, *The Initiative, Referendum and Recall* (Appleton, 1916) 314

b) Where a Member after the due process of the Law is found to have mismanaged public resources; and
c) Where a Member is convicted of an offence under the Election Act, 2011.

Constitutional Petition 209 of 2016; Katiba Institute & another v. Attorney General & another [2017], the High Court of Kenya sitting at Nairobi at paragraph 127; identified Sections 45 (2) (3) & (6), 46 (1) (b) (ii) and (c) and section 48 of the Elections Act and sections 27 (2), (3) and (6), section 28 (1) (b) (ii) and (c) of the County Governments Act, 2013 and ruled out the said sections as being meaningless and superfluous and that they fell short of the Constitutional imperative in Article 104 of the Constitution and to that extent were unconstitutional:

i. Section 45 (3) of the Election Act and Section 27 (3) of the County Government Act provided that a recall shall be initiated upon a judgment by the High Court confirming the above mentioned grounds.
ii. Section 45 (4) of the Election Act and Section 27 (4) of the County Government Act stipulates that the recall shall be initiated 24 months after the election and not later than 12 months immediately preceding the next general election.
iii. Section 45 (5) of the Election Act and Section 27 (5) of the County Government Act further provides that the recall petition shall not be filed against a Member of Parliament more than once during their term in Parliament.
iv. Section 45 (6) of the Election Act and Section 27 (6) of the County Government Act provides that person who unsuccessfully contested an election under the Election Act shall not be eligible to initiate the recall petition.

15.3 Procedure of filing a Recall Petition

The procedure for recall is provided in Section 46 and Section 28 of the Elections Act and County Government Act respectively. The petition is to be filed with the Commission and shall be in writing and signed by the petitioner who is a voter in the Constituency/Ward in respect of which the recall is sought and was registered to vote in the election in respect of which the recall is sought.

The petition will need to be accompanied by an order of the High Court. Furthermore, the petition shall specify the grounds for recall; contain a list of at least 30% of the voters in the Constituency/Ward together with the prescribed filing fee. The list of names shall contain the name, address, voter card number, national identity card/passport and signature/thumb print. For the Member of Parliament, the names shall comprise of at least 15% of the voters in more than half of the Wards in the Constituency.[123] The names should

[123]*The Election Act, 2011* Section 46 (3).

be submitted to the Commission within a period of 30 days after the petition has been filed after which the Commission shall have 30 days to verify the names.

Once the Commission is satisfied it will issue a notice of the recall to the Speaker of the relevant House within 15 days of the verification. The Commission is expected to conduct a recall election within 90 days. The recall election shall be by secret ballot and decided by a simple majority of the voters voting in the recall election.[124] In the event that the recall elections result in the removal of a Member of Parliament/ Member of the County Assembly, the Commission shall hold a by-election in the affected Constituency/Ward respectively.[125] It is noteworthy that for the Member of Parliament, the recall election shall be valid if the number of voters who concur in the recall election is at least 50 per cent of the total number of registered voters in the affected constituency.[126]

In *Katiba Institute & another v Attorney General & another Constitutional Petition No. 209 of 2016 [2017] eKLR* the petitioners challenged the provisions of these two Acts arguing that the process frustrates the constitutional right of voters to recall a Member of Parliament & Member of County Assembly without any obstacles. They sought a declaration that Sections 45, 46, 47 and 48 of the Election Act together with Sections 27, 28, 29 of the County Government Act were unconstitutional. The petition was successful. The Court declared sections 45(2) (3) and (6), 46(1) (b) (ii) and (c) and 48 of the Elections Act and sections 27 (2) (3) and (6) and 28(1) (b) (ii) and (c) of the County Governments Act are meaningless and superfluous; or, that they fall far short of the constitutional imperative in Article 104 of the Constitution and to that extent are unconstitutional.

It also declared Sections 45(1) (b) (ii) and 45(6) of the Elections Act and Sections 27(6) and 28(1) (b) (ii) of the County Government Act discriminatory and therefore unconstitutional.[127]

The effect of the above mentioned decision is that majority of the law on recall no longer exists save for the time limits which leaves a two-year window in which to recall an elected official. Further, it resulted in the grounds for recall being left open for the voter to decide. The requirement for a court order is no longer a hurdle. Moreover, persons who unsuccessfully contested in an election are eligible to initiate a recall petition and voters who did not participate in the previous election can participate in the recall election.

In any event, the unconstitutionality of various parts of the recall law does not abolish the right to recall.

As pointed out earlier, the net effect of the decision of the court in *Katiba Institute & another v Attorney General & another Constitutional Petition No. 209 of 2016 [2017] eKLR* was that there was no substantive law governing the grounds for recall in Kenya, since Article 104 of the Constitution provides no such grounds. However, this scenario has changed with

[124]*The Election Act,2011* Section 47 (4) (5), *The County Government Act, 2012* Section 29 (4) (5).
[125]*The Election Act,2011* Section 47 (6), *The County Government Act, 2012* Section 29 (6).
[126]*The Election Act 2011*, Section 48.
[127]*Katiba Institute & another v Attorney General & another [2017] eKLR*

respect to the members of county assemblies following the amendment to the County Governments Act which now provides a succinct procedure for recall.

The Elections Act is yet to be amended to provide the necessary grounds and procedure to govern the recall of a Member of parliament.

15.4 Recall in California, United States of America: a case for simultaneous recall election and by - election

In the state of California, the recall ballot has two components a yes or no vote for recall, and the names of replacement candidates, selected by the nomination process used in regular elections. Where the majority of electors vote "yes" on the recall, the elected official in question will be recalled from office and if the majority of electors vote "no," the official will remain in office.[128] In the event of a successful recall (12% of the last vote for that office), the replacement candidate who receives the most votes will serve the remainder of the recalled official's term.

15.5 Recommendations

80. Amend Section 45 Elections Act to provide for grounds for recall for members of parliament so as to seal the gap created by the decision in *Katiba Institute & another v Attorney General & another [2017] eKLR*

81. Consider adopting the grounds of recall as enumerated in Section 27 of the County Governments Act and incorporate them in the amended Section 45 Elections Act so as to have them apply to Members of Parliament *mutatis mutandis.*

82. Amend the regulations to enable the voters to initiate and prosecute recall petitions using appropriate technology. For instance, the collection of signatures to justify a recall can be done via an e-signing platform which will hasten the process of collecting the signatures. The effect of using an e-signing platform is that it will reduce the 30 days for verification of signatures by the Commission.

83. Amend the Act to allow for petitions for recall to run concurrently with the elections of a successor.

[128]Ballotpedia (8th June 2020), *Election Results*, https://ballotpedia.org/Laws_governing_recall_in_California.

16 ELECTION CAMPAIGN FINANCING

16.1 Introduction

Campaign financing as defined under the Election Campaign Financing Act, No. 42 of 2013, means resources spent by a candidate or political party during an election period for purposes of campaign.[129] Campaign finance has also been defined as the raising and spending of money intended to influence a political vote, such as the election of a candidate or a referendum.[130] Campaign expenses means the expenses incurred by a candidate, a political party, a referendum committee or an organization registered by the Commission to campaign in support of a candidate, a political party or a referendum committee during an election period.[131]

Competitive elections require that electoral contestants have a means of financing their election campaigns and routine operations. Generally, there are two sources of funds for parties and candidates; these are, public financing and private financing. Limits may apply to each of these funding types to ensure that candidates or political parties do not unduly influence the outcome of the elections and to provide a level playing field for all candidates and political parties participating in an election.

16.2 Legislative Framework

Regulation of election campaign financing is mainly anchored in the Constitution and the Election Campaign Financing Act, 2013.

16.2.1 *The Constitution of Kenya, 2010*

Article 88 (4) (i) of the Constitution mandates the Commission to regulate the amount of money that may be spent by or on behalf of a candidate or party in respect of any election. Consequently, the Election Campaign Financing Act was enacted in 2013.

16.2.2 *Election Campaign Financing Act, 2013*

The object of the Act is to provide for the regulation, management, expenditure and accountability of election campaign funds during election and referendum campaigns; and for connected purposes. The Act seeks to regulate, by limiting, the amount of money that candidates and political parties may spend in election campaigns as well as limit the contributions a candidate may receive.

Section 3 of the Act sets out the functions and powers of IEBC as follows; to:

i. keep a register of authorized persons under the Act;

[129] Section 2 of the *Election Campaign Financing Act, 2013*
[130] André Munro, Campaign finance, https://www.britannica.com/topic/campaign-finance
[131] Supra n 204

ii. supervise candidates, political parties, referendum committees and authorised persons in relation to campaign expenses;
iii. set spending limits and enforce compliance with such limits;
iv. set limits and verify sources of contributions to a candidate, a political party or a referendum committee;
v. monitor and regulate campaign expenses;
vi. provide a framework for the reporting of campaign expenses;
vii. advise a candidate, a political party or a referendum committee on any matter relating to campaign expenses;
viii. provide and enforce a framework for the regulation of media coverage; and
ix. perform such other functions as may be necessary for the purposes of the Act.

The Commission has the power to investigate or examine all matters relating to the performance of its functions under the Act, including the power to, upon obtaining a warrant, enter into any premises and conduct a search, request for information relating to party nomination expenses and election campaign expenses, and take action as is necessary for purposes of carrying out its functions under the Act.[132]

The Commission is mandated to, at least twelve months before the election, make rules to regulate election campaign financing. The Act further provides for authorized persons to be registered by the Commission to manage campaign expenses for candidates and political parties during an election.

The sources of funds for purposes of financing party nomination, election or referendum campaign are contributions received from any person, political party or any other lawful source, contributions from a lawful source not being directly from a foreign government and contributions from a fund raising. Anonymous contributions or contributions from an illegal source are prohibited under the Act. The Act also outlaws contribution or donation, in cash or in kind, from the State, a state institution or agency or any other public resource.[133]

Section 12 of the Act requires the Commission to set limits of how much can be spent during campaigns and establishes a mechanism for auditing the resources used to obtain financing by candidates. Contribution from a single source shall not exceed 20%. The limits should be gazetted at least twelve months before a general election. Candidates and political parties are required to disclose their sources of funding to the Commission failing which amounts to an offence.

Enforcement of the Act is vested in the Commission by dint of Article 88(4)(i) of the Constitution and Sections 3, 4 and 21 of the Act. The Act creates the following offenses:

i. contravening the party campaign expenditure rules;

[132] Section 4 of the Election Campaign Financing Act, 2013.
[133] see generally, sections 8 – 14.

ii. knowingly giving false or incorrect information;
iii. failing to submit the party expenditure reports to the Commission; or
iv. exceeding the spending limits prescribed without reasonable explanation.

16.2.3 *Implementation of the Election Campaign Financing Act, 2013*

In a bid to operationalize the provisions of the Campaign Financing Act the Commission in 2017, developed and published the Election Campaign Financing Regulations pursuant to Section 5(a) of the Act. The Regulations are still pending approval of Parliament.

It is worth noting that the operation of the Act was suspended by Section 32 Election Laws (Amendment) Act, No. 1 of 2017, until after the 2017 General Election by insertion of Section 1A.

16.3 Challenges

Statutory provisions within the Election Campaign Financing Act and lack of approval and publication of the Election Campaign Financing Regulations created ambiguities and inconsistencies in managing the process as highlighted below;

i. The Election Campaign Financing Act obliged parties and candidates to submit registration details 8 months to the date of the General Election per section 15(2)(c)(i).
   This period created ambiguity as to whom would be considered a candidate noting that the meaning of 'candidate' as described under Section 2 of the Election Campaign Financing Act and Section 2 of the Elections Act suggests that it is a person cleared following the Commission nomination. At 8 months to the General Election, no nominations had been conducted.
ii. Public servants who would also aspire to vie for elective positions and who were yet to resign as required by this period, would risk being locked out due to failure to adhere to the statutory requirements with respect to the submission of registration details and resignation from office by public officers per Section 43(5) of the Elections Act.
iii. The Election Campaign Financing Act seems to establish two distinct committees, that is, the campaign financing and expenditure committees as envisaged under Section 7(1) and Section 6(1)(c). Two separate committees would most likely be a challenge in terms of operation and management.
iv. Section 12 of the Election Campaign Financing Act dictates that contributions from a single source shall not exceed 20% of the total contributions. This can only be ascertained *post facto*, thus posing a difficulty in capping contributions as anticipated in the said Act.
v. Disclosure of funds under Section 16 extends to the money used in campaigns for nominations yet at that time, the aspirant is not a candidate.

vi. Provisions governing management of surplus funds as outlined under Section 17 of the Election Campaign Financing Act are ambiguous, for instance, submission of the surplus campaign funds to a preferred charitable organization.

vii. Section 19(f) of Election Campaign Financing Act stipulates allowable expenses to include '*any other justifiable allowances*. This provision is ambiguous and may be open to abuse by the political class.

viii. There was inconsistency within the law as to who is to file the registration details as required by law. Section 6 of the Campaign Financing Act, 2013, provides that '*the authorised person*" means a candidate; an agent of the candidate; political party campaign financing committee; and referendum campaign financing committee.

Section 15(2)(c)(i) of the Act requires candidates to file their registration details 8 months to the general election, at which time, there are no candidates since the definition of "candidates" suggests that these are persons who have been cleared (nominated by the Commission) to vie, yet nomination by the Commission ought to be conducted at least 60 days to the elections pursuant to Section 2 of the Elections Act.

This lacuna led to the number of persons and political parties submitting campaign financing details being larger than anticipated as it was not clear who was to be termed as a 'candidate' at a period when nominations had not yet been undertaken.

ix. The large numbers of the aspirants who turned out to submit their details as required, ended up posing a strain and being a logistical nightmare on the Commission's lean staff who were available to manage the process, resulting to the whole process being chaotic.

x. Receipt and registration was centralized to the Commission's headquarters thus posing logistical challenges in time management in a bid to facilitate those travelling from other counties.

xi. Banks were not co-operative resulting in back and forth challenges between candidates, political parties and the Commission.

xii. Lack of the requisite regulations to operationalize the Election Campaign Financing Act.

16.4 Comparative study

According to the research carried out by International Institute for Democracy and Electoral Assistance,[134] all the Countries in the world have regulations regarding the role of money in politics.

In Bahamas, Belize, Saint Vincent and the Grenadines, Samoa and Tuvalu, the only rule found was a ban on vote buying. While Djibouti and Saint Kitts and Nevis do not seem to have a ban on vote buying, they do use direct public funding and tax relief for political

[134] Publication on Political Finance Regulations Around the World, 2012, by International IDEA

parties respectively. These Countries have very small populations of about not more than 200,000, which may help to explain why there are few regulations on campaign financing.

Countries in the Eastern Europe, such as Bulgaria, Croatia, Latvia, Poland Canada, Ecuador, Israel, Portugal and Romania are among those that use the largest number of regulations.

When it comes to the issue of bans on donations, three forms of restriction exist in a majority of countries. These are donations from (a) foreign interests, (b) anonymous sources and (c) state resources (excluding regulated public funding). The prohibition of providing state resources to political parties or candidates is the most common. This simply implies that there is a general concern of the potential abuse of state resources. Foreign donations are also generally unwanted.

Entities that have not existed for at least a stipulated period in some countries are banned from contributing. This is in order to stop the possibility of having entities being set up shortly before elections to channel funds.

In Brazil, sporting clubs are not allowed to make donations while militias cannot do so in Iraq. Liberian banks and Malagasy and Ugandan terrorist groups are also banned from making donations. Germany explicitly bans donations made in expectation of political or financial advantage.

In Indonesia, donations must be based on the principle of honesty, volunteerism, fairness, transparency, accountability as well as sovereignty and independency of political parties. In Sierra Leone, only those eligible to be registered as voters are allowed to make contributions, while in Guinea Bissau and Bhutan only party members may do so.

On limits of donations, there are three forms of such limits; these are (a) ceilings on the amount a donor may give to a political party over a particular time period (normally one year), (b) ceilings on allowed donations to political parties in relation to an election, and (c) limits to the donations that may be made to candidates.

In some cases, arguments prevail that donations are a form of free speech that should not be limited, apart from the banning of donations from 'undesirable' sources. For instance, in the US, the Supreme Court issued a ruling in *Citizens United vs. Federal Election Commission* overruling an earlier decision made in *Austin v. Michigan State Chamber of Commerce (Austin),* which allowed prohibitions on independent expenditures by corporations.

The Court also overruled the part of *McConnell vs. Federal Election Commission* that held that corporations could be banned from making electioneering communications. The Court upheld the reporting and disclaimer requirements for independent expenditures and electioneering communications. The Court held that, although disclaimer and disclosure requirements may burden the ability to speak, they impose no ceiling on campaign activities

and do not prevent anyone from speaking. As a result, the disclaimer and disclosure requirements are constitutional as applied to both the broadcast of the film and the ads promoting the film itself, since the ads qualify as electioneering communications. The Court's ruling did not affect the ban on corporate contributions.[135]

The general idea behind election campaign funding is that political activities are not possible without money, and that providing 'regulated' funds can help to encourage political pluralism while counteracting the negative role of money in politics.

Campaign spending depends on the region. For instance, in the United States, television advertising time must be purchased by campaigns, whereas in other countries, it is provided for free.[136]

In conclusion, it is apparent that most of the governments have had to reform campaign financing in the hope of eliminating big money influence, with Kenya not being exempted.

Finally, in the words of Magnus Ohman, *"the main shortcoming in ensuring transparent political financing in Africa lies not so much in the legal frameworks but more in the implementation of existing provisions. … Underlying these challenges is an unwillingness of political leaders to subject themselves to outside scrutiny, and a lack of independence and political will among public institution."*[137]

In Kenya, the challenge has been the failure to implement the existing provisions of the Election Campaign Financing Act, 2013 which was compounded by the suspension of the operation of the Act in 2017.

16.5 Recommendations

84. Submission of details of authorized persons should be devolved to County and Constituency levels.
85. Development of Electronic software to facilitate registration of candidate/party details.
86. Review of timelines under the Election Campaign Financing Act, 2013 to align with the Elections Act, 2011 timelines.
87. Review of the Election Campaign Financing Act, 2013 to address, ambiguities, inconsistencies and flaws.
88. Publication and enactment of the Election Campaign Financing Regulations to effectively operationalize the Act.

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[135] Federal Electoral Commission of America, http://www.fec.gov/law/litigation/cu

[136] *Holtz-Bacha, Christina (2008). Encyclopedia of Political Communication. SAGE Publications. p. 3. ISBN 978-1412917995.*

[137] Magnus Ohman, The state of political finance regulations in Africa, https://www.idea.int/sites/default/files/publications/the-state-of-political-finance-regulations-in-africa.pdf.

17 REFERENDA AND OTHER POLLS

17.1 Introduction

The Referendum process is a critical touchstone of any stable and participatory democracy such as Kenya. It infuses public participation in democratic governance and safeguards the sovereignty of the people[138]. Considering that a Constitution is the legal and political foundation of a state, its legitimacy needs to derive from the people. The procedure for amending the Constitution involves the people, as an expression of their ultimate sovereignty. The most direct way to involve the public in amending the Constitution is through a referendum, usually following a vote by the legislature.

17.2 The Legal Framework Governing the Referendum Process in Kenya

Constitution of Kenya, 2010

Proposed Amendments to the Constitution of Kenya are provided for under Chapter 16 of the Constitution. The Constitution envisions two types of amendments:

i. Amendment by Parliamentary initiative as encapsulated under Article 256; and
ii. Amendment by popular initiative as encapsulated under Article 257

Any amendment under either Article 256 or 257 must be approved by a Referendum, if it relates to: the Supremacy of the Constitution; the territory of Kenya; the sovereignty of the people; the national values and principles of governance referred to in Article 10 (2) (a) to (d); the Bill of Rights; the term of office of the President; the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies; the functions of Parliament; the objects, principles and structure of devolved government; or the provisions of Chapter 16 of the Constitution on amendments.

Additionally, Amendment by popular initiative is also subjected to a referendum, if after the County Assemblies have passed the Draft Bill, either Houses of parliament fails to pass the same. The Constitution threshold for a referendum entails at least twenty per cent of the registered voters in each of at least half of the counties voting in the referendum and a support by a simple majority of the citizens voting in the referendum.

17.3 The Elections Act, 2011

Under the Elections Act, referendum and related processes are provided for under Part V, and Sections 88-104 which principally deal with the question of Referendum Petitions.

Part V basically provides for the process from the initiation of the referendum, to the conduct of the referendum. The Commission is tasked with the obligation of framing the referendum question or questions which is/are then laid before the National Assembly for approval. Additionally, the Commission is under an obligation to publish the referendum question or questions in the Kenya Gazette and electronic and print media of nationwide

[138]See International IDEA, Constitutional Amendment Procedure, September 2014 at p 4.

circulation. The referendum shall then be conducted within 90 days of the publication of the referendum question/questions.[139]

Section 51 provides for formation of national and constituency Referendum Committees for persons intending to campaign for or against referendum question/questions where such question /questions require a "yes" or "no" answer.

It is worth noting that the Procedure for conduct of referendum is similar to the procedure for the conduct of an election, albeit with necessary modifications.[140] The voting threshold of a referendum question on an issue other than that contemplated in Articles 255, 256 and 257 of the Constitution on the other hand, is a simple majority of the citizens voting in the referendum.

In addition to the processes and procedures of conducting a referendum, the Elections Act equally provides for challenging of the conduct, result and validity of a referendum, by way of a Petition to the High Court. The validity of a referendum can be challenged on account of corrupt practices during voting, error or misconduct on the part of a referendum officer, as well as error in counting or tallying in a referendum. The Petition can be instituted by a voter who had the right to vote in the referendum, and who voted, or, the commission.[141]

At the conclusion of the hearing of a referendum challenging the conduct or result of the referendum, the High Court may—

i. dismiss the petition;
ii. declare the published result to be incorrect;
iii. declare the referendum to be void; or
iv. uphold the petition in whole or in part.[142]

Petitions under the Act must be heard and determined within six months from the date of presentation by the Petitioner.[143]

This proposed law describes itself under the short title as an Act of Parliament to provide for the procedure of the approval of an amendment to the Constitution by a referendum, the conduct of a referendum, referendum petitions and for connected purposes.

In its quest to finalize the legal reform process post the 2013 General Election the Commission drafted referendum proposals to address gaps and ambiguities identified in the Elections Act. These proposals were presented to the Justice and Legal Affairs Committee (JLAC). JLAC directed that a joint technical working Committee between the Commission, Office of the Attorney General and the Kenya Law Reform

[139] Sections 49-50 of the Elections Act No. 24 of the 2011.
[140] *Ibid.,* Section 53.
[141] *Ibid.,* 88 – 92.
[142] *Ibid.,* Section 102.
[143] *Ibid.,* Section 98.

Commission (KLRC) work together and develop a Draft Bill for consideration by Parliament. To this end, the Commission developed a draft Referendum Bill, 2020 and regulations for discussion by JLAC.

17.4 Analysis of Salient Provisions of the Referendum Bill 2020

The referendum Bill, 2020 seeks to address challenges encountered during the Okoa and Punguza Mizigo initiatives and broadly provides as hereunder outlined;

No	Issue	Recommendation
1.	Applicable Timelines.	Develop timelines within which the Commission will undertake verification of signatures.
		Define period/date of submission of the Bill to the County Assemblies (Whether date of dispatch by the Commission or date of receipt by the County Assemblies)
		Clearly indicate the notification period following a Presidential proclamation on the Initiative.
2.	Amendment of the Constitution in relation to Article 255(1) of the Constitution.	Provide more in-depth provisions on how to address specific referendum issues on matters related to Article 255(1).
3.	Threshold on collection o f signatures	To provide clarity the coverage of the one million signatures as provided .
4.	Review and Re-submissio n of Initiatives	Provide procedure applicable where signatures do not meet threshold. (How do you salvage the promoter –Do they go back and review?)
5.	Multiple Referendum Initiatives.	To consider the need to make provision for Multiple Referendum Initiatives when legislating on the framing of questions.
		Provide clarity on procedure applicable where a single referendum initiative raises several divergent issues.

No	Issue	Recommendation
6.	Specific Referendum.	Provide for nature of Referendum initiative that may be introduced on a specific issue.
7.	Procedure before conduct of referendum	Provide clear distinction between the role of the Commission and that of the President where a Bill has been passed.
		Delineate between use of the word "proclamation' & 'notification'.
8.	Referendum Petitions	Specify in detail, the grounds that govern Referendum P etitions.
		To reconsider composition of the Courts in hearing Referendum Petitions as reflected under Clause 19 of the Draft Bill so as to bring petitions to a finality. (i.e. Court of Appeal as final)
9.	Local Referenda	Make provisions that govern referendum at local level n oting that this will be Specific and unique to each area.
10.	Funding of Referendum Campaign Initiatives.	Provide for regulation on the amount of money to be s pent on Referendum Campaigns.

17.5 Conclusion

The centrality of the referendum in a participatory democracy such as Kenya cannot be overstated. The Commission needs to continue proactively monitor salient factors that give rise to referendum initiatives and prepare its resources for the conduct of a referendum exercise. Further, it should take into account the overriding public interest for management of limited public funds and to accordingly advise all concerned stakeholders.

17.6 Recommendation

89. It is recommended that the Referendum Bill 2020 be considered and enacted in a timely manner to provide a robust regime upon which a referendum process can be anchored.

18 ICT IN THE ELECTORAL PROCESS

18.1 Background

Over the years, Electoral Management Bodies (EMB's) world over have inculcated and appreciated the use of Information Communication Technology (ICT) in their respective electoral processes. Technology refers to the scientific and engineering concepts and tools at the disposal of an EMB for the effective conduct and management of the election.

The Elections Act recognizes the pivotal role played by ICT in the electoral process. Section 44 of the Act succinctly defines the scope of the use of technology by establishing what it describes as an integrated electronic electoral system for registration of voters, voter identification and results transmission during an election. Further, Section 44A requires the Commission to set up a complementary mechanism where the system fails.

From the foregoing, it is discernable that the future of electoral management is inclined towards automation as evidenced by the increased deployment of technology in electoral processes.

The Independent Review Commission (famously known as the Kriegler Commission) established in 2008 to inquire into the circumstances of the 2007 post-election violence proposed the deployment of technology in the conduct of elections to enhance trust in the electoral process. In particular, the Kriegler Commission recommended that the body mandated to conduct elections *'develop and adopt an integrated and secure electoral management system that would allow computerized data entry and tallying at constituencies, secure simultaneous transmission from the polling station level to the national tallying centre and the integrated results-handling system in a progressive election result announcement system'.*[144]

Use of technology in the electoral process can be looked at from the prism of the three-tier stages of elections process. The electoral cycle is a 3-phased interdependent model comprising of the preparation stage; the Operations stage and the post-election or strategies stage.[145] The paragraphs below will consider the specifics of how technology may be utilized to support the elections.

18.2 Pre-election Stage.

At the pre-election stage certain activities of the Commision prior to the polling date require the deployment of technology.

The use of technology by the Commission has proven useful in voter registration and creation of a Register of Voters. The IEBC has employed the use of Biometric Voter Registration (BVR) to capture personal bio-data details of voters using finger-print scanners and digital cameras and storing the same in a database to be accessed during the voting

[144] Transparency International Kenya, *Kriegler Commission Report: An Audit of its Implementation* (Transparency International 2013).
[145] International Institute for Democracy and Electoral Assistance. (n.d.). The use of open source technology in elections.

day. The use of BVR, as acknowledged world over, is efficient in curbing duplications and enables the biometric it identification and verification of voters. In the long run, this prevents electoral fraud which desecrates the integrity of the vote.

In Nigeria, Toba Paul Ayemi and Adebimpe Omolayo Esan[146] attest to the relevant role of ICT in introducing credibility to the Nigeria electoral process while rooting out double registration and double voting. Specifically, the duo avers that the Nigeria General Election of 2011 was internationally acclaimed owing to an entirely new register of voters by the Country's Independent National Electoral Commission's (INEC) viewed as the only way to a free, fair, credible election. This was attributed to the fact that initially; the Voters' register did not reflect the electoral population matrix therefore affecting the credibility of resultant votes.

In India today, voter registration application is automated. An eligible voter applies for registration by filling in an online form then attaching a recent colour size photograph with photocopies of documentary proof of age or residence. One can use the same system to check their registration status.[147]

ICT can also be used in the geo-location of polling centers in preparation of the polling day. This is a requirement especially where result transmission is done electronically since there needs to be assurance that the transmission devices are relaying results from the polling stations. In Kenya, the Geographical Information System (GIS) is used to geo-reference electoral areas into units for purposes of elections.

The use of ICT in boundary delimitation is a factor to be celebrated. ICT has enabled boundary delimitation with high degrees of accuracy factoring in population quota vis-à-vis land mass, which would otherwise prove impossible with bare human estimation.

Party preliminaries are an important democratic exercise with a degree of impact on the election generally. ICT can specifically be incorporated in party primaries and thereafter in the submission of names of nominated candidates with the EMB. This will greatly simplify the generation of ballot papers.

Campaign financing is a critical aspect of ensuring that there is a level playing field to facilitate a free and fair election. ICT can, and has been used to report and monitor campaign financing requirements.

In the United States of America (USA), digital ballot papers are delivered to voters living abroad for self-printing by the EMB. This is done through a digital service channel where

[146] Toba, P. A., & Adebimpe, O. E. (2018). The Impact of ICT in the Conduct of Elections in Nigeria. *American Journal of Computer Science and Information Technology*.

[147] Retrieved from https://www.indiatoday.in/information/story/how-to-register-to-vote-in-india-divd-1440901-2019-01-28 at 2026hrs on 30th September 2020.

the marked ballot is sent back to the EMB via mail. According to the International Institute for Democracy and Electoral Assistance(IDEA)[148], voter registration and the review of electoral registers is the most efficient way of achieving an accountable and transparent preliminary election process. While it might be relatively cheaper to put up a database for a single election, the maintenance of voter data, its sustainability and intergrity usually comes with relatively higher costs.

18.3 Polling Stage

The day of casting the vote normally forms the ultimate purpose and culmination of the preparations cited above. ICT has great relevance in the following activities of the polling as enumerated below:

i. Voter identification and verification;
ii. Vote casting, the use of Electronic Voting Machines and internet voting systems; and
iii. Voter turn-out reporting.

Kenya has employed the use of ICT to identify and verify voters before allowing them to cast their votes on the polling day. Sections 44 and 44(A) of the Elections Act establishes an integrated electronic electoral system for purposes of furthering and enabling the conduct by the Commission, of its responsibilities under Article 88(4) of the Constitution. Further, Section 44A of the Elections Act appreciates the use of complementary mechanisms for identification of voters. It is under the strength of these provisions that the Kenya Integrated Election Management System was developed by IEBC for purposes of registration and identification of voters on the voting day.

Once a vote has been cast and counted, the same is relayed electronically through the Results Transmission System. The electronic transmission system is to provide an advance mode of relaying results as tabulated at the polling station.

The Commission has formulated the Elections (Technology) Regulations, 2017. These regulations would guide voter identification and registration. In Kenya the Election (General) Regulation provides for electronic voting under Regulation 60.

18.4 Post-election Stage

This stage involves the activities surrounding the transmission of the vote after it has been cast by the voter. These are:

i. Transmission and collation of results;
ii. Publication and display of results; and
iii. Algorithm and Reporting checks.

Once the technology employed in the electoral process transmits the results, it can be used to collate and display the results in preferred formats, geographically and even for different

[148] International Institute for Democracy and Electoral Assistance. (n.d.). The use of open source technology in elections.

election seats. The accuracy for such results is unmatched as opposed to manually prepared collated results.

Generally, however, ICT has proven useful in management of certain aspect of the elections including:

i. Creation and management of the Register of Voters
ii. Boundaries delimitation
iii. Results management, collation, aggregation and determination
iv. Candidate registration and management
v. Voting
vi. Election observation, monitoring and observation
vii. Creation and management of web voting services portals.
viii. provision of relevant information to various stakeholders of the election process.
ix. Administering election systems designed to perform tasks of a specific nature or function.
x. Collection of signatures for referenda initiatives, recall procedures and such other data driven processes.

18.5 Recommendations

The Commission recommends:

90. An amendment to Section 44 of the Elections Act to allow the Commission to deploy such technologies as may be necessary when circumstances permit such deployment;
91. The Elections Act to be amended to require the Commission to set up test laboratories for testing and certification of electoral technologies and the standards to be met in such technologies;
92. Review of the legislative framework governing registration of voters and voting of citizens living outside the country to provide for electronic registration and facilitate electronic voting.
93. A review of the petition rules and technology regulations to provide for the mode in which the Commission complies with Court orders during scrutiny.
94. Consider overhauling the Elections (Technology) Regulations, 2017 and develop new regulations to be process oriented as opposed to directives to the Commission regulation on testing and certification of technology. The regulations do not speak to a process.

19 SUMMARY OF RECOMMENDATIONS

This Chapter sets out the recommendations proposed in the report to give at a glance the proposals.

ELECTORAL SYSTEM

Recommendation

1. As the EMB for the Republic of Kenya, the IEBC is of the opinion that the cure to the current divisive electoral system regime would be to explore other options such as Proportional Representation (PR) and Mixed Member Representation (MMR) models as they are more inclusive and result in fair representation (*For more insight into these systems, kindly refer to Annexure One).* The Commission recommends that Parliament should enact legislation to give effect to the two-thirds gender representation rule provided in Article 81 of the Constitution. It is a requirement that the system must ensure that no more than two-thirds of the members of elective bodies should be of the same gender. Article 27 then requires legislative and other measures to be taken to implement this principle. Under the current FPTP, it is difficult to realize this Constitutional requirement. Application of MMR and PR with suitable adjustments will result in a more inclusive and representative electoral system.

ELECTORAL MANAGEMENT BODY

Recommendations

2. The Commission upon review of the legal and regulatory framework, and international best practice governing the EMB, proposes the following recommendations.

Recommendations Relating to Appointment of Commissioners

3. Amend Section 5 of the IEBC Act on the 'composition and appointment of the Commission' to reduce the number of Commissioners from seven to five inclusive of the Chairperson. This proposal will increase the efficiency and effectiveness of the Commission and reduces the potential for factionalism within.

4. Amend Section 5 of the IEBC Act to provide that the appointment of Commissioners should be staggered to ensure continuity, institutional memory and succession at the Commission.

5. Amend Section 6 (2) of the IEBC Act to provide:

    i. For one other member of the Commission (other than the Chair) who is qualified to serve as a Judge of the High Court of Kenya. This is important for two reasons. Firstly, from a corporate governance perspective the

committees of the Commission report to the Commission in plenary. The Chair of the Commission would then not be in the unenviable position of chairing a committee(s) and then being the same person to receive reports. Secondly, the legal nature of, say, the Legal Reforms, Enforcement of Code of Conduct and Compliance of necessity requires stewardship from a legal practitioner.

ii. For one member of the Commission to be a member with expertise in ICT in view of the central role it plays in the electoral process.

iii. Consideration may be given to one member being a Human Resources expert.

6. Amend the First Schedule of the IEBC Act to provide that the Selection Panel for the appointment of Commissioners should be altered to accommodate other professionals and other institutions as opposed to the existing one which is predominantly constituted by religious leaders.

7. The proposal by the BBI to introduce political parties in the selection panel for IEBC Commissioners or indeed to allow political parties to directly nominate Commissioners is a claw back the gains made to make the Commission an independent entity. Political party's interests are sufficiently catered for in the vetting process since the selected Commissioners are approved by the National Assembly.

Recommendations on the Question of Quorum in Commission Meetings

8. Clause 5 of the Second Schedule of the IEBC Act should be amended to provide that the quorum shall be a simple majority of commissioners present and in any case shall adhere to the Constitutional thresholds in Article 250 (1) of the Constitution.

Recommendation on Financing of the Commission

9. An amendment to the Constitution in similar terms to Article 173, creating an IEBC Fund to ensure that the appropriation to the Commission is assured and adequate for the proper conduct of electoral processes.
    - The IEBC is, by design and in law, intended to be free of undue influence from the executive and other electoral actors. to ensure the EMB has operational independence from government it is key that the Fund is operationalized as proposed.

Recommendations on Institutional Challenges

10. Amend Section 11A of the IEBC Act:
    (a) so that the roles and responsibilities of the Chairperson and Commissioners can be delineated from those of the Chief Executive Officer and Commission Secretary. The policy-making remit of the commissioners needs to be clearly delineated and the administrative remit of the secretariat should be outlined in the policy documents of the IEBC.

(b) to define what amounts to oversight by the commission over the secretariat and the parameters thereof.

i. To separate the roles of the Commission Secretary/Chief Executive Officer(CS/CEO) from those of the Accounting Officer. This would necessitate the creation of a different office which will perform accounting officer responsibilities leaving out the functions reposed in the CEO/CS.
ii. To separate the roles of the CEO/CS from those of the Accounting Officer. This would leave the Secretary/CEO free to attend to matters of the Commission while the other officer (probably to be designated Chief Operations Officer) shall be the Accounting Officer.

11. An amendment by way of introduction of a new section to the Leadership and Integrity Act, Number 19 of 2012 to establish the IEBC as the enforcement agency with respect to integrity issues in election matters and self-declaration forms to be administered by IEBC for election purposes. Additionally, this amendment would assist in the vetting process of candidates for elective political positions to ensure compliance with the Leadership and Integrity Act. Further and relation to this provide for the vetting process to be followed by IEBC.

BOUNDARY DELIMITATION

Recommendations

12. The Commission through the stakeholder engagement and proposals submitted to it therein recommends that the delimitation of boundaries should be customized to encompass parameters other than marginal quotient of populations in the spirit of Articles 88 (3) (c) and 89 of the Constitution of Kenya 2010. This will ensure that every voter within each electoral unit not only exercises their right to suffrage but also that the weight of their vote is equal to that of another voter casting their ballot for the same seat in the electoral contest. Though the margin of deviation from the quota provided for in Article 89 is a product of a contested past, it may be prudent to narrow that margin in order to ensure the votes of all Kenyans are treated equally. Parliament should provide a framework for the progressive implementation of the constitutional imperative in this direction.
13. The Commission recommends that Section 26 (3) (a) of the County Government's Act should be repealed having been declared unconstitutional in the case of *Rishad Hamid Ahmed &Anor v Independent Electoral and Boundaries Commission 149* for usurping the Commission's discretion to determine and review boundaries of the County Assembly Wards as mandated by Article 89(7) of the Constitution premised on parameters stated in Article 89 (5) thereof.

[149]Election Petition Number 1 of 2017, Rishad*Hamid Ahmed &Anor v Independent Electoral and Boundaries Commission,* 2016 [eKLR]

REGULATION OF POLITICAL PARTIES

Recommendations

To better regulate the political party space in Kenya, the Commission proposes:

14. An amendment to Sections 27 and 28 of the Elections Act to require the Commission to receive Political Party Membership Lists and Nomination Rules from ORPP to ensure consistency and authenticity.

15. An amendment to Sections 13 and 31 (2D) of the Elections Act compel political parties to conduct primaries using the political party membership registers.

16. Delete Sections 31(2E) and (2F) of the Political Parties Act to remove mandate of Commission to conduct party primaries.

ELECTIONS BY WAY OF PARTY LISTS

Recommendations

17. Each political party is required to formulate their own nomination rules. To this end, the rules vary from party to party, lacking in uniformity and in some instances leading to discrimination. It would thus be prudent to review the Political Parties Act to develop standard political party nomination rules to avoid inconsistencies;
18. On the backdrop of Article 100 of the Constitution on promoting marginalized groups, Parliament should enact legislation to govern representation of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities.
19. Allocation of party list seats needs regulations that clearly define a formula of proportional representation of these special seats in the interest of transparency and accountability;
20. Review of Regulations 54(8) of the Elections (General) Regulations 2012 on dispute resolution to provide delineation between publication of the first list and the second list after the dispute resolution processes and to provide delineation between publication of the first list and the second list after the dispute resolution processes.
21. Review of processes post-dispute resolution to provide for a mechanism and period of reviewing lists to ensure compliance with court orders without re-opening a series of disputes by aggrieved persons noting that party list processes are required to be completed before the date of the general elections.
22. Upon receipt of the party lists, the Commission is required to either issue certificates of compliance to political parties or require the parties to review the lists to ensure compliance failing which the Commission shall reject the list. Given the significance of the provisions of Section 34 (6A) of the Elections Act, it is worth noting that the laws do not provide for a subsequent period of review post-submission of the amended party lists to determine actual compliance with the prescribed guidelines.
23. Noting that a party's leadership cannot vouch for details submitted through the CRMS save for the fact that they have authorized their officers to upload the said

information, there is need to have a control function introduced in the CRMS to ensure that either the chairperson or the secretary general has rights to approve the information uploaded to the system before submission to the Commission.

24. The process of physical submission to be reviewed to ensure that it is the role of either the party chairperson or the secretary general to submit the hard copy report generated from the CRMS to the Commission. These checks and balances will ensure that the list is not manipulated by elements within the political party.
25. Review of Section 34(6A) of the Elections Act to provide for further vetting of lists after publication where disputes have been heard and decisions issued that alters the party list.
26. Legislative reform agenda that seeks to subject the Hare Quota principle to public scrutiny and have it legislated in the interest of transparency in the Commission's processes. A greater understanding of the application of the formula will also decrease the number of election petitions filed challenging the Commission's decisions.
27. Review the law on mandate of the Commission to address errors in Gazettement of nominees on allocated seats by way of corrigendum against positions taken by court that upon Gazettement, allocation is complete and the Commission is *functus officio (Constitutional Petition No 456 Of 2017 RahmaIssak Ibrahim v Independent Electoral & Boundary Commission & 2 others [2017] EkIr).*
28. Review of the law to address existing ambiguities, flaws and inconsistencies in the selection of nominees from party lists and allocation of special seats at the County Assemblies.
29. Review provisions of Sections 34-38 of the Elections Act against the County Government Act to address the composition of the marginalized groups for purposes of harmonizing the provisions under the two Acts on number of seats to be allocated.

VOTER REGISTRATION

Recommendations

30. Synchronization of the databases for Voter register, the civil register as well as the register of births and deaths should be undertaken. Not only will this save on costs for data collection, but also assure the accuracy of the register.
31. Amend the Elections Act to prohibit prospective candidates from vying in electoral areas other than those in which they are registered as voters.
32. Amend the Elections Act to obligate the Commission to set up electronic systems to facilitate special registration and voting by Kenyans in prisons and those out of the country.
33. There is need to develop suitable mechanism for the sensitization of the public on the methodology and criteria of auditing of voter register.
34. We recommend an amendment to Section 6 and 6A of the Elections Act to provide for inspection and verification of biometrics to run concurrently.

POLITICAL PARTY PRIMARIES

Recommendations

35. Repeal Section 31 (2) of the Elections Act to remove the conflict of interest where the Commission conducts, and supervises party primaries, then sits thereafter later to determine disputes arising in the said primaries.
36. Review of the amendments under sections 2, 13(1) and 13 (2A) of the Elections Act may provide a proper framework for dispute resolution. Dispute Resolution maybe enhanced further by legislating timelines for different stages of determination of the disputes. And to cure the overlap created by the various dispute resolution bodies,
37. Amend Section 33(1)(c) and repeal of Section 32(2) of the Elections Act to remove the requirement for independent candidates to submit symbols as a condition for registration as candidates and only require photographs of themselves.
38. Amend Section 28 of the Elections Act to reduce the number of days of submission of party membership list from 120 days to 90 days to coincide with the period within which an independent candidate should not have been a member of a political party.
39. Amend Section 30 of the Elections Act to require that where a coalition participates in an election, they shall present one agent per coalition at each polling station and further provide for a mechanism where the Commission is informed the willingness of the party to appoint an agent for the candidates.
40. Amend Section 30 of the Elections Act to require that where a coalition participates in an election, they shall present one agent per coalition at each polling station.

REGISTRATION OF CANDIDATES BY THE COMMISSION

Recommendations

41. Introduce a new provision to the Election Act to obligate all agencies which host data which can be used to verify whether the candidates are qualified to share such information with the Commission. These agencies include EACC for purpose of chapter 6 generally, the Chief Registrar of the Judiciary for purposes of data on convictions, the Director General for Health for purposes of data on insanity, the Official Receiver for purposes of data on bankruptcy, the Secretary for the Commission of University Education for purposes of verifying recognition of university and the authenticity of the academic credentials, the Director of Immigration Services for purposes of confirming dual citizenships and citizenship generally
42. Amend the Elections (General) Regulations, 2012 by introducing a new regulation to require all prospective candidates secure clearance from the respective agencies before presenting their names for electoral registration, including an amendment of the prescribed Form to encompass the recommended parameters.
43. Amend Section 24 and 25 of the Elections Act to require all candidates to submit a confirmation certificate from the ORPP confirming that the candidate is a member of the nominating political party.
44. Amend Section 15(1) of the Elections Act to provide for substitution of deputy president candidates before and after nomination.
45. Amend Section 16(3) A to make an additional proviso allowing the Commission to conduct the by-election in the event that the respective speaker does not issue the notice within the 21 days of the actual occurrence of the vacancy.
46. Amend Section 15 and 17 of the Elections Act to require the respective speaker to issue a seven-day notice following vacancy in the office of the President or County Governor.
47. Amend the Elections Act by deleting Section 21 and introducing it in the County Governments Act and provide for qualifications for the County Assembly Speaker.
48. Amend Section 23, 24 and 25 of the Elections Act to provide that candidates renounce dual citizenship prior to Commission nomination.

IDENTIFICATION OF VOTERS AND VOTING

Recommendations

49. Amend the Constitution to stagger elections by holding the National elections and County elections on different dates.
50. Amend the Elections Act to obligate the Commission and other handlers of the Register of Voters to put in place Regulations which ensures compliance with the Data Protection Act.

51. Amend the provisions of Section 44A of the Elections Act so as to limit the application of the complementary mechanism of identification only to instances where the KIEMS device has failed and cannot be replaced without undue delay.
52. Review the provisions of Regulations 26 and 27 of the Elections (Technology) Regulations, 2017 to create a seamless mechanism on the use of technology in the electoral process.
53. Develop the legal and regulatory environment to permit the adoption of new technologies in the electoral environment.
54. Amend the Elections Act and the Regulations to permit the use of technology to facilitate the conduct of elections by electronic means in particular the out of the country voting.
55. Amend Section 55 B of the Elections Act and Regulations 64 of the Elections (General) Regulations to provide the threshold within which the Commission can exercise its powers to postpone an election or to move polling stations in instance of violence and natural disasters.
56. The KIEMS kit should be reconfigured so as to capture more parameters of identification than it does now including the iris, ear lobe or voice

MANAGEMENT AND DECLARATION OF RESULTS

Recommendations

57. Amend the Elections Act and the regulations thereof to clearly provide the complimentary mechanism(s) to be adopted by IEBC in case the KIEMS fails. The primary document i.e. form 34A as clearly prescribed in the regulation may be adopted to address concerns raised in Katiba Institute case where the court frowned upon submission of in a non- prescribed form.
58. There is need to amend the law to clearly provide for the flow of electoral results right from the polling station to the national tallying center and the efficacy 34A, 34B and 34C in declaration of presidential election results.
59. There is need to amend the law to clearly state the role of the chairperson of IEBC in tallying and verifying presidential election results.
60. There is need to amend the law to clearly state the place of form 34B with respect to presidential election results.
61. There need to amend the law to provide for mechanisms to be employed in rectifying numerical errors that may cause discrepancies between forms 34A and forms 34B.
62. In light of the decision in Katiba Institute, the Act should be reviewed in 39, 44 and 44A to clarify the results management pathway.
63. The Elections Act should be amended to explicitly provide that results shall be transmitted electronically by scanning and electronically sending Form 34A to the National Tallying Centre.

64. Amend Section 39(1A) (ii) of the Elections Act to provide for the finality of the polling station as the point of declaration of election results for a presidential election.
65. In case of failure of technology, Form 34A shall be physically delivered to the National Tallying Centre.
66. Electronically transmitted Form 34A shall be verified against the physical Form 34A, which shall be the result.
67. Amend the Elections Act to explicitly provide in law that Form 34B has no place at the National Tallying Centre with reference to Presidential elections.

ELECTIONS DISPUTE RESOLUTION

Recommendations

68. Amend Section 75(4) of Elections Act to make appeals on MCA elections petitions to be finalized at the High Court and equally appeals on MNA election petitions to be finalized at the Court of Appeal to provide parity.
69. Amend Section 82(1) of the Elections Act and the Elections (Parliamentary and County Election) Petition Rules, 2017 to provide for the parameters and procedure of scrutiny of digital materials held by Commission. This amendment must take into consideration the need to protect the security and integrity of the Commission's servers.
70. Amend the rules to ensure standardization of the scrutiny process pursuant to Court Orders. This is informed by the haphazard manner with which scrutiny processes were conducted by the various Courts in past elections.
71. Harmonize the definition of nomination disputes, party primaries, party lists, Commission nomination between Elections Act and Political Parties Act to clearly distinguish the disputes to be handled by the Commission and disputes to be handled by PPDT.
72. Modify KIEMS to facilitate prompt generation of reports when required by the Courts during election petitions.
73. Amend the Supreme Court (Presidential Election Petition) Rules 2017 to provide for the issue of scrutiny as the current rules are silent.
74. Amend the rules to provide for timelines for which a party may apply for scrutiny.
75. Amend the rules to ensure standardization of the scrutiny process pursuant to Court Orders.
76. Amend Article 140 of the Constitution and increase the time for determination of presidential election petition. The period for hearing and determining a presidential election petition should be extended to at least 30 days.
77. Amend the Constitution to provide for mechanism for addressing resolving disputes that may arise from first round of a presidential election.
78. Amend the Election Act to increase the security for costs in election petitions.
79. Amend the electoral statutes where the Court has declared various sections to be unconstitutional.

ELECTION OFFENCES AND CODE OF CONDUCT ENFORCEMENT

Recommendations

80. Amend the Election Offences Act to include a provision that bans the sale of alcohol at 48 hours before the date of elections.

81. Amend Sections 14 of the Elections Offences Act and move the offences thereof to electoral code of conduct under the Elections Act. This will empower the Commission to effectively issue sanction under Section 14. Further, the Leadership and Integrity Act which prohibits misuse of state resources should be replicated in the electoral code of conduct for enforcement by the Commission during campaigns.
82. Alternatively amend the Elections Offences Act to enhance the Commission's mandate in implementing Section 14 of the said act.

83. Recommendations on Enhancing the Enforcement of the Electoral Code of Conduct

84. Amend the Election Offences Act to empower the Commission power to investigate and prosecute breaches to the code of conduct under Section 20 of the Act.
85. Amend Election Offences Act to oblige the ODPP to provide Commission with information on status of pending or prosecuted election cases so as to enable the Commission enforce the Electoral Code of Conduct and other provisions of the elections act e.g. removal of persons convicted of electoral offences from the Register of Voters as provided for under Section 87 of the Elections Act.
86. Amend the second schedule of the Elections Act to clearly provide for quorum and composition of the Electoral Code of Conduct Enforcement Committee and to align it with the minimum requirements of the Constitution which provides for minimum of three members in order to conduct business of the Commission.
87. Amend the IEBC Act to empower the Chairperson of the Commission to appoint/co-opt persons with requisite qualifications to be the Chairperson/Member of the Electoral Code of Conduct Enforcement Committee.
88. Election Offences Act should be left as a stand-alone statute but with enhanced provisions from some offences provided for under the Penal Code[150] and Public Officer Ethics Act which relate to elections.

RECALL PROCEDURES

Recommendations

89. Amend Section 45 Elections Act to provide for grounds for recall for members of parliament so as to seal the gap created by the decision in *Katiba Institute & another v Attorney General & another [2017] eKLR*
90. Consider adopting the grounds of recall as enumerated in Section 27 of the County Governments Act and incorporate them in the amended Section 45 Elections Act so as to have them apply to Members of Parliament *mutatis mutandis.*

[150] Penal Code, Chapter 63, Laws of Kenya.

91. Amend the regulations to enable the voters to initiate and prosecute recall petitions using appropriate technology. For instance, the collection of signatures to justify a recall can be done via an e-signing platform which will hasten the process of collecting the signatures. The effect of using an e-signing platform is that it will reduce the 30 days for verification of signatures by the Commission.

92. Amend the Act to allow for petitions for recall to run concurrently with the elections of a successor.

ELECTION CAMPAIGN FINANCING

Recommendations

93. Submission of details of authorized persons should be devolved to County and Constituency levels.
94. Development of Electronic software to facilitate registration of candidate/party details.
95. Review of timelines under the Election Campaign Financing Act, 2013 to align with the Elections Act, 2011 timelines.
96. Review of the Election Campaign Financing Act, 2013 to address, ambiguities, inconsistencies and flaws.
97. Publication and enactment of the Election Campaign Financing Regulations to effectively operationalize the Act.

REFERENDA AND OTHER POLLS

Recommendation

98. It is recommended that the Referendum Bill 2020 is considered and enacted in a timely manner to provide a robust regime upon which a referendum process can be anchored.

ICT TECHNOLOGY

Recommendations

The Commission recommends:

99. An amendment to Section 44 of the Elections Act to allow the Commission to deploy such technologies as may be necessary when circumstances permit such deployment.
100. The Elections Act to be amended to require the Commission to set up test laboratories for testing and certification of electoral technologies and the standards to be met in such technologies;
101. Review of the legislative framework governing registration of voters and voting of citizens living outside the country to provide for electronic registration and facilitate electronic voting.
102. A review of the petition rules and technology regulations to provide for the mode in which the Commission complies with Court orders during scrutiny.

103. Consider overhauling the Elections (Technology) Regulations, 2017 and develop new regulations to be process oriented as opposed to directives to the Commission regulation on testing and certification of technology. The regulations do not speak to a process.

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2. African Charter on Human and Peoples' Rights, 2005
3. Appellate Jurisdiction Act Cap9 Laws of Kenya
4. Building-bridges-to-a-new-Kenyan-nation
5. By-Elections Policy Brief Kenya Human Rights Commission
6. Can African States Conduct Free and Fair Presidential Elections?
7. Canada EMB Comparative Study 2014
8. Commission of Inquiry into Post-Election Violence (CIPEV) (Waki Report)
9. Commonwealth Electoral Act 1918 Australia
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12. Constitution of the United States of America
13. Controlling Money in Politics: An Introduction
14. Convention on the Political Rights of Women (1952)
15. County Governments Act No17of2012 Laws of Kenya
16. Digital Dilemmas: The Unintended Consequences of Election Technology
17. Digital Technology in Elections Efficiency versus Credibility
18. Election Laws Amendment Act No. 36 of 2016 Laws of Kenya
19. Election Management Bodies in East Africa
20. Election-Dispute-Guide
21. Elections Act Canada
22. Elections Act Netherlands
23. Elections Act No. 24 of 2011 Laws of Kenya
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25. Electoral Act of 1993 New Zealand
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31. Electoral Reforms Workshop Report Mwanzoni
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35. Fairness of Seat Allocation Methods in Proportional Representation
36. Framework Document for Electoral Reform
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40. Guidelines for Reviewing a Legal Framework for Elections
41. Independent Electoral and Boundaries Commission Act No. 9 of 2011 Laws of Kenya
42. Judiciary Post Election Report 2013

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Annex One

CLASSIFICATION OF ELECTORAL SYSTEMS

Electoral systems may be classified into three basic types:

A. Majoritarian/plurality systems
B. Proportional Representation Systems
C. Semi-Proportional Systems

A. Majoritarian/Plurality Systems

The principle of plurality/majority systems is simple. After votes have been cast and totaled, those candidates or parties with the most votes are declared the winners (there may also be additional conditions). However, the way this is achieved in practice varies widely. To be elected to office for an electoral area a single, or multiple candidates, must win the highest number of valid votes, or in some variants, the majority of valid votes in that electoral area. Majoritarian/plurality systems are based on constituencies (districts) within the area covered by an electoral body.

These systems include:

1. First Past The Post (FPTP)

The First Past the Post system is the simplest form of plurality/majority system, using single member districts and candidate-centred voting. The voter is presented with the names of the nominated candidates and votes by choosing one, and only one, of them. The winning candidate is simply the person who wins the most votes; in theory he or she could be elected with two votes, if every other candidate only secured a single vote. Along with the UK, the cases most often analysed are Canada, India, and the United States.

Advantages of FPTP

a) First Past the Post, like other plurality/majority electoral systems, is defended primarily on the grounds of simplicity and its tendency to produce winners who are representatives beholden to defined geographic areas and governability. The most often cited advantages are that:

b) It provides a clear-cut choice for voters between two main parties. The inbuilt disadvantages faced by third and fragmented minority parties under FPTP in many cases cause the party system to gravitate towards a party of the 'left' and a party of the 'right', alternating in power. Third parties often wither away and almost never reach a level of popular support above which their national vote yields a comparable percentage of seats in the legislature.

c) It gives rise to single-party governments. The 'seat bonuses' for the largest party common under FPTP (e.g. where one party wins 45 per cent of the national vote but 55 per cent of the seats) mean that coalition governments are the exception rather than the rule. This state of affairs is praised for providing cabinets which are not shackled by the restraints of having to bargain with a minority coalition partner.

d) It gives rise to a coherent opposition in the legislature. In theory, the flip side of a strong single-party government is that the opposition is also given enough seats to perform a critical checking role and present itself as a realistic alternative to the government of the day. It advantages broadly-based political parties. In severely ethnically or regionally divided societies, FPTP is commended for encouraging political parties to be 'broad churches', encompassing many elements of society, particularly when there are only two major parties and many different societal groups. These parties can then field a diverse array of candidates for election. In Malaysia, for example, the Barisan National government is made up of a broadly-based umbrella movement which fields Malay, Chinese, and Indian candidates in areas of various ethnic complexions.

e) It excludes extremist parties from representation in the legislature. Unless an extremist minority party's electoral support is geographically concentrated, it is unlikely to win any seats under FPTP. (By contrast, under a List PR system with a single national-level district and a large number of seats, a fraction of 1 per cent of the national vote can ensure representation in the legislature.)

f) It promotes a link between constituents and their representatives, as it produces a legislature made up of representatives of geographical areas. Elected members represent defined areas of cities, towns, or regions rather than just party labels. Some analysts have argued that this 'geographic accountability' is particularly important in agrarian societies and in developing countries.

g) It allows voters to choose between people rather than just between parties. Voters can assess the performance of individual candidates rather than just having to accept a list of candidates presented by a party, as can happen under some List PR electoral systems.

h) It gives a chance for popular independent candidates to be elected. This may be particularly important in developing party systems, where politics still revolves more around extended ties of family, clan, or kinship and is not based on strong party political organizations.

i) Finally, FPTP systems are particularly praised for being simple to use and understand. A valid vote requires only one mark beside the name or symbol of one candidate. Even if the number of candidates on the ballot paper is large, the count is easy for electoral officials to conduct.

Disadvantages of FPTP

However, FPTP is frequently criticized for a number of reasons.

These include:

a) It excludes smaller parties from 'fair' representation, in the sense that a party which wins approximately, say, 10 per cent of the votes should win approximately 10 per cent of the legislative seats. In the 1993 federal election in Canada, the Progressive Conservatives won 16 per cent of the votes but only 0.7 per cent of the seats and in the 1998 general election in Lesotho, the Basotho National Party won 24 per cent of the votes but only 1 per cent of the seats. This is a pattern which is repeated time and time again under FPTP.

b) It excludes minorities from fair representation. As a rule, under FPTP, parties put up the most broadly acceptable candidate in a particular district so as to avoid alienating the majority of electors. Thus it is rare, for example, for a black candidate to be given a major party's nomination in a majority white district in the UK or the USA, and there is strong evidence that ethnic and racial minorities across the world are far less likely to be represented in legislatures elected by FPTP. In consequence, if voting behaviour does dovetail with ethnic divisions, then the exclusion from representation of members of ethnic minority groups can be destabilizing for the political system as a whole.

c) It excludes women from the legislature. The 'most broadly acceptable candidate' syndrome also affects the ability of women to be elected to legislative office because they are often less likely to be selected as candidates by male-dominated party structures. Although the evidence across the world suggests that women are less likely to be elected to the legislature under plurality/majority systems than under PR ones, some variation resulting of data from two studies by the Inter-Parliamentary Union (IPU) in 2004 and 2013 is worth mentioning: whereas women had representation to 15.6% of the seats of the low chambers in the different parliaments in 2004, this percentage amounts to 20.1% by 2012. Moreover, and here is where we find the most representative variation, a comparison made in 2004 in established democracies showed that the average of women in the legislatures of countries with majority systems was 14.4%, while the quantity increased to 27.6% in countries with proportional systems, almost the double; in this same comparison made in 2012, the gap decreases slightly as the average of women in legislatures with majority system is 14% and 25% in proportional systems. In part, this may be explained by the implementation of policies that have regulated or promoted gender equity within countries, such as having a certain amount of seats reserved for women.

d) It can encourage the development of political parties based on clan, ethnicity or region, which may base their campaigns and policy platforms on conceptions that are attractive to the majority of people in their district or region but exclude or are hostile to others. This has been an ongoing problem in African countries like Malawi and Kenya, where large communal groups tend to be regionally concentrated. The country is thus divided into geographically separate party strongholds, with little incentive for parties to make appeals outside their home region and cultural–political base.

e) It exaggerates the phenomenon of 'regional fiefdoms' where one party wins all the seats in a province or area. If a party has strong support in a particular part of a country, winning a plurality of votes, it will win all, or nearly all, of the seats in the legislature for that area. This both excludes minorities in that area from representation and reinforces the perception that politics is a battleground defined by who you are and where you live rather than what you believe in. This has long been put forward as an argument against FPTP in Canada.

f) It leaves a large number of wasted votes which do not go towards the election of any candidate. This can be particularly dangerous if combined with regional fiefdoms, because minority party supporters in the region may begin to feel that they have no realistic hope of ever electing a candidate of their choice. It can also be dangerous where alienation from the political system increases the likelihood that extremists will be able to mobilize anti-system movements.

g) It can cause vote-splitting. Where two similar parties or candidates compete under FPTP, the vote of their potential supporters is often split between them, thus allowing a less popular party or candidate to win the seat. Papua New Guinea provides a particularly clear example.

h) It may be unresponsive to changes in public opinion. A pattern of geographically concentrated electoral support in a country means that one party can maintain exclusive executive control in the face of a substantial drop in overall popular support. In some democracies under FPTP, a fall from 60 per cent to 40 per cent of a party's share of the popular vote nationally can result in a fall from 80 per cent to 60 per cent in the number of seats held, which does not affect its overall dominant position. Unless sufficient seats are highly competitive, the system can be insensitive to swings in public opinion.

i) Finally, FPTP systems are dependent on the drawing of electoral boundaries. All electoral boundaries have political consequences: there is no technical process to produce a single 'correct answer' independently of political or other considerations. Boundary delimitation may require substantial time and resources if the results are to be accepted as legitimate. There may also be pressure to manipulate boundaries by gerrymandering or malapportionment. This was particularly apparent in the Kenyan elections of 1993 when huge disparities between the sizes of electoral districts—the largest had 23 times the number of voters the smallest had—contributed to the ruling party Kenyan African National Union winning a large majority in the legislature with only 30 per cent of the popular vote.

2. Block Vote (BV)

The Block Vote is simply the use of plurality voting in multi-member districts. Voters have as many votes as there are seats to be filled in their district, and are usually free to vote for individual candidates regardless of party affiliation. In most BV systems, they may use as many, or as few, of their votes as they wish. The system was used in Jordan in 1989, in Mongolia in 1992, and in the Philippines and Thailand until 1997, but was changed in all these countries as a result of unease with the results it produced.

Advantages of BV

The Block Vote is often applauded for retaining the voter's ability to vote for individual candidates and allowing for reasonably-sized geographical districts, while at the same time increasing the role of parties compared with FPTP and strengthening those parties which demonstrate most coherence and organizational ability.

Disadvantages of BV

However, the Block Vote can have unpredictable and often undesirable impacts on election outcomes. For example, when voters cast all their votes for the candidates of a single party, the system tends to exaggerate most of the disadvantages of FPTP, in particular its disproportionality. When parties nominate a candidate for each vacancy in a Block Vote system and encourage voters to support every member of their slate, this is particularly likely. In Mauritius in 1982 and 1995, for example, the party in opposition before the election won every seat in the legislature with only 64 per cent and 65 per cent of the vote, respectively. This created severe difficulties for the effective functioning of a parliamentary system based on concepts of government and opposition. The use of 'best loser' seats in Mauritius only partially compensates for this weakness.

In Thailand, the Block Vote was seen as having encouraged the fragmentation of the party system. Because it enables electors to vote for candidates of more than one party in the same district, members of the same party may be encouraged to compete against each other for support. The Block Vote was thus sometimes seen in this country as being a contributor to internal party factionalism and corruption, which eventually led to its replacement.

Besides Thailand, some other countries have abandoned the Block Vote in favour of other systems. Thailand and the Philippines both changed from BV to a mixed system in the late 1990s. In both cases, a major justification for the change was the need to combat vote-buying and strengthen the development of political parties.

3. Party Block Vote (PBV)

Under Party Block Vote, unlike FPTP, there are multi-member districts. Voters have a single vote, and choose between party lists of candidates rather than between individuals. The party which wins most votes takes all the seats in the district, and its entire list of candidates is duly elected. As in FPTP, there is no requirement for the winner to have an absolute majority of the votes. As of 2004, PBV was used as the only system or the major component of the system in four countries—Cameroon, Chad, Djibouti and Singapore.

Advantages of PBV

PBV is simple to use, encourages strong parties and allows for parties to put up mixed slates of candidates in order to facilitate minority representation. It can be used to help to ensure balanced ethnic representation, as it enables parties to present ethnically diverse lists of candidates for election—and may indeed be designed to require them to do so.

Disadvantages of PBV

However, the Party Block Vote also suffers from most of the disadvantages of FPTP, and may indeed produce highly disproportional results where one party wins almost all of the seats with a simple majority of the votes. In Djibouti's 1997 election, the ruling Union for the Presidential Majority coalition won every seat, leaving the two opposition parties without any representation in the legislature. Some electoral amendments were introduced by the government of Djibouti in 2012, through which some seats in parliament were allotted proportionally and the rest of them under the same PBV system. This change showed more equitable outcomes to other parties in the 2013 election.

4. Affirmative Vote (AV)

Elections under Alternative Vote are usually held in single-member districts, like FPTP elections. However, AV gives voters considerably more options than FPTP when marking their ballot paper. Rather than simply indicating their favoured candidate, under AV electors rank the candidates in the order of their choice, by marking a '1' for their favourite, '2' for their second choice, '3' for their third choice and so on. The system thus enables voters to express their preferences between candidates rather than simply their first choice. For this reason, it is often known as 'preferential voting' in the countries which use it. (The Borda Count, STV, and the Supplementary Vote are also preferential systems).

AV also differs from FPTP in the way votes are counted. Like FPTP or TRS, a candidate who has won an absolute majority of the votes (50 per cent plus one) is immediately elected. However, if no candidate has an absolute majority, under AV the candidate with the lowest number of first preferences is 'eliminated' from the count, and his or her ballots are examined for their second preferences. Each ballot is then transferred to whichever remaining candidate has the highest preference in the order as marked on the ballot paper. This process is repeated until one candidate has an absolute majority, and is declared duly elected. AV is thus a majoritarian system.

It is possible, but not essential, in preferential systems such as AV to require voters to number all, or most, of the candidates on the ballot paper. This avoids the possibility of votes becoming 'wasted' at a later stage in the count because they bear no further valid preferences. However, it can lead to an increase in the number of invalid votes, and it can sometimes give substantial importance to preferences between candidates to which the voter is indifferent or actively dislikes.

Advantages of AV

One advantage of transferring ballots is that it enables the votes of several candidates to accumulate, so that diverse but related interests can be combined to win representation. AV also enables supporters of candidates who have little hope of being elected to influence, via their second and later preferences, the election of a major candidate. For this reason, it is sometimes argued that AV is the best system for promoting centrist politics, as it can compel candidates to seek not only the votes of their own supporters but also the 'second preferences' of others. To attract these preferences, candidates must make broadly-based appeals rather than focusing on narrower issues. The experience of AV in Australia tends to support these arguments: the major parties, for example, typically try to strike bargains with minor parties for the second preferences of their supporters prior to an election—a process known as 'preference swapping'. Furthermore, because of the majority support requirement, AV increases the consent given to elected members, and thus can enhance their perceived legitimacy.

The experience of AV in Papua New Guinea and in Australia suggests that it can provide significant incentives for accommodatory and cooperative politics. In recent years, AV, or its variant the Supplementary Vote, has also been adopted for presidential and mayoral elections in Bosnia, London, and San Francisco.

Disadvantages of AV

Nevertheless, AV also has a number of disadvantages. First, it requires a reasonable degree of literacy and numeracy to be used effectively, and because it operates in single-member districts it can often produce results that are disproportional when compared to PR systems—or even in some cases compared with FPTP. Also, the potential of AV for promoting centrist outcomes is very dependent on underlying social and demographic conditions: while it successfully promoted interethnic accommodation in Papua New Guinea during the 1960s and 1970s, it has been criticized in another Pacific country, Fiji, since it was implemented there in 1997. Moreover, as its use in the Australian Senate from 1919 to 1946 noted, AV does not work well when applied to larger, multi-member districts.

5. Two Round System

The central feature of the Two-Round System is as the name suggests: it is not one election but takes place in two rounds, often a short time apart. The first round is conducted in the same way as a single-round plurality/majority election. In the most common form of TRS, this is conducted using FPTP. It is, however, also possible to conduct TRS in multi-member districts using Block Vote (as in Kiribati) or Party Block Vote (as in Mali). A candidate or party that receives a specified proportion of the vote is elected outright, with no need for a second ballot. This proportion is normally an absolute majority of valid votes cast, although several countries use a different figure when using TRS to elect a president. If no candidate or party receives an absolute majority, then a second round of voting is held and the winner of this round is declared elected.

The details of how the second round is conducted vary in practice from case to case. The most common method is for it to be a straight run-off contest between the two highest vote winners from the first round; this is called majority run-off TRS. It produces a result that is truly majoritarian in that one of the two participants will necessarily achieve an absolute majority of votes and be declared the winner. A second method, majority-plurality TRS, is used for legislative elections in France, the country most often associated with the Two-Round System. In these elections, any candidate who has received the votes of over 12.5 per cent of the registered electorate in the first round can stand in the second round. Whoever wins the highest number of votes in the second round is then declared elected, regardless of whether they have won an absolute majority or not. Unlike majority run-off, this system is not truly majoritarian, as there may be up to five or six candidates contesting the second round of elections.

Advantages of TRS

a) First and foremost, TRS allows voters to have a second chance to vote for their chosen candidate, or even to change their minds between the first and the second rounds. It thus shares some features in common with preferential systems like the Alternative Vote, in which voters are asked to rank-order candidates, while also enabling voters to make a completely fresh choice in the second round if they so desire.

b) TRS can encourage diverse interests to coalesce behind the successful candidates from the first round in the lead-up to the second round of voting, thus encouraging bargains and trade-offs between parties and candidates. It also enables the parties and the electorate to react to changes in the political landscape that occur between the first and the second rounds of voting.

c) TRS lessens the problems of 'vote-splitting', the common situation in many plurality/majority systems where two similar parties or candidates split their combined vote between them, thus allowing a less popular candidate to win the seat. Also, because electors do not have to rank-order candidates to express their second choice, TRS may be better suited to countries where illiteracy is widespread than systems which use preferential numbering like the Alternative Vote or the Single Transferable Vote.

Disadvantages of TRS

a) TRS places considerable pressure on the electoral administration by requiring it to run a second election a short time after the first, thus significantly increasing both the cost of the overall election process and the time that elapses between the holding of an election and the declaration of a result. This can lead to instability and uncertainty. TRS also places an additional burden on the voter in terms of time and effort required to cast the vote as the voter has to make it to the polling station twice, and sometimes there is a sharp decline in turnout between the first round and the second.

b) TRS shares many of the disadvantages of FPTP. Research has shown that in France it produces the most disproportional results of any Western democracy, and that it tends to fragment party systems in new democracies.

c) One of the most serious problems with TRS is its implications for deeply divided societies. In Angola in 1992, in what was supposed to be a peacemaking election, rebel leader Jonas Savimbi came second in the first round of a TRS presidential election to Jose dos Santos with 40 per cent of the vote as opposed to dos Santos' 49 per cent. As it was clear that he would lose the run-off phase, he had little incentive to play the democratic opposition game and immediately restarted the civil war in Angola, which went on for another decade. In Republic of the Congo in 1993, prospects of a government landslide in the second round of a TRS election prompted the opposition to boycott the second round and take up arms. In both cases, the clear signal that one side would probably lose the election was the trigger for violence. In Algeria in 1992, the candidate of the Islamic Salvation Front (Front Islamique du Salut, FIS) led in the first round, and the military intervened to cancel the second round. The results of the 2011 election in Liberia led to violence when the candidate from the opposition, Winston Tubman, called to boycott the second round alleging fraud during the first one. However, both rounds were won by then president Ellen Johnson Sirleaf.

B. Proportional Representation Systems

The rationale underpinning all PR systems is to consciously reduce the disparity between a party's share of the national vote and its share of the parliamentary seats; if a major party wins 40 per cent of the votes, it should win approximately 40 per cent of the seats, and a minor party with 10 per cent of the votes should also gain 10 per cent of the legislative seats. This congruity between a party's share of the vote and its share of the seats provides an incentive for all parties to support and participate in the system.

PR requires the use of electoral districts with more than one member: it is not possible to divide a single seat elected on a single occasion proportionally. There are two major types of PR system—List PR and Single Transferable Vote (STV). Proportionality is often seen as being best achieved by the use of party lists, where political parties present lists of candidates to the voters on a national or regional basis, but preferential voting can work equally well: the Single Transferable Vote, where voters rank-order candidates in multi-member districts, is another well-established proportional system.

There are many important issues which can have a major impact on how a PR system works in practice. The greater the number of representatives to be elected from a district, the more proportional the electoral system will be. PR systems also differ in the range of choice given to the voter—whether the voter can choose between political parties, individual candidates, or both.

In many respects, the strongest arguments for PR derive from the way in which the system avoids the anomalous results of plurality/majority systems and is better able to produce a representative legislature. For many new democracies, particularly those which face deep societal divisions, the inclusion of all significant groups in the legislature can be a near-essential condition for democratic consolidation. Failing to ensure that both minorities and majorities have a stake in developing political systems can have catastrophic consequences, such as seeking power through illegal means.

PR systems in general are praised for the way in which they:

a) Faithfully translate votes cast into seats won, and thus avoid some of the more destabilizing and 'unfair' results thrown up by plurality/majority electoral systems. 'Seat bonuses' for the larger parties are minimized, and small parties can have their voice heard in the legislature.

b) Encourage or require the formation of political parties or groups of like-minded candidates to put forward lists. This may clarify policy, ideology, or leadership differences within society, especially when, as in Timor-Leste at independence, there is no established party system.

c) Give rise to very few wasted votes. When thresholds are low, almost all votes cast in PR elections go towards electing a candidate of choice.

d) Facilitate minority parties' access to representation. Unless the threshold is unduly high, or the district magnitude is unusually low, then any political party with even a small percentage of the vote can gain representation in the legislature. This fulfils the principle of inclusion, which can be crucial to stability in divided societies and has benefits for decision making in established democracies, such as achieving a more balanced representation of minorities in decision-making bodies and providing role models of minorities as elected representatives.

e) Encourage parties to campaign beyond the districts in which they are strong or where the results are expected to be close. The incentive under PR systems is to maximize the overall vote regardless of where those votes might come from. Every vote, even from areas where a party is electorally weak, goes towards gaining another seat.

f) Restrict the growth of 'regional fiefdoms'. Because PR systems reward minority parties with a minority of the seats, they are less likely to lead to situations where a single party holds all the seats in a given province or district. This can be particularly important to minorities in a province which may not have significant regional concentrations or alternative points of access to power.

g) Lead to greater continuity and stability of policy. The West European experience suggests that parliamentary PR systems score better with regard to governmental longevity, voter participation, and economic performance. The rationale behind this claim is that regular switches in government between two ideologically polarized parties, as can happen in FPTP systems, makes long-term economic planning more difficult, while broad PR coalition governments help engender a stability and coherence in decision making which allow for national development.

h) Make power-sharing between parties and interest groups more visible. In many new democracies, power-sharing between the numerical majorities of the population who hold political power and a small minority who hold economic power is an unavoidable reality. Where the numerical majority dominates the legislature and a minority sees its interests expressed in the control of the economic sphere, negotiations between different power blocks are less visible, less transparent, and less accountable (e.g. in Zimbabwe during its first 20 years of independence). It has been argued that PR, by including all interests in the legislature, offers a better hope that decisions will be taken in the public eye and by a more inclusive cross-section of the society.

Disadvantages of PRS

Most of the criticisms of PR in general are based around the tendency of PR systems to give rise to coalition governments and a fragmented party system. The arguments most often cited against PR are that it leads to:

a) Coalition governments, which in turn lead to legislative gridlock and consequent inability to carry out coherent policies. There are particularly high risks during an immediate post-conflict transition period, when popular expectations of new governments are high. Quick and coherent decision making can be impeded by coalition cabinets and governments of national unity which are split by factions.

b) A destabilizing fragmentation of the party system. PR can reflect and facilitate a fragmentation of the party system. It is possible that extreme pluralism can allow tiny minority parties to hold larger parties to ransom in coalition negotiations. In this respect, the inclusiveness of PR is cited as a drawback of the system. In Israel, for example, extremist religious parties are often crucial to the formation of a government, while Italy endured many years of unstable shifting coalition governments. Democratizing countries are often fearful that PR will allow personality-based and ethnic-cleavage parties to proliferate in their undeveloped party systems.

c) A platform for extremist parties. In a related argument, PR systems are often criticized for giving a space in the legislature to extremist parties of the left or the right. It has been argued that the collapse of Weimar Germany was in part due to the way in which its PR electoral system gave a toehold to extremist groups of the extreme left and right.

d) Governing coalitions which have insufficient common ground in terms of either their policies or their support base. These coalitions of convenience are sometimes contrasted with coalitions of commitment produced by other systems (e.g. through the use of AV), in which parties tend to be reciprocally dependent on the votes of supporters of other parties for their election, and the coalition may thus be stronger.

e) Small parties getting a disproportionately large amount of power. Large parties may be forced to form coalitions with much smaller parties, giving a party that has the support of only a small percentage of the votes the power to veto any proposal that comes from the larger parties.

f) The inability of the voter to enforce accountability by throwing a party out of power or a particular candidate out of office. Under a PR system, it may be very difficult to remove a reasonably-sized centre party from power. When governments are usually coalitions, some political parties are ever-present in government, despite weak electoral performances from time to time. The Free Democratic Party (FDP) in Germany was a member of the governing coalition for all but eight of the 50 years from 1949 to 1998, although it never gained more than 12 per cent of the vote.

g) Difficulties either for voters to understand or for the electoral administration to implement the sometimes complex rules of the system. Some PR systems are considered to be more difficult than non-PR systems and may require more voter education and training of poll workers to work successfully.

1. List Proportional Representation

In its most simple form, List PR involves each party presenting a list of candidates to the electorate in each multi-member electoral district. Voters vote for a party, and parties receive seats in proportion to their overall share of the vote in the electoral district. Winning candidates are taken from the lists in order of their position on the lists.

The choice of List PR does not in itself completely specify the electoral system: more details must be determined. The system used to calculate the allocation of seats after the votes have been counted can be either a Highest Average or a Largest Remainder Method. The formula chosen has a small but sometimes critical effect on the outcomes of elections under PR. In Cambodia in 1998, a change in the formula a few weeks before polling day turned out to have the effect of giving the largest party 64 seats, instead of 59, in a 121-seat National Assembly. The change had not been well publicized, and it was with difficulty that the opposition accepted the results. This example clearly demonstrates the importance for electoral system designers of apparently minor details.

There are several other important issues that need to be considered in defining precisely how a List PR system will work. A formal threshold may be required for representation in the legislature: a high threshold (for example 10 per cent, as used by Turkey) is likely to exclude smaller parties, while a low threshold (for example 2 per cent, as used by Israel) may promote their representation. In South Africa, there is no formal threshold, and in 2004 the African Christian Democratic Party won six seats out of 400 with only 1.6 per cent of the national vote. List PR systems also differ depending on whether and how the voter can choose between candidates as well as parties, that is, whether lists are closed, open or free (panachage). This choice has implications for the complexity of the ballot paper.

Advantages of List PR

a) In addition to the advantages attached to PR systems generally, List PR makes it more likely that the representatives of minority cultures/groups will be elected. When, as is often the case, voting behaviour dovetails with a society's cultural or social divisions, then List PR electoral systems can help to ensure that the legislature includes members of both majority and minority groups. This is because parties can be encouraged by the system to craft balanced candidate lists which appeal to a whole spectrum of voters' interests. The experience of a number of new democracies (e.g. South Africa, and Indonesia) suggests that List PR gives the political space which allows parties to put up multiracial, and multi-ethnic, lists of candidates. The South African National Assembly elected in 1994 was 52 per cent black (11 per cent Zulu, the rest being of Xhosa, Sotho, Venda, Tswana, Pedi, Swazi, Shangaan and Ndebele extraction), 32 per cent white (one-third English-speaking, two-thirds Afrikaans-speaking), 7 per cent Coloured and 8 per cent Indian. The Namibian Parliament is similarly diverse, with representatives from the Ovambo, Damara, Herero, Nama, Baster and white (English and German-speaking) communities.

b) List PR makes it more likely that women will be elected. PR electoral systems are almost always more friendly to the election of women than plurality/majority systems. In essence, parties are able to use the lists to promote the advancement of women politicians and allow voters the space to elect women candidates while still basing their choice on other policy concerns than gender. As noted above, in single-member districts, most parties are encouraged to put up a 'most broadly acceptable' candidate, and that person is seldom a woman. In all regions of the world, PR systems do better than FPTP systems in the number of women elected, and 15 of the top 20 nations when it comes to the representation of women use List PR. In 2013, the number of women representatives in legislatures elected by List PR systems was 6.3 percentage points higher than the average of 21.8 per cent for all legislatures, while that for legislatures elected by FPTP was 2.8 percentage points lower.

Disadvantages of List PR

In addition to the general issues already identified relating to PR systems, the following additional disadvantages may be considered:

a) Weak links between elected legislators and their constituents. When List PR is used, and particularly when seats are allocated in one single national district, as in Namibia or Israel, the system is criticized for destroying the link between voters and their representatives. Where lists are closed, voters have no opportunity to determine the identity of the persons who will represent them and no identifiable representative for their town, district or village, nor can they easily reject an individual representative if they feel that he or she has performed poorly in office or is not the kind of person they would want representing them – e.g., warlords in countries such as Bosnia or Afghanistan. Moreover, in some developing countries where the society is mainly rural, voters' identification with their region of residence is sometimes considerably stronger than their identification with any political party or grouping. This criticism, however, may relate more to the distinction between systems in which voters vote for parties and systems in which they vote for candidates.

b) Excessive entrenchment of power within party headquarters and in the hands of senior party leaderships—especially in closed-list systems. A candidate's position on the party list, and therefore his or her likelihood of success, is dependent on currying favour with party bosses, while their relationship with the electorate is of secondary importance. In an unusual twist to the List PR system, in Guyana parties publish their list of candidates not ranked but simply ordered alphabetically. This allows party leaders even more scope to reward loyalty and punish independence because seats are only allocated to individuals once the result of the vote is known.

c) The need for some kind of recognized party or political groupings to exist. This makes List PR particularly difficult to implement in those societies which do not have parties or have very embryonic and loose party structures, for example, many of the island countries of the Pacific. While technically possible to allow independent candidates to run under various forms of PR, it is difficult and introduces a number of additional complications, particularly as relates to wasted votes.

2. Single Transferable Vote (STV)

STV has long been advocated by political scientists as one of the most attractive electoral systems, but its use for legislative elections has been limited to a few cases—the Republic of Ireland since 1921, Malta since 1947, and once in Estonia in 1990. It is also used for elections to the Australian Federal Senate and in several Australian states, and for European and local elections in Northern Ireland. It has been adopted for local elections in Scotland and in some authorities in New Zealand. It was also chosen as the recommendation of the British Columbia Citizens' Assembly.

The core principles of the system were independently invented in the 19th century by Thomas Hare in Britain and Carl Andræ in Denmark. STV uses multi-member districts and voters rank candidates in order of preference on the ballot paper in the same manner as under the Alternative Vote system. In most cases, this preference marking is optional, and voters are not required to rank-order all candidates; if they wish, they can mark only one.

After the total number of first-preference votes is tallied, the count then begins by establishing the quota of votes required for the election of a single candidate. The quota used is normally the Droop quota, calculated by the simple formula:

Quota = (votes / (seats +1)) +1

The result is determined through a series of counts. At the first count, the total number of first-preference votes for each candidate is ascertained. Any candidate who has a number of first preferences greater than or equal to the quota is immediately elected.

In second and subsequent counts, the surplus votes of elected candidates (i.e. those votes above the quota) are redistributed according to the second preferences on the ballot papers. For fairness, the entire candidate's ballot papers can be redistributed, but each at a fractional percentage of one votes, so that the total redistributed vote equals the candidate's surplus (the Republic of Ireland uses a weighted sample instead of distributing fractions). If a candidate had 100 votes, for example, and their surplus was five votes, then each ballot paper would be redistributed according to its second preference at the value of 1/20th of a vote. After any count, if no candidate has a surplus of votes over the quota, the candidate with the lowest total of votes is eliminated. His or her votes are then redistributed in the next count to the candidates left in the race according to the second and then lower preferences shown. The process of successive counts, after each of which surplus votes are redistributed or a candidate is eliminated, continues until either all the seats for the electoral district are filled by candidates who have received the quota, or the number of candidates left in the count is only one more than the number of seats to be filled, in which case all remaining candidates bar one are elected without receiving a full quota.

Advantages of STV

The advantages claimed for PR generally apply to STV systems. In addition, as a mechanism for choosing representatives, STV is perhaps the most sophisticated of all electoral systems, allowing for choice between parties and between candidates within parties. The final results retain a fair degree of proportionality, and the fact that in most actual examples of STV the multi-member districts are relatively small means that a geographical link between voter and representative is retained. Furthermore, voters can influence the composition of post-election coalitions, as has been the case in the Republic of Ireland, and the system provides incentives for interparty accommodation through the reciprocal exchange of preferences between parties.

STV also provides a better chance for the election of popular independent candidates than List PR, because voters are choosing between candidates rather than between parties (although a party-list option can be added to an STV election; this is done for the Australian Senate).

Disadvantages of STV

The disadvantages claimed for PR generally also apply to STV systems. In addition:

a) STV is sometimes criticized on the grounds that preference voting is unfamiliar in many societies, and demands, at the very least, a degree of literacy and numeracy.

b) The intricacies of an STV count are quite complex. This has been cited as one of the reasons why Estonia decided to abandon the system after its first election. STV requires continual recalculations of surplus transfer values and the like. Because of this, votes under STV need to be counted at counting centres instead of directly at the polling place. Where election integrity is a salient issue, counting in the actual polling places may be necessary to ensure legitimacy of the vote, and there will be a need to choose the electoral system accordingly.

c) STV, unlike Closed List PR, can at times produce pressures for political parties to fragment internally because members of the same party are effectively competing against each other, as well as against the opposition, for votes. This could serve to promote 'clientelistic' politics where politicians offer electoral bribes to groups of defined voters.

d) STV can lead to a party with a plurality of votes nonetheless winning fewer seats than its rivals. Malta amended its system in the mid-1980s by providing for some extra compensatory seats to be awarded to a party in the event of this happening. Many of these criticisms have, however, proved to be little trouble in practice. STV elections in the Republic of Ireland and Malta have tended to produce relatively stable, legitimate governments comprising one or two main parties.

3. Mixed Member Proportional (MMP)

Under MMP systems, the PR seats are awarded to compensate for any disproportionality produced by the district seat results. For example, if one party wins 10 per cent of the vote nationally but no district seats, then it will be awarded enough seats from the PR lists to bring its representation up to 10 per cent of the seats in the legislature. Voters may get two separate choices, as in Germany and New Zealand. Alternatively, voters may make only one choice, with the party totals being derived from the totals for the individual district candidates.

The proportion of seats allocated according to the two elements of the system varies from country to country. Lesotho's post-conflict electoral system, adopted in 2002, contains 80 FPTP seats and 40 compensatory ones while Germany elects 299 candidates under each system.

Although MMP is designed to produce proportional results, it is possible that the disproportionality in the single-member district results is so great that the list seats cannot fully compensate for it. This is more likely when the PR electoral districts are defined not at national level but at regional or provincial level. A party can then win more plurality/majority seats in a region or province than its party vote in the region would entitle it to. To deal with this, proportionality can be closely approached if the size of the legislature is slightly increased: the extra seats are called overhang mandates or Überhangsmandaten. This has occurred in most elections in Germany and is also possible in New Zealand. In Lesotho, by contrast, the size of the legislature is fixed, and the results of the first MMP election in 2002 were not fully proportional.

Advantages and Disadvantages of MMP

While MMP retains the proportionality benefits of PR systems, it also ensures that elected representatives are linked to geographical districts. However, where voters have two votes—one for the party and one for their local representative—it is not always understood that the vote for the local representative is less important than the party vote in determining the overall allocation of seats in the legislature. Furthermore, MMP can create two classes of legislators—one group primarily responsible and beholden to a constituency and another from the national party list without geographical ties and beholden to the party. This may have implications for the cohesiveness of groups of elected party representatives.

In translating votes into seats, MMP can be as proportional an electoral system as pure List PR, and therefore shares many of the previously cited advantages and disadvantages of PR. However, one reason why MMP is sometimes seen as less preferable than straight List PR is that it can give rise to what are called 'strategic

voting' anomalies. In New Zealand in 1996, in the constituency of Wellington Central, some National Party strategists urged voters not to vote for the National Party candidate because they had calculated that under MMP his election would not give the National Party another seat but simply replace an MP who would be elected from their party list. It was therefore better for the National Party to see a candidate elected from another party, providing that candidate was in sympathy with the National Party's ideas and ideology, than for votes to be 'wasted' in support of their own candidate.

C. Semi-Proportional Systems

These systems allow for some potential representation for parties or candidates that are of the highest vote winners in an electoral area, but do not intentionally provide for representation in proportion to each party's candidates' share of valid votes. These systems include:

1. Parallel Systems

Parallel systems also use both PR and plurality/majority components, but unlike MMP systems, the PR component of a parallel system does not compensate for any disproportionality within the plurality/majority districts. (It is also possible for the non-PR component of a Parallel system to come from the family of 'other' systems, as in Taiwan which uses SNTV.) In a Parallel system, as in MMP, each voter may receive either one ballot paper which is used to cast a vote both for a candidate and for his or her party, as is done in South Korea (the Republic of Korea), or two separate ballot papers, one for the plurality/majority seat and one for the PR seats, as is done for example in Japan, Lithuania, and Thailand. Parallel systems have been a product of electoral system design over the last decade and a half—perhaps because they appear to combine the benefits of PR lists with those of plurality/majority (or other) representation.

Advantages of Parallel Systems

In terms of disproportionality, Parallel systems usually give results which fall somewhere between pure plurality/majority and pure PR systems. One advantage is that, when there are enough PR seats, small minority parties which have been unsuccessful in the plurality/majority elections can still be rewarded for their votes by winning seats in the proportional allocation. In addition, a Parallel system should, in theory, fragment the party system less than a pure PR electoral system.

Disadvantages of Parallel Systems

As with MMP, it is likely that two classes of representatives will be created. Also, Parallel systems do not guarantee overall proportionality, and some parties may still be shut out of representation despite winning substantial numbers of votes. Parallel systems are also relatively complex and can leave voters confused as to the nature and operation of the electoral system.

2. Single Non-Transferable Vote (SNTV)

Under SNTV, each voter casts one vote for a candidate but (unlike FPTP) there is more than one seat to be filled in each electoral district. Those candidates with the highest vote totals fill these positions. SNTV can face political parties with a challenge. In, for example, a four-member district, a candidate with just over 20 per cent of the vote is guaranteed election. A party with 50 per cent of the vote could thus expect to win two seats in a four-member district. If each candidate polls 25 per cent, this will happen. If, however, one candidate polls 40 per cent and the other 10 per cent, the second candidate may not be elected. If the party puts up three candidates, the danger of 'vote-splitting' makes it even less likely that the party will win two seats.

Nowadays, SNTV is used for legislative elections in Afghanistan, Pitcairn Islands, Vanuatu and in 90 of the 150 seat of Jordan's Lower Chamber, the Senate elections in Indonesia and in 6 of the 113 seats under the Parallel system in Taiwan. The best known application of this system was for the integration of the Japanese Lower House between 1948 and 1993.

Advantages of Single Non-Transferable Vote

a) The most important difference between SNTV and the plurality/majority systems described earlier is that SNTV is better able to facilitate the representation of minority parties and independents. The larger the district magnitude (the number of seats in the constituency), the more proportional the system can become. In Jordan, SNTV has enabled a number of popular non-party pro-monarchist candidates to be elected, which is deemed to be an advantage within that embryonic party system.

b) SNTV can encourage parties to become highly organized and instruct their voters to allocate their votes to candidates in a way which maximizes a party's likely seat-winning potential. While SNTV gives voters a choice among a party's list of candidates, it is also argued that the system fragments the party system less than pure PR systems do. Over 45 years of SNTV experience, Japan demonstrated quite a robust 'one party dominant' system.

c) Independent candidates are easily accommodated.

d) Finally, the system is praised for being easy to use and understand.

Disadvantages of Single Non-Transferable Vote

a) Parties whose votes are widely dispersed will win fewer seats than otherwise and larger parties can receive a substantial seat bonus which turns a plurality of the vote nationally into an absolute majority in the legislature. These anomalies may lead to significant protests against the results and the system. Although the proportionality of the system can be increased by increasing the number of seats to be filled within the multi-member districts, this weakens the voter–MP relationship which is so prized by those who advocate defined geographical districts.

b) As with any system where multiple candidates of the same party are competing for one vote, internal party fragmentation and discord may be accentuated. This can serve to promote clientelistic politics where politicians offer electoral bribes to groups of defined voters.

c) Parties need to consider complex strategic questions of both nominations and vote management; putting up too many candidates can be as unproductive as putting up too few, and the need for a party to discipline its voters into spreading their votes equally across all a party's candidates is paramount.

d) As SNTV gives voters only one vote, the system contains few incentives for political parties to appeal to a broad spectrum of voters in an accommodatory manner. As long as they have a reasonable core vote, they can win seats without needing to appeal to 'outsiders'. However, they could win more seats by wooing voters from other parties by putting up candidates acceptable to them.

e) SNTV usually gives rise to many wasted votes, especially if nomination requirements are inclusive, enabling many candidates to put themselves forward.

3. Limited Vote

Like SNTV, the Limited Vote is a plurality/majority system used in multi-member districts. Unlike SNTV, electors have more than one vote—but fewer votes than there are candidates to be elected. Counting is identical to SNTV, with the candidates with the highest vote totals winning the seats. This system is used for various local-level elections, but its application at the national level is restricted to Gibraltar and to Spain, where it has been used to elect the Spanish upper house, the Senate, since 1977. In this case, with large multi-member districts, each voter has one vote less than the number of members to be elected. Like SNTV, LV is simple for voters and relatively easy to count. However, it tends to produce less proportional results than SNTV. Many of the arguments relating to internal party competition, party management issues, and clientelistic politics apply to LV in a similar way as to SNTV.

4. Borda Count System

The modified Borda Count used in the tiny Pacific country of Nauru. The Borda Count is a preferential electoral system in which electors rank candidates as for the Alternative Vote. It can be used in both single- and multimember districts. There is only one count, there are no eliminations and preferences are simply tallied as 'fractional votes': in the modified Borda Count devised by Nauru, a first preference is worth one, a second preference is worth half, a third preference is worth one-third and so on. These are summed and the candidate(s) with the highest total(s) are declared the winners151.

[151] Electoral Systems, Ace, The Electoral Knowledge Network, http://aceproject.org/ace-en/topics/es/esd/esd04/esd04c 17th September 2020

Annex 2

Index of Resource Material

ELECTORAL REFORM BILLS PENDING BEFORE PARLIAMENT

NO	NAME	OUTLINE
1.	The Constitution of Kenya (Amendment) (No. 2) Bill, 2018	The principal objective of the Bill is to amend Articles 101 (1), 136 (2) (a), 177 (1) (a) and 180 (1) of the Constitution of Kenya by changing the existing date for the general election for members of Parliament, the President, member of County Assembly and the county governors and deputy county governors from second Tuesday of August in every fifth year to third Monday in December in every fifth year.
2.	The Constitution of Kenya (Amendment) Bill, 2019	This Bill seeks to amend the Constitution to make it mandatory for the Independent Electoral and Boundaries Commission to submit a Report to Parliament, containing details of proposed alterations to names and boundaries of constituencies and wards. Parliament then has thirty days to make recommendations on the report of the Independent Electoral and Boundaries Commission containing details of proposed alteration to names or boundaries of constituencies and wards.
3.	The Elections (Amendment) Bill, 2019	The purpose of this Bill is to amend the Elections Act, No. 24 of 2011, to allow a candidate to be presented to the electorate on party primary or election ballot papers in the way in which the candidate has chosen to familiarize himself or herself to the electorate. It ensures that a voter easily identifies his or her preferred candidate on a ballot and therefore votes in the way he or she intended. Candidates should therefore not be unduly restricted in the way they present themselves to the electorate on the ballot and other election-related material.
4.	The Elections Laws (Amendment) Bill, 2017	The principal object of this Bill is to amend the Elections Act, No. 25 of 2011 to provide for elections petitions appeals generally, including setting timelines for filing and determination of appeals and introducing a new requirement that only one appeal may be allowed in an election petition. The Bill proposes a new section 39A to be inserted in the Political Parties Act, No. 11 of 2011 in order to provide for appointment of additional *ad hoc* members of the Political Parties Disputes Tribunal to enable the Tribunal to effectively and expeditiously deal with the many disputes which may arise during the party primaries and nomination of candidates for the general elections.
5.	The Election Laws (Amendment) Bill, 2018	The Bill seeks to amend the Elections Act, No. 24 of 2011, to ensure that a document containing election returns is signed by the candidates or the representatives of the candidates. The Bill therefore proscribes failure to fill out election return forms as a means to ensure that candidates in an election or their representatives are unable to deny being given the opportunity to oversee the tallying of results.
6.	The Election Laws (Amendment) (No. 2) Bill, 2018	The principal object of this Bill is to amend the Elections Act, 2011, to provide for the procedure for the revocation of the membership of a nominated member of Parliament or county assembly where it is necessitated by the variation in the membership of the various political parties represented in the respective legislature. The Act currently does not provide for the manner in which the nomination of a member would be revoked where the membership in the legislature changes upon the vacancy of a seat and where a by-election leads to a change in the membership of a political party in that legislature. The Bill therefore

		seeks to address this gap by providing for the circumstances under which a nomination may be revoked and the slot re-allocated to another party following an outcome of a by-election.
7.	The Independent Electoral and Boundaries Commission (Amendment) Bill, 2019	The principal object of this Bill is to amend the First Schedule of the Independent Electoral and Boundaries Commission Act, 2011 in order to provide for a mechanism of appointing members of the Independent Electoral and Boundaries Commission. As it is presently, the Selection Panel that was established under the First Schedule to the Act stood dissolved upon appointment of the current Members of the Independent Electoral and Boundaries Commission and hence there exists a vacuum as to the mechanism of appointing members of the Independent Electoral and Boundaries Commission in case of a vacancy or lapse of the term of office of any Member of the Commission.
8.	The Independent Electoral and Boundaries Commission (Amendment) (No. 2) Bill, 2019	This Bill seeks to amend the Independent Electoral and Boundaries Commission Act to address two issues. First, in order to address the lacuna in the law in terms of the appointment of commissioners when a vacancy arises. Secondly, the Bill seeks to amend the Fifth Schedule that is already spent after the first review relating to the delimitation of boundaries of constituencies and wards. Thus, the Fifth Schedule needs to be aligned to section 36 of the Act.
9.	The Referendum Bill, 2020	The principal object of the Bill is to provide for the procedure of the approval of an amendment to the Constitution by a referendum, the conduct of a referendum, referendum petitions and consequential amendments to the Elections Act, No. 24 of 2011 which currently provide for the conduct of a referendum.
10.	The Referendum (No. 2) Bill, 2020	The principal object of this Bill is to consolidate the law relating to conduct of referenda, to provide for a transparent and fair process in order to obtain a clear expression of the will of people, by establishing the procedures for the conduct of referenda, providing for the referendum committees and establishing a level playing field for the opposers and supporters of a referendum question, by providing for equal public funding and by limiting expenditure in a reasonable manner for the public good, to afford the people an opportunity to make decisions based on information from both points of view.