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REPUBLIC OF KENYA



PARLIAMENT OF KENYA



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By Hon. (Dr) Ngom
Shaban on
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[Signature]

ELEVENTH PARLIAMENT

FOURTH SESSION

**REPORT OF THE JOINT PARLIAMENTARY SELECT COMMITTEE ON
MATTERS RELATING TO THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION (IEBC)**

VOLUME I

16TH AUGUST, 2016

#02

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ABBREVIATIONS AND ACRONYMS

AG	Attorney-General
ANC	Amani National Congress
BVR	Biometric Voter Registration
CAF	County Assemblies Forum
CAJ	Commission on Administrative Justice
CBS	Chief of the Order of the Burning Spear
CCTV	Closed Circuit Television
CEO	Chief Executive Officer
CMD	Centre for Multi-Party Democracy
CoG	Council of Governors
COMELEC	Commission on Elections of the Philippines
CORD	Coalition for Reforms and Democracy
COTU	Central Organization of Trade Unions
CSK	Computer Society of Kenya
CSOs	Civil Society Organizations
CS-RG	Civil Society Reference Group
DICT	Directorate of Information Communication and Technology
DVREO	Director of Election Operations & Voter Registration
EACC	Ethics and Anti-Corruption Commission
EACLJ	East Africa Centre for Law and Justice
EAK	Evangelical Alliance of Kenya
EGH	Elder of the Order of the Golden Heart
EISA	Electoral Institute for Sustainable Democracy in Africa
ELOG	Elections Observation Group
EMBs	Election Management Bodies
EOP	Election Operation Plan
EVID	Electronic Voter Identification Devices
FIDA	Federation of Women Lawyers -Kenya
FY	Financial Year
GSIS	Government Service Insurance System of the Philippines
Hon.	Honourable
HSC	Head of State Commendation
IBP	Integrated Bar of the Philippines
ICJ	International Commission of Jurists
ICPAK	Institute of Certified Public Accountants
ICT	Information and Communications Technology
ID	Identification Document
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electoral Systems
IIEC	Interim Independent Electoral Commission of Kenya
IPPG	Inter-Parties Parliamentary Group
ISACA	Information System Audit and Control Association
JCE	Judiciary Committee on Elections

JLAC	Justice and Legal Affairs Committee
KCCB	Kenya Conference of Catholic Bishops
KCCF	Kiambu County Clergy Forum
KEPSA	Kenya Private Sector Alliance
KLRC	Kenya Law Reform Commission
KNAD	Kenya National Association for the Deaf
KNCHR	Kenya National Commission on Human Rights
MBS	Moran of the Order of the Burning Spear
MP	Member of Parliament
MSF	Multi-Sectoral Forum
NBI	National Bureau of Investigation of the Philippines
NCKK	National Council of Churches of Kenya
NCIC	National Cohesion and Integration Commission
NGEC	National Gender and Equality Commission
NRB	National Registration Bureau
ODPP	Office of the Director of Public Prosecutions
OCR	Optical Character Recognition
OMR	Optical Mark Recognition
PAC	Public Accounts Committee
PIN	Personal Identification Number
PNP	Philippine National Police
PPDT	Political Parties Disputes Tribunal
PPLC	Political Parties Liaison Committee
PRC	Professional Regulatory Commission of the Philippines
RTS	Results Transmission System
SADC	Southern African Development Community
Sen.	Senator
SID	Society for International Development
SQA	Software Quality Audit
SSS	Social Security System of the Philippines
SUPKEM	Supreme Council of Kenya Muslims
TI	Transparency International
UAT	User Acceptance Testing
UK	United Kingdom
USD	United States Dollar

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PREFACE

Mr. Speaker Sir,

Honourable Members will recall that on Tuesday, 5th July, 2016 and on Wednesday, 6th July, 2016, the Senate and the National Assembly, respectively, approved a Motion that established a Parliamentary Select Committee on matters relating to the Independent Electoral and Boundaries Commission. The mandate of the Committee as stated in the Motion, was as follows-

- (a) Inquire into the allegations against the Independent Electoral and Boundaries Commission (IEBC) Commissioners and the Secretariat;
- (b) On the findings of (a) above may recommend legal mechanisms for the vacation from office of the current Commissioners of the Independent Electoral and Boundaries Commission and Secretariat in accordance with the Constitution;
- (c) Recommend legal, policy and institutional reforms to strengthen the Independent Electoral and Boundaries Commission and improve the electoral system and processes so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner; and
- (d) On the basis of the findings and recommendations in (a), (b) & (c) prepare a report and a draft Bill or draft Bills.

The Committee was further required to receive views from experts, members of the public, the business community, civil society, religious groups, political parties, county governments and any other persons on matters relating to the Independent Electoral and Boundaries Commission and the electoral process.

The membership of the Committee was as follows-

- (1) Sen. Kiraitu Murungi (Co-Chair);
- (2) Sen. James Orengo (Co-Chair);
- (3) Sen. Kipchumba Murkomen;
- (4) Sen. Beatrice Elachi;
- (5) Sen. Johnson Muthama;
- (6) Sen. Mutula Kilonzo Junior;
- (7) Sen. (Dr.) Boni Khalwale.
- (8) Hon. (Dr.) Naomi Shaban;
- (9) Hon. (Eng.) Mohamed Mohamud Maalim;
- (10) Hon. Jimmy Angwenyi;
- (11) Hon. Moses Kuria;
- (12) Hon. (Dr.) David Eseli;
- (13) Hon. Junet Mohamed; and
- (14) Hon. Mishi Mboko.

Mr. Speaker Sir,

Following its establishment, the Joint Parliamentary Select Committee on Matters Relating to the Independent Electoral and Boundaries Commission held its first meeting on the 12th July, 2016 and other preparatory meetings, where it considered and adopted its rules of procedure and a work plan, identified stakeholders for engagement with the Committee and prepared a framework for public hearings.

In fulfillment of its mandate and pursuant to Article 118 of the Constitution and standing order 127(3) and 130(4) of the National Assembly and Senate Standing Orders, respectively, the Clerks of the Houses of Parliament invited the members of the public through a public advert to submit their views to the Committee. As a general guide, members of the public and stakeholders were requested to submit their views along four Thematic Areas, namely-

1. Allegations against Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission, specifically on—
 - (a) Credibility;
 - (b) Impartiality;
 - (c) Integrity; and
 - (d) Independence.
2. Recommendations on legal mechanisms for the vacation from office of the current Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission in accordance with the Constitution.
3. Recommendations on legal, policy and institutional reforms to strengthen the Independent Electoral and Boundaries Commission so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner. Submissions to address the following issues—
 - (a) Composition of the Independent Electoral and Boundaries Commission and the Secretariat; and
 - (b) Appointment, term of office, terms of service and removal from office of the Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission.
4. Recommendations on legal, policy and institutional reforms to improve the electoral system and processes so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner. Submissions to address the following issues—
 - (a) Voter registration;
 - (b) Voter education;
 - (c) Nomination and registration of candidates;
 - (d) Campaign management;
 - (e) Publicity and media;
 - (f) Use of Information Communication Technology in elections;

- (g) Voting process;
- (h) Transmission and declaration of election results;
- (i) Allocation of special seats;
- (j) Election observation, monitoring and evaluation; and
- (k) Dispute resolution (including nomination and petitions).

The Committee held public hearings from 18th July, 2016 to 3rd August, 2016. The Committee received fifty-eight (58) oral submissions and one hundred and thirteen (113) written Memoranda from members of the public and other stakeholders.

Thereafter, the Committee proceeded for a working retreat which provided the opportunity to consider the submissions of the public and stakeholders and to further draft, consider and approve its Report and draft Bills. The Report of the Committee contains a number of recommendations based on the Thematic Areas identified by the Committee. The Report further includes two draft Bills, namely, the Elections Laws (Amendment) Bill, 2016 and the Election Offences Bill, 2016. The Report and draft Bills are proposed by the Committee for adoption by the Houses of Parliament.

Mr. Speaker Sir,

The Committee wishes to thank the Offices of the Speaker of the National Assembly and the Speaker of the Senate as well as the Offices of the Clerk of the National Assembly and the Clerk of the Senate for the support extended to the Committee in the execution of its mandate. The Committee further extends its appreciation to the members of the public and the various institutions and organizations that appeared before the Committee or submitted Memoranda to the Committee for their well-researched and eloquent submissions in this matter.

The Committee also appreciates the technical support accorded to it by the Office of the Attorney-General, the Office of Director of Public Prosecution, the Judiciary, the Kenya Law Reform Commission, the Independent Electoral and Boundaries Commission and the Computer Society of Kenya. The Committee also benefitted immensely from the Panel of Experts and the Joint Rapporteurs who worked with the Committee throughout the process. The Committee wishes to acknowledge members of the public who have continued to keenly follow the proceedings of the Committee and the media who ensured that the country remained updated at all times.

Mr. Speaker Sir,

It is now my pleasant duty and privilege, on behalf of the Joint Parliamentary Select Committee on Matters Relating to the Independent Electoral and Boundaries Commission, to present the Report which includes two draft Bills, namely, the Elections Laws (Amendment) Bill, 2016 and the Election Offences Bill, 2016.

1. Hon. (Dr.) Naomi Shaban, EGH, MP

Shaban

2. Hon. (Eng.) Mohamed Maalim Mohamud, CBS, MP

3. Hon. Jimmy Angwenyi, MP

4. Hon. Moses Kuria, HSC, MP

5. Hon. (Dr.) David Eseli Simiyu, CBS, MP

6. Hon. Junet Mohamed, MP

7. Hon. Mishi Mboko, MP

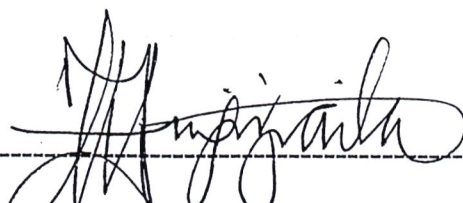
8. Sen. Kipchumba Murkomen, MP

9. Sen. Beatrice Elachi, CBS, MP

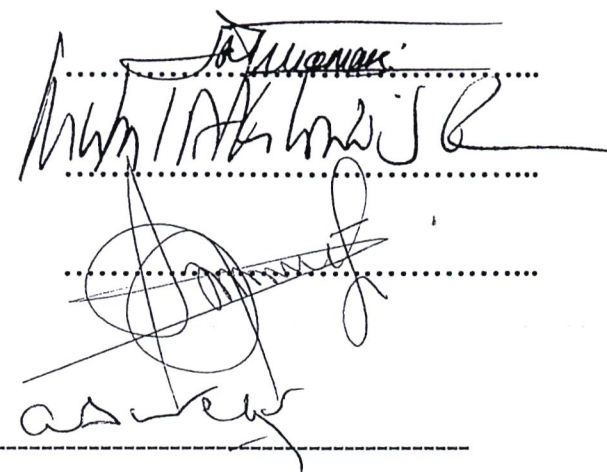
10. Sen. Johnson Muthama, MP

11. Sen. Mutula Kilonzo Jnr., MP

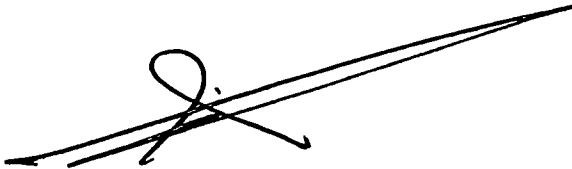
12. Sen. (Dr.) Boni Khalwale, MBS, MP


SEN. KIRAITU MURUNGI, EGH, MP,
(CO-CHAIR)

DATE 16/8/2016


SEN. JAMES ORENGO, EGH, MP,
(CO-CHAIR)

DATE 16/8/2016



HON. ADEN DUALE, EGH, MP

**(Leader of the Majority Party – National
Assembly)**

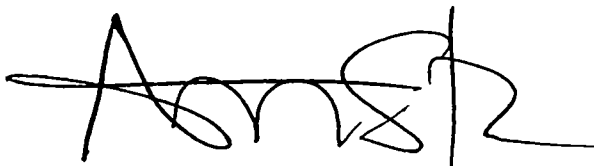
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HON. FRANCIS NYENZE, EGH, MP,

**(Leader of the Minority Party – National
Assembly)**

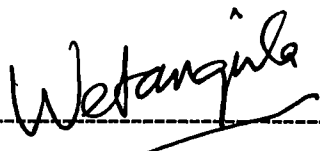
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SEN. (PROF.) KITHURE KINDIKI, EGH, MP

(Leader of the Majority Party – Senate)

DATE18-08-2016.....



SEN. MOSES M. WETANG'ULA, EGH, MP

(Leader of the Minority Party – Senate)

DATE18/8/16.....

CHAPTER ONE INTRODUCTION

1.0 BACKGROUND

1. On Tuesday, 5th July, 2016 and on Wednesday, 6th July, 2016, the Senate and the National Assembly, respectively, approved a Motion (*Annex 3*) that established a Parliamentary Select Committee on matters relating to the Independent Electoral and Boundaries Commission. The Motion states as follows-

THAT:

ACKNOWLEDGING that the sovereign power of the People of Kenya may be exercised directly or indirectly through their democratically elected representatives and that the People's sovereign power shall be exercised only in accordance with the Constitution;

RECOGNIZING that through pronouncements, sections of the Kenyan society have raised issues on the credibility, impartiality, integrity and independence of the Independent Electoral and Boundaries Commission, the electoral processes and the electoral law;

APPRECIATING the need to have the August 2017 general elections conducted by a body enjoying the broad confidence of most Kenyans;

NOW THEREFORE in accordance with the provisions of Article 1(1) and (2) of the Constitution of Kenya and Rule 9 of the Houses of Parliament (Joint Sittings) Rules, the Senate/ National Assembly **RESOLVES** that:-

1. The two Houses of Parliament establish a joint select committee consisting of fourteen (14) members, seven (7) each from the two Coalitions in Parliament.
2. The mandate of the said joint select committee shall be to:-
 - (a) Inquire into the allegations against the Independent Electoral and Boundaries Commission (IEBC) Commissioners and the Secretariat;
 - (b) On the findings of (a) above may recommend legal mechanisms for the vacation from office of the current Commissioners of the Independent Electoral and Boundaries Commission and Secretariat in accordance with the Constitution;
 - (c) Recommend legal, policy and institutional reforms to strengthen the Independent Electoral and Boundaries Commission and improve the electoral system and processes so as to ensure the August, 2017 elections are free and fair and are administered in an impartial,

efficient, simple, accurate, verifiable, secure, accountable and transparent manner; and
(d) On the basis of the findings and recommendations in (a), (b) & (c) prepare a report and a draft Bill or draft Bills.

THE SENATE/NATIONAL ASSEMBLY FURTHER RESOLVE THAT:-

3. *The Joint Select Committee shall report to Parliament within 30 days;*
4. *The leaders of the two coalitions agree to issue statements separately to support the final report and Draft Bill or Bills;*
5. *The Majority and Minority leaders in Parliament will signify the approval of the final report and draft Bill or Bills by affixing their signatures thereon prior to presentation to Parliament;*
6. *The joint select committee shall have two Co-chairs each appointed by the respective Coalitions;*
7. *The Coalitions shall provide joint rapporteurs to the Joint Select Committee, but the official record will be the parliamentary Hansard;*
8. *The Joint Select Committee and each coalition may engage experts, professionals and such other technical resource persons as they may deem necessary;*
9. *The parliamentary Clerk's office shall provide secretarial services in accordance with the Standing Orders;*
10. *The Committee shall receive views from experts, members of the public, the business community, civil society, religious groups, political parties, county governments and any other persons on matters relating to the Independent Electoral and Boundaries Commission and the electoral process;*
11. *Each member of the joint select committee shall have one vote. Decisions in the select Committee shall be made by two-thirds majority vote;*
12. *The Committee shall formulate its own rules of procedure; and*
13. *The Joint Select Committee shall comprise the following members drawn from the two Coalitions in Parliament:*
 1. *Hon. (Dr.) Naomi Shaban*
 2. *Hon. (Eng.) Mohamud Mohamed Maalim*
 3. *Hon. Jimmy Angwenyi*
 4. *Hon. Moses Kuria*
 5. *Hon. (Dr.) David Eseli Simiyu*
 6. *Hon. Junet Mohammed*
 7. *Hon. Mishi Mboko*
 8. *Sen. Kiraitu Murungi (Co-chair)*
 9. *Sen. James Orengo (Co-chair)*
 10. *Sen. Kipchumba Murkomen*
 11. *Sen. Beatrice Elachi*

12. *Sen. Johnson Muthama*
13. *Sen. Mutula Kilonzo Jnr*
14. *Sen. (Dr.) Boni Khalwale*

1.1. METHOD OF WORK

2. In the execution of its mandate, the Committee conducted a number of activities which are set out below.

1.1.1. Meetings of the Committee

3. Following its establishment, the Committee held its first meeting on the 12th July, 2016 where it considered its rules of procedure, adopted a work plan, identified stakeholders for engagement with the Committee and prepared a framework for public hearings. Thereafter the Committee proceeded for a working retreat which provided the opportunity to consider the submissions of the public and stakeholders and to further draft, consider and approve its Report and draft Bills. The Report of the Committee contains a number of recommendations based on the Thematic Areas identified by the Committee. The Report further includes two draft Bills, namely, the Elections Laws (Amendment) Bill, 2016 and the Election Offences Bill, 2016 (*Annex I*). The Report and draft Bills are proposed by the Committee for adoption by the Houses of Parliament. The Minutes of the meetings of the Committee are herein annexed as *Annex 2*.

1.1.2. Public Hearings

4. Prior to the hearing, members of the public were invited vide an advert in the dailies of Monday 17th July, 2016 and Tuesday 18th July, 2016 (*Annex 4*) to submit their views on the matter to the Committee. As a general guide, the public was required to submit their views along four thematic areas, namely-
 1. *Allegations against Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission, specifically on—*
 - (a) *Credibility;*
 - (b) *Impartiality;*
 - (c) *Integrity; and*
 - (d) *Independence.*
 2. *Recommendations on legal mechanisms for the vacation from office of the current Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission in accordance with the Constitution.*
 3. *Recommendations on legal, policy and institutional reforms to strengthen the Independent Electoral and Boundaries Commission so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner. Submissions to address the following issues—*

- (a) *Composition of the Independent Electoral and Boundaries Commission and the Secretariat; and*
 - (b) *Appointment, term of office, terms of service and removal from office of the Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission.*
4. *Recommendations on legal, policy and institutional reforms to improve the electoral system and processes so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner. Submissions to address the following issues—*
- (a) *Voter registration;*
 - (b) *Voter education;*
 - (c) *Nomination and registration of candidates;*
 - (d) *Campaign management;*
 - (e) *Publicity and media;*
 - (f) *Use of Information Communication Technology in elections;*
 - (g) *Voting process;*
 - (h) *Transmission and declaration of election results;*
 - (i) *Allocation of special seats;*
 - (j) *Election observation, monitoring and evaluation; and*
 - (k) *Dispute resolution (including nomination and petitions).*
5. Accordingly, the Committee received the views of the stakeholders and general public between 18th July, 2016 and 3rd August, 2016. The Committee received fifty-eight (58) oral submissions and one hundred and thirteen (113) written Memoranda from members of the public and other stakeholders.

1.1.3. Rules of Procedure

6. The Committee during its sitting held on 15th July, 2016 adopted the Rules of Procedure to guide the conduct of its subsequent meetings. The Rules of Procedure are annexed herein as *Annex 5*.

CHAPTER TWO

THEMATIC AREA 1

2.0 ALLEGATIONS AGAINST THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

7. In the Motion establishing the Joint Parliamentary Select Committee on matters relating to the Independent Electoral and Boundaries Commission, Parliament acknowledged that pursuant to Article 1 of the Constitution, all sovereign power belongs to the people of Kenya and may be exercised directly or indirectly through their democratically elected representatives in accordance with the Constitution. Parliament further recognized that through pronouncements, sections of the Kenyan society had raised issues on the credibility, integrity and independence of the Commission, the electoral processes and the electoral law. It is on this basis that the Houses then resolved, in accordance with Article 1(1) and (2) of the Constitution and Rule 9 of the Houses of Parliament (Joint Sittings) Rules to establish the Committee.
8. Pursuant to its mandate, the Committee invited oral and written submissions from members of the public on any allegations against Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission, specifically on—
- (a) Credibility;
 - (b) Impartiality;
 - (c) Integrity; and
 - (d) Independence.
9. In the course of its proceedings, the Committee received various allegations against the members and the Secretariat of the Commission as outlined below.

2.1.1. Credibility

10. The Coalition for Reforms and Democracy alleged that;
- (a) the Commission is culpable of opaque and negligent management of electoral data including mistaking of results, losing crucial information and not complying with the principles under Articles 10 and 35 of the Constitution on the transparency and accountability and release of public information;
 - (b) the members of the Commission failed to exercise their authority in a manner that was consistent with the purposes and objects of the Constitution, that demonstrated respect for the people, that brought honour to the nation and dignity to the office and that promoted public confidence in the integrity of their office as required under Article 73(1) of the

Constitution. This allegation was supported by the Commission on Administrative Justice and the Central Organization of Trade Unions;

- (c) the Commission collectively failed to act in the best interests of the public, failed to take personal responsibility for the reasonably foreseeable consequences of its actions, did not carry out the duties of the office efficiently and honestly or in a transparent and accountable manner and failed to act professionally and in a manner that maintains public confidence in the integrity of the office;
- (d) the members of the various Tender Committees of the Commission collectively failed to act in the best interests of the public, failed to take personal responsibility for the reasonably foreseeable consequences of its actions, did not carry out the duties of the office efficiently and honestly or in a transparent and accountable manner and failed to act professionally and in a manner that maintains public confidence in the integrity of the office;
- (e) notwithstanding the catastrophic events after the 2007 elections, the Commission has been unable or unwilling to reform its practices in order to guarantee the integrity of the electoral system;
- (f) the Commission failed to safeguard the public interest leading to loss of funds through expensive loans;
- (g) the failure of technology in the 2013 General Elections hugely dented the image of the Commission;
- (h) even with a biometric system, the Commission has not maintained a credible and verifiable voters register, did not know the total number of voters, left out some registered voters from the national voters roll, had more than one final register which it had not fully cleaned up and had lost some data which it had never managed to find out how it disappeared and had never recovered the data.
- (i) the Commission staff were negligent in doing their job and they had messed up the data because some voters had fingerprints and photos which did not match their names and other data captured electronically.
- (j) the accuracy of the register was compromised by the existence of multiple registers and loss of data due to staff negligence.
- (k) the Commission failed as a whole to provide policy guidance and oversight to the Secretariat.
- (l) nearly forty months after the 2013 General Election and only twelve months to the 2017 General Election, the Commission has yet to release a complete set of results for all elective offices.

11. Mr. Barasa Nyukuri alleged that;

- (a) the members of the Commission failed to prepare and regularly revise the principal voters register contrary to Article 88(4)(a) and (b) of the Constitution. This allegation was supported by Bunge la Wazalendo and the International Commission of Jurists -Kenya;

- (b) the members of the Commission failed to train Commission personnel prior to the deployment of Information Communication Technology in the March, 2013 General Elections;
- (c) the members of the Commission failed to investigate and prosecute candidates, political parties or their agents for electoral offences contrary to section 4 of the Independent Electoral and Boundaries Commission Act, 2011 This allegation was supported by the International Commission of Jurists, Kenya Section;
- (d) the members of the Commission failed to publicize election results and maintain a publicly available audit trail of the results;
- (e) the members of the Commission failed to regulate political parties during nominations and campaigns for the 2013 General Elections, contrary to the provisions of Articles 88(4)(d), 91 and 92 of the Constitution;
- (f) the members of the Commission failed to conduct voter education contrary to Article 88(4)(g) of the Constitution. This allegation was supported by Bunge la Wazalendo;
- (g) the members of the Commission failed to facilitate the observation, monitoring and evaluation of elections contrary to Article 88(4)(h). This allegation was supported by Bunge la Wazalendo.

12. The Auditor-General alleged that;

- (a) the Commission failed to obtain value for public money spent in the procurement of Biometric Voter Registration (BVR) Kits used for the March, 2013 elections.
- (b) the Commission failed to obtain value for public funds spent in the procurement of Electronic Voter Identification Devices (EVIDs) used for the March, 2013 General Elections.

13. The Multi-Sectoral Forum (MSF) alleged that Kenyans have lost confidence in the ability of the Commission as currently constituted to conduct credible elections. This allegation was supported by the submissions made by the Elections Observation Group, the Evangelical Alliance of Kenya, the Youth Agenda, FIDA-Kenya, Hon. Peter Kaluma, M. P., the Central Organization of Trade Unions, the Commission on Administrative Justice, Amani National Congress, Bunge la Wazalendo, Barasa Nyukuri, International Governance Institute, Intellectus Consultancy and the Civil Society Reference Group.

14. The International Commission of Jurists, Kenya Section, alleged that the credibility of the Commission has been undermined by the mention of sections of the Commission in the "*Chickengate*" scandal. This allegation was supported by Article 19 and the Civil Society Reference Group.

15. Mr. Okiya Omtatah Okoiti alleged that the members of the Commission failed to competently discharge the constitutional mandate of the Independent Electoral and

Boundaries Commission. This allegation was supported by Mr. Barasa Nyukuri and the International Commission of Jurists- Kenya.

2.1.2. Impartiality

16. Mr. Barasa Nyukuri alleged that the Commission recruited the staff of the Commission through favouritism and nepotism.
17. Article 19 alleged that the Commission exhibited bias against the Petitioner in the Presidential Petition filed after the March, 2013 General Elections. This allegation was supported by Hon. Peter Kaluma, M. P. and the Civil Society Reference Group.
18. Article 19 alleged that the Commission distributed Biometric Voter Registration Kits in an unfair manner during voter registration.
19. Mr. Okiya Omtatah Okoiti alleged that the Commission irregularly favoured FACE Technologies in the procurement of Electronic Voter Identification Devices.
20. The International Commission of Jurists, Kenya Section alleged that the Commission's selective handling of disputes has failed to inspire confidence in dealing with political parties and members of the public.
21. The Luhya Community around Maseno alleged that the Commission had shown bias against one of the communities in the area surrounding Maseno.
22. The Kenya Diaspora Alliance alleged that during the 2012 discussion on boundaries review and delimitation, despite written pleas to the Commission by Kenyans living in the diaspora, the Commission ignored and did not consider the plea for the creation of five diaspora constituencies.
23. The Kenya Diaspora Alliance alleged that the Commission excluded Kenyans in the diaspora from their voter education and registration exercises.

2.1.3. Integrity

24. The Coalition for Reforms and Democracy alleged that;
 - (a) the Commission is culpable of persistent and endemic corruption in electoral procurement. This allegation was supported by the Amani National Congress;
 - (b) the Commission is culpable of manipulation and mismanagement of the Voter's Register;
 - (c) officials of the Interim Independent Electoral Commission, including Commissioner Issack Hassan, on at least one occasion were accommodated and their expenses paid by Smith and Ouzman during their visits to the United Kingdom and information on rival bids was supplied to Smith and Ouzman by their agent Trevy Oyombra thereby adding verisimilitude to his claims that he

was acting on behalf of officials in the Interim Independent Electoral Commission;

- (d) the Interim Independent Electoral Commission under its Chairman's watch systematically overpaid for procurement of election materials;
- (e) corruption and corruption-related offences were committed in the course of the procurement of the electronic voting equipment for the 2013 General Election as set out in the decision of the Public Procurement Administrative Review Board in the case of *Avante International Technology Inc. and 2 Others v. The Independent Electoral and Boundaries Commission*, the Special Audit on the Procurement of Electronic Voting Devices for the 2013 General Election by the Commission conducted by the Auditor-General and the Report of the Public Accounts Committee on the Special Audit Report of June 2014 on the Procurement of Electronic Voting Devices for the 2013 General Election;
- (f) the Commission approved irregular variations and supply of laptops rather than handheld devices;
- (g) the Commission allowed direct procurement against the advice of the Attorney-General;
- (h) the Commission conducted an election that was flawed and a complete fraud;
- (i) the Commissioners in their management of the transmission and tallying of results in the last election can only be explained on the basis of willful and deliberate violation of the Constitution, gross misconduct or incompetence on a level that warrants removal;
- (j) the Commission has deliberately concealed information on elections violating the transparency and accountability requirements and making it impossible to cross-check the announced results against each other;
- (k) there were widespread irregularities and illegalities in the last General Election that were eventually allowed to stand;
- (l) there was dishonest revision and doctoring of election results in the last general election;
- (m) there were many instances, in the last General Election, in which the electoral laws were willfully broken and already announced results were unlawfully changed;
- (n) the members of the various Tender Committees of the Commission were individually and jointly culpable for flouting procurement regulations as detailed in the Auditor-General Special Audit Report and the Public Accounts Committee Report.

25. Mr. Okiya Omtatah Okoiti alleged that the Commission failed to properly account for Kshs. 2.53 Billion appropriated by Parliament for the March, 2013 General Elections.

26. The International Commission of Jurists-Kenya alleged that the Commissioners lack integrity as a result of their involvement in the "Chickengate" scandal. This

allegation was supported by the Evangelical Alliance of Kenya, Article 19, the Kenya Diaspora Alliance, the Commission on Administrative Justice, the Luhya Community surrounding Maseno and Mr. Mulatya Ndungi.

27. The Ethics and Anti-Corruption Commission alleged that the Commission engaged in “rushed” or “induced” or “emergency” procurements for essential items and equipment especially in the run-up to an election.

2.1.4. Independence

28. Mr. Barasa Nyukuri alleged that the Commission failed to make independent decisions on the date of the 2013 General Elections, the diaspora vote, the procurement of the Biometric Voter Registration (BVR) Kits and the donation of BVR Kits for the Burundi elections. This allegation was supported by the International Commission of Jurists-Kenya Section, the Kenya Diaspora Alliance, the Elections Observation Group and Bunge la Wazalendo.

2.1.5. Specific Allegations against the Commissioners and the Secretariat Touching on Credibility and Integrity

29. The Committee also received specific allegations against individual Commissioners and members of the Secretariat as set out below.

(1) Mr. Ahmed Issack Hassan, Chairman

30. The Coalition for Reforms and Democracy alleged that;
- (a) the Chairman irregularly singly procured legal services for the presidential petition in 2013. This allegation was supported by Mr. Barasa Nyukuri;
 - (b) as Chairman of the Interim Independent Electoral Commission, the Chairman compromised public interest by accepting gifts;
 - (c) the Chairman ignored expert advice from the International Foundation for Electoral Systems (IFES) and did not disclose to fellow Commissioners that the Electoral Voter Identification Device (EVID) contract should be cancelled, thereby leading to the misuse and waste of public resources;
 - (d) the Chairman failed to provide leadership, was involved in the operations of the Secretariat and had vested interests in the Commission;
 - (e) the Chairman should take overall responsibility for deceiving the public with reference to acquisition of voting equipment (including lobbying members of the secretariat) on voter registration and vote tallying.
31. The Ethics and Anti-Corruption Commission submitted that it was in receipt of an allegation that the Chairman engaged in irregular procurement of Biometric Voter Registration (BVR) Kits by the Commission from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion.

(2) Mr. Thomas Letangule, Commissioner

32. The Ethics and Anti-Corruption Commission submitted that it was in receipt of an allegation that the Commissioner engaged in irregular procurement of Biometric Voter Registration (BVR) Kits by the Commission from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion.

(3) Mr. Mohamed Alawi, Commissioner

33. The Ethics and Anti-Corruption Commission submitted that it was in receipt of an allegation that the Commissioner engaged in irregular procurement of Biometric Voter Registration (BVR) Kits by the Commission from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion.

(4) Mr. Ezra Chiloba, Secretary and Chief Executive Officer

34. Mr. Barasa Nyukuri alleged that that the current Secretary and Chief Executive Officer of the Commission is incompetent.
35. The Coalition for Reforms and Democracy alleged that the current Secretary made irregular payments of Kshs. 258 Million to Face Technologies without a valid contract. This allegation was supported by Mr. Barasa Nyukuri.

(5) Ms. Betty Sungura Nyabuto, Deputy Secretary

36. Mr. Barasa Nyukuri alleged that Ms. Sungura chaired the Tender Committee which awarded a contract for transporting elections material to an unregistered company at an exorbitant price.
37. The Ethics and Anti-Corruption Commission submitted that it was in receipt of an allegation that Ms. Sungura engaged in irregular procurement of Biometric Voter Registration (BVR) Kits by the Commission from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion.

(6) Ms. Immaculate Kassait, Director of Election Operations & Voter Registration

38. Mr. Barasa Nyukuri alleged that Ms. Kassait played a role and was responsible for the delayed preparation of a faulty principal voters register used for the March, 2013 General Elections.
39. The Ethics and Anti-Corruption Commission submitted that it was in receipt of an allegation that Ms. Kassait engaged in irregular procurement of Biometric Voter Registration (BVR) Kits by the Commission from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion.

(7) Ms. Praxedes Tororey, Director of Legal & Corporate Affairs

40. Mr. Barasa Nyukuri alleged that Ms. Tororey played a role and was responsible for the payment of legal fees to firms procured irregularly and under unclear circumstances contrary to Article 227 of the Constitution and the Public Procurement and Disposal Act, 2005.

(8) Mr. Bernard Nyachio

41. The Ethics and Anti-Corruption Commission submitted that it was in receipt of an allegation that Mr. Nyachio engaged in irregular procurement of Biometric Voter Registration (BVR) Kits by the Commission from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion.

2.1.6. Response to the Allegations

42. On account of the nature of the above allegations and the mandate of the Committee, the Committee resolved to inform the Commissioners and the Secretariat of the allegations in order to afford them a fair hearing. The Committee set out the allegations in a letter to the Commission dated 29th July, 2016 (*Annex 6*) which was copied to all Commissioners and members of the Secretariat who were specifically cited.
43. By a letter dated 1st August, 2016 (*Annex 7*), the Chairperson of the Commission wrote to the Clerks of Parliament raising a preliminary objection and inviting the Committee to make a determination on whether—
- (a) the Terms of Reference as cited in Thematic Area 1 and 2 of the Motion establishing the Committee are contrary to the express provisions of Article 251 of the Constitution which sets out grounds and mechanisms of removal of commissioners;
 - (b) the National Assembly and the Senate have through the processes undertaken by the Committee gone out and solicited for allegations against the Commissioners in a manner not contemplated under Article 251 of the Constitution; and
 - (c) the participation of Members of the National Assembly in the Committee violates the rights of the Commissioners to a fair hearing contemplated under Article 50 of the Constitution as read with Article 25 of the Constitution as a Petition is the only mechanism available to the public for removal of Commissioners.
44. The Committee delivered a unanimous Ruling on the objection (*Annex 8*) stating—
- “10. The first aspect of the preliminary objection by the Commission is whether the Terms of Reference as cited in Thematic Area 1 and 2 are contrary to the express provisions of Article 251 of the Constitution which sets out grounds and mechanisms of removal of commissioners from office.*

11. *It is important to state, at the outset, that Parliament in the execution of its representative, legislative or oversight mandate and in accordance with Articles (1), 94, 95 and 96 of the Constitution has the jurisdiction to inquire into any matter. For this purpose, Article 124(1) of the Constitution empowers each House of Parliament to establish Committees. Further, pursuant to Article 124(2) of the Constitution, Parliament may establish joint committees consisting of Members of both Houses of Parliament.*
12. *The Joint Parliamentary Select Committee is therefore a joint committee established pursuant to Article 124 (2) of the Constitution and the Standing Orders of both Houses of Parliament with the mandate of inquiring into the matters set out in the Motion. The Joint Committee is therefore not established pursuant to Article 251 of the Constitution and is therefore not the Committee of the National Assembly contemplated under Standing Order 230(3) of the National Assembly Standing Orders.*
13. *Further, it is instructive to note that the Motion as passed by both Houses of Parliament does not speak to the question of removal from office in accordance with Article 251 of the Constitution but rather mandates the Committee, where appropriate, to recommend "legal mechanisms for the vacation from office, of the current commissioners". The mandate of the Committee is not restricted to the matter of vacation from office of the Commissioners and the Secretariat. A significant portion of the mandate of the Committee extends to legal, policy and institutional reforms to strengthen the Commission and to improve the electoral system and processes. The role of the Joint Committee is therefore a role that is much broader than that contemplated of a committee established standing order 230(3) of the National Assembly Standing Orders to consider a Petition for the removal of a Commissioner pursuant to Article 251 of the Constitution.*
14. *It is further important to observe that Article 251 of the Constitution provides for removal from office for the grounds enumerated in Article 251(1) but does not provide for the myriad of other means by which a commissioner may vacate office otherwise than by removal.*
15. *On the question of whether the National Assembly and the Senate have through the processes undertaken by the Committee gone out and solicited for allegations against the Commissioners in a manner not contemplated under Article 251 of the Constitution, first, as we have stated above, the proceedings of this Committee are not proceedings undertaken in terms of Article 251 of the Constitution and are not, of themselves, intended to result in the removal of any or all of the Commissioners in accordance with Article 251 of the Constitution.*

16. *Additionally, in the preamble to the Motion, Parliament recognized that there were pronouncements which were in the public domain and through which sections of society had raised issues on the credibility, impartiality, integrity and independence of the Commission. The Motion as passed by Parliament therefore required the Committee to "inquire into the allegations against the Independent Electoral and Boundaries Commission, Commissioners and the Secretariat". In this regard, the Committee was mandated to receive views from the public generally on any such allegations.*
17. *In the course of its proceedings, the Committee received a number of allegations against Commissioners and the Secretariat of the Commission. In accordance with the rules of natural justice, the Committee resolved to forward all such allegations to the Commission so as to give the Commission an opportunity to respond to any of the allegations. These are the allegations set out in the letter dated 29th July, 2016. In that letter as well as in previous letters to the Commission, the Commission, like all other stakeholders who were invited to appear before the Committee, was invited to appear before the Committee and to make representations on any or all of the Thematic Areas identified by the Committee. The Commission would therefore be within its rights to make representations on all, some or none of the Thematic Areas. Indeed, some of the persons and institutions who appeared before the Committee restricted themselves to specific Thematic Areas which they felt competent to address. It is for this reason that the letter to the Commission, just like that of other stakeholders, was an invitation to appear and make representations and not a summons to appear.*
18. *On the question of whether the participation of Members of the National Assembly in the Committee violates the rights of the Commissioners to a fair hearing contemplated under Article 50 of the Constitution as read with Article 25 of the Constitution as a Petition is the only mechanism available to the public for removal of Commissioners, we have already established above that the mandate and processes of this Committee are independent of and distinct from the processes for removal of a member of a commission under Article 251 of the Constitution. Consequently the objection by the Commission that the discharge of the mandate of this Committee would affect any processes under Article 251 if any were to be set in motion is premature and anticipatory.*
19. *The upshot of this therefore, is that the Commission, in accordance with the rules of natural justice, has been informed of the allegations received by the Committee against the Commission generally, specific Commissioners and specific members of the Secretariat. It is therefore open to the Commission, its Commissioners or its Secretariat to*

respond to these allegations. It is equally open to the Commission to opt not to respond to these allegations and to instead make representations on any of the other Thematic Areas."

45. In light of the Ruling, the Chairperson of the Independent Electoral and Boundaries Commission wrote to the Committee on 2nd August, 2016, stating—

"We refer to our meeting with the Committee yesterday on 1st August 2016 where we raised our preliminary objection in our letter of even date.

Pursuant to the ruling of the Committee that the hearings were not an Article 251 process for the removal of the Commissioners and that the Commissioners could choose to comment on any of the thematic areas covered under the Terms of Reference of Committee, the Commission has decided not to comment on thematic areas 1 and 2. However, with the permission of the co-Chairs of the Committee the Commissioners and staff who are personally mentioned adversely in allegations in your letter dated 29th July, 2016 will file a written response to the Committee on the allegations against each one of them.

In view of the above, the Commission wishes to expunge paragraphs 9 – 24 of the memorandum dated 1st August 2016."

46. The Paragraphs 9 to 24 in the memorandum dated 1st August, 2016 which the Commission wished to expunge related to previous submissions made by the Commission for consideration by the Committee with regard to Thematic Areas 1 and 2.

47. By a letter dated 3rd August, 2016 (*Annex 9*) the Commissioners of the Independent Electoral Commission and staff specifically cited in the allegations filed their responses as set out below.

(1) Mr. Ahmed Issack Hassan, Chairman

- (a) *It has been alleged that the Chairman of the IEBC engaged in irregular procurement of biometric Voter Registration (BVR) kits from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing.*

I wish to clarify that this procurement was the subject of investigations in the Special Audit Report conducted by the Office of the Auditor-General. It is now public knowledge that I challenged the credibility of the Special Audit Report through the Court and obtained a court order expunging my name from the said report. The same was highlighted in the Justice Legal Affairs Committee of National Assembly, when I appeared before them in the Nyukuri petition. The Auditor-General has since confirmed the Court Order.

- (b) *It has also been alleged that I regularly singularly procured legal services for the presidential petition in 2013.*

Having perused the allegations contained in Nyukuri's petition of 7th June, 2016, I noticed that he makes general claims without particulars. I wish to state that following the 2013 General Elections, a total of 188 petitions were filed across the country. The Commission engaged a total of 44 Law Firms to defend its interests drawn from the Commission's database of prequalified lawyers in line with the Public Procurement and Disposal Act, 2005.

Payment of legal fees relating to petitions following the 2013 General Election, were made in accordance with the law. As a matter of fact both the National Treasury and the Auditor-General undertook an audit of the same and did not make any adverse findings. In addition this matter was discussed at Justice and Legal Affairs Committee, which acknowledged efforts made by the Commission to manage legal fees relating to election petitions.

- (c) *It has been alleged that as Chairman of IIEC I compromised public interest by accepting gifts.*

I wish to state that the issue around Chickengate was investigated by the Ethics and Anti-Corruption Commission. It is now public knowledge that I have since been vindicated on this matter.

- (d) *It has also been alleged that I ignored expert advice from IFES and did not disclose it to my fellow commissioners that the EVID contract should be cancelled, thereby leading to misuse and waste of public resources.*

I wish to clarify that the allegation is unfounded and there are no particulars to proof otherwise.

- (e) *It has also been alleged that I deceived the public in the acquisition of voting on voter registration and vote tallying equipment.*

I wish to clarify that the allegations too are unfounded and there are also no particulars to support this allegations.

In conclusion, my response is that the allegations presented before this Committee against myself are malicious, unfounded and lack particulars and I would pray that this Committee finds no merit in these allegations"

(2) Mr. Thomas Letangule, Commissioner

It has been alleged that acting in the capacity of a Commissioner of the Independent electoral and Boundaries Commission, I engaged in irregular procurement of Biometric Voter Registration (BVR) Kits from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion particulars of which are contained in the Ethics and Anti-Corruption Commission (EACC) submission to the Joint Parliamentary Select Committee.

I have perused the allegations submitted before this Committee and I have found no particulars on any of the allegations raised other than mere mentions in the EACC matrix report detailing the list of cases and status of the cases being undertaken by the EACC. It is worth noting that in its submission to the

Committee, the EACC at page 16 exonerated me when it stated that there was no evidence obtained to support the allegations raised against Commissioners and Secretariat currently in office.

It must be said that BVR transaction under reference was a Government-to-Government procurement between the Government of Kenya and the Government of Canada where the Commission and myself in particular played no role in either identifying the vendor, negotiations with the vendor or in issuing of specifications to the tender.

(3) Mr. Mohamed Alawi, Commissioner

It has been alleged that acting in the capacity of a Commissioner of the Independent electoral and Boundaries Commission, I engaged in irregular procurement of Biometric Voter Registration (BVR) Kits from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion particulars of which are contained in the Ethics and Anti-Corruption Commission (EACC) submission to the Joint Parliamentary Select Committee.

I have perused the allegations submitted before this Committee and I have found no particulars on any of the allegations raised other than mere mentions in the EACC matrix report detailing the list of cases and status of the cases being undertaken by the EACC. It is worth noting that in its submission to the Committee, the EACC at page 16 exonerated me when it stated that there was no evidence obtained to support the allegations raised against Commissioners and Secretariat currently in office.

It must be said that BVR transaction under reference was a Government-to-Government procurement between the Government of Kenya and the Government of Canada where the Commission and myself in particular played no role in either identifying the vendor, negotiations with the vendor or in issuing of specifications to the tender.

(4) Mr. Ezra Chiloba, Secretary and Chief Executive Officer

It has been alleged that as the Chief Executive Officer (CEO) I made irregular payments of Kshs. 258 Million to M/S Face Technologies.

I wish to clarify that the allegation was first raised by the Parliamentary Account Committee (PAC) of the National Assembly. The PAC's decision was purportedly based on Special Audit of the BVR, EVID, RTS and the Universal Kit undertaken by the Auditor-General in 2014. However, it should be pointed out that the Special Audit Report did not cover the payment of Ksh. 258 million to Face Technology since the payment was made in FY 2014/2015 long after the Special Audit had been completed. What this means is that PAC prematurely made a finding on payment that the Auditor-General himself had not reviewed. If PAC had any concerns on the payment, the best recommendation would have been to direct the Auditor-General to review it as opposed to passing judgment. Notwithstanding the finding by PAC, the Auditor-General reviewed the payment during the audit of the

FY 2014/2015 financial statement. With respect to procurement of 4,600 EVIDs he makes the following observations:

- (i) The Contractor submitted invoice dated 6 February 2013 amounting to USD 4,628,746, which was validated as a pending bill by The National Treasury's Internal Audit. The National Treasury issued additional funding amounting to Ksh 388,562,633 (USD 4,628,746) for the payment of the pending obligation.*
- (ii) However the incoming CEO reviewed the invoices and considered that there was no adequate ground to support the invoice claim amounting to USD 2,075,572, therefore, paid USD 2,553,174.80 (Ksh 259,020,516.80) to discharge the obligation during financial year 2014/2015.*
- (iii) In the circumstance, the responsibility for the procurement of the additional electronic voter identification devices rests with the past management.*

When appearing before the Justice Legal Affairs Committee on 30th June 2016, the Auditor-General reaffirmed his position as follows:

The payment of 258 million shillings by the current CEO was for clearance of pending bills as advised by the National Treasury. These were bills incurred by his predecessor. He had to make decisions based on inherited processed and therefore he is not part of the report under consideration.

I wish to state that following the due diligence that I undertook even after approvals had been made, the Commission was able to save taxpayers USD. 2,075,572.00.

The Joint Committee is hereby requested to discard the allegations, as they do not have a basis.

(5) Ms. Betty Sungura Nyabuto, Deputy Secretary

- (a) It has been alleged that I chaired the Tender Committee which awarded a contract for transporting elections material to an unregistered company at an exorbitant price. (The Particulars are contained in the Memorandum submitted by Mr. Barasa Nyukuri).*

I wish to clarify that I chaired the Tender Committee meeting No. 39 held on 13th February 2013, at 12 noon and deliberated the 'Awarding of hire for transport for General Election Tender' under agenda No. 6. I wish to confirm that we never awarded a contract to any company called ALHAMDUL COMPANY.

Indeed all the companies that were awarded by the Tender Committee were registered. All the awarded companies submitted the following: Copy of Registration certificate/ Certificate of Incorporation and Tax Compliance Certificate and PIN. Further all responsive bidders who met the preliminary stage requirements, were subjected to a technical evaluation before moving to the financial evaluation stage.

The allegation that the Tender Committee awarded the Tender at an exorbitant price is unfounded as the Tender Committee only awarded as per the Evaluation Report. The lowest evaluated bidders were awarded by the Tender

Committee as provided by the Public Procurement and Disposal Act. Therefore the particulars in the memorandum under reference are unfounded, untrue and unwarranted and should be dismissed.

- (b) That I engaged in irregular procurement of Biometric Voter Registration (BVR) Kits from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion particulars of which are found in the EACC report submitted to the Joint Parliamentary Select Committee.

I wish to state that I joined the Commission on 21st August, 2012. By that time, the BVR procurement was in process. I wish to clarify and make correction that I was not involved in any way in the procurement of the BVR kits as alleged in the letter of invitation. This allegation should therefore be dismissed.

(6) Ms. Immaculate Kassait, Director of Election Operations & Voter Registration

- (a) It is alleged that I played a role and was responsible for the delayed preparation of a faulty principal voters register used for the March, 2013 General Elections.

I wish to clarify to you that as the DVREO, I am not responsible for processing and production of the voter register. My role is to coordinate the development and overseeing the implementation of voter registration strategies and work plan and overseeing execution of approved voter registration inspection plan.

I further wish to state that in the implementation of voter registration as stipulated by Section 5,6,7 and 8 of the Elections Act 2011, the Commission has approved procedures. The procedure stipulates: the enrolment of voters i.e. the data collection, data processing, production and inspection.

The process of data collection is undertaken by Registration Officers/Assistant in the field under the supervision of DVREO while data processing and register production is done by Directorate of Information Communication and Technology (DICT). As part of the planning in October 2012, DVREO organized an approved National Conference that brought together all Registration Officers to plan for Voter Registration. During the workshop the timeline for voter registration workflow process, monitoring, feedback training and logistics were discussed.

Following the Government-to-Government agreement, the DVREO developed an approved timeline for Biometric Voter Registration (BVR) roll out. The roll out included the Voter Registration work breakdown structure in terms of how data was to be captured and uploaded to the database before production of the register.

The registration of voters using BVR took place from 18th November, to 19th December, 2012. The register data processing and production was to be progressive. However due to the delay in the data processing and production, there was no feedback to the field and we had to await final data processing. The data on enrolment of voters was submitted on time.

At the end of registration IEBC registered 14,388,781 voters (14,352,545 biometric and 36,236 non-biometric) in 24,563 registration centers (2,637 in Diaspora in record 30 days. This is the principal register of voters after the inspection, which was used in the 2013 General elections.

The above is a demonstration that I did my work diligently and within the timeline.

- (b) It is alleged that I engaged in irregular procurement of Biometric Voter Registration (BVR) kits by the Commission from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion.*

I noted that the allegations are found in the memorandum of EACC. It must be said that BVR transaction under reference was a Government-to-Government procurement between the Government of Kenya and the Government of Canada. I further wish to note that in the Special Audit Report conducted by the Office of the Auditor-General on BVR never found me culpable.

Having perused through the same memorandum, I find no particulars in support of the allegations. It is worth noting that in its submission to the Committee, the EACC at page 16 exonerates me when it stated that there was no evidence obtained to support the allegations raised against Commissioners and Secretariat currently in office.

Therefore the allegations are unfounded and should be dismissed with the contempt they deserve.

(7) Ms. Praxedes Tororey, Director of Legal & Corporate Affairs

It is alleged that I was responsible for the payment of legal fees to firms procured irregularly and under unclear circumstances contrary to Article 227 of the Constitution and the Public Procurement and Disposal Act, 2005.

Having perused the allegations contained in Nyukuri's petition of 7th June 2016. I noticed that he makes general claims without particulars. I wish to state that following the 2013 General Elections, a total of 188 petitions were filed across the country. The Commission engaged a total of 44 law firms to defend its interests drawn from the Commission's database of prequalified lawyers in line with the Public Procurement and Disposal Act, 2005.

Payment of legal fees relating to petitions following the 2013 General Election, were made in accordance with the law. As a matter of fact, both the National Treasury and the Auditor-General undertook an audit of the same and did not make any adverse findings. In addition, this matter was discussed at Justice and Legal Affairs Committee, which acknowledged efforts made by the Commission to manage legal fees relating to election petitions.

I therefore find the allegations spurious, unfounded in law, lack merit and are borne out of malice aimed at harming my professional reputation. I pray that the Committee dismisses the allegation.

(8) Mr. Bernard Nyachio

It is alleged that I engaged in irregular procurement of Biometric Voter Registration (BVR) kits by the Commission from Sanfran Morpho Canada through Canadian Commercial Corporation by way of single sourcing at a cost of Kshs. 6.2 Billion.

I noted that the allegations are found in the memorandum by the EACC. It must be said that BVR transaction under reference was a Government-to-Government procurement between the Government of Kenya and the Government of Canada. I further wish to note that in the Special Audit Report conducted by the Office of the Auditor-General on BVR never found me culpable.

I noted that the allegations are found in the memorandum by the EACC. Having perused through the same memorandum, I find no particulars in support of the allegations. It is worth noting that in its submission to the Committee, the EACC at page 16 exonerates me when it stated that there was no evidence obtained to support the allegations raised against Commissioners and Secretariat currently in office.

48. The responses were forwarded to the Committee by the Chairperson of the Commission, Mr. Ahmed Issack Hassan on his behalf and on behalf of the cited members of the Commission and the Secretariat. The Chairperson concluded by stating—

“As the Committee retreats to finalise its report, it should endeavor to protect the Constitution and promote democratic governance of the Republic. We urge this Committee to be guided by the Constitution and the law and not other extraneous considerations. We ask you for justice; justice in accordance with the law and the Constitution.”

2.2. RECOMMENDATIONS OF THE COMMITTEE

49. The Committee took into account the following factors-

- (1) The provisions of the Constitution and the law on the process for disposal of allegations against the Commissioners and the Secretariat;
- (2) The views received from the public and the stakeholders;
- (3) The time remaining to the August, 2017 General Elections;
- (4) The need to ensure stability, public confidence and an orderly transition in the Commission; and
- (5) The offer by the Commissioners to vacate from office in the event of a negotiated settlement;

The Committee made no findings on the allegations against members of the Commission and the Secretariat.

CHAPTER THREE
THEMATIC AREA 2

3.0 LEGAL MECHANISMS FOR THE VACATION FROM OFFICE

3.1. VACATION FROM OFFICE OF THE CURRENT COMMISSIONERS

50. The Independent Electoral and Boundaries Commission is a constitutional Commission established under Article 88 of the Constitution and the Independent Electoral and Boundaries Commission Act. The Commission is responsible for conducting and supervising referenda and elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament.
51. Pursuant to section 5 of the Independent Electoral and Boundaries Commission Act, the current Chairperson and eight Commissioners of the Commission were appointed to office on 9th November, 2011 vide Gazette Notices 14091 and 14094, respectively. As per Article 250(6)(a) of the Constitution and section 7 of the Independent Electoral and Boundaries Commission Act, the term of office of the Commissioners is a single six-year period and precludes the Commissioners from re-appointment to office. The term of office of the current Commissioners therefore expires on 8th November, 2017.
52. If the Commissioners were to vacate office otherwise than by the expiry of their term in office, the following are the possible mechanisms that would apply-
- (a) removal of the Commissioners from office under the circumstances and in the manner contemplated under Article 251 of the Constitution;
 - (b) resignation of the Commissioners from office;
 - (c) a negotiated exit that is agreed to by the Commissioners; or
 - (d) by operation of the law through an amendment to the Constitution and repeal or amendment of the Independent Electoral and Boundaries Commission Act.
53. These mechanisms for vacation from office are discussed below.

3.1.1. Removal from Office

54. Article 95(5)(a) of the Constitution empowers the National Assembly to review the conduct in office of the President, the Deputy President and other State officers and to initiate the process of their removal from office. The mechanism for initiating the removal of a member of a constitutional Commission is outlined under Article 251 of the Constitution which provides—
- (1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for—*

- (a) *serious violation of this Constitution or any other law, including a contravention of Chapter Six;*
- (b) *gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;*
- (c) *physical or mental incapacity to perform the functions of office; (d) incompetence; or*
- (d) *bankruptcy.*
- (2) *A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.*
- (3) *The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.*
- (4) *On receiving a petition under clause (3), the President—*
 - (a) *may suspend the member or office holder pending the outcome of the complaint; and*
 - (b) *shall appoint a tribunal in accordance with clause (5).*
- (5) *The tribunal shall consist of—*
 - (a) *a person who holds or has held office as a judge of a superior court, who shall be the chairperson;*
 - (b) *at least two persons who are qualified to be appointed as High Court judges; and*
 - (c) *one other member who is qualified to assess the facts in respect of the particular ground for removal.*
- (6) *The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.*
- (7) *A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.*

55. Standing Order 230 of the National Assembly Standing Orders provides for the procedure for considering a petition for the removal of a member of a constitutional Commission. It states—

- (1) *In addition to complying with the requirements of paragraphs (a), (b), (c), (d), (e), (h), (i), (j), (l) and (m) of Standing Order 223 (Form of Petition), a petition to the House for removal of a member of a Commission under Article 251 of the Constitution—*
 - (a) *shall indicate the grounds under Article 251(1) of the Constitution which the member of the commission is in breach;*
 - (b) *may contain affidavits or other documents annexed to it.*
- (2) *The paragraphs (1), (3), (4) and (5) of Standing Order 220 (Submission of a petition), Standing Order 222 (Notice of Intention to Present Petition), Standing Order 225 (Presentation of Petitions), and Standing Order 226*

(Comments on petitions), shall apply to a petition to the House for removal of a member of a Commission under Article 251 of the Constitution.

(3) Every Petition presented or reported pursuant to this Standing Order shall stand committed to the relevant Departmental Committee.

(4) Upon receipt of a petition under paragraph (3), the relevant Departmental Committee shall investigate the matter and shall, within fourteen days, report to the House whether the petition discloses ground for removal under Article 251(a) of the Constitution.

(5) The House shall, within ten days of the tabling of the report of the committee under paragraph (4) resolve whether or not the petition discloses a ground for removal under Article 251(a) of the Constitution.

(6) Where the House resolves that a petition discloses a ground for removal, the Speaker shall, within seven days of the resolution, transmit the resolution and the petition to the President.

56. The sequence of events and the timelines attached to the process of removal from office of Commissioners under Article 251 of the Constitution is summarized in the table below-

Table 1: Process of Removal from Office of Commissioners under Article 251 of the Constitution of Kenya, 2010

NO.	ACTION	TIMELINE PROVIDED
1.	Receipt and consideration of a petition(s) for the removal of a member(s) of the Commission by the relevant Committee of the National Assembly. ¹	14 days.
2.	Consideration by the National Assembly of the report on a petition(s) for the removal of a member(s) of the Commission. ²	10 days.
3.	Sending of the petition(s) for the removal of a member(s) of the Commission to the President where the National Assembly is satisfied that the petition(s) discloses a ground under Article 251(1) of the Constitution. ³	7 days.
4.	Appointment, by the President, of a Tribunal(s) to investigate the ground(s) for removal of a member(s) of the Commission. ⁴	No timeline provided.
5.	Investigation by the Tribunal of the matter and reporting to the President. ⁵	No timeline provided.
6.	Action by the President on a recommendation made by the Tribunal. ⁶	30 days.

¹ This is provided for under Standing Order 230(4) of the National Assembly Standing Orders. In the Petition for the Removal of the Commissioners of the Independent Electoral and Boundaries Commission filed by Mr. Barasa Kundu Nyukuri, the Departmental Committee on Justice and Legal Affairs took the stipulated fourteen days but sought an extension of a further ten days from the National Assembly which was approved by the National Assembly.

² Standing Order 230(5) of the National Assembly Standing Orders

³ Standing Order 230(6) of the National Assembly Standing Orders

⁴ Article 251(4)(b) of the Constitution.

⁵ Article 251(6) of the Constitution of Kenya

⁶ Article 251(6) of the Constitution of Kenya

57. The Committee noted that the removal of the current Commissioners under Article 251 of the Constitution is not time-bound as there is no statutory timeline for the formation of a tribunal by the President and the conclusion of investigations by such a tribunal. The Committee further noted that since the promulgation of the Constitution of Kenya, 2010, five tribunals had been formed for the removal of holders of constitutional offices. The first tribunal was formed in 2012 to investigate allegations made against the former Deputy Chief Justice, Ms. Nancy Baraza.
58. The Tribunal was appointed vide Gazette Notice No. 664 dated 26th January, 2012 which was later amended by Gazette Notice No. 2057 dated 24th February, 2012. The members of the tribunal took their oath of office on 1st February, 2012. The former Deputy Chief Justice filed a petition, No. 23 of 2012 in the High Court of Kenya, following which the tribunal stayed the investigations pending the finalization of the case. On 13th March, 2012, the High Court dismissed the petition and the tribunal commenced its substantive work thereafter. The tribunal concluded its proceedings and submitted its report to the President on 7th August, 2012, recommending removal of the former Deputy Chief Justice. Ms. Baraza appealed against the finding in the Supreme Court and resigned from office on 18th October, 2012 before the determination of the appeal. This was more than nine months after the swearing into office of the tribunal.
59. The second tribunal formed related to the removal of a judge of the High Court, Justice Joseph Mutava in May, 2013. The tribunal is still conducting its sittings to date.
60. The third tribunal formed related to a petition filed against six of the eleven Commissioners of the Judicial Service Commission serving in the Commissions Finance and Administration Committee. The Judicial Service Commission moved to Court and obtained final judgment and orders in Petition 518 of 2013 Judicial Service Commission vs The Speaker of the National Assembly & 5 Others [2014] eKLR barring the swearing in of a four member tribunal headed by Justice (Rtd.) Aaron Ringera.
61. The fourth tribunal formed in 2015 related to the former Chairperson and Deputy Chairperson of the Ethics and Anti-Corruption Commission. The two Commissioners resigned before the tribunal could investigate the allegations made against them.
62. The fifth tribunal was formed in April, 2016 to investigate allegations of misconduct against Justice (Rtd.) Phillip Tunoi. The Tribunal commenced its investigations into the allegations made against the former judge of the Supreme Court but ruled that its mandate had expired in light of the decision of the Supreme Court in Supreme Court Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal vs.

Judicial Service Commission & 5 Others [2016] eKLR. In its Ruling, the Supreme Court held that the judge under investigation had retired at the age of seventy.

63. The Committee noted that the experiences of these five Tribunals, particularly those formed to investigate allegations against Justice Mutava and former Deputy Chief Justice Nancy Baraza offered guidance on the period it may take to inquire into allegations made against the holder of a constitutional office. Although the Constitution requires a tribunal formed to investigate allegations against a member of a Commission to conduct the investigations “*expeditiously*”, the Justice Mutava Tribunal is yet to conclude its sittings, more than three years after it was appointed.
64. With the precedents provided by these Tribunals, the Committee observed that if the process for removal contemplated under Article 251 of the Constitution was to be applied to the current Commissioners of the Independent Electoral and Boundaries Commission, the process would take anywhere between eight months and twenty-two days and nine months and six days barring any intervention by the Court.
65. In submissions made to the Committee, although Article 251 of the Constitution was acknowledged as the constitutional mechanism for removal from office, there was concern that if the processes contemplated under Article 251 were to be put in motion this would interfere with and adversely affect the preparations for the next General Elections. On this matter, the International Commission of Jurists, Kenya Section, in its submissions, stated that “*the existing legal framework [Article 251] may not be ideal for deployment ...as the twelve months remaining to the next general elections may be inadequate to recommend the establishment of a tribunal by the President, for the tribunal to undertake its work and for a fresh recruitment to be undertaken which in our estimation may conclude in May 2017 if there are no legal challenges in court*”.
66. A contrary view was expressed in the submissions of two lawyers, Mr. John Harrison Kinyanjui and Mr. Christopher Kibe Mungai. It was the view of Mr. Kinyanjui that the current Commissioners may only vacate office through the removal process provided for under Article 251 of the Constitution and that the Committee had no jurisdiction to address the issue of the removal of the Commissioners as the National Assembly is the only forum recognized under Article 251 for consideration of a Petition in this regard and that Article 251 of the Constitution did not include the Senate. He stated “*the appointing authority has no option but to amend and delete from its motion any deliberations on the removal of the IEBC [Independent Electoral and Boundaries Commission] Commissioners as it stands (while including the Senate), it stands in violation of Article 251(2) of the Constitution to the extent of that singular agenda*”. It was his further submission that Article 251 of the Constitution contemplates specific allegations being made against individual Commissioners and that a Tribunal appointed pursuant to the Article could not investigate more than one Commissioner. Mr. Kibe Mungai

supported the view that only Article 251 of the Constitution could be used for the vacation from office of the current Commissioners stating: *“the Committee should recommend to the Attorney-General or any other appropriate persons to file a petition against IEBC [Independent Electoral and Boundaries Commission] Commissioners on the grounds of contravention of Chapter Six of the Constitution.”*

67. On the whole, from the vast majority of the submissions received on this matter, in light of the fast-approaching 2017 General Elections, the Committee was urged to seek mechanisms other than removal from office in terms of Article 251 to address the question of removal of the current Commissioners of the Independent Electoral and Boundaries Commission.

3.1.2. Resignation

68. The Constitution does not expressly provide for the resignation from office of a member of a Commission or the holder of an Independent Office. However, the voluntary resignation from office of the former Commissioners of the Ethics and Anti-Corruption Commission, Mr. Mumo Matemu, Ms. Irene Keino and Prof. Jane Onsongo by delivering a written notice to the President serves as a precedent. The Constitution however expressly provides for the resignation from office of other constitutional office holders such as the Deputy President⁷, the Chief Justice and other Judges⁸, the Director of Public Prosecutions⁹, Cabinet Secretaries¹⁰ and Principal Secretaries¹¹ who are all required to give written notice of their resignation to the President.
69. Some of the views received by the Committee proposed resignation from office of the current Commissioners of the Independent Electoral and Boundaries Commission as a viable option rather than that of removal under Article 251 of the Constitution which it was feared would affect the preparations for the August 2017 elections on account of the lack of set timelines for the formation of a Tribunal to investigate allegations made against the Commissioners and timelines for the actual investigation by the Tribunal.
70. The Committee noted that although resignation of a member of a Commission is not expressly provided for in the Constitution, pursuant to Article 259 of the Constitution which requires that the Constitution be interpreted in a manner that *“promotes its purposes, values and principles”*, it would be open to the current Commissioners of the Commission to give written notice of their voluntary resignation from office to the President in line with the provisions for resignation

⁷ Article 148 (7) of the Constitution.

⁸ Article 167(5) of the Constitution.

⁹ Article 158(9) of the Constitution.

¹⁰ Article 152(4)(b) of the Constitution.

¹¹ Article 155(5) of the Constitution.

from office of other constitutional officers. It is important to note, though, that this option would be wholly within the discretion of the Commissioners.

3.1.3. Negotiated Exit

71. Majority of the submissions received on the appropriate mechanism for vacation from office of the current Commissioners of the Independent Electoral and Boundaries Commission centered on vacation from office by the Commissioners on the basis of a negotiated exit. This was the view taken by, amongst others, the Coalition for Reforms and Democracy, the Multi-Sectoral Forum, the Council of Governors, the Commission on Administrative Justice, Transparency International, Kenya, The International Commission of Jurists, Kenya Section, Intellectus Consultancy, Mr. Mulatya Ndungi, Power Digital Systems, the Elections Observation Group, Hon. Peter Kaluma, M.P., Amani National Congress, the Institute of Certified Public Accountants of Kenya, the Society for International Development, the Kenya National Commission on Human Rights, Prof. Herman Manyora, the Youth Agenda, the Central Organisation of Trade Unions, the National Cohesion and Integration Commission, the Kenya Law Reform Commission.
72. On this option, the Multi-Sectoral Forum specifically submitted before the Committee that it had *“met the Commissioners severally and they repeatedly indicated that they are willing to vacate office through a negotiated settlement anchored in law.”*
73. As to the nature of the exit package, the Council of Governors recommended that the Commissioners be urged to voluntarily resign. They further proposed that the Commissioners be given their full benefits and that they should qualify for appointment to other public offices. The Council of Governors submitted that the Commission should resign by the end of August 2016 so as to pave way for the appointment of new Commissioners and to give the new Commissioners sufficient time to prepare for the 2017 General Elections. The Multi-Sectoral Forum recommended that where an agreement is reached with the Commissioners, the agreement should serve as a notice of resignation that would allow them to remain in office until the reconstitution of the Commission.
74. A similar position was held by the Commission on Administrative Justice which held the view that the Commissioners of the Independent Electoral and Boundaries Commission should voluntarily exit office in the interest of the country and for the greater public good. They submitted that a negotiated exit of the Commissioners would forestall a constitutional crisis as there was a prospect that the 2017 General Election processes would most probably go beyond the end of the six-year term of the Commissioners if a petition challenging the election of the President-elect was filed and the Supreme Court determined, in accordance with Article 140 of the Constitution that a fresh election be held. The fresh election is required to be held

within sixty days of the determination of the Supreme Court and the Commission on Administrative Justice estimated that this would be around 4th November, 2017 and that the results would be required to be declared by 11th November, 2017, after the expiry of the term of the Commissioners, which was slated to end on 8th November, 2017.

75. The Commission on Administrative Justice further submitted that if there was also a petition challenging the result of the election of the President-elect in the fresh election, the resulting processes, including a second fresh election if one was to be held, would all arise when there were no Commissioners in office. Thus the fear of a constitutional crisis by the Commission on Administrative Justice.
76. The Commission on Administrative Justice further took the view that since the exit of the current Commissioners would not be on account of removal in accordance with Article 251 of the Constitution, the full benefits of the Commissioners be secured as if they had served their full terms. The Kenya Law Reform Commission, Hon. Peter Kaluma, M.P., the Youth Agenda, Western Kenya Civil Society, International Governance Institute and the Election Observation Group were of a similar view with regard to the compensation of the Commissioners for their unexpired term.
77. The Jubilee Coalition also took the view that the reconstitution of the Commission was necessary for purposes of proper succession planning in the event of a run-off and subsequent by-elections. The Coalition proposed a partial reconstitution of the Commission in order to avoid loss of institutional memory, experience and expertise and urged that the Committee comes up with a framework, in line with the precedent set by the Hon. Chief Justice Dr. Willy Mutunga for early exit, to afford the Commissioners and the Commission Secretary the liberty to voluntarily retire from office. This, as per the Coalition's submissions, would address succession and avoid the risk of the lacuna that may be created by the entire Commission's term expiring in the middle of an election process. The Coalition further stated that "*any Commissioner, including the Commission Secretary, who so chooses to voluntarily retire should do so with full benefits in line with the legal opinion and any guidelines offered by the Attorney-General and the National Treasury*".
78. Transparency International- Kenya, however, took the view that the Commissioners who had criminal allegations against them should face the law. They urged that no immunity against criminal culpability should be considered under whatever circumstances. This view was shared by the Evangelical Alliance of Kenya which submitted that although a negotiated exit was the best option in light of the prevailing public perception of the Independent Electoral and Boundaries Commission, alleged impropriety should be investigated regardless of the approach used in relieving the Commissioners of their duties.

79. The Civil Society Reference Group, on its part, submitted that as the Commissioners leave office, they should not receive any monetary compensation but should be tried for their direct and indirect crimes *“given the loss that their stay in office has cost this nation; the extra cost of our elections necessitated by a fifty two million (52M) bribe, the loss of lives that cannot be computed in money, the injured people languishing in hospitals or in their homes as well as the damage to private property and public amenities.”*
80. On the administrative arrangements for a negotiated exit, the Attorney-General submitted that the negotiated exit from office of the immediate former Commissioners of the Ethics and Anti-Corruption Commission provided precedent. He further submitted that should the matter of a negotiated exit arise, the Office of the Attorney-General, the Department of Justice and the National Treasury would be involved in the negotiations with the Commissioners on behalf of the Executive. The Cabinet Secretary for the National Treasury further confirmed that in the event that a negotiated settlement for the exit of the Commissioners was reached, the Government would be in a position to provide for the required funds from the Contingency Fund.
81. When the members of the Independent Electoral and Boundaries Commission appeared before the Committee, the Chairperson of the Commission, Mr. Ahmed Issack Hassan stated *“There are only eight Commissioners plus the Chairman. We are very few and the country is bigger than all of us. We are also Kenyans. We want to work and live here. We do not have a spare country to go to. If a political settlement is reached, and which requires what you have read from the stakeholders, I have said this before, and I can confirm again that the Commission will not be a stumbling block and stand on the way of the settlement.”*
82. The rest of the Commissioners expressed their support of the Chairperson’s words. Ms. Lilian Mahiri-Zaja, the Vice-Chairperson stated *“I fully subscribe to the words and statements of my Chairman. We took an oath of office. We uphold the principles in the Constitution. We have served the country with great honour and we appreciate the leadership this Committee has shown in the process.”*
83. Commissioner Thomas Letangule stated *“One of the strengths of this Commission has been the cohesive team that we are. We have never voted on any single item. We always agree by consensus. Therefore, I can confirm that what our chairman has said is what we have all agreed. We will not be a stumbling block to any political settlement reached. We will stand by that.”*
84. Commissioner Mohamed Alawi stated *“I confirm that I stand by what my Chairman has said. I also want to state that this Commission has served this country diligently and selflessly. It is in our interest that this country grows. I will not stand on the way of a dignified settlement.”*

85. Commissioner Kule Galma Godana stated *"I underline what our chairman has said. He said everything on our behalf. As Commissioner Alawi has said, we started serving this country as commissioners with one accord – to serve this country to our best and do it with transparency and all the commitment that is necessary to take Kenya to the next level in terms of the electoral process. Another thing is that this country needs to invest in institutions and make them stronger. It should not bring down institutions every time and just look for solutions to a problem without thinking about tomorrow. Just as the commissioners have said, the staff is prepared, devoted, strong and able. They should be allowed to work. People say that there comes a time when the country is greater than an individual. The country is always greater than an individual. If we have to provide a way for the country to move on, I have no objection."*
86. Commissioner Muthoni Wangai stated *"I would like to support what our Chairman has said. We shall not stand in the way of a political settlement. I just want to underwrite that this Commission has done its work very well. It is difficult to appreciate that a political environment is what makes a democratic country great. So, we shall be supportive of any political settlement and also hope that being the first Commission after the promulgation of the Constitution 2010 and the Houses of Parliament; being the first Houses after that promulgation, we will not go down in history in destroying any important institutions set up under that. Instead, we take this opportunity to build this institution and others. Perhaps, most of the times you see the commissioners but even as we work, we wish to acknowledge that we have staff and the staff have done a very big and good job. That is why we are all here today peacefully."*
87. Commissioner Albert Bwire stated *"I want to mention a few things before I concur with my Chairman. First, I confirm that I am a nationalist. Mimi ni mzalendo kamili. I confirm that I am available for any other national duty that this country will bestow on us. Having said that, I concur with what the Chairman has said."*
88. Commissioner Yusuf Nzibo stated *"I thank the Co-Chairs, the Committee and the nation. We have served with dignity and we leave with dignity. I confirm what my Chairman has said. It has been a privilege serving as a Commissioner and also serving his country in various capacities."*
89. Commissioner Abdullahi Sharawe stated *"I totally agree with the statements of my Chairman."*

3.1.4. Amendment of the Constitution and Repeal or Amendment of the Independent Electoral and Boundaries Commission Act

90. The Hon. Peter Kaluma submitted that it is possible to remove the current Commissioners from office by legislation. This option would entail the amendment of Article 88 of the Constitution and the Independent Electoral and Boundaries

Commission Act so as to replace the Independent and Electoral Boundaries Commission with a new Electoral Management Body. The Tenth Parliament set a precedent in this regard when it enacted the Constitution of Kenya (Amendment) Act, No. 10 of 2008 which disbanded the Electoral Commission of Kenya and established two new bodies, the Interim Independent Electoral Commission and the Interim Independent Boundaries Review Commission, to undertake the mandate of the Electoral Commission of Kenya.

91. One of the questions that would arise is whether an amendment to Article 88 of the Constitution would require ratification through a referendum. The High Court has pronounced itself on this matter in Petition 689 of 2008 *Priscilla Ndululu Kivuitu & Musili Kivuitu (Suing as the Personal Representatives of Samuel Mutua Kivuitu (Deceased)) & 22 Others vs. The Attorney-General & 2 Others* [2015] eKLR.

92. In that case, the former Commissioners of the defunct ECK sued the Attorney General, the Speaker of the National Assembly and the then Interim Independent Electoral Commission seeking various reliefs including damages for the termination of their contracts by operation of the law and a declaration that the amendment to the former Constitution to disband the ECK was unconstitutional. In its judgment the Court stated—

“162. The question would then be whether the 2008 Amendment of Section 41 distorted the basic structure of the repealed Constitution. If the amendment was in respect of the 2010 Constitution, the answer to that question would, without doubt, be in the affirmative. We say so since Article 255(1)(g) provides that any amendment which relates to “the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies” should be approved by a referendum. According to Article 248(1), the Independent Electoral and Boundaries Commission is one of the commissions to which Chapter Fifteen applies. The people of Kenya therefore deemed it important that only a referendum can approve any amendment touching on the IEBC [Independent Electoral and Boundaries Commission]. The importance of the IEBC [Independent Electoral and Boundaries Commission] in the functioning of our democracy cannot be overemphasized.”

93. A second option to anchor the removal of the current Commissioners in the Constitution was proposed by Mr. Kibe Mungai. He proposed the amendment of Article 251 of the Constitution to introduce two new grounds for the removal from office of a member of a Commission or holder of an independent office as follows—

“(f) Loss of confidence based on actual or perceived lack of credibility, impartiality, integrity and independence by the public and political class.

(g) Clause (f) above shall lapse after the second General Election under this Constitution unless two thirds of the Members of Parliament (National Assembly and Senate) votes to retain the Clause within one year after the said general election."

94. The Committee observed that the time required for the passage of a Constitution Amendment Bill and the subsequent referendum process, where necessary, would be far too lengthy and would considerably reduce the time available for the removal and replacement of the Commissioners in time for the August, 2017 General Election.
95. The Committee further noted that Amendment of Article 88 of the Constitution may also attract legal challenge by the affected Commissioner(s) with regard to the violation of their legitimate expectation of serving out their entire six-year terms as per their contracts of service. It may result in the award of monetary compensation by the Court as was the case for the former Commissioners of the Electoral Commission of Kenya who were awarded monies owed to them before the 2008 Amendment.
96. Further, the fact that the Independent Electoral and Boundaries Commission as presently constituted is the body mandated under Article 88 of the Constitution to conduct and supervise referenda and would therefore be charged with conducting the referendum on a Bill affecting their stay or otherwise in office would also attract legal challenge as to the impartiality of the Commissioners and Secretariat.

3.2. VACATION FROM OFFICE OF THE CURRENT SECRETARY AND CHIEF EXECUTIVE OFFICER OF THE COMMISSION

97. Section 10 of the Independent Electoral and Boundaries Commission Act establishes the office of the Secretary and Chief Executive Officer of the Independent Electoral and Boundaries Commission. The Secretary is required to be appointed by the Commission through an open, transparent and competitive recruitment process and holds office for a term of five years, but is eligible for re-appointment for one further term of five years.¹²
98. Pursuant to section 10(7) of the Independent Electoral and Boundaries Commission Act, the secretary is—
- (a) the chief executive officer of the Commission;
 - (b) head of the secretariat;
 - (c) the accounting officer of the Commission;
 - (d) custodian of all commission's records;
 - (e) responsible for—
 - (i) executing decisions of the Commission;

¹² Section 10(4) of the Independent Electoral and Boundaries Commission Act, 2011

- (ii) assignment of duties and supervision of all employees of the Commission;
- (iii) facilitating, co-ordinating and ensuring execution of Commission's mandate;
- (iv) ensuring staff compliance with public ethics and values; and
- (v) the performance of such other duties as may be assigned by the law and Commission.

99. The current Secretary of the Commission was appointed on 11th January, 2016. Under the law, the Secretary may vacate office—

- (a) if removed from office in accordance with section 10 of the Independent Electoral and Boundaries Commission Act;
- (b) if he resigns from office by giving written notice to the Commission before the end of his contract;
- (c) through a negotiated exit; or
- (d) by operation of the law through a repeal or amendment of the Independent Electoral and Boundaries Commission Act, 2011.

3.2.1. Removal from Office

100. Section 10(8) of the Independent Electoral and Boundaries Commission Act allows the Commission to remove the Secretary for—

- (a) inability to perform functions of the office arising out of physical or mental incapacity;
- (b) gross misconduct;
- (c) bankruptcy; or
- (d) incompetence.

101. The Committee noted that Section 10(9) of the Act requires the Commission to inform the Secretary, in writing, of the reasons for the intended removal. The Commission should further give the Secretary an opportunity to submit a defence against any such allegations either in person or through an Advocate.

3.2.2. Resignation

102. The Independent Electoral and Boundaries Act does not expressly provide for the resignation from office of the Secretary. However, as section 10 of the Act provides for the appointment and removal from office of the Secretary by the Commission, it would follow that the Secretary may resign from office by giving written notice to the Commission.

3.2.3. Negotiated Exit

103. Section 10(4) of the Independent Electoral and Boundaries Act sets the term of office of the Secretary as five years from the date of appointment. Apart from accepting a notice of resignation or removing the Secretary from office for

misconduct, the Commission may negotiate the exit of the Secretary before the end of his term in office.

104. The Jubilee Coalition submitted that the framework for a negotiated exit package for the Commissioners should also apply to the Secretary. This view was shared by the Kenya Institute of Charity Organizations, the Civil Society Professional Network, the Council for Foreign Relations, Haki na Amani Africa, the Institute of International Governance and the Western Kenya Civil Society.

3.2.4. Repeal or Amendment of the Independent Electoral and Boundaries Commission Act

105. The Secretary may be removed from office by operation of the law through the repeal or amendment of the Independent Electoral and Boundaries Commission to vary his term of office. Precedent in this regard exists. The Tenth Parliament, by operation of the law, established the Ethics and Anti-Corruption Commission thereby replacing both the Director and Deputy Directors of the defunct Kenya Anti-Corruption Commission. This was done through the enactment of the Ethics and Anti-Corruption Commission Act¹³ which amended the Anti-Corruption and Economic Crimes Act¹⁴ to delete references to the offices of the Director and Deputy Directors.
106. One of the Deputy Directors filed a suit with regard to the violation of his legitimate expectation of serving out the stated term contained in his contract of service. In Cause No. 1168 of 2012 *Pravin Bowry vs. Ethics and Anti-Corruption Commission* [2013] eKLR, the Industrial Court awarded the former Deputy Director of the Kenya Anti-Corruption Commission Kshs. 35,491,983/- on account of his contract of employment at the defunct Kenya Anti-Corruption Commission which contained a clause entitling the holder of the position to compensation for the unexpired term of their contract in the event of premature termination of their employment.

3.3. VACATION FROM OFFICE OF OTHER EMPLOYEES OF THE COMMISSION

107. Section 11 of the Independent Electoral and Boundaries Commission Act, 2011 establishes the Secretariat of the Commission. It states—
- (1) *There shall be a secretariat of the Commission which shall be headed by the secretary.*
 - (2) *The secretariat shall comprise of—*
 - (a) *such professional, technical and administrative officers and support staff, as may be appointed by the Commission in the discharge of its functions under this Act; and*

¹³ Act No. 22 of 2011.

¹⁴ Act No. 3 of 2003.

(b) such public officers as may be seconded to the Commission upon its request.

(3) The employees of the Commission may be appointed, subject to its approved establishment.

(4) For purposes of this Act, a public officer who is seconded to the Commission under subsection (2)(b), shall be deemed to be an employee of the Commission and shall enjoy the same benefits and shall be required to comply with the Constitution, this Act and any other written law relating to elections and any instruction, orders and directions of the Commission in the same manner as an employee recruited directly by the Commission under this Act.

(5) The Commission shall ensure that in the appointment of employees, not more than two-thirds of the employees of the Commission shall be of the same gender and that the following are also taken into account—

(a) persons with disabilities; and

(b) regional and other diversity of the people of Kenya.

108. Under the law, the employees may vacate office—

(a) if removed for a breach of the Code of Conduct for employees set out under the Fourth Schedule to the Independent Electoral and Boundaries Commission Act or the Commission's Human Resource processes;

(b) if they resign from office by giving written notice to the Commission;

(c) if they agree to retire early or to a negotiated exit; or

(d) by operation of the law through a repeal or amendment of the Independent Electoral and Boundaries Commission Act.

3.3.1. Removal from Office

109. The Code of Conduct set out under the Fourth Schedule to the Independent Electoral and Boundaries Commission Act requires employees of the Commission to—

(a) impartially and independently perform the functions of the Commission;

(b) disclose any conflicting interests;

(c) observe professionalism;

(d) refrain from improperly enriching themselves;

(e) conduct their private affairs in a manner that maintains public confidence in the integrity of their office and the Commission;

(f) not sexually harass a member of the public or colleague;

(g) not practice favouritism on the grounds of tribe, race, kin, culture, sex or acquaintance or otherwise in performance of their duties;

(h) not act for foreigners in a manner detrimental to the security interest of Kenya;

(i) safeguard privileged information that comes into their possession and protect it from improper or inadvertent disclosure; and

(j) abide by the General Code of Conduct set out in the Public Officer Ethics Act, No. 4 of 2003.

110. Paragraph 10 of the Code of Conduct provides that *“any breach of the Code by a member or an officer of the Commission shall be treated as misbehaviour for a member and misconduct for an officer.”*

111. The Committee noted that the Commission may remove employees from office subject to the provisions of the Employment Act which requires it as an employer to notify the employees and afford them a hearing prior to terminating their contracts of employment. Section 41 of the Act states—

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

112. The Committee further noted that Article 47 and 236 of the Constitution guarantee the right of the employees to fair administrative action and requires that the due process of the law be followed where the dismissal, removal from office, demotion in rank or discipline of a public officer is proposed, respectively.

3.3.2. Resignation

113. From the submissions received, the International Commission of Jurists-Kenya Section urged employees of the Commission adversely mentioned in the allegations against the Commission to voluntarily vacate office. The Independent Electoral and Boundaries Act does not expressly provide for the resignation from office of the employees of the Commission. However, since section 11 of the Act provides for the appointment of the employees by the Commission, it would follow that the employees may resign from office by giving written notice to the Commission.

3.3.3. Early Retirement and Negotiated Exit

114. Employees of the Commission are subject to either individual contracts of employment or a general Scheme of Service adopted by the Commission. Where necessary, the Commission may negotiate the exit of the employees before the end of their contracts or implement a voluntary early retirement scheme with regard to staff on permanent and pensionable basis.

3.3.4. Repeal or Amendment of the Independent Electoral and Boundaries Commission Act

115. The employees of the Commission may be removed from office by operation of the law in the event of the repeal or amendment of the Independent Electoral and Boundaries Commission Act. An amendment may also require that their suitability to continue serving the Commission be determined through vetting.
116. The Tenth Parliament, by operation of the law, established the Ethics and Anti-Corruption Commission through the enactment of the Ethics and Anti-Corruption Commission Act. Section 34 of the Act required the staff of the defunct Kenya Anti-Corruption Commission to make fresh applications to the newly created body and be vetted to determine their suitability to continue serving. In the Eleventh Parliament, the National Assembly has further amended the Act to require the vetting of all serving staff of the Ethics and Anti-Corruption Commission with a view to the termination of the employment of officers found unsuitable to continue serving.¹⁵
117. Majority of the views received recommended the vetting of the employees of the Commission along the lines adopted during the reconstitution of the Ethics and Anti-Corruption Commission. The Evangelical Alliance of Kenya submitted that senior or key members of the secretariat be subjected to vetting and relieved of duties if found unsuitable based on involvement in any impropriety. The Central Organisation of Trade Unions proposed that the vetting exercise be structured in a manner that does not compromise the preparations for the 2017 elections. This view was shared by the Jubilee Coalition, which, while recommending the vetting of only the senior level management of the Commission, urged that the exercise be completed within thirty days of the appointment of new Commissioners. The Commission on Administrative Justice, however, submitted that only members of the secretariat adversely mentioned in official complaints be vetted to determine their suitability to continue serving in the Commission.
118. The Committee noted that the vacation from office of the employees of the Commission by the operation of the law may attract legal challenge with regard to the violation of their legitimate expectation of serving out their agreed contracts of service or their entitlement to terminal benefits and may result in the award of monetary compensation by the Court.

3.4. RECOMMENDATIONS OF THE COMMITTEE

119. The Committee recommends as follows-
- (1) That a dignified vacation from office of the current Commissioners of the Independent Electoral and Boundaries Commission be negotiated and

¹⁵ Section 6 of the Ethics and Anti-Corruption Amendment Act, No. 12 of 2015

agreed upon in accordance with the law within two weeks of the adoption of this Report of the Committee by Parliament;

- (2) That the current Commissioners leave office when the new Commissioners are sworn-in, which should not be later than 30th September, 2016; and
- (3) That in respect of the Secretariat of the Commission, the existing human resource policies and capacity building mechanisms of the Commission be applied, as appropriate, by the new Commission.

CHAPTER FOUR

THEMATIC AREA 3

4.0 LEGAL, POLICY AND INSTITUTIONAL REFORMS

120. The mandate of the Committee under this Thematic Area is to make proposals on *“legal, policy and institutional reforms to strengthen the Independent Electoral and Boundaries Commission so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner.”*
121. The Committee invited stakeholders to make submissions on the Thematic Area and specifically, on -
- (a) composition of the Independent Electoral and Boundaries Commission and the Secretariat; and
 - (b) appointment, term of office and terms of service of the Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission.
122. This Chapter therefore considers the existing institutional framework for the Independent Electoral and Boundaries Commission, the frameworks in selected jurisdictions and proposals from stakeholders and members of the public on mechanisms for strengthening the Commission. The Chapter finally gives the Committee’s recommendations on legal, policy and institutional reforms to strengthen the Commission.

4.1.1. Institutional Framework

123. The Independent Electoral and Boundaries Commission, is established under Article 88(1) of the Constitution.
124. The institutional framework of the Commission is further provided for under Chapter Eleven of the Constitution, which generally provides for Commissions and Independent Offices established under the Constitution, while the Independent Electoral and Boundaries Commission Act provides more specific detail on the organization and functioning of the Commission.

4.1.2. Composition of the Commission

125. Article 250(1) of the Constitution limits the number of members of a commission to a minimum of three members and a maximum of nine members. The specific number of members per commission is then provided for in the respective legislations. In this regard, section 5(1) of the Independent Electoral and Boundaries Commission Act provides that *“the Commission shall consist of a chairperson and eight other members”* thus providing for the maximum of nine members.

126. Article 250(4) of the Constitution also has implications on the composition of a commission as it requires that *“appointments to commissions and independent offices shall take into account the national values referred to in Article 10, and the principle that the composition of the commissions and offices, taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya”*.

127. The composition of electoral bodies varies from jurisdiction to jurisdiction. South Africa has a Commission of five members,¹⁶ Canada's has one member¹⁷ and Lesotho has three.¹⁸ In Ghana, the Electoral Commission consists of seven members;¹⁹ a Chairman, two Deputy Chairmen, and four other members and Nigeria's Independent National Electoral Commission is made up of a Chairman, and twelve National Commissioners.²⁰ In India, the Constitution provides that the Election Commission consists of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time determine.²¹ The Commission has previously had a single member but the current Commission in India comprises three members.²² The Federal Elections Commission of the United States of America consists of six members and the chairmanship of the Commission rotates on a yearly basis, and no Commissioner can serve as chairman more than once during their term.²³

128. The International Institute for Democracy and Electoral Assistance, in its Handbook on Electoral Systems, observes that the number of members of an election management body, need not be related to the size of the country and cites India and Lesotho, which both have three Commissioners, as examples. The Institute further notes that elections management bodies which include political party nominees tend to have higher numbers of members so as to accommodate a credible range of political interests, while expert-based bodies tend to have fewer members.²⁴

129. Stakeholders and members of the public made varied proposals on the composition of the Independent Electoral and Boundaries Commission. The Evangelical Alliance of Kenya proposed seven commissioners, emphasizing on the need for a lean commission which would be able to efficiently and effectively serve Kenyans. The International Commission of Jurists (Kenya), Ethics and Anti-Corruption Commission, Centre for Multi-party Democracy, and Society for International

¹⁶ Section 6(1) of Electoral Commission Act, No.51 of 1996

¹⁷ Section 13 of Canada Elections Act (as at 21st June, 2016)

¹⁸ Article 66 of the Constitution of Lesotho, 1993

¹⁹ Article 43(1) of the Constitution of Ghana, 1992

²⁰ Section 45 of the Constitution of the Federation of Nigeria, 1960

²¹ Article 324 of India's Constitution

²² It had a single member between 1950 and 1981 and between 1990 and 1993, three members between 1980 and 1990 and from 1993 to date; (website of India Election Commission <http://eci.nic.in/eci/eci.html>)

²³ Federal Election Commission <http://www.allgov.com/departments/independent-agencies/federal-election-commission?agencyid=7324>

²⁴ Ace Project, Electoral Knowledge Network, <http://aceproject.org/epic-en>

Development, on the other hand, proposed a five to seven member commission while the Amani National Congress proposed three members.

130. A number of stakeholders, including the Multi-Sectoral Forum, proposed retention of the current nine commissioners. The National Gender and Equality Commission, for its part, recommended that the current number of nine Commissioners be retained on the basis that there was a lot of work required to be done by the Commission. In this regard, the Commission on Administrative Justice noted that it was the geo-political circumstances of Kenya that necessitated the current number of Commissioner and that this reality is still relevant today. Given the limited time for appointment of new Commissioners coupled with the geo-political situation, the Commission on Administrative Justice recommended that the next members of the commission be treated as transitional, with the same membership of nine. The Jubilee Coalition also supported a membership of nine Commissioners.
131. Stakeholders also recommended diversity in the Commission. FIDA – Kenya recommended that the composition of the Commission “*should be broad based and reflective of the face of Kenya, inclusive of persons with disabilities and disadvantaged groups with proper gender balance/adherence to the two-thirds gender principle*”. The National Gender and Equality Commission recommended an electoral commission which includes persons with disabilities, ethnic and other minorities and marginalized communities and an equal number of Commissioners of both genders in accordance with the African Union’s parity principle. Similarly, the Society for International Development recommended that the membership of the commission should reflect the national character and the broader public interest.
132. On the overall, the Committee observed that most stakeholders were of the view that the number of Commissioners should be reviewed downwards so as to enhance efficiency within the Commission. The majority of stakeholders proposed a commission comprising five to seven members which is reflective of the diversity in the country, including compliance with the two-thirds gender rule.

4.2. QUALIFICATIONS OF CHAIRPERSON AND COMMISSIONERS

133. Section 6(1) of the Independent Electoral and Boundaries Commission Act provides that the chairperson of the Commission shall be a person who is qualified to hold the office of judge of the Supreme Court under the Constitution. In this regard, Article 166 (2) provides for the qualifications of a judge of the Supreme Court as follows-
 - (2) *Each judge of a superior court shall be appointed from among persons who—*
 - (a) *hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;*

- (b) *possess the experience required under clauses (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and*
- (c) *have a high moral character, integrity and impartiality.*
- (3) *The Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have—*
 - (a) *at least fifteen years experience as a superior court judge; or*
 - (b) *at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or*
 - (c) *held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.*

134. For other members of the Commission, the qualifications are set out under section 6(2) of the Independent Electoral and Boundaries Commission Act as follows—

- (1) *A person is qualified for appointment as a member of the Commission if such person—*
 - (a) *is a citizen of Kenya;*
 - (b) *holds a degree from a recognised university;*
 - (c) *has proven relevant experience in any of the following fields—*
 - (i) *electoral matters;*
 - (ii) *management;*
 - (iii) *finance;*
 - (iv) *governance;*
 - (v) *public administration;*
 - (vi) *law; and*
 - (d) *meets the requirements of Chapter Six of the Constitution.*

135. In addition, Article 88(2) and (3) of the Constitution, precludes certain categories of persons from eligibility for appointment as Commissioners as follows—

- (2) *A person is not eligible for appointment as a member of the Commission if the person—*
 - (a) *has, at any time within the preceding five years, held office, or stood for election as—*
 - (i) *a member of Parliament or of a county assembly; or*
 - (ii) *a member of the governing body of a political party; or*
 - (b) *holds any State office.*
- (3) *A member of the Commission shall not hold another public office.*

136. A study of the qualifications of Commissioners in other jurisdictions also shows varied requirements for qualification. In Australia, the Chairperson of the Commission must be a Judge while no qualifications are specified for the other two

commissioners²⁵. In Botswana, the Chairman must be a judge of the High Court while the Deputy Chairperson is required to be a legal practitioner and no qualifications are specified for the other five Commissioners who are political appointees.²⁶ In Ghana, a person must be qualified to be Member of Parliament (a citizen of Ghana, twenty-one years of age and is a registered voter) to be appointed as a commissioner.²⁷ In the Philippines, the Chairman and the six Commissioners are required to be natural-born citizens of the Philippines and, at the time of their appointment, at least thirty-five years of age, holders of a college degree, must not have been candidates for any elective positions in the immediately preceding elections. A majority thereof, including the Chairman, are required to be members of the Philippine Bar who have been engaged in the practice of law for at least ten years.²⁸

137. On the issue of qualifications, most stakeholders proposed that the Commissioners should be persons with experience in elections and institutional management. The Committee observed that these recommendations were similar to the recommendations of the Kriegler Commission which observed as follows-

International practice in the composition of EMBs [Electoral Management Bodies] tends to revolve around certain major principles which are sometimes combined, such as professional competence, political balance and consensus. These principles tend to reinforce EMBs in terms of professional stature, credibility and political acceptability (although in certain circumstances, some can create other problems, such as the risk of a deadlock in a consensus-based EMB).²⁹

138. Mkenya Daima further proposed the expansion of the list of possible competencies of the Commissioners to include those with a long track record in constitutionalism, ICT, logistics, strategic decision making procurement, communication, and stakeholder management preferably in global agencies.
139. On the question of whether the Chairperson should be a lawyer, different views were presented. On this issue, the Multi-Sectoral Forum recommended that amendment of the Independent Electoral and Boundaries Commission Act be amended to remove the provision that the Chairperson of the Commission must be a person who is qualified to hold the office of Judge of the Supreme Court while Professor Naitule of the National Cohesion and Integration Commission requested for healthy balance between lawyers and managers in the Commission. This view

²⁵ Section 6(3) of the Commonwealth Electoral Act, 1918

²⁶ Section 65 of the Constitution of Botswana, 1966

²⁷ Article 44 of the Constitution of Ghana, 1992

²⁸ Article IX, Sec. C-1 (1) of the Constitution of Philippines, 1987

²⁹ Pages 31 of the Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007

was also supported by the Institute of Certified Public Accountants, who in support of this view, stated that electoral management is a managerial task and therefore does not require legal training.

140. With respect to the character and other attributes of Commissioners, despite the fact that section 6 of the Independent Electoral and Boundaries Commission Act also requires that the commissioners meet the requirements of Chapter Six of the Constitution, a recurring recommendation from stakeholders was on the character and integrity of the Commissioners suggesting that there was need for greater enforcement of this requirement. In this regard, groups such as the International Commission of Jurists, the National Cohesion and Integration Commission, the Society for International Development, Mkenya Daima and the Evangelical Alliance of Kenya recommended that members of the Commission should possess outstanding character and should uphold the values of professionalism and nationalism.
141. The issue of whether or not some of the members of the Commission should be non-citizens also arose. On the question of the citizenship of Commissioners, The Commission on Administrative Justice, in recommending nine commissioners for the Independent Electoral and Boundaries Commission, proposed that three or four of the commissioners, including the chairperson, should be non-Kenyans. The rationale given for recommending co-option of non-Kenyans into the Commission was *"the present geopolitics, mistrust and the need to infuse instant confidence in the IEBC [Independent Electoral and Boundaries Commission] as the country prepares for the 2017 general elections."*
142. The Commission on Administrative Justice further noted that inclusion of foreigners in constitutional commissions and the judiciary is contemplated under Article 78(3) of the Constitution and in this regard gave the Judges and Magistrates Vetting Board and the defunct Committee of Experts that drafted the current Constitution as examples of bodies which comprised foreigners. The Coalition for Reforms and Democracy also supported inclusion of foreigners in the Commission for the reasons that the foreigners have no stake in the election and therefore they represent an external voice without a live interest and their presence would be to enrich the Commission for compliance with international best practices. The Evangelical Alliance of Kenya on the other hand was of the view that there were Kenyans were able to 'manage their affairs' and therefore there was no need for foreigners in the Commission.
143. A survey of other comparative jurisdictions shows that citizenship is a requirement in the Philippines,³⁰ Ghana³¹ and South Africa³² but is not a requirement in New

³⁰ One must be a "natural-born citizen", per Section 1(1) of Section C in Part IX of the Constitution of the Philippines, 1987

³¹ Article 44(1) of the Constitution of Ghana, 1992

Zealand.³³ *The Principles and Guidelines on the Independence of Election Management Bodies (EMBs) In the SADC Region* propose that members of the Election Management Body should be citizens who are qualified as voters and should be highly respected persons who subscribe to the principles of free and fair elections and good governance.³⁴

4.3. APPOINTMENT OF COMMISSIONERS

144. Article 250(2) and (3) provides for the appointment of Commissioners as follows-
- (2) The chairperson and each member of a commission, and the holder of an independent office, shall be—*
 - (a) identified and recommended for appointment in a manner prescribed by national legislation;*
 - (b) approved by the National Assembly; and*
 - (c) appointed by the President.*
145. Section 5(2) and (3) of the Independent Electoral and Boundaries Commission Act as read with the First Schedule to the Act provides for the procedure for the appointment of Commissioners with the approval of the National Assembly. It provides for the shortlisting and interviewing of candidates by a selection panel comprising-
- (a) four persons, being two men and two women, nominated by the President;³⁵*
 - (b) one person nominated by the Judicial Service Commission;*
 - (c) one person nominated by the Kenya Anti-Corruption Advisory Board;³⁶ and*
 - (d) one person nominated by the Association of Professional Societies of East Africa.*
146. Countries take different approaches to the process of nomination of members of their elections management bodies. Similar to Kenya is South Africa where the Commissioners are required to be nominated by a selection panel. South Africa's panel comprises the President of the Constitutional Court, as chairperson, a representative of the Human Rights Commission, a representative of the Commission on Gender Equality and the Public Protector. The panel is required to submit a list of no fewer than eight recommended candidates to the National Assembly for approval.³⁷

³² Section 6(2) of the South Africa Electoral Commission Act, No. 51 of 1996 (prior to enactment of this Act, five out of the sixteen Commissioners were non-citizens)

³³ Electoral Management Case Studies <http://aceproject.org/ace-en/topics/em/electoral-management-case-studies/mexico-a-sophisticated-scheme-for-addressing-a>

³⁴ Adopted by the Annual General Conference August 2007, Luanda Angola

³⁵ For purposes of appointment of the First Commission under the Constitution, two of the four nominees, were nominated by the Prime Minister.

³⁶ Now defunct

³⁷ Section 23 of Electoral Commission Act

147. In Ghana, the Electoral Commission members are appointed by the President, on the advice of the Council of State. The Council of State is a body of prominent citizens, comprising a former Chief Justice of Ghana, a former Chief of the Defence Staff and a former Inspector General of Police and the President of the National House of Chiefs, an elected representative from each region in Ghana and eleven members appointed by the President.³⁸ *The Principles and Guidelines on the Independence of Election Management Bodies (EMBs) in the SADC Region* similarly propose that the appointment process of members of an Election Management Body should involve a committee representing key electoral stakeholders, which shortlists and recommends nominees to an appointing authority.³⁹
148. In some cases the recruitment body presents a list of names that includes more names than there are places to be filled, and another body makes the final choice from within that group. In South Africa, the selection panel submits eight names to the National Assembly but only five are approved for appointment.⁴⁰
149. Another model of appointment of the members of an elections management body members is to let specified bodies select a certain percentage of members instead of appointing all members in the same way. For instance in Botswana the Judicial Service Commission chooses five of the seven members from a list of recommendations from an all-party conference.⁴¹ In Portugal, the Council of Magistrates, Parties represented in the Portuguese Parliament and Key government departments (Internal Administration, for Foreign Affairs and for the Mass Media) each designate a member of the National Election Commission.⁴²
150. This approach was recommended by the Evangelical Alliance of Kenya which proposed that three commissioners should be competitively appointed by main political parties, three competitively appointed by religious bodies and one appointed by civil society.
151. With respect to appointment of Commissioners in Kenya, the Committee observed that there was need to amend the First Schedule to the Independent Electoral and Boundaries Commission Act to reflect the present circumstances. This is in view of the fact that the schedule currently provides for membership of the selection panel which comprises persons nominated by the Kenya Anti-Corruption Advisory Board and the Prime Minister, which offices are no longer in existence.

³⁸ Section 43(2) of the Constitution of Ghana, 1992

³⁹ Paragraph 2(d) of *The Principles and Guidelines on the Independence of Election Management Bodies (EMBs) in the SADC Region*

⁴⁰ S.6(4) of the Electoral Commission Act, No. 51 of 1996

⁴¹ Article 65A of the Constitution of Botswana

⁴² Article 2 of National Election Commission, Law No. 71/78 of Dec. 27

152. The Committee further observed that the majority of stakeholders favoured the recruitment of Commissioners by a selection panel with most recommending seven to nine members of the panel. Some of the proposed memberships of the selection panel were as set out below-

Table 2: Stakeholder proposals on the composition of the Select Panel

	Stakeholder	Proposal on the composition of the selection panel
(a)	Current Composition in the Independent Electoral and Boundaries Commission Act, Cap. 7A	A Selection Panel comprising of— (a) two persons, being one man and one woman, nominated by the President; (b) two persons, being one man and one woman, nominated by the Prime Minister; (c) one person nominated by the Judicial Service Commission; (d) one person nominated by the Kenya Anti-Corruption Advisory Board; and (e) one person nominated by the Association of Professional Societies of East Africa.
(b)	The Independent Electoral and Boundaries Commission (Amendment), National Assembly Bills No. 16 of 2016	(a) two persons, being one man and woman, nominated by the majority party or coalition of parties in the in the National Assembly; (b) two persons, being one man and woman, nominated by the minority party or coalition of parties in the National Assembly; (c) three persons nominated by the President from a list submitted by the Public Service Commission.
(c)	International Commission of Jurists – Kenya Chapter	Adoption of a multi-stakeholder panel anchored in law to recruit commissioners, comprising representatives (one each) from- (a) Office of the Attorney-General (b) Public service commission (c) Law Society of Kenya (d) Ethics and Anti-Corruption Commission (e) Judicial Service Commission
(d)	Amani National Congress	A selection panel of seven persons comprising of: (a) two persons nominated by the registered political parties through the Political Parties Liaison Committee (PPLC); (b) two persons nominated by the Public Service Commission; (c) one persons nominated by the Judicial Service Commission; (d) one person nominated by the Kenya Anti-corruption Advisory Board; (e) one person nominated by the Association of Professional Societies of East Africa
(e)	Center for Multi-Party Democracy	Political parties' representation in the selection panel should not be confined to Jubilee Coalition and the Coalition for Reforms and Democracy and parties outside these two formations should be included as follows- (a) One person nominated by the majority party or coalition in the National Assembly. (b) One person nominated by the minority party or coalition in the National Assembly. (c) One person nominated by parties that are neither in the majority nor in the minority coalitions. (d) One person nominated by civil societies.

Stakeholder	Proposal on the composition of the selection panel
	(e) One person nominated by faith based organisations. (f) One person nominated by persons living with disabilities. (g) One person nominated to represent the Public Service Commission.
(f) Civil Society Professional Network, Consortium of Coast NGOs, Africa Youth Leadership Network, Youth Senate-Nairobi County	A selection panel of eight persons consisting of- (a) two persons nominated by the majority party/coalition in Parliament. (b) two persons nominated by the minority coalition/party in Parliament. (c) one person nominated by a recognized national interreligious council. (d) one person nominated by the Kenya Private Sector Alliance. (e) one person nominated by the Law Society of Kenya. (f) one person nominated by the public Service Commission.
(g) Intellectus Consultancy	A selection panel should of seven persons consisting of- (a) two persons, being one man and one woman, nominated by majority coalition in Parliament; (b) two persons, being one man and one woman, nominated by minority coalition in Parliament; (c) one person nominated by the Public Service Commission; (d) one person nominated by the Ethics and Anti-Corruption Commission; and (e) one person nominated by the Law Society of Kenya.
(h) International Governance Institute	A selection panel of eight persons comprising- (a) two persons nominated by the ruling coalition (to represent the majority of Members of Parliament); (b) two persons nominated by the opposition coalition (to represent the minority members of Parliament); (c) one person nominated by the Law Society of Kenya (to represent the civil societies and professional groups); (d) one person nominated by the interreligious council(to represent the religious groups); (e) one person nominated by Kenya Private Sector Alliance(to represent the business community); and (f) one person nominated by the Public Service Commission to represent the public sector).
(i) National IDPs Forum-Kenya	A selection panel of eight persons comprising- (a) two persons, being one man and one woman, nominated by majority coalition in Parliament; (b) two persons, being one man and one woman, nominated by minority coalition in Parliament; (c) one person nominated by the Public Service Commission; (d) one person nominated by the Kenya Private Sector Alliance; (e) one person nominated by the Interreligious Council; and (f) one person nominated by the Law Society of Kenya. In alternative, Public Service Commission be Mandated to recruit the new IEBC Commissioners.
(j) Council of Governors	A selection panel of nine persons comprising- (a) two people nominated by the largest party or coalition in the National Assembly; (b) two people nominated by the second largest party in the National Assembly; (c) one person nominated by the Council of Governors ;

	Stakeholder	Proposal on the composition of the selection panel
		(d) one person nominated by an umbrella body representing religious institutions; (e) one person nominated by an umbrella body representing the private sector, e.g. Association of Professional Societies of East Africa; (f) one person nominated by an umbrella body representing civil society organisations; and (g) a representative nominated by the Public Service Commission and Council of County Public Service Boards.
(k)	Multi-Sectoral Forum	A selection panel of nine persons comprising- (a) Two representatives: one appointed by the coalition with a majority number of members in Parliament, and one by the coalition with a minority number of members in Parliament; (b) A representative of non-parliamentary political parties appointed through the Political Parties Liaison Committee; (c) A representative of the Law Society of Kenya; (d) Three representatives nominated by religious institutions; (e) A representative of women; and (f) A representative of civil society organisations involved in the promotion of democracy and management of elections.
(l)	International Agency for Electoral Reforms	A selection panel of seven persons comprising- (a) two persons (one man, one woman) nominated by the Majority Coalition in Parliament; (b) two persons (one man, one woman) nominated by the Minority Coalition in Parliament; (c) one person nominated by the Public Service Commission; (d) one person nominated by the Kenya Anti-corruption Commission; and (e) one person nominated by the Law Society of Kenya.
(m)	Election Observation Group (ELOG)	A nine member selection panel to be composed of- (a) one member nominated by KEPSA; (b) one member nominated by Central Organisation of Trade Unions-Kenya; (c) three members nominated by religious sector; (d) one from people with disabilities; (e) one member from Judicial Service Commission; and (f) two members from Civil Society Organisation. Two joint secretaries, one from the Public Service Commission.
(n)	United Christian Churches of Kenya(UCKK)	A selection panel of nine persons comprising- (a) two persons nominated by the Majority Party/Coalition in Parliament; (b) two persons nominated by the Minority Party/Coalition in Parliament; (c) one person nominated by a recognized interfaith umbrella body- United Christian Churches of Kenya(UCKK) (d) one person nominated by the Kenya Private Sector Alliance; (e) one person nominated by the Law Society of Kenya; and (f) one person nominated by the Public Service Commission;
(o)	The Kiambu County Clergy Forum (KCCF)	A selection panel of seven persons comprising- (a) two persons, one man, one woman, nominated by the Majority Coalition in Parliament;

	Stakeholder	Proposal on the composition of the selection panel
		(b) two persons, one man, one woman, nominated by the Minority Coalition in Parliament; (c) one person nominated by the Public Service Commission; (d) one person nominated by the Kenya Anti-corruption Commission; and (e) one person nominated by the Law Society of Kenya.
(p)	Jubilee Coalition	A selection panel of seven persons comprising- (a) four persons competitively recruited by the Public Service Commission; (b) three persons nominated by religious institutions in the following formula- (i) National Council of Churches of Kenya – one; (ii) Catholic Church – one; and (iii) Supreme Council of Kenya Muslims –one.
(q)	Media Owners Association of Kenya	Proposed selection panel to include representatives of non-state actors as follows: (a) eminent professional societies such as Law Society of Kenya; (b) media industry; (c) faith based organisations; (d) civil society; (e) business community.

153. The Committee further observed that the multi-stakeholder approach was also favoured by the Kriegler Commission which recommended “*a broad consultative process prior to the appointment of ordinary members and the chairman of the ECK be given legislative grounding; consultation should include political parties and civil society in its broadest sense.*”⁴³ and further recommended that it is “*not essential to any purpose that the actual appointment be made by the President*” and that alternative means should be considered, including appointment by Parliament⁴⁴.

154. The Committee further observed that there were divergent views as to whether political parties and the Public Service Commission should participate in the recruitment of either the commissioners or the selection panel.

155. The proponents of the inclusion of political parties in the recruitment process, such as the Evangelical Alliance of Kenya, were of the view that this would ensure that decisions do not unduly favour other parties and that such a commission would attract greater support and confidence from the political class. Political parties were also considered to be major stakeholders in the elections process and therefore should participate in recruitment of persons involved in the management of the electoral process and therefore having a balanced representation of political parties creates perceived and actual political impartiality.

⁴³ Pages 31 and 49 of the Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007

⁴⁴ Page 49 of the Report of the Independent Review Commission

156. To further support the involvement of political parties in the selection of commissioners, Hon. Kaluma, in his submissions to the Committee cited the example of the United States of America where members of the Federal Electoral Commission are political appointees (three Republicans or two Democrats and One Independent) and the United Kingdom where four out of the current ten electoral commissioners are former Members of Parliament representing political parties in Parliament. He also cited Kenya in 1997 and 2002 where political parties were allowed to nominate members and was of the view that the elections in those two years were comparatively peaceful, free and fair. He further stated that *“the ‘independence’ of Independent Electoral and Boundaries Commission refers to the autonomy of the electoral body as an institution; and not to the independence of individual members of the Commission...the notion that there exist Kenyans or persons who are politically independent is a fallacy, since all adult Kenyans, including members of the electoral commission have a right to register and vote in elections.”*
157. On the converse, it was argued that political party involvement in the selection of Commissioners has the capacity to undermine confidence in the Commission and the electoral system. In this regard, Mkenya Daima and the Commission on Administrative Justice, took the view that non-partisanship was a non-negotiable requirement to ensure independence. This view was also supported by FIDA-Kenya. The Commission on Administrative Justice further noted that the inclusion of political parties would be further complicated by *‘the mutating nature of political parties’* while there was still the need for stability and credibility in the electoral process. It was also felt that such an approach would not be all-inclusive as it would only consider the political sector, effectively leaving out other interest groups.
158. With respect to the involvement of the Public Service Commission in the appointment of Commissioners, the Commission on Administrative Justice was of the view that the Public Service Commission is of equal status as other constitutional Commissions and therefore its involvement in the recruitment of other Commissioners amounts to subjugation of those Commissions to the Public Service Commission. Another concern raised by Hon. Kaluma was that the Public Service Commission is the Executive’s Employment Agency and is therefore likely to be partial.

4.4. TERM OF OFFICE AND TERMS OF SERVICE FOR COMMISSIONERS

159. Article 250(5) of the Constitution provides that a member of a commission may serve on a part-time basis while section 7(2) of the Independent Electoral and Boundaries Commission Act specifies that the members of the Commission shall serve on a full-time basis.

160. Article 250(6) of the Constitution provides that a member of a commission, or the holder of an independent office—

(a) *unless ex officio, shall be appointed for a single term of six years and is not eligible for re-appointment; and*

(b) *unless ex officio or part-time, shall not hold any other office or employment for profit, whether public or private.*

161. In the United States of America, the Commissioners of the Federal Election Commission serve full time and are responsible for administering and enforcing the Federal Election Campaign Act.⁴⁵ In South Africa, whether or not commissioners serve on a full-time basis is determined by the President in consultation with the Commission on Remuneration of Representatives.⁴⁶ In Zambia, the Commissioners serve on a full-time basis. In Ghana, the Chairman and the two Deputy Chairmen hold their offices on a full-time basis while the other four members of the Commission are part-time.⁴⁷ In Australia, two out of the three members of the Australian Electoral Commission serve on a part-time basis.⁴⁸

162. With respect to the term of the Commissioners, some of the stakeholders recommended that the Commissioners should serve on a part-time basis as their role is to provide policy and strategic direction⁴⁹ while others were of the view that the Commissioners should serve on a full-time basis due to the amount of work that the Commission is required to undertake.⁵⁰

163. The Council of Governors, for its part, proposed that the Commissioners “*should serve on a part time basis, except for the general election year when they should serve on a full time basis*” and should oversee a single election. The justification given for this was that “*handling only one election removes the inevitable challenge by a losing party to future elections. [And] boosts confidence and gives each new commission and general election a clean slate and credibility.*” Mkenya Daima however, proposed that commissioners should manage at least two electoral cycles and no more than three electoral cycles.

164. In considering whether to increase the number of Commissioners in India, the following was said⁵¹—

⁴⁵ Website of the Federal Election Commission <http://www.fec.gov/members/members.shtml>

⁴⁶ Section 7(2) of the Electoral Commission Act, No. 51 of 1996

⁴⁷ Section 5 of the Electoral Commission Act, 1993

⁴⁸ Section 6(3) of the Commonwealth Electoral Act, 1918 (as amended and in force on 1 July 2016)

⁴⁹ Including Transparency International, the Multi-Sectoral Forum, Ethics and Anti-Corruption Commission, Barasa Nyukuri, the Kenya Law Reform Commission, Central Organisation for Trade Unions and Hon. Peter Kaluma.

⁵⁰ Including the National Gender and Equality Commission, Mr. Okiya Omtatah, Media Owners Association, Center for Multi-Party Democracy, National Cohesion and Integration Commission, the Election Observation Group and the Jubilee Coalition.

⁵¹ Quoted in *Comparative Analysis of Modalities for EMB Appointment in Selected Countries* by Rukambe J. et al (July 30, 2016)

“Although the Constitution permits the President to fix the number of Election Commissioners at any number without any limit, it is felt that in the interest of smooth and effective functioning of the Election Commission, the number of Election Commissioners should not be unduly large and should remain as two as presently fixed, in addition to the Chief Election Commissioner. The three-member body is very effective in dealing with the complex situations that arise in the course of superintending, directing and controlling the electoral process, and allows for quick responses to developments in the field that arise from time to time and require immediate solution. Increasing the size of this body beyond the existing three-member body would, in the considered opinion of the Commission, hamper the expeditious manner in which it has necessarily to act for conducting the elections peacefully and in a free and fair manner.”

165. According to the international Institute for Democracy and Electoral Assistance, whether it is more appropriate for an electoral body’s membership to be a full-time or part-time position depends on the electoral and administrative circumstances. In permanent bodies, workloads may be high throughout the electoral cycle and require that members are full time and thus readily available for speedy consultation and decisions. Further, full-time members may be a good option where there are recurring activities, such as regular or by-elections, ongoing voter education and information, continuous voter registration or continuing electoral law reforms. Full-time membership may also be appropriate where there are doubts about the impartiality and skill levels of the Commission’s secretariat.⁵²
166. The International Institute for Democracy and Electoral Assistance further observes that there is also the risk of a potential conflict between senior members of the secretariat and full-time members, especially when the former begin to interpret the full-time presence of the members as interfering in the implementation of policy. The Institute further observes that it is also possible for members to serve part-time in non-electoral periods and full-time during electoral periods.⁵³
167. In its written submissions on whether or not Commissioners should serve on a full-time basis, the Independent Electoral and Boundaries Commission stated as follows-

As to whether the Commission managing elections should be part time or full time Parliament might wish to revisit its Hansard of the deliberations relating to the IEBC Act. It will be recalled that the Bill provided for part time Commissioners but amendments were made on the floor of the House for reasons, which may as well have been valid.

⁵² Handbook on Electoral Management Design, Chapter 4
http://www.idea.int/publications/emd/upload/EMD_chapter4.pdf

⁵³ Handbook on Electoral Management Design, Chapter 4
http://www.idea.int/publications/emd/upload/EMD_chapter4.pdf

As this Committee considers this question, it is important to remember that our Constitution with respect to elections management is instructive. The Constitution provides for strict timelines for conducting elections including by-elections. General election are held on the 2nd Tuesday of August every 5th year and not on any other date. By-elections for MPs are held within 90 days, of occurrence of vacancy while that of the president and the governor, where their respective deputies are unable to take over office, within 60 days upon assumption to office by the respective Speakers.

It is unwise for the Country to have only part time Commissioners considering that the entire policy-making and execution of the mandate in Article 88 of the Constitution is performed by Commissioners; the secretariat only executes the policy resolutions arrived at by the Commission. Countries like Namibia, which have part time Commissioners, are moving towards a full time Commission.

168. With respect to the Independent Electoral and Boundaries Commission, it was also proposed by stakeholders that the appointment and retirement of commissioners should be staggered to enable smooth transition from one commission to another. On the mechanism for staggering the appointment and retirement of Commissioners, the Center for Multi-Party Democracy, having proposed a Commission of five members, recommended that three commissioners should initially be appointed and the remaining two vacancies filled after six months in order to provide for continuity at the expiry of the terms of the other commissioners. The Central Organization of Trade Unions, Ambassador Jack B. Tumwa and the Kenya Law Reform Commission also proposed that the staggering should be based on the appointment dates for the Commissioners. The Institute of Certified Public Accountants proposed that after appointment, the Commissioners may ballot on which Commissioner would be the first to retire. They further commended to the Committee, the American model where two commissioners are appointed every two years. The Multi-Sectoral Forum proposed the appointment of nine commissioners with five to be appointed immediately, and the other four after the 2017 elections. The formula proposed by the Election Observation Group was that the chairperson and deputy chairperson should have initial longer periods than the other three commissioners.

169. Staggering appointment model was adopted in Zambia, where the first members of the Electoral Commission were appointed for periods ranging from two to five years in order to facilitate retirement by rotation⁵⁴. In the Philippines, of those first appointed to the Commission on Elections, three members were to hold office for seven years, two members for five years, and the last members for three years,

⁵⁴ Section 5(1) of the Zambia Electoral Commission Act, Cap.17, Laws of Zambia

without reappointment. Appointment to any vacancy is however only for the unexpired term of the predecessor.⁵⁵

170. As to when the term of a commission should expire, the Kriegler Commission recommended that the expiry of the terms of office commissioners should not coincide with election years. The Kriegler Commission further recommended that a fully composed commission should be in office for two years prior to the conduct of general or presidential elections. This view was also supported by FIDA-Kenya and the Center for Multiparty Democracy. The Commission on Administrative Justice however observed that the current commissioners of the Independent Electoral and Boundaries Commission held an election with only fifteen months of coming into office and therefore took the view that the twenty-four months period was not fixed. On the other hand the Evangelical Alliance of Kenya proposed further recommended that the Commission would require to be in place at least ten months before the general election to enable it to adequately prepare for the election.
171. The Electoral Institute of Sustainability of Elections in Africa (EISA) also observed that the Act was silent as to whether the Commissioners are executive or non-executive and in this regard recommended that they should be non-executive.
172. The Kenya Law Reform Commission further proposed the amendment of the Independent Electoral and Boundaries Commission Act to allow for the process of recruitment of new commissioners at least six months before expiry of the term of sitting Commissioners.

4.5. TRANSPARENCY AND ACCOUNTABILITY MECHANISMS FOR THE COMMISSION

173. Article 254 of the Constitution provides for reporting by commissions and independent offices as follows-
- (1) As soon as practicable after the end of each financial year, each commission, and each holder of an independent office, shall submit a report to the President and to Parliament.*
 - (2) At any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue.*
 - (3) Every report required from a commission or holder of an independent office under this Article shall be published and publicised.*
174. Section 24 of the Independent Electoral and Boundaries Commission Act gives further details on annual reporting by the Commission by requiring that the Commission reports to Parliament and the President within three months after the end of each financial year. It further specifies that the reports should include the

⁵⁵ Section 1(2), Part C, Article IX of the Constitution of the Republic of the Philippines, 1987

financial statements of the Commission, the activities the Commission has undertaken, and any other information, the Commission may consider relevant. This report is required to be published in the *Gazette* and in at least one newspaper of national circulation.

175. With respect to finances, section 23 of the Independent Electoral and Boundaries Commission Act requires -

- (1) the Commission to keep all proper books and records of account of the income, expenditure and assets of the Commission;
- (2) the Commission to submit to the Auditor-General the accounts of the Commission together with a statement of the income and expenditure of the Commission during that year and a statement of the assets and liabilities of the Commission on the last day of that year; and
- (3) all accounts kept by the Commission be audited by the Auditor-General at least once in every financial year.

176. Section 27 of the Public Finance Management Act provides for publication of pre- and post-election economic and fiscal reports by the National Treasury, not earlier than four months before the polling day for any general election, and four months after the polling day of any general election respectively.

177. To ensure accountability by election management bodies, various mechanisms are employed in other jurisdictions. In Australia, there is a multiparty committee of the Legislature, the Joint Standing Committee on Electoral Matters in Australia, to deal with electoral body matters. The Joint Committee is established by a resolution of the House of Representatives and the Senate. Its role is to inquire into and report on such matters relating to electoral laws and practices and their administration as may be referred to it by either House of Parliament or a Minister.⁵⁶ In Rwanda, the National Electoral Commission submits in each year, its program and activity report to the Parliament and submits copies thereof to such other State organs determined by law.⁵⁷

178. The South African Electoral Commission is required to submit, annually, to the National Assembly an audited report of all money received from other sources apart from the exchequer, as well as the audited statement on income and expenditure and a report in regard to the functions, activities and affairs of the Commission in respect of the financial year. Further, the Commission is required to prepare a report at the end of each election. In addition, the Commission may, if it deems it necessary, publish a report on the likelihood, or otherwise, that it will be able to ensure that any pending election will be free and fair.⁵⁸ Hon. Kaluma submitted that

⁵⁶ Joint Standing Committee on Electoral Matters

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters

⁵⁷ Article 180 of the Constitution of the Republic of Rwanda, 2003

⁵⁸ Section 14 of the South Africa Electoral Commission Act, No, 51 of 1996

in the United Kingdom, the Electoral Commission is answerable to Parliament via the Speaker's Committee. The Commission is required to submit annual estimates of income and expenditure to the Committee. The Committee is also responsible for answering Parliamentary questions on behalf of the Commission.

179. With respect to the accountability of Kenya's Commission, the Kriegler Commission had recommended that the Commission *"be made accountable to Parliament, without prejudice to its status as an independent body; this should affect the channels by which it establishes and seeks approval for its budgetary requests."*
180. In his memorandum to Parliament, Mr. Harrison Sang' recommended that *"to ensure that IEBC is accountable to Kenyans, it should publish quarterly reports of all its activities in at least three local dailies and its official website at the end of the last month in every quarter. This must be anchored in law. From time to time Parliament through the request of a citizen or MP should summon IEBC commissioners and secretariat to discuss quarterly reports."*
181. The Commission on Administrative Justice also recommended that all the proceedings and deliberations of Independent Electoral and Boundaries Commission should be recorded verbatim. This will infuse objectivity and transparency. The International Governance Institute proposed the establishment of an Elections Review Board, comprising of both ruling and opposition party representatives at least nine months to elections to authenticate, review and give credence to decisions of Independent Electoral and Boundaries Commission regarding elections to ease tension and disputes especially regarding presidential elections and results. The Board, they proposed, would be to have two representatives from each party or coalition with a presidential candidate. The role of the Board would be to follow, review, authenticate and give credence to all the electoral processes, procurements of election materials, ICT arrangements and staff placements, voting processes and vote tallying, and announcement of results.
182. Article 19 also drew the Committee's attention to Ghana where, to enhance the credibility of the Electoral Commission, in 2009, an Interparty Advisory Committee was created to address important election-related matters through an informal agreement between the election commission and political parties. Members of the Advisory Committee helped spearhead a number of major reforms, including the decision to use transparent ballot boxes and to declare election results at polling stations. Similarly in Malawi, in the lead-up to Malawi's 2009 general elections, the Malawi Centre for Multiparty Democracy created a multi-stakeholder dialogue platform to promote regular consultation between the election commission and political stakeholders in order to encourage a culture of dialogue, facilitate the

resolution of interparty conflict, strengthen the capacities of political parties, and foster peace and reconciliation.⁵⁹

183. The Electoral Institute for Sustainable Democracy proposed a review of the code of conduct for commissioners and staff to provide for establishment of Committees, their terms of reference and that provision should be made for reporting of committees and transparency including-

- (a) invitation of members of the public in these committee proceedings;
- (b) observer status during the discussion of particular aspects of elections; and
- (c) dissemination of minutes of committees.

184. The Ethics and Anti-Corruption Commission also proposed that-

- (1) the Ethics and Anti-Corruption Commission prepares a general advisory on issues of corruption in procurement in the electoral management system;
- (2) the Independent Electoral and Boundaries Commission submits annual procurement plan to the Ethics and Anti-Corruption Commission and thereafter submits quarterly reports of all tenders/contracts awarded providing the information on the name of the directors/proprietors, firms and the amount awarded; and
- (3) the Independent Electoral and Boundaries Commission sets up and operationalizes structures and systems for corruption prevention which should include-
 - (a) establishment of a corruption prevention committee;
 - (b) identification and training of integrity assurance officers;
 - (c) conducting a Corruption Risk Assessment which should be submitted to the Ethics and Anti-corruption Commission; and
 - (d) training corruption prevention committee members and undertaking sensitization of the commissioners and staff.

4.6. VACATION FROM OFFICE FOR COMMISSIONERS

185. The Kenya Law Reform Commission observed that there was need to amend the Independent Electoral and Boundaries Commission Act to specifically provide for the resignation of Commissioners and staff as one of the modes of vacation from office. The Committee further observed that the Independent Electoral and Boundaries Commission Act does not provide for vacancy in the Commission and how such vacancies should be filled. This appears to have been an omission during the enactment of the law.

186. Comparatively, the laws providing for the membership and appointment of other Chapter 15 constitutional commissions, provide for vacancy in the Commissions.

⁵⁹ African Election Best Practices, Ghana <http://www.ku.ac.ke/actil/wp-content/uploads/2015/07/AFRICAN-ELECTION-BEST-PRACTICES-GHANA.pdf>

Section 15 of the Kenya National Commission on Human Rights Act, for instance, provides as follows-

Vacancy of office of chairperson and members

(1) The office of the chairperson or a member of the Commission shall become vacant if the holder—

(a) dies;

(b) by notice in writing addressed to the President resigns from office;

(c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.

187. The same provision is replicated in section 10 of the National Land Commission Act, section 9 of the Public Service Commission Act, section 9 of the Salaries and Remuneration Commission Act, Section 10 of the Teachers Service Commission Act and section 20 of the National Police Service Commission Act.

Table 3: Summary of Institutional Framework for Elections in Selected Jurisdictions

COUNTRY	COMPOSITION	APPOINTMENT	TERM	TERM OF SERVICE	QUALIFICATION	VACATION FROM OFFICE
1. Australia: Australian Electoral Commission	3 members: a Chairperson; the Electoral Commissioner; and one other member (non-judicial appointee).	Judicial and executive appointments. The Chairperson and the non-judicial appointee are appointed by the Governor-General and hold office on a part-time basis.	An appointed Commissioner holds office for such period not exceeding 7 years	- The Chair and the non-judicial appointee are part-time while the Electoral Commissioner is full-time - Other terms are determined by the governor general	The chairperson must be a judge, and must be among the 3-listed judges submitted to the governor-general by the chief justice	- Expiry of 7 years term if there is no reappointment - Resignation in writing to the Governor - Termination by Governor General
2. Botswana: Botswana Independent Electoral Commission.	7 members: 1. A Chairman 2. A legal practitioner; and 3. five other persons	Judiciary and Political parties. - Chairperson and legal practitioner are appointed by the Judicial Service Commission. - The five other persons are appointed by appointed by the Judicial Service Commission from a list of persons recommended by the All Party Conference (All Party Conference is a meeting of all registered political parties convened from time to time by the Minister).	The term of office of the Commission is the period of two successive terms of Parliament, namely 10 years.	They hold the office on a full time basis	- Chairman is required to be a judge of the High Court - Qualification of the other five- - is honest; and - is fit, proper and impartial. - A person cannot be appointed if he or she is found to be bankrupt - A person shall not be appointed if he or she is found to have ever committed an offence - Must be a citizen	Retirement by rotation
3. South Africa: South African Electoral Commission	Five members	The president appoints the chairman and vice chairman among the members of the commission. Commissioners recruited by a panel consisting of:- - president of constitutional court as the chairperson, - a representative of the human rights commission, - a representative of commission of gender	Seven years, renewable for a specified period	Whether commissioners are appointed full time or part time, is decided by the president in consultation with commission of representatives.	- one member must be a judge appointed by the president - A Commissioner must be A citizen of South Africa.	- Retirement by rotation - The commissioner may only be removed from office by the president on grounds of misconduct, incapacity or incompetence through recommendation by the electoral court and approval of National Assembly. - he or she resigns or dies at an earlier date

COUNTRY	COMPOSITION	APPOINTMENT	TERM	TERM OF SERVICE	QUALIFICATION	VACATION FROM OFFICE
		equality, a public protector. Panel submits 8 names to the National Assembly for approval of five and then the President appoints the members after the approval				
4. Nigeria, Independent National Electoral Commission	The commission consists of:- - Chairman, who is the Chief Electoral Commissioner; and - twelve other members to be.	The commissioners are appointed by the president.	They serve for a term of five years.	Full time basis	A commissioner must be:- - a person of unquestionable integrity - Must be 40 and above years of age and 50 and above years of age as for the chairman.	The president has the power to remove a member from the commission, If the member fails to discharge his duties or for any act of gross misconduct
5. Ghana, Ghana Electoral Commission	The Electoral Commission shall consist of - (a) a Chairman; (b) two Deputy Chairmen; and (c) four other members	The commissioners are appointed by the president on the advise of the Council of state	Not specified	Chair and Deputy are full-time while other four members are part-time The Chairman of the Electoral Commission shall have the same terms and conditions of service as a Justice of the Court of Appeal. The two Deputy Chairman of the Commission shall have the same terms and conditions of service as applicable to a Justice of the High Court. The other four members of the Commission shall be paid such allowances as Parliament may determine. Full time basis	A person must meet the qualifications of a member of parliament to be appointed as a commissioner	Not Specified

COUNTRY	COMPOSITION	APPOINTMENT	TERM	TERM OF SERVICE	QUALIFICATION	VACATION FROM OFFICE
6. Tanzania - Tanzanian Electoral Commission	Seven consisting of- • Chairman; • a Vice-Chairman, • a member appointed from amongst the Tanganyika law society. • Four other persons	The members of the Commission are appointed by the President	A member of the commission shall be deemed out of office after expiration of five years after the appointment	Part time basis	• A chairman should be a Judge of the high court or Justice of the Court of Appeal. • A Vice Chairman should be a judge of the high court or a person of with qualification of a Judge of the High Court or Justice of Court of Appeal. • The four members must have experience on parliamentary elections or such other experienced • Deemed fit by the president in carrying out there mandate.	• A person ceases to be a member, where anything happens which, had he not been a member of the Commission, would have made him ineligible for appointment to be a member of the Commission. - The president has the authority to remove a member of the commission from office, if they fail to discharge their duties, illness or gross misconduct
7. India, Election Commission of India	The Election Commission consists of the • Chief Election Commissioner and such number of other • Election Commissioners, if any, as the President may from time to time fix (currently they are three)	The president appoints the chief Election Commissioner and two other Election commissioner	They serve for a term of six years or up to the age of 65 years, whichever is earlier	Full term basis The Chief Election Commissioner and the two Election Commissioners draw salaries and allowances at par with those of the Judges of the Supreme Court of India	Not specified	• The grounds for removal for a Chief Election Commissioner are similar to the judge of the high court. • The chief Elections Commissioner can only be impeached by the parliament. • The election commissioner can be removed from office by the president under the recommendations by the Chief Elections Commissioner.
8. United States of America, Election Assistance	The commission consist of six members	The Commission is made up of six members, who are appointed by the President and confirmed by	• Each member serves a six-year term, and two seats are subject to appointment every	Two of the members (not more than one of whom may be affiliated with the same political party)	Each member of the Commission shall have experience with or expertise in election	

COUNTRY	COMPOSITION	APPOINTMENT	TERM	TERM OF SERVICE	QUALIFICATION	VACATION FROM OFFICE
Commission		the Senate.	two years. The Chairmanship of the Commission rotates among the members each year, with no member serving as Chairman more than once during his or her term.	shall be appointed for a term of 2 years. They serve on a full term basis.	administration or the study of elections By law, no more than three Commissioners can be members of the same political party,.	
9. Canada, Elections Canada	One member - The Chief Electoral Officer	The Chief Electoral Officer is appointed by the House of Commons of Canada	The Chief Electoral Officer serves for a non-renewable term of ten years.	The Chief Electoral Officer Serves on a full time basis	He or she must be a person of good behavior and utmost integrity.	The Chief Electoral Officer can only be removed from office by the Governor General after a joint request following a majority vote by House of Commons and Senate. The retirement age for this position is 65 years old.
10. Zambia, Electoral Commission of Zambia	The members of the commission consists of:- - A chairperson - Not more than four other members	The members are appointed by the president, subject to ratification by the National Assembly.	The members shall be appointed for a term not exceeding 7 years (renewable)	They serve on a full term basis	The chairperson shall be a person who has held, or is qualified to hold, a high judicial office or, any other qualified person.	- The president may remove a member from office if the member is declared bankrupt or, of unsound mind. - the first members are appointed for periods from two to five years in order to facilitate retirement by rotation - May resign upon giving a month's notice to the President.

4.7. SECRETARIAT TO THE COMMISSION

4.7.1. Secretary to the Commission

188. Article 250(12) of the Constitution provides for the secretary to commissions and specifically provides that the secretary is to be appointed by the commission and is the chief executive officer of the commission.

189. Section 10 of the Independent Electoral and Boundaries Commission Act provides for competitive recruitment of the Secretary to the Commission and outlines the qualifications as follows-

(2) *A person shall be qualified for appointment as the secretary if the person—*

- (a) *is a citizen of Kenya;*
- (b) *possesses a degree from a recognised university;*
- (c) *has had at least five years' proven experience at management level;*
- (d) *has proven relevant experience in either—*
 - (i) *electoral matters;*
 - (ii) *management;*
 - (iii) *finance;*
 - (iv) *governance;*
 - (v) *public administration;*
 - (vi) *law; or*
 - (vii) *political science; and*
- (e) *meets the requirements of Chapter Six of the Constitution.*

190. The Act further provides that the secretary shall hold office for a term of five years but shall be eligible for re-appointment for one further term of five years. Where the Commission does not intend to reappoint the secretary, the Commission is required to notify the secretary and cause the vacancy to be advertised at least three months before the expiry of the incumbent's term.

191. The Act also states that the secretary, in the performance of the functions and duties of office, is responsible, answerable and reports to the Commission. The functions of the Secretary are outlined as follows-

The secretary shall be—

- (a) *the chief executive officer of the Commission;*
- (b) *head of the secretariat;*
- (c) *the accounting officer of the Commission;*
- (d) *custodian of all commission's records;*
- (e) *responsible for—*
 - (i) *executing decisions of the Commission;*
 - (ii) *assignment of duties and supervision of all employees of the Commission, facilitating, co-ordinating and ensuring execution of Commission's mandate;*
 - (iv) *ensuring staff compliance with public ethics and values; and*

(v) the performance of such other duties as may be assigned by the law and Commission.

192. The grounds for the removal of the Secretary are stated as inability to perform functions of the office arising out of physical or mental incapacity, gross misconduct, bankruptcy, or incompetence. The secretary is required to be accorded fair administrative action prior to removal.

4.7.2. Staff of the Commission

193. Article 252(1)(c) of the Constitution empowers the Commission to recruit its own staff. In this regard, section 11 of the Independent Electoral and Boundaries Commission Act provides that the Secretariat is to be headed by the secretary and further provides that the secretariat is to comprise of "*such professional, technical and administrative officers and support staff, as may be appointed by the Commission in the discharge of its functions*" and "*such public officers as may be seconded to the Commission upon its request.*"
194. Section 12 of the Act also empowers the Commission to establish units *directorates, field offices, divisions or committees and appoint thereto such employees as it may determine.*
195. In South Africa, the Electoral Commission is empowered to acquire the necessary staff, whether by employment, secondment, appointment on contract or otherwise. The Electoral Commission also appoints a chief electoral officer to head of the administration of the Commission and the accounting officer of the Commission. The chief electoral officer, in consultation with the Commission, appoints such officers and employees of the Commission as he or she may consider necessary to enable the Commission to exercise its powers and to perform its duties and functions effectively.⁶⁰ In Ghana, the Commission is empowered to appoint such officers and other employees as it may require for the effective implementation of its functions. The appointment of officers and other employees of the Commission is done by the Commission acting in consultation with the Public Services Commission.⁶¹
196. In Canada, the staff of the Chief Electoral Officer (the only electoral commissioner) consists of an officer known as the Assistant Chief Electoral Officer, appointed by the Governor in Council, and any other officers, clerks and employees that may be required, who are appointed in accordance with the Public Service Employment Act.⁶² The Office through which the Chief Electoral Officer carries out his mandate normally comprises a group of 500 employees working in the National Capital

⁶⁰ Section 8 of the Electoral Commission Act of Ghana, 1993

⁶¹ Section 12 of the South Africa Election Commission Act, No. 51 of 1996

⁶² Section 19(1) of the Canada Elections Act

Region. The law further allows the Chief Electoral Officer to engage, on a temporary basis, the services of persons having technical or specialized knowledge of any matter relating to the Chief Electoral Officer's work to advise and assist him or her in the exercise or performance of his or her powers, duties and functions. Pursuant to this provision, during a general election or referendum, more than 235,000 positions are filled by election workers across the country.⁶³

197. On the issue of the Secretariat to the Commission, various proposals were made by stakeholders and members of the public. These include-

- (a) The Commission should maintain a skeleton team of staff, and the bulk of the secretariat's role should be sub-contracted to independent entities that can hire, train and contract staff and hold them to account on the professional management of elections.⁶⁴ On this issue, the National Treasury observed that the Commission has a "*bloated staff establishment notwithstanding that elections are held after every 5 year*" and that the Commission does not need too many officers to handle boundaries related matters since boundaries review every eight to twelve years. The Treasury therefore recommended a staff rationalization by the Salaries and Remuneration Commission.
- (b) The Secretariat should consist of a professional center with a lean regional structure all characterized by personal integrity beyond reproach, non-partisanship and with knowledge, skill and experience aligned to the specific goal.⁶⁵
- (c) There is a need to address what it termed as the "*perennial turf wars between the commissioners and the secretariat*".⁶⁶ In this regard, the Commission should be restricted to provision of policy direction while the Secretariat should be involved in implementation of policy and the day-to-day running of the Commission.⁶⁷ To underscore this point, the Office of the Auditor-General suggested that this lack of clarity was perhaps the reason that the Commissioners had been actively involved in procurement issues.
- (d) That recruitment must be advertised and competitively filled through professional firms and not the secretariat.⁶⁸
- (e) Review of the administrative procedures with a view to reduce discretion in key operational areas.
- (f) The secretariat should serve a term that enables them to manage at least to electoral cycles and no more than three electoral cycles.⁶⁹

⁶³ Official website of Elections Canada

⁶⁴ Mkenya Daima

⁶⁵ Mkenya Daima

⁶⁶ Transparency International

⁶⁷ Office of the Auditor -General, Transparency International,

⁶⁸ Mkenya Daima

⁶⁹ Mkenya Daima

- (g) That the Secretariat to the Commission be placed under performance contracting.⁷⁰
- (h) An evaluation should be undertaken on Independent Electoral and Boundaries Commission, with input from the commissioners and staff of the Independent Electoral and Boundaries Commission, by an appropriate expert to determine the appropriate/optimum staff levels through a detailed job analysis of the functions of the electoral body.⁷¹

198. The Committee observed that the Kriegler Commission had also made recommendation on relations between the Secretariat and the Commission. The Kriegler Commission recommended that *“greater, if not all, implementation responsibility should be delegated to the Secretariat while greater, if not exclusive, policy-making responsibility should remain with the Commission.”*

199. The Kriegler Commission further recommended that-

- (a) to ensure accountability, IREC recommends the establishment of clear lines of individual responsibility for service delivery *among both commissioners and staff* introducing performance management across the board;
- (b) staff of the Commission should be on three to five year contracts, renewable on the basis of performance;⁷²
- (c) the staff should have clear job descriptions and the space to perform their roles on the basis of the responsibilities set out therein;
- (d) annual performance appraisals and performance-improvement measures for staff; and
- (e) the Commission Secretary, among other qualifications, be an experienced election manager, competitively recruited from the open job market and have the status of Permanent Secretary.

200. The Independent Electoral and Boundaries Commission informed the Committee that there were ongoing reforms as follows-

As part of strengthening the institutional capacity of the IEBC, the Commission is making significant progress. It has a staff establishment of about 900 with 863 in post. 75% of IEBC staff are based in various parts of the country. As part of the Commission’s new strategic direction, a restructuring programme will be effected gradually. So far, with the support of development partners, a consultant has been hired to look at options that the Commission may consider in establishing an efficient and effective secretariat for IEBC. In other words, we are building a strong institution for the long-term.

⁷⁰ Ethics and Anti-Corruption Commission

⁷¹ Ethics and Anti-Corruption Commission

⁷² This view was supported by Mkenya Daima which recommended that the Secretariat serves a term that enables them to manage at least 2 electoral cycles, and no more than 3 electoral cycles

201. Some stakeholders such as the International Commission of Jurists affirmed the current framework outlined under the Independent Electoral and Boundaries Commission Act.
202. The Committee observed that the prevailing view was that there was a need for a clear delineation between the functions of the Commission and those of the Secretariat. The general view was that the Commission should provide policy direction and oversight while the secretariat should implement the Commission's policy and be fully empowered to manage and administer elections.
203. On the Organizational Structure of the Commission, the Office of the Auditor-General proposed the following distinct units-
- (a) Operations – the units under operations should be charged with the singular mandate to deliver an election in a credible, controlled and believable by Kenyans.
 - (b) Finance – to address strong controls to avoid weaknesses observed in previous audit such as poor record keeping, lack of reconciliations. In addition, the annual budget of the IEBC should take cognizance of other sources of funding that should be firmed up well in advance of the budget cycle and should be approved by Parliament
 - (c) Procurement – this should be professionalized and adequately staffed in a manner that proper procurement planning and execution can be assured.
 - (d) Human Resources / Administrative
 - (e) Other outreach/communication units

4.8. RECOMMENDATIONS OF THE COMMITTEE

204. The Committee recommends as follows –
- (1) That the number of Commissioners of the Independent Electoral and Boundaries Commission be seven and that the Commissioners serve on a full-time basis;
 - (2) That for the appointment of the first Commissioners after the tabling of this report, a Selection Panel be established and appointed by the President, consisting of-
 - (a) four persons, being two men and two women, nominated by the Parliamentary Service Commission;
 - (b) one person nominated by the Kenya Conference of Catholic Bishops (KCCB);
 - (c) one person nominated by the National Council of Churches of Kenya (NCCK);
 - (d) one person nominated by the Evangelical Alliance of Kenya; and

- (e) one person nominated by the Supreme Council of Kenya Muslims (SUPKEM), the National Muslim Leaders Forum (NAMLEF) and the Kenya Council of Imams and Preachers of Kenya; and
- (f) one person nominated by the Hindu Council of Kenya;
- (3) That the Parliamentary Service Commission provides secretariat services to the Selection Panel;
- (4) That after the August, 2017 General Elections, the law be amended to provide for a different composition for future selection panels;
- (5) That on the roles of the Commission vis-à-vis the Secretariat-
 - (a) The Commissioners shall perform their functions in accordance with the Constitution and, in particular, shall be responsible for strategy, policy direction and oversight;
 - (b) The Secretariat implements policies designed by the Commissioners and performs day-to-day administrative functions of the Commission;
- (6) That in light of the fast-approaching date of the next General Elections, the processes relating to the appointment of the new Commissioners be undertaken with expedition and be concluded by 30th September, 2016;
- (7) That for the future, the processes of recruitment of new Commissioners be commenced at least six months before the expiry of their term; and
- (8) That the Independent Electoral and Boundaries Commission Act be amended to include provisions on vacation from office by the Commissioners other than by way of removal from office in line with similar legislation.

CHAPTER FIVE

THEMATIC AREA 4

205. The Committee sought views from the public on recommendations on legal, policy and institutional reforms to improve the electoral system and processes so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner. The submissions were to address the following issues—

- (a) Voter registration;
- (b) Voter education;
- (c) Nomination and registration of candidates;
- (d) Campaign management;
- (e) Publicity and media;
- (f) Use of Information Communication Technology in elections;
- (g) Voting process;
- (h) Transmission and declaration of election results;
- (i) Allocation of special seats;
- (j) Election observation, monitoring and evaluation; and
- (k) Dispute resolution (including nomination and petitions).

5.0 VOTER REGISTRATION

206. Voter registration is one of the first steps towards achieving universal suffrage as enshrined in Article 81(d) of the Constitution. Accordingly, a credible voter register is an essential ingredient in the conduct of elections that are free, fair, transparent and accountable. The voter register must meet high-level standards of accuracy, completeness, comprehensiveness, accuracy and reliability. A credible voter register enhances voter confidence and trust in the electoral system and the processes that follow. Where voter registration is not managed well, this has the potential of tainting the electoral processes that follow, potentially leading to electoral disputes and chaos.

207. It has been observed that voter registration remains the most expensive part of conducting elections. Voter registers may be manually or electronically generated. The choice of the voter registration system to be used is usually dependent on a number of factors, including *“political demands, legal provisions, the capacity of the institutions responsible for the establishment of the voters’ role, financial resources, the level of information technology available in the country and environmental constraints”*.⁷³ In the Kenyan context, the voter register created before the 2013 General Elections was electronically generated using the Biometric

⁷³ Voter Registration in Africa: A comparative analysis

Voter Registration (BVR) kits. Although this was the first time in Kenya that technology was deployed in voter registration, in other jurisdictions, including South Africa and the Philippines, electronic voter registration is the norm.

5.1.1. Current Legal Framework

208. The process of voter registration and the resulting voter register should conform to the national, regional and international legal regime and established standards. Notable provisions on the subject of the right to vote in international instruments include-

- (i) The United Nations Declaration on Human Rights: Article 21(3) states that *"the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*⁷⁴
- (ii) The International Convention on Political and Civil Rights: Article 25 states that *"every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:*
 - (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; and*
 - (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."*⁷⁵
- (iii) The International Convention on Elimination of all Forms of Racial Discrimination: Article 5 guarantees the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law in the enjoyment of political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage.
- (iv) The Convention on the Rights of Persons with Disability: Article 29 states that *"Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives including the right and opportunity for persons with disabilities to vote and be elected, inter alia by: ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use, protecting the right of persons with disabilities to vote by secret ballot in elections and*

⁷⁴ The UN declaration on Human Rights Article 21(3) 1948.

⁷⁵The United Nations General Assembly. 1966. "International Covenant on Civil and Political Rights." Treaty Series 999 (December): 171.

public referendums without intimidation, and to stand for elections to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate."⁷⁶

209. At the regional level, the African Charter on Human and Peoples' Rights, the African Union Declaration on Principles Governing Democratic Elections in Africa and the African Charter on Democracy, Elections and Governance are important also to note. Notable provisions on the subject of right to vote in these regional instruments include-

- (1) The African Charter on Human and Peoples' Rights 77: Article 13(1) provides that every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law; and
- (2) The African Union Declaration on Principles Governing Democratic Elections in Africa: Article 4(2) states that State parties shall recognize popular participation through universal suffrage as the inalienable right of the people.

210. The Constitution and the Elections Act make voter registration both a right and a pre-requisite to voting in elections or referenda. Article 38 of the Constitution, in providing for political rights, provides that "*every adult citizen has the right, without unreasonable restrictions...to be registered as a voter.*" This right is restated in section 3(1) of the Elections Act.

211. To exercise this right, however, a citizen requires to be registered as a voter. In this regard, Article 83 of the Constitution provides that a person qualifies for registration as a voter if the person is an adult, is not declared to be of unsound mind and has not been convicted of an election offence during the preceding five years. Similarly, section 3(2) of the Elections Act provides that a citizen is entitled to vote if the citizen is registered in the Principal Register of Voters.

212. Pursuant to Article 88(4)(a) and (b) of the Constitution, the Independent Electoral and Boundaries Commission is the body responsible for the continuous registration of citizens as voters, and for regular revision of the voters roll. Specifically, section 4(2) of the Elections Act requires the Commission to compile and maintain a Principal Register of Voters which is to comprise-

- (a) a poll register in respect of every polling stations;
- (b) a ward register in respect of every ward;
- (c) a constituency register in respect of every constituency;
- (d) a county register in respect of every county; and

⁷⁶ <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>

⁷⁷ www.achpr.org/instruments/achpr/

(e) a register of voters residing outside Kenya.

213. The detailed administrative and regulatory framework for voter registration is set out in the Elections (General) Regulations, 2012, the Elections (Registration of Voters) Regulations, 2012 and the Elections (Voter Education) Regulations, 2012.

5.1.2. Comparative Analysis

214. The most important parameters relating to voter registration in any country are-

- (a) the number of registered voters vis-à-vis the population of the country;
- (b) the method of updating the voters register;
- (c) the registration points;
- (d) the requirement, if any, for the use of national identification cards for voter registration and voting;
- (e) the method of collection of data of the voters registered; and
- (f) the connection between voter registration and the national identification registration process.

215. The Electoral Institute for Sustainability of Democracy in Africa in a publication titled “Voter Registration in Africa: A Comparative Analysis”⁷⁸ compared voter registration systems in eight African countries across these parameters. The results of the Institute’s study specifically with regard to Ghana, Rwanda and South Africa are presented below together with the prevailing position in Kenya, India and the Philippines.

⁷⁸ <https://www.eisa.org.za/pdf/vrafrica.pdf>

Table 4: Overview of Voter Registration in Various Countries

No.	Data	Kenya	Ghana	Rwanda	South Africa	Philippines	India
1.	Population (million)	47	24	9.2	40	102	1.33 Billion
2.	Registered voters (million)	14	12.8	4.7	24	54	844
3.	Method for updating the voter register	Continuous update	Periodic	Continuous with periodic updates before each election	Continuous registration with registration drives before each election	Periodically before election	Periodically before election
4.	Registration points	Registration is done at the polling centres to be used during election as well as gazetted areas	Registration centres covering up to five polling places	2007 door to door, later updates at village and cell level	Polling station level	Local Commission on Elections(COMELEC) offices, Satellite registration in malls, satellite registration booths in Barangays, Philippines Embassies and consulates abroad, COMELEC's website	By mail or in person at voter registration offices
5.	ID cards	Required for registration	Limited access to national ID card	National ID introduced in 2007	National civil photo ID book with unique ID number	Required for registration	Required for registration
6.	Production of Voter ID	Not required, ID only	Produced on the spot with photograph	Voter cards produced centrally, distributed at a second stage	No voter ID	It can take up to three years to get a voters I.D but on registering one gets an acknowledgement receipt	Produced after verification by voter registration and sent via email.
7.	Field collection of data	Biometric entry with a computer, webcam, fingerprints sensor and signature pad	Paper-based Optical Mark Reading(OMR) forms and webcam	Biometric data collection with laptop, webcam, fingerprint and signature pad	Zip-zip machines scan South African ID document barcode, residential data filled in on paper form	Paper based forms as well as Biometrics with a computer which takes your signature, thumb mark and picture	Paper based by filling in forms and sending them via email or delivering them in person
8.	Data Exchange with ID	No	No	Regular data exchange	Computerized regular data exchange	No	No

5.1.3. Submissions Received by the Committee

216. A number of submissions were received on issues to do with voter registration throughout the inquiry period as follows-

(a) Integration of the Civil Registration and the Voter Registration Systems

217. The overwhelming majority of the stakeholders and the members of the public submitted that the voter registration system should be integrated or interlinked with the civil registration system. This was the position taken by the Evangelical Alliance of Kenya, Mkenya Daima, Transparency International, International Commission of Jurists - Kenya, the Electoral Institute for Sustainable Democracy in Africa, Article 19, the Amani National Congress, the Council of Governors, the Ethics and Anti-Corruption Commission, the Institute for Certified Public Accountants of Kenya, the Political Parties Liaison Committee, the Kenya Young Voters Alliance and Mr. Joseph Nduhiu.
218. The National Registration Bureau specifically recommended that for the future, the government should introduce a multi-purpose, chip-based, electronic identity card which will support e-Government and e-commerce functions, and which the Independent Electoral and Boundaries Commission should use for registration of voters and e-voting. The Cabinet Secretary National Treasury submitted that there was scope for greater efficiency, particularly if the data from the National Bureau of Registration was used in voter registration.
219. Similarly, in their oral submissions to the Committee, the Coalition for Reforms and Democracy observed that voter registration and registration for IDs are conducted separately at the cost of tax payers. The Coalition proposed for coordination between the Nation Registration Bureau and the Independent Electoral and Boundaries Commission so that the Commission would use the registration data of the Bureau and only proceed to allocate voting areas.
220. On this matter the Independent Electoral and Boundaries Commission submitted that it would not be prudent to give the role of voter registration to the National Registration Bureau as the Bureau was part of the Executive which was a player in the electoral process. The Commission submitted that if this route was to be pursued it would be necessary to first integrate the various laws on registration of persons so as to have a body independent of the Executive to handle registration. Short of this, the Commission submitted that the best route would remain that of the Independent Electoral and Boundaries Commission.

(b) Acquisition of National Identity Cards (IDs)

221. Stakeholders such as the Evangelical Alliance of Kenya, Youth Agenda and the Institute of Certified Public Accountants of Kenya were concerned that not all Kenyans of eighteen years and above who were eligible to be issued ID cards are

adequately facilitated to acquire the cards. In particular, the Council of Governors submitted that the acquisition of the document should be devolved to the counties. Others such as the Evangelical Association of Kenya and the Kenya National Commission for Human Rights proposed that ID cards should be given to all students leaving form four. Mkenya Daima called upon the National Registration Bureau to improve coverage of ID issuance and collection.

(c) Continuous Registration of Voters

222. The National Registration Bureau submitted that of the eligible voters, 9.2 million Kenyans were yet to be registered as voters. Following this submission by the Bureau a number of stakeholders also urged for registration of voters throughout the electoral cycle. The Society for International Development, the International Commission of Jurists - Kenya, the Council of Governors, the Amani National Congress, the Kenya Young Voters Alliance, the Elections Observation Group and Mr. Joseph Nduhiu submitted that the Independent Electoral and Boundaries Commission should continuously register voters in accordance with Articles 38 and 81 of the Constitution. In particular the National Gender and Equality Commission, and the Kenya National Commission for Human Rights averred that the Independent Electoral and Boundaries Commission must comply with the timelines provided for in section 6 of the Elections Act for the compilation of the voter register, inspection by the public and gazettelement of the final register before elections. They submitted that compliance with timelines will reduce incidences of tampering with the register.

(d) Fresh Register of Voters

223. The Coalition for Reforms and Democracy raised concerns about the integrity of the existing Principal Register of Voters stating, in oral submissions, that the Independent Electoral and Boundaries Commission had been unable to compile an accurate register for the 2013 General Elections. They also questioned the fairness and distribution of the Biometric Voter Registration kits.
224. On this matter, the Jubilee Coalition submitted that the existing Principal Register of Voters should be maintained and continuously updated. They argued that due to the short time remaining before the 2017 elections, the reach of any new registration would be limited, and hence would disenfranchise many Kenyans. They also stated that the potential cost of launching a new exercise would be enormous. On the integrity of the Principal Register of Voters, the Independent Electoral and Boundaries Commission submitted that it had asked a civil society organization to conduct an independent third party audit on the Principal Register of Voters and that the audit had indicated that the register was 99.8 percent accurate.

(e) Mandatory Registration of all Eligible Voters

225. Some stakeholders were of the opinion that voting should be made mandatory for all eligible citizens. They argued that all citizens should participate in the political processes of the country in order to ensure that the government elected would reflect the diversity of the people of Kenya and to address voter apathy. The Central Organization of Trade Unions and the Institute of Certified Public Accountants of Kenya shared this opinion.

(f) Diaspora Voters

226. The Kenya Diaspora Alliance submitted that the registration of voters pursuant to Article 38 of the Constitution would not be complete without including Kenyan citizens in the diaspora. This position was further supported by the International Commission of Jurists, the Electoral Institute for Sustainable Democracy in Africa and the Elections Observation Group. The Electoral Institute for Sustainable democracy in Africa particularly recommended a comprehensive framework for the implementation of voter registration for diaspora.
227. The Kenya Diaspora Alliance further appealed that the Independent Electoral and Boundaries Commission avails resources and the infrastructure necessary to register eligible citizens in the diaspora for the next election. They averred that although the diaspora constituency includes at least ten percent of the population of Kenya, it had been disenfranchised from the everyday life of the Kenyan community despite numerous efforts to be mainstreamed. The Multi-Sectoral Forum recommended that the Elections Act be amended to provide for a mechanism and framework within which registration of citizens in the diaspora would be undertaken.

(g) Right of Prisoners to Vote

228. The Kenya National Commission for Human Rights and the Elections Observation Group argued for the rights of prisoners to be registered as voters. They supported their position by referring to Nairobi High Court Petition No. 574 of 2012 where the court held that subject to Article 83(1) of the Constitution, prisoners are entitled to be registered as voters and have a right to vote under Article 38(3)(a) and (b) of the Constitution.⁷⁹

(h) Verification and Scrutiny of the Register

229. Transparency International, the Office of the Registrar of Political Parties, the Ethics and Anti-Corruption Commission and the Kenya Law Reform Commission urged for the verification and scrutiny of the voter register before use in the 2017 General Elections. The Council of Governors proposed that the Election Act be amended so as to introduce a requirement that the Independent Electoral and Boundaries Commission publishes, on quarterly basis, new entries into the register.

⁷⁹ Kituo cha Sheria V Independent Electoral And Boundaries Commission & Another [2013] eKLR

230. The Multi-Sectoral Forum also called for the auditing, updating and verification of the voters register while the Elections Observation Group submitted that the Independent Electoral and Boundaries Commission should develop a repository of the voters' signatures or thumb prints to ensure that Commission avoids the pitfalls witnessed during the processing of the Coalition for Reforms and Democracy's referendum initiative.

(i) Waiting Cards

231. The Jubilee Coalition and the Young Kenya Patriots expressed the view that section 3(a) of the Elections Act should be amended to disallow the use of waiting cards as a document to be used for registration. It was submitted that the use of a waiting card creates a window of opportunity for fraudulent entries into the register hence compromising the integrity of not only the voters roll, but also the elections generally. Further, that the waiting card has no serial number or the bearer's photo and is just proof of application for an identity card, which application may later be rejected. The Council of Governors held a contrary view to the effect that a database of those holding waiting cards should be developed and the holders allowed to vote.

5.1.4. Recommendations of the Committee

232. The Committee recommends as follows –

- (1) That for purposes of the 2017 General Elections-
 - (a) The Independent Electoral and Boundaries Commission engages a professional reputable firm to conduct an audit of the Register of Voters for the purpose of verifying the accuracy of the Register, updating the Register and recommending mechanisms to enhance the accuracy of the Register;
 - (b) The audit in (a) above be completed not later than 30th November, 2016.
 - (c) The Commission submits the Audit Report to Parliament within fourteen days of receipt of the Report; and
 - (d) The Commission implements the recommendations of the audit and thereafter reports to the National Assembly and the Senate on such implementation within thirty days of receipt of the Audit Report.
- (2) That the Elections Act be amended to enable the Commission to conduct an audit of the Register of Voters for the purpose of verifying the accuracy of the Register, updating the Register and recommending mechanisms to enhance the accuracy of the Register.
- (3) That for purposes of the conduct of the audit and in the future for the maintenance of the Register of Voters, the National Registration Bureau, the Kenya Citizens and Foreign Nationals Management Service and all other relevant agencies and institutions that hold information on Kenyan citizens

should avail the information to the Independent Electoral and Boundaries Commission electronically for cross-referencing and information sharing.

- (4) That the Elections Act be amended to increase the period for verification of the Register of Voters and scrutiny and closing of the register before elections from the current sixty (60) days to ninety (90) days;
- (5) That verification of the Register of Voters be only by means of biometric voter data and that this be done at the polling stations;
- (6) That the Independent Electoral and Boundaries Commission makes provision for online inspection of the Register of Voters by individual voters through a public portal;
- (7) That the Independent Electoral and Boundaries Commission ensures that the registration of prisoners as voters for presidential elections is implemented and that a progress report on this matter be included in the Commission's Annual Report to the President and Parliament submitted under Article 254 of the Constitution;
- (8) That the Independent Electoral and Boundaries Commission ensures that mechanisms and targets for the progressive realization of registration of Kenyans abroad as voters are put in place and that a progress report on this matter be included in the Commission's Annual Report to the President and Parliament submitted under Article 254 of the Constitution;
- (9) That the Elections Act be amended by deleting section 5(3A) and (3B) to disallow the use of an acknowledgment of registration certificate for National Identity Card (waiting card) in elections;
- (10) That the National Registration Bureau facilitates the expeditious issuance of Identity Cards and, in particular, that-
 - (a) in the case of a fresh application for an identity card, the application be processed within a period of thirty (30) days; and
 - (b) in the case of an application for replacement of an identity card, the application be processed within a period of fourteen (14) days;
- (11) That the National Registration Bureau develops simple guidelines for vetting of applicants for issuance of Identification Cards.

5.2. VOTER EDUCATION

233. Voter education is generally used to describe the dissemination of information, material and programs designed to inform voters about the specifics and mechanics of the voting process. Voter education involves providing information on who is eligible to vote, where and how to register, how electors can check the voter lists to ensure they have been duly included, where, when and how to vote, who the candidates are and how to file complaints on the voting processes.

234. The goal of voter education is to make information available and accessible to all constituents. It should seek to achieve universal coverage of the electorate. It should

also take into account factors such as high rates of illiteracy or the use of different languages in a country, even if there is only one official language. Voter education is generally conducted for a period of three months before a general election, which many stakeholders believe to be inadequate to achieve the extensive coverage required for voter education. A strategy that responds to the needs of the different divides of the citizenry is required to achieve holistic voter education programming in the country.

235. In discharging its mandate of voter education, the Independent Electoral and Boundaries Commission partners with other stakeholders to deliver voter education programmes. In the run-up to the 2013 General Elections, the Commission faced challenges in launching effective voter education initiatives. The Commonwealth Observer Group in its final report noted that *“the IEBC’s voter education campaign, which is critical given the new system and complexity of the voting process, was initiated relatively late in the process.”*⁸⁰
236. The Institute for Education in Democracy, in its Report on the Audit of the Legal, Institutional and Administrative Frameworks that governed the 2013 General Elections, noted that the Independent Electoral and Boundaries Commission had faced a number of challenges due to delays in internal decision-making as well as delays and problems related to the voter registration process, late amendments of laws by the outgoing Parliament and late passage of laws in some instances. The report states *“... these time pressures may have contributed to the IEBC’s relatively late launching of its voter education campaign. Civic and voter education presented extreme challenges in the lead-up to the 2013 elections. With a new Constitution, the implementation of major changes in governance structures due to devolution and multiple changes to the electoral system, Kenyans needed to understand their rights to better exercise them.”*⁸¹ It further recommended that voter education be conducted for a sufficient period that would ensure its effectiveness.
237. In its Post-Evaluation Report on the 2013 General Election⁸², the Independent Electoral and Boundaries Commission stated that *“the policy to deploy two voter educators per ward needed review as the number of educators was inadequate to effectively provide voter education in an entire constituency. Further, the contractual arrangements with other stakeholders for the provision of voter education in line with the provisions of section 26 of the IEBC Act 2011 were not effective.”*

⁸⁰ <http://thecommonwealth.org/media/news/kenya-general-elections-2013-final-report> p34

⁸¹ <http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/research-publications/item/an-audit-of-the-legal-institutional-and-administrative-frameworks-that-governed-the-4th-march-2013-general-elections> page 20 accessed on 1 August 2016

⁸² <http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/research-publications/item/post-election-evaluation-report-on-the-march-4th-2013-general-election-october-2014> page 40, accessed on 31 July 2016

238. The Carter Centre, while acknowledging the role of the Independent Electoral and Boundaries Commission in voter education, recommended in its Final Report⁸³ on the 2013 General Elections, earlier engagement with partners and preparation of materials as well as sound financial support for partners to enhance the voter education effort. They further recommended that greater effort should be made to ensure that voter education materials are comprehensible for illiterate persons.

5.2.1. Current Legal Framework

239. Pursuant to Article 88(4)(g) of the Constitution read together with section 4(g) of the Independent Electoral and Boundaries Commission Act, the Commission is the body responsible for conducting voter education. Further, section 40 of the Elections Act provides that the Commission shall, in performing its duties under Article 88(4)(g) of the Constitution, establish mechanisms for the provision of continuous voter education and cause to be prepared a voter education curriculum.
240. Detailed regulatory and guiding principles for voter education are clearly set out in the Election (Voter Registration) and Election (Voter Education) Regulation, 2012, the Voter Education Curriculum, the Voter Education Manual and the Independent Electoral and Boundaries Commission Website.

5.2.2. Comparative Analysis

241. Many electoral management bodies in various jurisdictions have the responsibility of providing public information and holding voter education campaigns in order to enhance the knowledge of voters of the electoral processes and systems and encourage their participation in elections.
242. In South Africa, for example, voter education is, by legislation, a function of the Independent Electoral Commission. The Commission has historically undertaken this role primarily through contracted non-governmental organizations that develop and deliver voter education programmes during pre-election periods. The Commission has sought to focus more on youth involvement in elections by specifically targeting institutions of higher learning in a bid to encourage more young people to vote. The Commission implements voter education initiatives for a period of about sixteen months prior to an election with the aim of reaching every part of the country. Elections observers have commended the Commission for reaching out to the majority of the citizens through the voter education initiatives implemented throughout the country.
243. In India voter education is implicit in the overall mandate of the Electoral Commission of India. The constitutional mandate of the Commission extends to

⁸³ ⁸³ https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf
page 8 accessed on 31 July 2016

supervision, direction and control of elections. It contains the in-built high responsibility to all eligible voters to register as a voter and voluntarily vote during elections. The Commission has innovatively interwoven voter education with Indian festivals and fairs to reach as many eligible voters as possible. It has also incorporated the use of Campus Ambassadors in institutions of higher learning who facilitate inclusion of voter education in the various co-curricular activities, organizing workshops, talks and debate to enhance the same among the new voter cohort. Social media such as twitter, Facebook and YouTube are key means used by the Commission to conduct voter education to widen its reach.

244. In the Philippines, while voter education is an inherent and legislated function of the electoral management body, it is done in partnership with non-governmental organizations. In the recent past, even the police launched a voter education initiative to extend the reach of the voter education initiatives to the diverse members of the society.

5.2.3. Submissions Received by the Committee

245. A number of submissions were received on the matter of voter education as follows-

(a) Adequate Budgetary Allocation

246. Allocation of adequate resources to conduct effective and timely voter education throughout the electoral cycle was a concern raised by a number of stakeholders. The Jubilee Coalition, the Central Organization of Trade Unions, The Elections Observation Group and the Council of Governors recommended that Parliament should allocate adequate resources for voter education. The Coalition for Reforms and Democracy and the Kenya National Commission on Human Rights further submitted that Government policy should support the provision of adequate finances to enable the Commission to establish effective mechanisms for the continuous provision of voter education so to ensure robust and timely voter education. The Amani National Congress was also of the opinion that more financial support should be given to local radio and television stations to provide time to educate voters.
247. On the whole, stakeholders were in agreement that adequate financial resources would ensure the conduct of meaningful voter education initiatives throughout the country before the elections.

(b) Integrate Voter Education into the Wider Civic Education Programme

248. There was a general convergence of opinion amongst the stakeholders that voter education initiatives should be anchored within the wider national civic education programme. This was the position of the Multi-Sectoral Forum, the Amani National Congress, the Ethics and Anti-Corruption Commission, the Political Parties Liaison

Committee and Jubilee Coalition. In particular, the Multi-Sectoral Forum called for the Department of Justice, with other stakeholders to establish a national civic education programme that should work with the Commission to ensure that Kenyans receive quality, timely and well-coordinated civic and voter education. Mkenya Daima and the Council of Governors further recommended the development of an integrated curriculum of voter education while the Amani National Congress called for long-term investments in civic education.

(c) Engagement and Building of Partnerships Other Stakeholders

249. Transparency International encouraged the Independent Electoral and Boundaries Commission to partner with non-governmental organizations, community-based organizations, faith-based organizations and institutions of higher learning in provision of voter education. This call for wider partnership in voter education was supported by the Ethics and Anti-Corruption Commission who also recommended for the establishment of training partnerships with the Ethics and Anti-Corruption Commission and the National Cohesion and Integration Commission and other stakeholders. Similarly, the Jubilee Coalition in their submission further recommended that the Independent Electoral and Boundaries Commission partners with non-state actors to provide voter education while the Coalition for Reforms and Democracy advised a more collaborative framework involving the participation of civil society, the Independent Electoral and Boundaries Commission and political parties that would develop the curriculum and roll out voter education processes that should be free from Government influence.
250. The Coalition for Reforms and Democracy further submitted that due to the continuous and time consuming nature of voter education initiatives, the Independent Electoral and Boundaries Commission should consider outsourcing the voter education function while retaining overall supervision. The Kenya National Commission for Human Rights further submitted that there should be better coordination between the Independent Electoral and Boundaries Commission and civil society in the provision of structured and comprehensive voter education including mapping of voter education providers and their coverage.

(d) Delivery of Voter Education through Innovative Platforms and Social Media

251. Transparency International recommended the use of social media for voter while the Deaf Association of Kenya requested to be involved in the process. This, they submitted, could be done by hiring sign language interpreters. The Kenya Diaspora Alliance further urged the Independent Electoral and Boundaries Commission to conduct civic and voter education for the voters in the diaspora using the available cost-effective communication technologies.

(e) Media Channel Owned by the Commission

252. The Jubilee Coalition and Article 19 recommended the establishment of a television station owned by the Independent Electoral and Boundaries Commission for purposes of transmitting and sharing information related to elections, its work and voter education.

(f) Timeliness for Voter Education

253. On the timelines relating to the voter education processes, submissions were received to the effect that the ninety days period allocated for voter education is inadequate. The Center for Peace and Democracy/ Human Rights Agenda, the Kenya Young Voters Alliance and the Elections Observation Group submitted that voter education should be continuous throughout the electoral cycle and all over the country as it forms part of the core mandate of the Independent Electoral and Boundaries Commission.

5.2.4. Recommendations of the Committee

254. The Committee recommends that the Independent Electoral and Boundaries Commission-
- (1) Partners with other agencies and non-state actors in the provision of voter education; and
 - (2) Ensures the inclusion of Persons With Disabilities when carrying out voter education.

5.3. NOMINATION AND REGISTRATION OF CANDIDATES

255. Nomination and registration of candidates is an integral element in the electoral system and process. During the one-party state, there was little by way of competitive elections. Following the repeal of section 2A of the Constitution in 1991, which had hitherto prohibited the formation of other political parties, Kenya became a multi-party State. In the 1992 General Elections that followed, party nomination processes were conducted in a way that could be described today as chaotic and undemocratic. These nominations displayed the highest forms of interference by party leadership, where successful candidates were replaced by those preferred by the party leader. Party hopping became the norm and created confusion in the whole process. This discontentment with the process and party hopping by disgruntled candidates continued to manifest itself in the subsequent General Elections.
256. The promulgation of the Constitution of Kenya in 2010 and a series of other legal and administrative electoral reforms necessitated by the new constitutional dispensation that followed were intended and expected to usher in greater confidence for candidates and the public in the party nomination processes. In particular, it was expected that the legal and administrative reforms would resolve

the challenges that had been witnessed in political party primaries in previous elections.

257. In the scheme as set out in the Constitution, the Elections Act and the Political Parties Act, political parties were expected to hold competitive party primaries as part of the candidate nomination processes. Political parties were also obliged to have in place internal dispute resolution mechanisms so that the final list of candidates submitted to the electoral management body was acceptable to all parties. These mechanisms were expected to infuse internal democracy in the parties.
258. Despite the reforms in the law, the challenges previously witnessed in the nomination processes prior to 2013 elections continued unabated. The Carter Centre in its Report on the 2013 General Elections⁸⁴ stated that *“the selection of candidates by political parties was publicly perceived as disorganized, marred with technical difficulties, and surrounded by persistent rumors of fraud and manipulation of results.”*⁸⁵ They further observed that *“the major political parties opted to have their nominations as close to the deadline as possible in order to limit last-minute party-hopping.”*⁸⁶ And further that *“moving the primaries closer to the IEBC deadline for submission of candidate lists only brought confusion to the candidate nomination process...[and]...ultimately, the decision to hold party nominations so close to the deadline resulted in the inability to conduct an all-inclusive nomination process that allowed for timely dispute resolution.”*⁸⁷
259. This state of affairs had implications on the dispute resolution process anticipated in the law. The Carter Center reported that *“immediately following the primaries, 206 complaints were filed with the IEBC dispute resolution committee challenging the conduct and the results of the primaries. A total of 47 cases proceeded to the high court, challenging the decision of the committee. In the meantime, the IEBC was running out of time to prepare ballot boxes and other materials. While the high court rejected some of the cases, it directed the IEBC tribunal to reconvene and hear a number of complaints again. Some of the aggrieved candidates were still getting orders requiring the IEBC to include them in the ballots two weeks prior to elections, after the ballot papers had started to be printed.... The last-minute primaries, combined with a lengthy judicial process, negatively impacted the electoral calendar and put an unnecessary operational pressure on the IEBC.”*

⁸⁴ https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-final-101613.pdf, accessed on 31 July 2016

⁸⁵ Ibid. 32

⁸⁶ Ibid.

⁸⁷ Ibid. 33

260. These concerns were reiterated in the Elections Observation Report of the European Union⁸⁸ in which it was observed that *"the 2013 nominations for political party primaries took place rather chaotically amid accusations of rigging... Factors such as lack of experience, late preparation and mismanagement caused delays and subsequently provoked multiple disputes over the results... In some areas, the party primaries were marred by violent incidents ... The way the political party nomination process was carried out led to party hopping and was also discriminatory against women and marginalized groups."*⁸⁹
261. In its Post-Evaluation Report on the March 4th 2013 General Election⁹⁰, the Independent Electoral and Boundaries Commission also made observations on the nomination process. The Commission found that the party primaries were poorly organized, with widespread reports of fraud and manipulation of results, and it did not appear that parties had adequate internal dispute mechanisms, or did not leave themselves enough time to properly complete all necessary procedures before the nomination deadline.
262. During the 2013 General Elections there were reported cases of party leaders dishing out certificates to those who lost during the party primaries while some candidates secured direct nomination without participating in the primaries at all. These undemocratic processes led to situations where the lists given to the IEBC by the parties were not always correct, with some wrong names appearing in the ballot papers. This meant that while the IEBC was printing the ballot papers, some aspirants were in the courts contesting the nomination process. In cases where they were successful it meant that the wrong names appeared on the ballot paper and thus an election petition was likely after the polls. This whole exercise undermined the internal democracy the political parties were expected to infuse into the party primaries. Women candidates were specifically adversely affected by the shambolic party primaries.
263. In its Report: Gender Audit of Kenya 2013 Election Process⁹¹, FIDA Kenya noted the following key challenges that women faced in the party primaries-
- (a) violence against women candidates;
 - (b) use of unfair tactics by male opponents;
 - (c) marginalization and exclusion of women at party level (e.g., irregular direct nominations, names missing from ballot papers); and

⁸⁸ http://www.eods.eu/library/eu-eom-kenya-2013-final-report_en.pdf accessed on 31, July 2016 accessed on 31, July, 2016

⁸⁹ Ibid

⁹⁰ <http://www.iebc.or.ke/index.php/2015-01-15-11-10-24/research-publications/item/post-election-evaluation-report-on-the-march-4th-2013-general-election-october-2014> accessed on 31, July 2016

⁹¹ http://www.fidakenya.org/dr7/sites/default/files/ELECTIONS%20GENDER%20AUDIT%202013_0.pdf

- (d) ineffective and often non-existent dispute resolution mechanisms at party level.

264. The report further stated that “*our political contest requires an enormous outlay of social capital, yet the processes of economic, cultural, and political capital accumulation still favour men more than women, regardless of men’s ethnic, religious, or class divisions. In addition, the first-past-the-post electoral system has produced an overly adversarial and violence-prone political contest, which often favours men who can hire and retain violent gangs and run nocturnal campaigns to the detriment of women candidate.*”⁹²

265. In its Post-Election Evaluation of the conduct of the 2013 General Elections, the Independent Electoral and Boundaries Commission, with reference to the avalanche of disputes that emanated from the process, observed the need for the development of guidelines and a policy governed by law, to determine the structure and management of party nomination processes.⁹³

5.3.1. Current Legal Framework

266. Pursuant to Article 88 of the Constitution, the Independent Electoral and Boundaries Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections prescribed by an Act of Parliament. With regard to the process of nomination of candidates for election, Article 88(4)(d) of the Constitution mandates the Commission to regulate the process by which parties nominate candidates for election. Article 88(4)(e) of the Constitution further vests in the Commission the function of settling electoral disputes, including disputes relating to or arising from nominations, but excluding election petitions and disputes subsequent to declaration of election results.

267. The mandate of the Commission under Article 88(4)(d) and (e) of the Constitution is re-stated in section 4(d) and (e) of the Independent Electoral and Boundaries Commission Act. Section 4(k) of the Act further mandates the Commission to monitor compliance with the legislation required by Article 82(1)(b) of the Constitution relating to nomination of candidates by parties.

268. The Elections Act in section 13 provides for nomination of candidates by political parties. In particular, section 13(1) of the Act requires that “*a political party shall nominate its candidates for an election under [the] Act at least forty-five days before a general election under [the] Act in accordance with its constitution and nomination rules*”. Section 13(2) further provides that a political party shall not

⁹² Ibid.2

⁹³ Post-election Evaluation Report on the March 4th 2013 General Elections, Op.Cit.,41

change the candidate nominated after the nomination of that person has been received by the Commission. Exceptions to this would only be in the event of death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate.

269. The Code of Conduct for Political Parties as set out in the First Schedule to the Political Parties Act requires at paragraph 4 that political parties *"respect and uphold the democratic process as they compete for political power so as to implement their policies"* and further at paragraph 6 that they *"respect, uphold and defend their respective political party constitutions, political party election rules, political party nomination rules and any other political party rules and regulations developed and agreed upon in accordance with this code of conduct"*. Paragraph 19 of the Second Schedule further requires that political parties make provisions in their constitutions or rules on their nomination rules and regulations with respect to elections of the party and rules governing the preparation of party lists.

270. One primary function of any political party is to nominate and present a candidate in elections. This right to elect and be elected is not only protected and guided by the Constitution and our statutes, but is also provided for by both regional and international instruments. The right to found a political party flows from the internationally protected rights to freedom of association and assembly and non-discrimination, among other regionally and internationally recognized rights.

5.3.2. Comparative Analysis

271. The table below sets out a comparative analysis of some of the critical elements of the nomination process in Kenya vis-à-vis those of comparative jurisdictions.

Table 5: Critical Elements in the Nomination Process in Various Jurisdictions

Country	Supervision/ Conduct of Nomination Processes	Rules of Nominations Developed by	Nomination period (number of days before the election)	Electronic/ Manual Nomination Processes	Gender Nomination Processes	Representation in Nomination Processes	Eligibility to Vote in Nomination Processes	Funding for Nomination Processes
Kenya	Political Party	Political party	45 days before	Manual	No specific legislation for parties	Party members only	Political party	
Canada	Political party	Political party	21 days before	Electronic filing of the nomination form	No specific legislation- parties have affirmative action policy on nomination	Party members	A deposit of USD 1000 is given to the returning officer by the candidate/party ⁹⁴	
Philippines	Political party	Political parties	45 days before for local position and 90 days before election day for national position	Manual filing of the nomination form	Several legislation passed at the National level. ⁹⁵	Party members only	Political party	
Nigeria	Independent National Electoral Commission (INEC) ⁹⁶	Independent National Electoral Commission (INEC) ⁹⁷	30 days before the day of election. ⁹⁸	Manual	Lacks a national quota system but parties have their own affirmative action regulations that govern them. ¹⁰⁰	Party members	Political party ¹⁰¹	
South Africa	Independent Electoral Commission of South Africa (IEC)	Independent Electoral Commission of South Africa (IEC)	Parties can submit Party Lists from proclamation of date 25 February until the cut-off date before 17h00 ¹⁰²	Electronic	ANC has an electoral quota system in its nomination guidelines. There is no national legislation governing electoral quotas. ¹⁰³	Political party members	Political party	
Ghana	Electoral Commission of Ghana ¹⁰⁴	Political parties	Shall be stated in the notice of election ¹⁰⁵	Manual ¹⁰⁶	No affirmative action legislation-	Political Party delegates	Political parties	

⁹⁴ Canada Elections Act

⁹⁵ <http://www.pcw.gov.ph/focus-areas/leadership-political-participation/initiatives> Accessed on 6th August, 2016 at 12.13pm.

⁹⁶ Electoral Act section 86, 2011.

⁹⁷ Electoral Act Section 87, 2011

⁹⁸ Section 34 of the Electoral Act, 2011.

⁹⁹ Gender in Nigeria Report 2012; improving the lives of Girls and women in Nigeria. British Council, Nigeria.

¹⁰⁰ <https://eisa.org.za/pdf/JAE11.Pogson.pdf>

¹⁰¹ Section 92(1) of the Electoral Act, 2011.

¹⁰² http://www.congressofthepeople.org.za/uploads/files/Candidate_Nomination.pdf Accessed on 6th August, 2016 at 11.47 am.

¹⁰³ Mavivi Myakayaka-Manzini (2003), *Political Party Quotas in South Africa* International Institute for Democracy and Electoral Assistance http://aceproject.org/ero-en/topics/parties-and-candidates/CS_South_Africa_Manzini-final2-6-2004.pdf Accessed on 6th August, 2016 at 11.16am

¹⁰⁴ Constitution 1992, Article 51

¹⁰⁵ C. I. 15 Public Elections Regulations, 1996, Section 3(2)

¹⁰⁶ C. I. 15 Public Elections Regulations, 1996

5.3.3. Submissions Received by the Committee

272. A number of submission were received on the matter of nomination of candidates as follows-

(a) Supervision and Conduct of Political Party Nominations

273. A number of concerns were raised on the matter of supervision and conduct of political party primaries. It was proposed in a number of submissions, that the Independent Electoral and Boundaries Commission should fully manage nominations by political parties. This was the submission of the Jubilee Coalition, the Multi-Sectoral Forum, the Commission on Administrative Justice, the Evangelical Alliance of Kenya, the Kenya Diaspora Alliance and Article 19 who all submitted that the Commission should manage nominations by political parties. Mkenya Daima in their submissions stated that the Commission should help create the necessary capacity and support for holding credible nominations.

274. The Kenya National Commission for Human Rights recommended that the responsibility for the nomination process be shared between the parties and the Commission. They took the view that the Commission should take a more active role in the political party primaries as opposed to the “*hands off*” approach which they stated was witnessed in the 2013 General Elections, in contravention of its obligation under Article 88 of the Constitution. The Coalition for Reforms and Democracy submitted that issue of disputes arising out of nomination of candidates or internal management of parties should be outside the province of the Independent Electoral and Boundaries Commission. The Coalition proposed that the Political Parties Dispute Tribunal should be completely divorced from the Independent Electoral and Boundaries Commission as it did not fall under the co-mandate of the Commission.

275. There were also submissions that highlighted the critical role played by the Office of the Registrar of Political Parties in the nomination processes particularly in ensuring compliance with regulations and guidelines for nomination processes. Consequently, calls were made by, amongst others, the Multi-Sectoral Forum, the Amani National Congress, the Commission for Administrative Justice the Elections Observation Group, the Society for International Development and Mkenya Daima, for the recruitment and appointment of a substantive Registrar of Political Parties.

(b) Timelines for Nomination Processes

276. On the timelines relating to the nomination processes, submissions were received to the effect that the forty-five days period set out in section 13(1) of the Elections Act for the nomination by political parties of their candidates for an election was not adequate. This was the view taken by, amongst others, Article 19, the Kenya Young Voters Alliance and Hon. Kabando wa Kabando. Various proposals were

made for enhancement of the timelines, some suggesting that ninety days and others six months.

(c) Gender Representation in Nomination Processes

277. FIDA-Kenya in their submissions encouraged the provision of a nomination system that would result in the nomination of more women candidates and that the nomination process that requires parties to not only ensure that both genders vie for every electoral seat, but also that women are supported and facilitated by the parties. They further urged that the nomination process should be guided by affirmative action policy guidelines to be developed by the Office of the Registrar of Political Parties for adoption and implementation by every political party. The Office of the Registrar of Political Parties also urged that the nomination process should abide with the “*not more than two-thirds*” gender principles. The National Cohesion and Integration Commission recommended that measures be put in place to compel parties to nominate a larger number of women to contest for electoral seats.

(d) Registration of Political Party Members

278. There was general concern about the nomination processes and the persons entitled to participate in nominations of the various political parties. Claims were made that the lack of proper structures created a lacuna for interference in the nomination processes. In this regard, the Coalition for Reforms and Democracy, the Jubilee Coalition and the Council of Governors urged that the Registrar of Political Parties should continuously update political parties’ membership lists. Further, the Kenya National Commission on Human Rights proposed that the Political Parties Act be amended so as to obligate political parties to have all their members registered and issued with membership cards. On this matter, the Office of the Registrar of Political Parties and the Elections Observation Group in their submissions stated that the political parties should use only their membership list in conducting nominations instead of the voters register.

(e) Rules on Nomination Processes

279. The rules and guidelines governing nomination processes were identified as an area of concern. The Society for International Development (SID) in its presentation submitted that despite the legal framework in place, most parties had failed to institute credible internal party elections to ensure solid nominations. They further observed that given the zoning of the country in terms of party blocs, it would be important to put in place capacity-building strategies, clear timelines and compliance monitoring for the nomination processes that they described as the “*real election*”.

280. There were submissions, by the Evangelical Alliance to the effect that the Independent Electoral and Boundaries Commission should develop a uniform

standard of managing nomination processes. Similarly, the Council of Governors proposed that the Independent Electoral and Boundaries Commission should develop basic minimum guidelines and standards that political party nominations should adhere to. The National Gender and Equality Commission and the Office of the Registrar of Political Parties urged that nomination guidelines be developed and published. This was also the position of the Kenya National Commission on Human Rights which stated that political party nomination rules should be standardized to ensure compliance with constitutional provisions, rather than the prevailing situation where each political party develops its own nomination rules. They further urged that the Registrar of Political Parties should take firm action against parties that fail to comply with the provisions of the Political Parties Act. On this, they submitted that the law should be amended to provide, without any doubt, that the offences provided for in the Elections Act would apply in equal measure to the nomination process.

(f) Management and Funding of Nomination Processes

281. The Multi-Sectoral Forum submitted that State funding for political parties should be enhanced to include funds for the purpose of enabling the Independent Electoral and Boundaries Commission to conduct nominations for parties funded by the State. Similarly, the Evangelical Alliance in their submissions submitted that sufficient funding should be provided to the Independent Electoral and Boundaries Commission for overseeing the nomination exercise of candidates. The Office of the Registrar of Political Parties further submitted that all political parties participating in an election ought to be provided with the requisite software by the Independent Electoral and Boundaries Commission for nomination purposes.

5.3.4. Recommendations of the Committee

282. The Committee recommends as follows-

- (1) That list of party members be submitted to the Commission at least 90 days before the date of the general election;
- (2) That party membership lists be used for party primaries;
- (3) That political parties forward to the Independent Electoral and Boundaries Commission the names of their candidates for nomination twenty-one days before the nominations and that the Independent Electoral and Boundaries Commission publishes the names in the *Kenya Gazette* within seven days of receipt;
- (4) That the Independent Electoral and Boundaries Commission publishes the dates of party primaries of all political parties in the *Kenya Gazette*;
- (5) That the names of party candidates and independent candidates who will contest in a general election be submitted to the Commission at least sixty (60) days before the election;

- (6) That independent candidates forward their names to the Independent Electoral and Boundaries Commission fourteen (14) days before the nomination date in the same manner as candidates participating in the party nominations;
- (7) That after the names of candidates are forwarded to the Independent Electoral and Boundaries Commission, a candidate who changes their party shall not be eligible to contest in an election as a candidate of the new party or as an independent candidate.
- (8) That any amendments with regard to timelines for the nomination processes be concluded at least six months before the August, 2017 General Elections so as not to interfere with preparations for the elections;
- (9) That at the request of a political party, the Independent Electoral and Boundaries Commission shall conduct and supervise party nominations in accordance with Article 88 of the Constitution;
- (10) That the Office of the Registrar of Political Parties continuously updates party membership lists so that only registered members are allowed to participate in party nominations;
- (11) That the Political Parties Act be further amended to provide for fiscal incentives be put in place in the law to encourage the implementation of the two-thirds gender principle in the nomination processes by political parties; and
- (12) That the sanctions prescribed in the Political Parties Act be enforced by the Registrar of Political Parties and that the Office of the Registrar of Political Parties be strengthened to enable the Office to effectively carry out its functions.

5.4. CAMPAIGN MANAGEMENT

283. It is crucial for the electoral management body to create an enabling environment for political parties, candidates and the electorate to meaningfully participate in electoral campaigns. This also entails creating a level playing field for people of whichever gender, age and economic status to participate in the electoral process without fear of intimidation, violence or improper influence.
284. Part of campaign management entails the management of finances that are involved in campaigns and elections commonly referred to as campaign financing. The legitimacy of financing the democratic process can become tainted by risks that threaten to undermine its very purpose if the financing of political parties and electoral campaigns is not adequately regulated. Well-designed political finance regulations that are enforceable and anchored in a country's context play a vital role in electoral processes.

285. According to the Kriegler Report¹⁰⁷, election management and administration was at the core of the failure that was noted in the disputed 2007 elections, and constituted the main trigger for the 2008 post-election violence. It was noted, in the report, that *"campaigning at all three levels of the contest had been vigorous, characterised by robust language occasionally lapsing into ethnic hate-speech and deteriorating into violence"*. It was further noted that the voters, together with their leaders, engaged in the following unacceptable practices-

- (a) *vote-buying and -selling;*
- (b) *unapologetic use of public resources for campaigns;*
- (c) *participation by public servants in campaign activities of certain camps;*
- (d) *ballot-stuffing;*
- (e) *organising marauding gangs and bully-boys to "zone" regions and electoral areas and intimidate opponents;*
- (f) *using and cheering and uploading hate speech and ethnic sentiments;*
- (g) *demonising opponents and presidential candidates of opponent camps; and*
- (h) *using sexist tactics and violence to keep women out of the race.*

286. The need for effective regulation of campaign financing was noted by the Commonwealth Observer Group in its Report¹⁰⁸ on the 2013 General Elections as follows -

*"It appeared that considerable resources—financial and material—were used during the campaigns. In the absence of clear campaign finance legislation, which the country's previous parliament failed to approve, spending during the campaign period was largely unregulated."*¹⁰⁹

The Group further noted-

*"...that while existing campaign finance regulations (Sec. 27, Political Parties Act) prohibit political parties from obtaining foreign funding, reporting requirements for campaign expenditure were inadequate, except for funds provided by the State. The transparency of the electoral process could be enhanced by an early passage of campaign finance legislation."*¹¹⁰

287. The Kriegler Report further noted that *"unregulated political finance should not be allowed in a young democracy, where it can easily have adverse impacts on an election"*.¹¹¹ This was prompted by observations on the inadequacy of regulation of campaign financing in the 2008 General Elections. Some of the malfeasances noted in the Report included-

- (a) *the use, for campaign or party objectives, of money that a political office holder has received from a corrupt transaction;*

¹⁰⁷ Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007

¹⁰⁸ Report of the Commonwealth Observer Group on the Kenya General Elections of 4th March, 2013

¹⁰⁹ Report of the Commonwealth Observer Group on the Kenya General Elections of 4th March, 2013, pg 19

¹¹⁰ Ibid.

¹¹¹ Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007

- (b) *unauthorised use of state resources by parties for political purposes which are a common feature of ruling parties' campaigns in many democratic countries, i.e. the resources available to office holders, national and local, are blatantly used for electioneering, use of state-owned vehicles to ferry electors to governing party rallies and party supporters employed on the public payroll and expected to spend their time on political campaigning;*
- (c) *acceptance of money in return for an unauthorised favour or promise of a favour in the event of election to an office (quid pro quo donations);*
- (d) *contributions from disreputable sources; and*
- (e) *spending of money on illegal purposes such as vote-buying or unfair purposes such as treating voters (especially ordinary voters) by giving food, drinks and/or accommodation.*

5.4.1. Current Legal Framework

288. Article 88 of the Constitution mandates the Commission to undertake the following functions-
- (i) *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;*
 - (j) *the development of a code of conduct for candidates and parties contesting elections;*
289. The Independent Electoral and Boundaries Commission Act further restates the mandate of the Commission in section 4(i) and (j).
290. The Elections Act defines “campaign period” as “*the period specified as such in the notice issued by the Commission in relation to an election*”. Further guidelines on the campaign period are elaborated in Section 57 and 58 of the Elections Act. According to the Election Manual published by the Independent Electoral and Boundaries Commission and the National Democratic Institute for International Affairs, the law no longer provides for an official campaign period because the Political Parties Act allows political parties to popularize their party and policies throughout the electoral cycle. While this involves an element of campaigns, campaigns related to elections heighten after presentation of nomination papers. Parties and candidates are required to undertake their campaigns in a manner that is respectful and adheres to the law.
291. The Electoral Code of Conduct was enacted as part of the Elections Act. The objective of the code 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*”, pursuant to the Second Schedule of the Act, Sections 51(6) and 110(1) of the Elections Act.

292. The Election Campaign Financing Act was enacted to provide for the regulation, management, expenditure and accountability of election campaign funds during election and referendum campaigns.

293. Section 3 (1) of the Act provides that the Commission, pursuant to Article 88 (4)(i) of the Constitution and section 4(i) of the Independent Electoral and Boundaries Commission Act, shall be responsible for the regulation and administration of campaign financing under this Act and shall—

- (a) keep a register of authorised persons under this Act;*
- (b) supervise candidates, political parties, referendum committees and authorised persons in relation to campaign expenses;*
- (c) set spending limits and enforce compliance with such limits;*
- (d) set limits and verify sources of contributions to a candidate, a political party or a referendum committee;*
- (e) monitor and regulate campaign expenses;*
- (f) provide a framework for the reporting of campaign expenses;*
- (g) advise a candidate, a political party or a referendum, committee on any matter relating to campaign expenses; and*
- (h) provide and enforce a framework for the regulation of media coverage;*
- (i) perform such other functions as may be necessary for the purposes of this Act.*

294. Section 5 of the Election Campaign Financing Act further provides that:

The Commission shall make rules to regulate election campaign financing—

- (a) in the case of a general election; at least twelve months before the election; and*
- (b) in the case of a by-election or referendum, at such time as the Commission may determine.*

295. Section 11 of the Election Campaign Financing Act states that the sources of funds for purposes of financing party nomination, election or referendum campaign are—

- (a) contributions received from any person, political party or any other lawful source;*
- (b) contributions from a lawful source, not being directly from a foreign government; and*
- (c) contributions from a harambee.*

296. Further, Section 12 of the Election Campaign Financing Act provides that—

(1) The Commission shall, at least twelve months before a general election, by notice in the Gazette, prescribing limits on—

- (a) total contributions;*
- (b) contributions from a single source;*
- (c) paid-up media coverage;*

- (d) *loan forming part of a contribution, which a candidate, political party or referendum committee may receive during the expenditure period*
- (2) *Except where contribution is from a candidate to that candidate's campaign financing account, or from a political party or a referendum committee to that political party's or referendum committee's campaign financing account, no contribution from a single source shall exceed twenty percent of the total contributions received by that candidate, political party or referendum committee.*
- (3) *The Commission shall prescribe the limit beyond which contributions received by a candidate, a political party or a referendum committee a single source may be disclosed.*

297. The Independent Electoral Boundaries Commission has formulated draft Election Campaign Financing Regulations pursuant to section 5 of the Election Campaign Financing Act. The said regulations are currently undergoing pre-publication scrutiny at the National Assembly. The draft Regulations provide for, among other matters:

- (a) Registration of an organisation that intends to campaign in support of, contribute to or otherwise directly incur expenditure in support of a political party, a candidate or referendum committee (regulation 9);
- (b) Sources of contributions (regulation 12), including-
 - (i) Political party contributions;
 - (ii) Funds received under section 25 of the Political Parties Act;
 - (iii) Donations from individuals and other authorised persons;
 - (iv) Supporting organisation contributions; and
 - (v) Self-financing contributions;
- (c) The making of reports on expenditure and contributions made; and
- (d) The making of returns (including nil returns).

298. It is however important to note that the Regulations do not set any specific limits on expenditure or contributions, but instead mandate the Commission to gazette such limits.

5.4.2. Comparative Analysis

299. In the Philippines, the main objective for regulating campaign financing can be found in the 1987 Constitution, specifically Article II, section 26, which provides that *"the State shall guarantee equal access to opportunities for public service, and prohibit political dynasties as may be defined by law. Equal access to opportunities means a level playing field for all candidates, regardless of their financial capacity."* The significance of this policy was recognized by the Supreme Court in the case of *Chavez v. COMELEC*,¹¹² when it stated that *"equal opportunity to*

¹¹² *Melchor Chavez v. Commission on Elections*, G.R. No. 162731-32. April 13, 2004

proffer oneself for public office, without regard to the level of financial resources one may have at his disposal, is indeed of vital interest to the public. The State has the duty to enact and implement rules to safeguard this interest."

300. Section 95 of the Philippines Constitution prohibits contributions for purposes of partisan political activity made either directly or indirectly by any of the following-
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- (a) Public or private financial institutions;*
- (b) Natural and juridical persons who hold contracts or sub-contracts to supply the government or any of its divisions, subdivisions or instrumentalities, with goods or services or to perform construction or other works;*
- (c) Natural and juridical persons who have been granted franchises, incentives, exemptions, allocations or similar privileges or concessions by the government or any of its divisions, subdivisions or instrumentalities, including government-owned or controlled corporations;*
- (d) Natural and juridical persons who, within one year prior to the date of the election, have been granted loans or other accommodations in excess of P 100,000 by the government or any of its divisions, subdivisions or instrumentalities including government-owned or controlled corporations;*
- (e) Educational institutions;*
- (f) Officials or employees in the Civil Service, or members of the Armed Forces of the Philippines; and*
- (g) Foreigners and foreign corporations.*

301. Section 13 of the Republic Act No. 7166, which amended sections 100 of the Omnibus Election Code, provides the following limits with regard to authorized expenses of candidates and political parties-

- 1. for President and Vice-President, Ten pesos (P10.00¹¹⁴); and*
- 2. for other candidates Three Pesos (P3.00) for every voter currently registered in the constituency where he filed his certificate of candidacy: Provided, That a candidate without any political party and without support from any political party may be allowed to spend Five Pesos (P5.00) for every such voter; and*
- 3. for political parties. - Five pesos (P5.00) for every voter currently registered in the constituency or constituencies where it has official candidates.*

302. In India, the official campaign period lasts at least two weeks from the drawing up of the list of nominated candidates, and officially ends forty-eight hours before

¹¹³ Compare with section 27 of the Political Parties Act, no 11 of 2011

¹¹⁴ 1 Philippine peso = 2.16 Kenyan shillings

polling closes. During the election campaign the political parties and contesting candidates are expected to abide by a Model Code of Conduct developed by the Election Commission on the basis of a consensus among political parties. The Model Code lays down broad guidelines as to how the political parties and candidates should conduct themselves during the election campaign. It is intended to maintain the election campaign on healthy lines, avoid clashes and conflicts between political parties or their supporters and to ensure peace and order during the campaign period and thereafter, until the results are declared.

303. In the United Kingdom, legislation to prevent excessive spending by electoral candidates has been in place since the Corrupt and Illegal Practices Prevention Act of 1883. Currently, the law regarding campaign financing in the United Kingdom is contained in the Representation of the People Act of 1983, and the Political Parties Election and Referendum Act of 2000. The objective of legislation on campaign financing however focuses on limiting the expenditure of political parties and individual candidates, and not the donations that can be received by these parties and individuals.

304. The United Kingdom experiences very high campaign spending owing to the fact that campaigns by presidential candidates begins in January of the election year with a series of primaries and caucuses, leaving ten months to election day.

5.4.3. Submissions Received by the Committee

305. A number of submissions were received on the matter of campaign management as follows-

(a) Regulation of Campaigns and Capping of the Campaign Period

306. The Kenya Young Voters Alliance noted that Campaigns in Kenya are a sensitive subject and that the running of campaigns in Kenya has contributed to a vicious cycle of violence. It recommended the setting of parameters for campaigns, and engraining those rules and regulations in the law. For there to be effective regulation of campaigns, the Ethics and Anti-Corruption Commission in its submissions recommended the strengthening of the intelligence capacity of law enforcement agencies to effectively deal with campaign malpractices. The Evangelical Alliance of Kenya further submitted that political party agents to be restricted from making political pronouncements outside Parliament and political party meetings, to prevent premature campaigns.

(b) Enforcement of the Code of Conduct

307. In their submissions, the Council of Governors and the Jubilee Coalition, the Coalition for Reforms and Democracy noted the need for effective enforcement of the Electoral Code of Conduct by all responsible parties such as political parties, Independent Electoral and Boundaries Commission, the Registrar of Political Parties, the Media Council, the Inspector General, the Director of Public

Prosecutions and the National Cohesion and Integration Commission. The Attorney General proposed that the Independent Electoral and Boundaries Commission develops regulations for the enforcement of the Code of Conduct. The Coalition for Reforms and Democracy and the Attorney-General further recommended the inclusion of a schedule of campaigns in the Regulations.

(c) Campaign Financing: Regulation of Sources of Funds and Caps on Expenditure

308. On the need to regulate campaign financing, the East African Centre for Law and Justice, while recommending that candidates should be given strict guidelines on how much funding they can use from their personal resources and how they can fundraise from supporters, noted that-

As long as campaigns are bankrolled by candidates, two things will continue happening: First, financially weak candidates will always have a hard time trying to make it in politics due to massive voter bribery and flashy campaigns. Second, those who run for office will always see it as an investment where once they enter office, they have to recoup their losses and make a profit. This perpetuates corruption even in governance.

309. The Kenya Diaspora Alliance and the Central Organisation of Trade Unions concurred that there should be a cap on campaign financing, and that the cap should be enacted and strictly complied with. The Evangelical Alliance of Kenya, in their submissions, also recommended that a strict campaign financing policy be enacted, and that there be disclosure on the sources of funds used. The Office of the Registrar of Political Parties also submitted that there should be operationalization of Article 88(4)(i) on campaign financing, and Article 92(h) in terms of developing regulations and monitoring tools on use of public resources.

310. Although the Election Campaign Financing Act was enacted in 2013, most stakeholders noted that no regulations have been put in place by the Independent Electoral and Boundaries Commission to operationalise the Act. As such, the Jubilee Coalition, the Coalition for Reforms and Democracy and the Centre for Multi-Party Democracy submitted that the Independent Electoral and Boundaries Commission should develop the campaign financing regulations. NARC- Kenya concurred with that submission, and recommended that appropriate legislation be enacted to curb voter bribery. The Independent Electoral and Boundaries Commission however submitted that the Election Campaign Financing Regulations have already been drafted, and that they have already been submitted to the National Assembly for pre-publication approval.

311. Transparency International noted the need to enhance the institutional capacity to implement the Election Campaign Financing Act and seek partnership in monitoring spending. Article 19 recommended that institutions such as the Central

Bank of Kenya be strengthened so as to give it capacity to track money from the hands of politicians as well as to curb the circulation of illegal money during campaigns.

5.5. PUBLICITY AND MEDIA

312. The media plays an integral role in the election process in Kenya. In a 2013 report by BBC Media Action¹¹⁵, a midline survey showed that more than half (58%) of adult Kenyans who voted in the 2013 election stated that debate in the media influenced their decision on who to vote for. Additionally, for forty-four percent (44%) of Kenyans who voted in the 2013 General Elections, media and communication (radio, television, press, mobile phones and the internet) were reported to be the main sources of information for voters when deciding who to vote for. Radio emerged top on the list, with one in four voters (26% of voters) reporting that this was their main source of information with regard to the candidates to vote for.
313. The media plays an important watchdog role in elections. The media is an important monitor through the various election processes and has an important role of informing the public on electoral malpractices by candidates, for example vote-buying, illegal party financing, defamation and hate speech in campaigns, voter intimidation and exclusion of marginalized or special interest groups.
314. The media plays a significant role in voter education by creating awareness on the electoral processes and emerging issues. The BBC Media Action survey revealed that aside from influencing voting trends, the media played a crucial role in educating the public in the run-up to the 2013 General Elections. These elections, the first to be conducted under the Constitution of Kenya, 2010, were perhaps the most complicated elections in Kenya on account of the new governance structures, both at the national and county levels of Government, established in the Constitution. In these elections, the Independent Electoral and Boundaries Commission, in discharging its mandate of voter education, used the media for mass media campaigns in the form of media scripts, newspapers adverts, road shows in collaboration with media house, media appearances, radio announcements and presenter-guided television talk shows to disseminate information on elections¹¹⁶.

¹¹⁵ Muriithi Angela Githitho and Page Georgina, *The Kenyan election 2013: the role of the factual discussion programme Sema Kenya (Kenya Speaks)*, Bridging Theory and Practice Research Dissemination Series: Working paper Issue, BBC Media Action, 05th September 2013, pg.13-14
Available at http://downloads.bbc.co.uk/mediaaction/pdf/kenya_election_2013_working_paper.pdf [accessed 16th July, 2016]

¹¹⁶ Independent Electoral and Boundaries Commission, *Post-Election Evaluation Report on the March 4th 2013 General Election*, October, 2013, pg.12

315. For political parties and candidates in elections, the media creates a platform for presentation of their manifestos. The media also highlights the needs of special interest groups and marginalized groups by covering issues faced by different sections of the society including marginalized and underserved groups such as the youth, elderly, women, the poor, ethnic and religious minorities in matters of elections. Further, the media provides a forum for the enunciation of diverse viewpoints and information on various issues relevant to elections and further offers a forum for debates and discussions on public interest and topical issues involving citizens, civil society, political parties and Government officials or bodies.

316. Overall, the Independent Review Commission on the General Elections made the following recommendations concerning the media¹¹⁷-

- *The Media Council of Kenya should oversee the conduct of media and properly enforce its Code of Conduct.*
- *Develop a media and elections policy to encourage accurate and responsible reporting on electoral matters.*
- *There should be full disclosure on a regular basis of the actual owners of media.*
- *The KBC Act should be amended to give the ECK the power to compel KBC to act in accordance with the law.*
- *Mechanisms should be set up to ensure the independence and public accountability of KBC*
- *The access to KBC by the Presidential Press Service, particularly in an election year, should be reviewed.*
- *Key provisions in the KBC Act pertaining to free access slots for party political broadcasts should be clarified and precisely defined as to the rights of the parties and candidates.*
- *A substantive Act prohibiting hate speech should be considered.*

317. With regard to freedom of expression and equitable access to the media, the Independent Review Commission on the General Elections made the following recommendations-

- *Enhance the constitutional guarantee of the right by a provision restricting hate speech.*
- *Media, especially State-owned media such as KBC, should strive to offer balanced coverage to all the players in the election as is required by KBC's establishing statute and enhanced by the IPPG [Inter-Parties Parliamentary Group] agreement.*

¹¹⁷ Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007, pg.156

- *The ECK should ensure that the media receives correct and timely information so as to mitigate the possibility of misinformation such as was witnessed in the 2007 election period.*
- *Media houses should ensure that they recruit professional reporters and editors and, in the case of talk-shows and call-in programmes, avoid using staff who are ignorant of conflict reporting or moderation.*
- *Media houses should ensure that they liaise with the ECK before publishing results to ensure the reliability and accuracy of the information they pass on to their readers/ audience.*
- *The ECK or its successor should urgently devise and implement a sound media relations policy and strategy”*

318. The media’s role in peace building and conflict resolution was demonstrated in the 2013 General Elections, despite criticisms of self-censorship. According to the BBC Media Action Report the most damaging criticism leveled against the media was that it practiced “self-imposed censorship” before, during and immediately after the 2013 election with respect to sensitive topics and topics that were feared to be capable of inciting violence. Experts described the media as “very cautious”, “very restrained”, “careful”, “reticent” or “hesitant”. They maintained that “there was too much self-censoring” and said that “the media lacked courage and objectivity and did not delve deeply enough.”¹¹⁸

319. In previous elections, the role of the media before and during elections raised several issues and concerns, particularly with regard to lack of equity in coverage of different political parties during the campaign period. The State media, Kenya Broadcasting Corporation, was criticized for favouring the then incumbent party and was perceived to be biased towards the Government. The report stated as follows-

“The Kenya Broadcasting Corporation (KBC), a State corporation established during one party rule, existed as a broadcasting monopoly and was widely viewed as a propaganda arm of the government. It was therefore hardly surprising that KBC came under serious criticism over the way it covered the 2007 general elections. The station was specifically accused of favouring PNU [Party of National Unity]. Aggrieved political parties raised their concerns with ECK but it had neither the power nor the resolve to force KBC to change and merely issued statements agreeing with the complaint of the opposition parties. Equally controversial was the official announcement of the presidential results via KBC. The swearing-in of the president, also carried live by KBC, was unacceptable to some Kenyans. Much of the criticism of KBC has arisen not just from its former monopoly status but also because of its strategic position as the only broadcaster

¹¹⁸ *Supra* note 1, pg.18

covering virtually the entire country and its failure to make a clean break with the past."¹¹⁹

320. This perception persisted following the 2013 elections where it was alleged that the Kenya Broadcasting Corporation appeared to favour the government in its coverage during the campaign period.¹²⁰ It was also noted that media coverage was, skewed in favour of the two dominant political party coalitions, Coalition for Reforms and Democracy and Jubilee, with less coverage of the less dominant parties.¹²¹
321. Issues were also raised with regard to the poor handling of interviews with experts, political analysts and candidates and the poor moderation of debates and discussions which it was argued may have contributed to the impression that there was a lack of in-depth analyses during the election period.¹²²
322. The influence of opinion polls in elections has also been controversial and its influence on public opinion was mentioned in the Independent Review Commission on the General Elections Report.¹²³ The Report observed that although the significance of the polls was downplayed by politicians, they were taken seriously by political campaign strategists, voters and presidential contestants. While some Kenyans doubted the veracity of the polls, some took it as an indication that their preferred candidate would win the election. The use of opinion polls raised the question of the justification for limited regulation and infringement of the freedom of expression.¹²⁴ These concerns may perhaps have led to the introduction and eventual passage by Parliament of the Publication of Electoral Opinion Polls Act, 2012 which regulates the publication of electoral polls in Kenya and which, notably, prohibits the publication of opinion polls forty-eight hours before the Election Day and imposes penalties for violation of these provisions.
323. There has also been an increase in the use of social media platforms especially by the youth which has raised questions of regulation and monitoring with concerns being raised on its role in fanning ethnic divisions and tensions. On a more positive note on the role of social media, the Independent Electoral and Boundaries Commission noted that platforms such as Twitter, Facebook and Google were largely employed to engage the youth on elections and to attract them to the website of the Commission.¹²⁵

¹¹⁹ *Supra* note 3, pg. 62

¹²⁰ African Union Commission, Report Of African Union Elections Observation Mission to the 4 March 2013 General Elections In Kenya, 2013, pg.13 , para 52

¹²¹ *Ibid.*

¹²² *Supra* note 1, pg 18

¹²³ *Supra* note 3, ,pg.101

¹²⁴ *Supra* note 3 pg.101

¹²⁵ *Supra* note 2 , pg.13

324. A major concern for the media in Kenya and the world over, particularly with respect to election issues, is the security of journalists. The safety of journalists is essential to preservation of the fundamental right to freedom of expression. According to the UN Plan of Action on the Safety of Journalists and the Issue of Impunity¹²⁶ –

In recent years, there has been disquieting evidence of the scale and number of attacks against the physical safety of journalists and media workers as well as of incidents affecting their ability to exercise freedom of expression by threats of prosecution, arrest, imprisonment, denial of journalistic access, and failures to investigate and prosecute crimes against them. This evidence has been repeatedly brought to the attention of the international community by inter-governmental organizations, professional associations, non-governmental organizations (NGOs) and other stakeholders.

5.5.1. Current Legal Framework

325. The Constitution of Kenya, 2010 guarantees freedom of expression,¹²⁷ freedom of the media¹²⁸ and access to information.¹²⁹ Article 34 of the Constitution specifically provides for freedom of the media as follows–

(1) Freedom and independence of electronic, print and all other types of media is guaranteed, but does not extend to any expression specified in Article 33 (2).

(2) The State shall not—

(a) exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium; or

(b) penalise any person for any opinion or view or the content of any broadcast, publication or dissemination.

(3) Broadcasting and other electronic media have freedom of establishment, subject only to licensing procedures that—

(a) are necessary to regulate the airwaves and other forms of signal distribution; and

(b) are independent of control by government, political interests or commercial interests.

(4) All State-owned media shall—

(a) be free to determine independently the editorial content of their broadcasts or other communications;

(b) be impartial; and

(c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

¹²⁶ The International Programme for the development of Communication, *UN Plan of Action on the Safety of Journalists and the Issue of Impunity*, 2012, pg. Ipara 1.1

¹²⁷ Article 33 of the Constitution

¹²⁸ Article 34 of the Constitution

¹²⁹ Article 35 of the Constitution

(5) Parliament shall enact legislation that provides for the establishment of a body, which shall—

- (a) be independent of control by government, political interests or commercial interests;*
- (b) reflect the interests of all sections of the society; and*
- (c) set media standards and regulate and monitor compliance with those standards.*

326. In addition, and perhaps on account of previous experiences with the media in the election processes, Article 92(a) and (b) of the Constitution specifically required Parliament to enact legislation to provide for—

- (a) the reasonable and equitable allocation of airtime, by State-owned and other mentioned categories of broadcasting media, to political parties either generally or during election campaigns; and*
- (b) the regulation of freedom to broadcast in order to ensure fair election campaigning.*

327. In this regard, section 41(1) of the Elections Act requires that political parties participating in an election have access to State-owned media services during the campaign period. Section 41(2) of the Act mandates the Independent Electoral and Boundaries Commission, after consultations with the independent candidates, the political parties concerned and the officers responsible for the State-owned media services, to monitor the equitable allocation of air-time during the campaign period. Section 41(3) further requires every media house and every person who reports on any election and any referendum to adhere to the Electoral Code of Conduct which is prescribed under the Media Act. Section 108 of the Elections Act further provides that *“all candidates and political parties participating in an election shall be allocated reasonable airtime on all broadcasting media during the campaign period.”*

328. The Media Council Act, 2013 gives effect to Article 34(5) of the Constitution. It establishes the Media Council of Kenya as the body that sets media standards and regulates and monitors compliance with those standards. The Act applies to media enterprises, journalists, media practitioners, foreign journalists accredited by the Media Council of Kenya and consumers of media services, including the public.

329. The Act, at section 3, sets out the obligation for media enterprises, journalists, media practitioners, foreign journalists and consumers of media services to—

- (a) reflect the interests of all sections of society;*
- (b) be accurate and fair;*
- (c) be accountable and transparent;*
- (d) respect the personal dignity and privacy of others;*
- (e) demonstrate professionalism and respect for the rights of others; and*

- (f) be guided by the national values and principles of governance set out under Article 10 of the Constitution.

330. Section 27 of the Act further establishes a Media Complaints Commission. The Commission has the mandate to mediate disputes between the government or the public and the media as well as intra-media disputes on ethical issues. It also ensures adherence to set standards.¹³⁰

331. Kenya has ratified the major international instruments which provide for the right to information and are related to freedom of the media. These form part of the Laws of Kenya in accordance with Article 2(6) of the Constitution. These include-

- (a) the Universal Declaration on Human Rights which states that everyone has the right to freedom of opinion and expression and to receive or communicate information and ideas through any media;¹³¹
- (b) the International Covenant on Civil and Political Rights on the right to the freedom of expression and the right to receive and communicate the information through any media of his choice;¹³² and
- (c) the African Charter on Human and Peoples' Rights on the right to information and the freedom of expression.¹³³

5.5.2. Comparative Analysis

332. With regard to equity in coverage, the Canadian Radio-Television and Telecommunications Commission devised rules in 1990 for allocation of time for paid political advertising that include limiting the amount of time purchased by candidates by six and a half hours and that only registered parties are eligible to purchase time. This is done through a consultative process between the Commission and representatives of the Broadcasting Arbitrator.¹³⁴ The Broadcasting Arbitrator has the mandate under the Canada Elections Act to allocate broadcasting time to parties under the Act, issue guidelines concerning the obligations of broadcasters during a general election and arbitrate disputes.

333. The power of social media or 'new media' has changed the way information is disseminated with regard to electoral processes and outcomes and the interaction between candidates and citizens. Citizens are increasingly turning to social media to obtain information and to submit their views on election-related matters. This was apparent in the 2011 Arab Spring where social media was a major factor in social change and political mobilization. Social media also played a major role in the

¹³⁰ Section 31 of the Media Council Act, 2013

¹³¹ Article 19 of the Universal Declaration on Human Rights

¹³² Article 19 of the International Covenant on Civil and Political Rights

¹³³ Article 9 of the African Charter on Human and Peoples' Rights

¹³⁴ The Electoral Knowledge Network, *Media and Elections*, 2012 <http://aceproject.org/ace-en/topics/me/me/me/ca02> [accessed 28th July, 2016]

2014 elections in India. Narendra Modi who was sworn in as the Prime Minister, was the most 'liked' politician on Facebook second only to Barack Obama who has used social media and especially Twitter to reach out to a younger demographic.¹³⁵

334. In Nigeria's general elections, both major presidential candidates and their parties maintained active Twitter and Facebook accounts. In addition, the Independent National Electoral Commission engaged with the public on social media to address inquiries related to the electoral process. Social media is widely credited with playing a major role in promoting transparency ahead of the vote that led to the first election of an opposition candidate to the position of President in Nigeria's history.¹³⁶ Kenya has also seen a growth in transmission of information through social media and the emergence of bloggers who influence public opinion.

335. With regard to the transmission of results, the Supreme Court of Canada ruled in January 2006 that the media could not report election results until after all polling stations had closed. Internet sites, including web logs, were included in the ban.¹³⁷ Transmission of results to the public was prohibited under section 329 of the Canadian Elections Act, however, this section was repealed on June 19, 2014, by the coming into force of section 73 of the Fair Elections Act on grounds of technological changes and the inability to enforce the provision.¹³⁸

5.5.3. Submissions Received by the Committee

336. The issues raised by stakeholders with regard to publicity and the media centred on the following areas-

(a) Equity in Coverage

337. Several stakeholders noted that the media has immense power over public opinion through the news that reaches the citizenry and submitted that there should be equity in coverage by the media among political players. This view was shared by the Coalition for Reforms and Democracy, the Kenya National Commission on Human Rights, the Office of the Registrar of Political Parties, the Ethics and Anti-Corruption Commission, the Political Parties Liaison Committee, the Kenya Young Voters Alliance, among others.

¹³⁵ Richard M. Barron, *Master of the Internet: How Barack Obama Harnessed New Tools and Old Lessons to Connect, Communicate and Campaign his Way to the White House*, The University of North Carolina at Chapel Hill, 2008

¹³⁶ Samer Elchahabi, *The Evolving Role of Media in Elections*, <http://www.ifes.org/news/evolving-role-media-elections> [accessed 22nd July, 2016]

¹³⁷ *Supra* note 21

¹³⁸ Federal General Election, 15, *Broadcasting Guidelines*, Issued August 3rd 2015 by the Broadcasting Arbitrator, <http://www.elections.ca/content.aspx?section=abo&dir=bra/bro/2015&document=index&lang=e> [accessed 28th July, 2016]

338. Specifically, the Kenya National Commission on Human Rights was of the view that media houses should conduct their role with an ethical approach and should ensure equity of air time across the political divide. The Office of the Registrar of Political Parties further submitted that Article 92(a) of the Constitution which requires reasonable and equitable allocation of airtime by State-owned media houses should be operationalized. Further, the Office suggested that a multi-sectoral agreement on allocation of airtime to political parties be established as well as development of monitoring tools on airtime allocation by media houses.
339. The Ethics and Anti-Corruption Commission proposed the development and strengthening of appropriate legal, policy, administrative and other mechanisms to ensure political parties and candidates participating in the elections are accorded fair and equitable time by media houses. Further, the Ethics and Anti-Corruption Commission proposed the Commission review of the regulatory framework for the media industry with a view to ensuring fairness and impartiality in the discharge of media business in relation to elections and that media malpractices that may prejudice or give unfair advantage to some political parties or candidates should be prohibited and sanctions meted out against those who are in violation.
340. The Political Parties Liaison Committee submitted that the Independent Electoral and Boundaries Commission should enforce the laws with regard to fair media coverage to all the political players. They stated that successful electoral campaigns are dependent on, among others, accessibility of media coverage to all parties. The Kenya Young Voters Alliance submitted that both mainstream and social media be put under checks to ensure free and fair elections and to ensure balanced reporting of campaigns and candidates.
341. In addition, the Coalition for Reforms and Democracy and the Political Parties Liaison Committee proposed monitoring mechanisms to ensure equitable allocation of time and fair and balanced news coverage. The Political Parties Liaison Committee further proposed a multi-sectoral agreement on allocation of airtime to political parties. In this regard, the Amani National Congress submitted that stakeholder involvement will lead to adoption of the most effective approach to fairness and transparency.

(b) Sensitivity on Content

342. In light of the role of the media in past elections, the Kenya National Commission on Human Rights submitted that the media should be sensitive to the content of news that reaches the public during the election period. The media, they submitted, holds immense power and controls public opinion by the news that reaches the citizenry. They therefore took the view that media houses should conduct themselves with an ethical approach.

(c) Code of Conduct

343. A number of stakeholders submitted that journalists reporting on the elections should be subject to the code of conduct and other rules and regulations under the law. This view was shared by the Coalition for Reforms and Democracy, the Kenya National Commission on Human Rights, the Amani National Congress among others. Kenya National Commission on Human Rights and the Coalition for Reforms and Democracy in their submissions noted that media houses should conduct their role with an ethical approach submitted and that all media actors should to sign a code of conduct to guide their engagements in the electoral process.
344. In addition, Amani National Congress submitted that the rules and regulations developed to govern media conduct, particularly during elections ought to be subject to the input of stakeholders.

(d) Role of Independent Electoral and Boundaries Commission and the Media in Voter Education

345. The important role of the media in voter education was observed by majority of the stakeholders. The Kenya National Commission on Human Rights, the National Registration Bureau, the Central Organization of Trade Unions, the Young Kenyan Patriots and the National Gender and Equality Commission submitted that the Independent Electoral and Boundaries Commission should effectively and proactively engage the media for purposes of publicity by educating voters continuously in good time through mass media and use all media for regular reporting on the electoral cycle.
346. It was further submitted that the Independent Electoral and Boundaries Commission should engage the media to sensitize the public through print and electronic media about the electoral processes including a platform both to the candidates and voters to debate and air their concerns. In addition submissions were received that there should be continuous sensitization and mobilization campaigns to encourage voter registration and create awareness and educate Kenyans on the electoral processes.
347. Further, the Political Parties Liaison Committee proposed that the Independent Electoral and Boundaries Commission and the Political Parties Liaison Committee should meet at least once a month to be updated on the current electoral activities and the immediate plans they intend to undertake. The Political Parties Liaison Committee that frequent meetings will allow the Political Parties Liaison Committee to give an input on the plans being undertaken and that would increase confidence and transparency in the Commission.

(e) Disclosure of Media Owners

348. The Amani National Congress submitted that there should be regular disclosure of real media owners and went further to propose that a law distinguishing media ownership and political engagement be enacted.

(f) Media Conduct During the Campaign Period

349. Stakeholders shared their views on the conduct of the media during elections. Kenya Young Voters Alliance submitted that if not checked, the media and information technology can be a very dangerous source of conflict as both mainstream and social media have in the past inflamed passions which have led to violence among citizens. Social media, they stated, has further exacerbated the age-long problem of tribalism in the country.
350. On the other hand, the Society for International Development and Uraia Trust submitted a publication on various issues entitled *New Constitution, Same Old Challenges: Reflections on Kenya's 2013 General Elections*.¹³⁹ The publication identifies the role of the media in the 2013 elections as a direct mobiliser of peace that communicated public service announcements and reinforced harmony and ethnic tension. However, despite the peace narrative, the author argues that certain main issues were not tackled, for example, the link of peace to political reforms, justice for victims of post-election violence and accountability. In this regard, the media was criticized for self-censorship due to anxiety of a recurrence of the post-election violence. As a result, it was agreed that media owners did not allow for debate on how to resolve pertinent issues such as historical injustices, land allocation and matters of post-election violence victims.¹⁴⁰
351. With regard to the transmission of results, the Young Kenyan Patriots submitted that Results beamed by media houses should be provisional since the commission has sole constitutional mandate to announce final results.

(g) Inclusion of Persons with Disabilities

352. The Kenya National Association of the Deaf submitted that the media, in publicizing electoral events and materials should include a sign language interpreter for the deaf audience.

(h) Election Polls

353. Amani National Congress submitted that the Publication of the Election Polls Act be amended to prohibit the publication of electoral poll results ten days before the

¹³⁹ Society for International Development (SID)/Uraia Trust, *New Constitution, Same Old Challenges: Reflections on Kenya's 2013 General elections*, 2015

¹⁴⁰ Galava Denis, *New Constitution, Same Old Challenges: Reflections on Kenya's 2013 general elections, From Watchdogs to Hostages of Peace: The Kenyan Media and the 2013 General Elections*, Society for International Development (SID) /Uraia Trust,pg.238

elections and to include the management of exit polls. An exit poll is a survey which asks voters, after they have voted at polling stations, which candidate or political party they have voted for.¹⁴¹ They further submitted that the Act should be amended to provide for enforcement mechanisms including: setting up of a Political Opinion Polling Regulation Authority as is the case in the United Kingdom and a management board to consist of polling organisations, political parties and media.

354. They further noted that while Article 33 of the Constitution of Kenya, 2010 provides for freedom of expression, this right must be balanced with the need to protect the integrity and fairness of the electoral process in relation to the publication of pre-election opinion and exit polls for example, as seen in the United Kingdom, Canada, Bulgaria and India.

(i) Rules of Engagement between the Independent Electoral and Boundaries Commission and the Media

355. Some stakeholders noted that there is need to formulate rules of engagement between the Independent Electoral and Boundaries Commission and the media with regard to elections. The Editor's Guild submitted that the Independent Electoral and Boundaries Commission should establish rules of engagement with the media as well as voting and vote tallying coverage rules to facilitate availability of the information and thereby inject transparency in the process and avoid speculation.

356. On a similar note, the Young Kenyan Patriots submitted that the media should work closely with the Independent Electoral and Boundaries Commission to ensure that the information being disseminated to the public is factual and uniform in order to avoid misleading the public.

5.5.4. Recommendations of the Committee

357. The Committee recommends that the Independent Electoral and Boundaries Commission-

- (1) Liaises with the Media Council in developing and implementing Regulations on media coverage and conduct during campaigns as well as electoral polls; and
- (2) Mainstreams the needs of persons with disabilities in the publications of the Commission on election matters.

¹⁴¹ In Brief, What are the legal restrictions on publishing exit polls during elections?
<http://www.inbrief.co.uk/media-law/publication-of-exit-polls-law/> [accessed on 05th August 2016]

5.6. USE OF INFORMATION AND COMMUNICATION TECHNOLOGY IN ELECTIONS

358. Various forms of technology may be deployed in the election process, including software programs and electronic equipment, such as computers, printers, scanners, bar code readers and the Internet. But there are other technologies used in elections that do not directly involve computers, but rather new materials, such as cardboard, fibreglass and plastic used in polling equipment.¹⁴²

359. The Independent Review Commission on the General Elections found that the 2007 disputed General Elections were not credible due to names of deceased voters appearing in the electoral register, impersonation of absent voters and defective planning of voter registration system among other shortcomings in the electoral process. The Commission recommended that –

“Use of technology should also be implemented in order to enhance, not only integrity’ and accuracy of results, but to increase speed of transmission, storage, and further analysis and audits by the ECK. If the law does not recognize results that are transmitted or tallied electronically, this technical solutions should, at least before the law is amended, be used as a parallel system for providing a back-up system for ensuring accuracy of tallies and results, while still using the paper-based system of statutory forms.”¹⁴³

360. The Independent Electoral and Boundaries Commission employed technology in the 2013 General Elections in the following forms-

(1) The Biometric Voter Registration System (BVR) was used for registering voters. It comprises a laptop, a finger print scanner and a camera. The Biometric Voter Registration System (BVR) captures a voter’s facial image, finger prints and civil data or Personally Identifiable Information (PII), that is, the name, gender, identity card or passport number, telephone number among other details.¹⁴⁴

(2) The Electronic Voter Identification System (EVID) is an electronic poll book. There are two types of Electronic Voter Identification System (EVID) technology: the laptop with attached finger-print reader and the handheld device with in-built finger print reader. The Electronic Voter Identification System (EVID) verifies and confirms voters electronically as registered by the Biometric Voter Registration System (BVR). They are used to “check-in”

¹⁴² Elections and Technology, <https://aceproject.org/ace-en/topics/et/et10> [accessed 30th July, 2016]

¹⁴³ Report of the Independent Review Commission on the General Elections (IREC) held in Kenya on 27th December, 2007 (*Annex 6.A Report on the Data analysis of the 2007 general elections results- Based on sample constituencies and case studies, Final report, September 9, 2008*), pg.360

¹⁴⁴Independent Electoral and Boundaries Commission, <http://www.iebc.or.ke/index.php/biometric-voter-registration-system-bvr> [accessed 23rd July, 2016]

voters at polling station on polling day and are helpful in streamlining. Electronic Voter Identification System (EVID) curbs impersonation and ensures that only those who registered to vote are allowed to vote.¹⁴⁵

(3) The Political Party Nominations System (PPNS) ensures that primary data on candidates nominated by political parties are entered in a format that makes it easy for the Independent Electoral and Boundaries Commission to verify the accuracy of the candidate details, compliance and generate ballot paper proofs. This is achieved by cross-matching the voters register and the political party register.¹⁴⁶

(4) The Results Transmission System (RTS) is a system for transmitting provisional results electronically to an observation centre. At the end of voting and when votes have been counted and tallied, the Presiding Officers enter the data on the signed results sheet (Form 35) into specially configured mobile phones and transmit the results simultaneously to the election results centres at the constituency, county and national level. The Results Transmission System (RTS) is meant to enhance transparency through electronic transmission of provisional results from polling stations and to also display and visualize provisional results at the tally centers and provide access to provisional elections data to media and other stakeholders in real time.¹⁴⁷

361. Several issues and concerns were raised with regard to the use of technology in the 2013 General Elections which include-

(1) that during the 4th March 2013 polls, only 17,000 of the 33,000 polling stations managed to transmit results before it was overwhelmed by some technical hitches. This alternative way of getting results had to be discontinued when it became too slow and although the problem was identified and fixed, a number of officials had abandoned the transmission as they took hard copies of the same to tallying centres.¹⁴⁸

(2) the Electronic Voter Identification Device (EVID) experienced some challenges when some of the machines failed to work largely due to inadequate training and running out of battery charge. In such cases, the polling officials carried out verification of voters using the voter register print outs.¹⁴⁹

¹⁴⁵ Independent Electoral and Boundaries Commission, Electronic Voter Identification System (EVID) <http://www.iebc.or.ke/index.php/electronic-voter-identification-system-evid> [accessed 23rd July, 2016]

¹⁴⁶ Independent Electoral and Boundaries Commission, <http://www.iebc.or.ke/index.php/political-party-nominations-system-ppns> [accessed 23rd July, 2016]

¹⁴⁷ Independent Electoral and Boundaries Commission, Results Transmission System (RTS), <http://www.iebc.or.ke/index.php/results-transmission-and-presentation-rts> [accessed 23rd July, 2016]

¹⁴⁸ *Supra* note 6

¹⁴⁹ *Supra* note 4

(3) in roughly half of polling stations observed, the Electronic Voter Identification Device (EVID) was not used, largely due to the limited timeframe in which hardware was received, configured and deployed, alongside incomplete training for polling staff.¹⁵⁰

(4) inconsistencies in the data submitted by political parties have posed a challenge on processing of ballot proofs, for example, mix up of photos. There have also been inaccuracies in the data submitted by Political Parties, for example, use of nicknames.¹⁵¹

5.6.1. Special Audit Report by the Auditor-General on Procurement of Electronic Voting Devices for the 2013 General Elections¹⁵²

362. Pursuant to a request by Clerk of the National Assembly, on 3rd June, 2013 the Auditor-General conducted an audit on the procurement of Biometric Voter Registration (BVR) kits for the March 2013 General Elections by the Independent Electoral and Boundaries Commission. This request was made on the basis that the kits had failed during the elections and it was therefore felt that this was a waste of tax payers' funds.¹⁵³

363. The Terms of Reference for the report by the Auditor-General were as follows-

- (1) To establish what triggered the requirement for these devices for the General Election in Kenya;
- (2) To establish the amount of money spent and the financing arrangements on each item;
- (3) To carry out a comprehensive review of the procurement processes used in acquiring the above devices and establish if these processes were in compliance with the Government's procurement requirements and legislation;
- (4) To establish whether the procured devices were delivered in the right specifications, quantity, timely and to the intended recipients;
- (5) To establish if there was value for money to the public on each of the item;
- (6) To identify irregularities and persons responsible for these irregularities; and
- (7) To issue a report including recommendations.

364. Some of the main findings of the Auditor-General's report were as follows-

- (1) The Auditor-General reported that following the 2007/2008 General Elections, the Independent Review Commission on the General Elections recommended the use of technology in the management of the electoral process;

¹⁵⁰ European Union Election Observation Mission to Kenya, General Elections 2013

¹⁵¹ *Supra* note 4

¹⁵² Office of the Auditor General, *Special Audit on Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission*, 06 June, 2014

¹⁵³ *Ibid.* pg 9, para 1.1.2

- (2) The Auditor-General alleged that Independent Electoral and Boundaries Commission failed to obtain value for public funds spent in the procurement of Biometric Voter Registration (BVR) Kits and the Electronic Voter Identification Devices (EVID) used for the March, 2013 elections;¹⁵⁴
- (3) The report identified irregularities and the mismanagement of the tender processes and assigned responsibility and culpability with regard to the procurement process by the Independent Electoral and Boundaries Commission on other election technology employed in the 2013 general elections;
- (4) The report also looked into the procurement processes of other elections devices procured by the Commission including: Electronic Result Transmission System (ERTS), Electronic Voter Registration (EVR), Strategic Materials and Optical Mark Recognition (OMR) Scanners, Universal Polling Kits (UPK);¹⁵⁵
- (5) The report further identified procurement irregularities contrary Procurement Regulations, 2006 and made wide ranging recommendations on the procurement processes of the Commission.

5.6.2. Current Legal Framework

365. Article 86 of the Constitution provides as follows-

At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*

366. The Independent Electoral and Boundaries Commission has the responsibility of procuring ICT materials to conduct elections. Article 227 of the Constitution further provides on public procurement as follows-

When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

367. Section 44 of the Elections Act provides that –

¹⁵⁴ Supra note 11, pg.27, para 1.3.7

¹⁵⁵ Supra note 11

The Commission may use such technology as it considers appropriate in the electoral process.

368. The Public Procurement and Asset Disposal Act, 2015 sets out procedures for efficient public procurement and for assets disposal by public entities. It sets out various roles of the institutions in public procurement such as the National Treasury, Public Procurement Regulatory Authority, Public Procurement Administrative Review Board, the roles and responsibilities of the County Governments, the role of the accounting officer in public organizations among other responsibilities.

5.6.3. Comparative Analysis

369. Countries around the world have adopted technologies with electoral applications in different forms. With regard to registration, a survey of 138 countries by the International Institute for Democracy and Electoral Assistance showed that an estimated twenty four percent (24%) of countries around the world have adopted biometric voter identification at polling stations. These include Ghana which procured about 40,000 Biometric Verification Devices (BVR) to ensure that the machine is available for more than 26,000 polling stations. In Rwanda the system is integrated with the national register. The voter register is compiled from the National Identification card database and then updated through a process of public verification. Equally, the photos from the National Identification database are incorporated in the final voter register used in the polling stations on the Election Day.¹⁵⁶
370. With regard to voting technology, mechanical voting machines which were widely used in the United States are now being replaced by electronic voting machines. Some of the main electronic voting systems used include punch card voting or tabulation systems, machine readable (optical scanning), voting/tabulation systems and direct recording electronic systems.
371. With regard to e-voting, according to the International Institute for Democracy and Electoral Assistance only fourteen percent (14%) of countries of the 140 countries surveyed have the option of e-voting. These include Belgium, Brazil, France, India, among others. The most widely used technology for e-voting includes the direct recording electronic voting machines with and without voter-verified paper audit trail used in Australia, Brazil, France, India, Japan, the United States among others. Others include internet voting systems, Optical Mark Recognition (OMR) or Optical Character Recognition (OCR) and electronic ballot printers.¹⁵⁷

¹⁵⁶ IDEA, *Is biometric data used in voter identification at polling stations?*

<http://www.idea.int/elections/ict/field.cfm?id=488> [accessed 31st July, 2016]

¹⁵⁷ IDEA, *If e-voting is currently being used, what type(s) of technology used?*

<http://www.idea.int/elections/ict/field.cfm?id=488> [accessed 31st July, 2016]

372. In addition, with regard to capturing manual votes, electronic scanning systems are also used to convert data marked manually on paper into electronic form. It can also be used to capture other data, such as lists of electors who have voted or information shown on forms. There are four main types of optical scanning technologies. They are optical mark reading, optical character recognition, intelligent character recognition and imaging technology. Electoral technology further extends to identification systems, the internet, office automation and specialized electronic or mechanical devices.

373. In the 2014 Indonesian Elections, the election commission, the Komisi Pemilihan Umum (KPU) came up with technology-based solutions. The KPU published the Excel tabulations on its website from the sub-district, regency, provincial, and national levels. Similarly, for transparency and evidence the KPU scanned images of the polling station results (C1 form) from about 81 per cent of the polling stations. Tabulation workers from 497 regional KPUs worked tirelessly to tabulate results at the regency (*kabupaten/kota*) level. Within the first week, 98.53 percent of C1 forms have been scanned and uploaded to the KPU's website. In addition, for quick preliminary results data entry of the result forms at community offices with preliminary results in 48-72 hours while the manually tabulated result was delivered by the KPU within the mandated 30 days.

5.6.4. Submissions Received by the Committee

374. From the submissions received, there was general consensus that the use of information, communication technology in the election processes was crucial and critical. On specific matters, the following issues were raised-

(a) Prior Testing of Election Technology before the General Elections

375. The Evangelical Alliance of Kenya, the International Commission of Jurists, Electoral Institute for Sustainable Development in Africa, National Gender and Equality Commission, Multi-Sectoral Forum, Electoral Observers Group, Jubilee Coalition, the Central Organization of Trade Unions all submitted that reasonable time should be allowed for the testing and piloting of all electronic systems and equipment to be used for voter identification, voting and for the transmission of results to avoid cases of failed technology during a general elections.

376. The Amani National Congress further submitted that the Elections Act be amended to provide for the participation of political parties in testing and validating technology used in the elections.

(b) Training of the Independent Electoral and Boundaries Commission Staff on Election Technology

377. Along with prior testing of Election technology, many stakeholders submitted that the Independent Electoral and Boundaries Commission recruits competent staff to handle the relevant technology and train their existing staff on the use of the technology at both the constituency and national level. They included Evangelical Alliance of Kenya, Mkenya Daima, the International Commission of Jurists, Electoral Institute for Sustainable Development in Africa, National Gender and Equality Commission, Multi-Sectoral Forum, Electoral Observers Group, the Central Organization of Trade Unions among others. Further, that there is reasonable time for training of their staff to ensure that they are competent in handling the election technology to be employed.

(c) Timely and Transparent Procurement of Election Technology

378. Majority of stakeholders submitted that there should be early and transparent procurement of elections technology to ensure that testing of the technology and training of staff before the elections and with the involvement of stakeholders in the choice of technology. In addition, Hon. Peter Kaluma submitted that Independent Electoral and Boundaries Commission should consult other countries that run electronic voting and results transmission system to secure tamper proof system for Kenya.

379. The Evangelical Alliance of Kenya, the International Commission of Jurists, the Electoral Institute for Sustainable Development in Africa, the National Gender and Equality Commission, the Multi-Sectoral Forum, the Electoral Observers Group, Article 19, the Society for International Development, the Jubilee Coalition and the Amani National Congress submitted that Independent Electoral and Boundaries Commission should ensure that there are clear and open processes for procurement and use of ICT materials and that Independent Electoral and Boundaries Commission works towards building public confidence for the use of the procured ICT tools.

380. In addition, the Amani National Congress submitted that the Election Act be amended to provide for professional audit firms participation in pre-election and post-election audit of technologies used in the elections. The Computer Society of Kenya further proposed that there should be physical inspection of the hardware procured by Independent Electoral and Boundaries Commission while software requirements must be documented in details.

381. The International Commission of Jurists-Kenya further noted that if properly adopted, technology would reduce electoral fraud, enhance voter participation and introduce an efficient, faster and more accurate mode of counting ballots, eliminate costs and logistics of handling paper ballots. Without such inclusive and transparent

deliberations, suspicions that often exist in competitive political environments may undermine the decision to use electronic voting or counting systems, and erode the legitimacy of the electoral process. The Electoral Observers Group further proposed that procurement for the technology to be used in 2017, be completed by December 2016. Further, the Electoral Institute for Sustainable Development in Africa submitted that ICT must be aligned to the legal procedures governing key aspects of election.

382. East African Center for Law and Justice further proposed that in the event of some malfunctioning kits, there should be swift prosecution of the people responsible for ensuring that the kits work, from the procurement officers to the technicians.
383. Further, with regard to timely procurements for general election materials, the Ethics and Anti-Corruption Commission submitted that the Independent Electoral and Boundaries Commission should streamline its procurement processes. They submitted that this was demonstrated in the Public Procurement Administrative Review Board Review No.59 of 2012 (consolidated with the Reviews No.61 and 62 of 2012). Avante International Technology Inc. & Others Vs IEBC. The review was instituted at the Public Procurement Administrative Review Board in relation to the supply, delivery, installation, configuration, training, testing and commissioning of Electronic Voter Identification Devices (EVID). The Board analysed the manner in which the particular tender was handled and concluded that it was fatally flawed. Bearing that the elections were only two months away, the Board upheld the award but expressed serious reservations.

(d) Public Awareness on Election Technology to be Employed

384. The National Gender and Equality Commission and the Elections Observation Group submitted that voters should be able to be made aware of what to expect when ICT systems and applications are used to implement elections in order to adequately manage their expectation and that manual voting be put on standby if technology fails like was the case in 2013.

(e) Integrate Electoral Management Systems

385. Some stakeholders proposed that electoral systems should be integrated to have one system. The Evangelical Alliance of Kenya submitted that the election technology systems should be synchronized to ensure that one system, whether electronic or manual is used for all places, hence if the electronic system fails, then the rest of the places switch to the manual system. Similarly, East African Center for Law and Justice submitted that the Independent Electoral and Boundaries Commission should engage a 'one fit all' approach where the system should be uniformly applied across the board.

386. On the other hand, Mkenya Daima submitted that national registration of persons should be integrated with voter registration so as to have only one document employed for voting. Further, the Council of Governors submitted that the Independent Electoral and Boundaries Commission should use Biometric Voter Registration (BVR) and on Election Day only Electronic Voter Identification (EVID) should be applied.
387. In this regard, the National Registration Bureau submitted that the Independent Electoral and Boundaries Commission Automated Fingerprint Identification Systems (AFIS) should be used to verify and cross-match the fingerprints of voters during the voting process. They submitted that they supported an integrated system. The Bureau further submitted that post-2017 elections the Government intends to introduce a multi-purpose, chip based, electronic identity card which will support e-Government and e-Commerce functions and that the Independent Electoral and Boundaries Commission should use the same card for registration and e-voting. In addition, that the data held by National Registration Bureau can be used to verify and cleanse the data of registered persons. The National Registration Bureau further submitted that while the Independent Electoral and Boundaries Commission has 14,352,545 voters registered, the National Registration Bureau has registered and issued 26.3 million Kenyans with national ID Cards, out of which, 2.7 million are projected dead by the KNBS. This means that of the eligible voters, 9.2million Kenyans are yet to be registered as voters.
388. On the contrary, the Vice-chairperson of the Independent Electoral and Boundaries Commission, Mr. Ahmed Issack Hassan, submitted that while there have been proposals to integrate different registration systems by registering agencies such as the Kenya Revenue Authority (KRA), the National Hospital Insurance Fund (NHIF), Central Bank and the National Social Security Fund (NSSF).Further, the Chairperson submitted that in order to have an integrated registration system the laws need to be integrated and to give the mandate to an independent body.
389. The Chairperson, while giving comparatives, stated as follows-
- "You have talked about Integrated Personal Exchange System (IPES) where you have got one document for a voter and also as a Kenyan. Until we integrate our laws, we cannot integrate the system. This is because when you are born, you get a birth certificate under the Kenya Births and Deaths Acts. When you reach 18 years old, you get an ID card under the Registration of Persons Act which is another Act of Parliament with different personnel. When you die, those who are going to bury you will apply for the death certificate under the Registration of Death Act. When you apply for a Passport, you get it under the Immigration Act. There are five separate Acts with different bodies. Some of them if not all of them are really executive. These are all bodies within the Executive. This includes those*

who give the ID cards, the deaths and birth certificates and the Passport. Now the voter register is given to the IEBC.”

390. The Chairperson further clarified that-

“In places where they use the same information, the voter register resides with the electoral commission. In fact, the entire southern region (SADC), which includes countries like Zambia, Zimbabwe and South Africa, they get data from the central Government, but the register is hosted and held by the commission for good reason. This is because the Executive is a player in the electoral process. It may be very appealing and very fanciful. However, right now in our current environment, you cannot give this role to the Kenya National Registration Bureau (KNRB). You have to first integrate the law and get an independent body that will do that. Currently, the best way that you have is the IEBC for it is the body that has been given the constitutional mandate to conduct voter registration, carry out continuous registration and amend the register. I, therefore, want to disagree with any appeal by this KNRB that they can do this work themselves. They have been unable to integrate our own documentation for we still have more than six documents in our wallet. We have the Driving License, the Pin Number, the National Hospital Insurance Fund (NHIF) card and many more. Let us first start with that one before they come to the voter register.”¹⁵⁸

(f) Electrification of Polling Stations

391. Mkenya Daima submitted that electrification of schools as polling centres is essential and makes it possible for greater adoption of technology in voting and counting processes as these also serve as polling stations.

(g) Use of ICT to Allow Kenyans Living Outside Kenya to Vote

392. The Kenya Diaspora Alliance submitted that a specific “Diaspora Electoral Law” should be put in place to facilitate voting in Diaspora. Such a law should provide for the different unique factors in the Diaspora constituency, including, but not limited to registration, time zone differences, diverse privacy and data protection legislations in host countries.

(h) Monitoring and Evaluation of ICT used in Elections

393. The necessity of monitoring and evaluation was brought up by several stakeholders. The Computer Society of Kenya noted that the hardware and software used by Independent Electoral and Boundaries Commission should be independently audited before, during and after elections by organizations such as Information Systems Audit and Control Association. They further proposed that there should be independent ICT experts as election observers. Similarly, the Evangelical Alliance

¹⁵⁸ Parliament of Kenya, Hansard record of the Meeting of the Joint Parliamentary Select Committee on Matters Related to the Independent Electoral and Boundaries Commission held on Tuesday, 2nd August, 2016 in County Hall – Mini Chamber, Parliament Buildings, Nairobi,pg.25

of Kenya submitted that there should be ICT agents for all stakeholders to observe ICT used in elections at all times so as to create public confidence in the ICT system and ensure transparency.

(i) Use of Additional Technologies

394. Some of the stakeholders were of the view that Independent Electoral and Boundaries Commission should invest and adopt in new technology to ensure free and fair elections. National Gender and Equality Commission submitted that Independent Electoral and Boundaries Commission should continue to invest in ultra-modern ICT election management process.
395. Some stakeholders such as the Electoral Institute for Sustainable Development in Africa submitted that Electronic Voter Identification System (EVID) should be replaced with more reliable and portable machines. Similarly, Mkenya Daima submitted that Independent Electoral and Boundaries Commission should install electronic counters in each ballot box to maintain a running count of the ballots cast for that position. Further, Mkenya Daima and the Council of Governors submitted that there is need to install mobile CCTV technology at every entrance to a polling stream. The Coalition for Reforms and Democracy further submitted that Independent Electoral and Boundaries Commission should liaise with other Government institutions and other stakeholders to get the technology for use in elections.
396. With regard to the transmission of results, Mkenya Daima and the Council of Governors submitted that Independent Electoral and Boundaries Commission should adopt the use of scanners to record elections to increase efficiency and integrity of the electoral process. Scanning of ballots as part of the counting process will serve as data points and back up to the physical ballots and data analysis to provide insights into patterns to inform the electoral reform. Further, Mr. Barasa Nyukuri submitted that polling station data should be available electronically in easily accessible formats rather than the PDF format which is not accessible to all.

5.6.5. Report of the Panel of Experts on Information and Communication Technology

(a) Challenges Identified by the Panel of Experts on Information and Communications Technology

397. A Panel of Experts on ICT identified by the Committee in their Report, herein attached as *Annex 9A*, observed the following challenges that had arisen in the 2013 General Election-
- (1) Late introduction of technology to the electoral process left limited time to follow laid down Standard Operating Procedures (SOPs) and policies for acquisition and implementation of the systems, e.g. procurement, testing, sign-offs, audit, training, etc;

- (2) Lack of adequate infrastructure (power, hardware, software, telecommunication, etc) to support the electoral system;
- (3) Non-conformity of the deployed election system to the original technical specifications; the Electronic Voter Identification (EVID) procured was not the same as what was in the original specification;
- (4) Lack of a Disaster Recovery and Business Continuity Plan to counter any system failures;
- (5) Lack of a legal framework and Standard Operating Procedures (SOPs) to guide on the ICT electoral system and the lack of a national ICT standards regulatory framework;
- (6) Inadequate skilled or trained personnel to manage and operate the election system;
- (7) Lack of an Information Security Policy to protect election data and information;
- (8) Lack of interoperability and integration of various legacy electoral systems;
- (9) Lack of a defined framework for technical stakeholder engagement and participation in planning, procurement, testing and implementation of the system;
- (10) Lack of an election system audit mechanism before, during and after elections;
- (11) Slow system response to users at the polling stations during elections; and
- (12) There was no capacity building done for the Independent Electoral and Boundaries Commission by the system developer in terms of use, configuration, upgrade, maintenance and sustainability of the election system.

(b) Current Status of Election Technology

398. The Panel further set out the current status on ICT and made recommendations for the 2017 General Elections.

(i) Hardware

- (1) There are 15,000 Biometric Voter Registration (BVR) kits. Out of 15,000 BVR kits only 8,000 are functional. However, there is need to upgrade some parts of the 8,000 kits to make them fully functional for the coming elections. Statistically, these 8,000 translate to 5 Biometric Voter Registration (BVR) kits per ward (1,450 wards country-wide);
- (2) There are 34,600 Election Voter Identification Devices (EVIDS). Out of 34,600 only 22,500 are functional. However, the functionality of these 22,500 is not fully guaranteed (failure rate is 1 out of 3) due to tare and ware, taking into consideration the average life span of electronic devices is 3 years;

- (3) There are 40,000 Mobile Phones. Out of 40,000 phones only 15,000 are available. The models in stock (Nokia 1100 and Nokia 1680) are out of production; and
- (4) The current servers (procured in 2010) are due for replacement.

(ii) Software

- (1) The Results Transmission System (RTS) was developed for the Independent Electoral and Boundaries Commission through a technical support assistance by International Foundation for Electoral System (IFES);
- (2) BVR software- the Independent Electoral and Boundaries Commission recently signed a five (5) year Service Level Agreement (SLA) for support and maintenance;
- (3) Tallying software- there is no tallying software;
- (4) The Independent Electoral and Boundaries Commission Portal, Internet and Web services need to be upgraded to enhance result display;
- (5) Voter database- this runs on Oracle database and is functional; and
- (6) The nomination system, which is used for management of election candidates, should be upgraded.

(iii) Infrastructure

- (1) The location of Independent Electoral and Boundaries Commission offices within the Central Business District poses a lot of risks, threats and hazards to its ICT operations;
- (2) Data Centre Facility- the current data centre facility is hosted in the current premises at a position which is a major risk;
- (3) Currently the Independent Electoral and Boundaries Commission does not have a Disaster Recover site;
- (4) The current Wide Area Network (WAN) covers only seventeen (17) regional offices; and
- (5) The current result transmission network is only provided by one service provider. This is a risk.

5.6.6. Recommendations of the Committee

399. The Committee recommends as follows-

(1) Guiding Principles for Use of ICT

- (a) That the ICT systems used be impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent;
- (b) That the processes for the identification, procurement and deployment of ICT systems be conducted in an open and transparent manner; and
- (c) That no new technology should be introduced in the election process later than one year before an election.

(2) Legislative Framework for ICT

- (a) That section 44 of the Elections Act be amended to require the use of technology in the electoral process;
- (b) That pursuant to sections 44 and 109 of the Elections Act, the Independent Electoral and Boundaries Commission, in consultation with all relevant stakeholders, including political parties, agencies or institutions, makes regulations to govern the use of technology in the elections, and that the regulations be tabled in Parliament within thirty days from the date of enactment of the Election Laws (Amendment) Bill;
- (c) That the regulations to be made provide for, among other things-
 - (i) acquisition and disposal of ICT assets and systems;
 - (ii) testing and certification of the system;
 - (iii) mechanisms for the conduct of a system audit;
 - (iv) data storage and information security;
 - (v) data retention and disposal;
 - (vi) access to electoral system software source codes;
 - (vii) development and implementation of a disaster recovery and operations continuity plan;
 - (viii) telecommunication service provision;
 - (ix) inventory of ICT assets and systems;
 - (x) capacity building of staff of the Commission and stakeholders on the use of technology in the electoral process;
 - (xi) telecommunication network for voter validation and result transmission; and
 - (xii) the establishment of an ICT oversight technical committee comprising of key stakeholders.

(3) ICT for the 2017 General Elections and Beyond

- (a) That for purposes of the 2017 General Elections, the technology to be applied shall be for registration, identification and results transmission (BVR, EVID and RTS);
- (b) That the Independent Electoral and Boundaries Commission puts in place mechanisms to ensure-
 - (i) Electronic submission of names and other information required in the nomination processes;
 - (ii) Electronic transmission of all poll results; and
 - (iii) Polling result forms be made available to the public through a public portal; and
 - (iv) Voter identification through biometrics.
- (c) That the Independent Electoral and Boundaries Commission ensures that the necessary hardware and software are in place to support the use of technology in the 2017 General Elections;

- (d) That where procurement of new equipment may be necessary, the Independent Electoral and Boundaries Commission, in consultation with all relevant agencies and institutions, ensures the timely procurement of appropriate equipment;
- (e) That all procurement of ICT equipment for the 2017 General Election to be concluded at least eight months before the election.
- (f) That all existing equipment and any new equipment procured be transparently tested and deployed in good time in readiness for the next General Elections;
- (g) That the equipment to be used in the election be tested sixty (60) days before the next General Elections;
- (h) That a structured and scheduled capacity building programme be put in place and implemented for training of staff and other stakeholders on the technology to be used in the electoral process; and
- (i) That the Independent Electoral and Boundaries Commission urgently puts in place a Disaster Recovery and Business Continuity Plan.

5.7. VOTING PROCESS

400. The voting process includes opening of polling stations and election materials and casting of votes on the Election Day.
401. The 2013 General Elections saw the election of the President and Deputy President, Senator, Member of Parliament, Woman Representative Governor and Deputy Governor and Member of County Assembly all on the same day.
402. The Report of the Independent Review Commission on the General Elections with regard to the 2007 General Elections¹⁵⁹ made the following recommendations with regard to the voting process and specifically to the polling day operations-
- *Take steps to eliminate bribery including stronger sanctions like disqualification - for candidates involved in it.*
 - *Discontinue the complementary practice of allowing assistance on the basis of illiteracy and adjust voter education programmes accordingly.*
 - *Stop using black books (consider destroying them) and consider using tendered ballots instead.*
 - *Assure party agents' access to polling stations and tallying centres: and the only restriction should be the maximum number of persons that the polling station or the tallying centre can reasonably accommodate.*
 - *Party agents should be adequately identified and, in the case of tallying centres, be issued with special tags.*

¹⁵⁹ Report of the Independent Review Commission on the General Elections held in Kenya on 27th December , 2007, pg.161/162

- *In joint elections, hand all three ballots to the voter at the same time, and stress this point in training and in voter education.*
- *Make every effort to make polling stations accessible to all voters, especially people with disabilities and the elderly.*
- *Issue a checklist to electoral officials surveying polling stations to assess whether the polling stations are accessible to all categories of voters.*
- *Polling stations need to be well designed to allow for easy entry and exit. Further, the safety corridor needs to be restricted to ECK [Electoral Commission of Kenya] personnel, party agents and those voting.*
- *Party agents need to undergo ECK [Electoral Commission of Kenya] - supervised training (the same training as poll workers) and should not be allowed into the polling station unless they have undergone the training.*
- *After training all poll workers and party agents need to be sworn. Training should identify the penalties for perjury, fraud and rigging.*
- *Train one poll worker as a 'greeter' for each polling station to ensure that voters are directed to the correct polling place.*
- *On Election Day, the ECK [Electoral Commission of Kenya] should provide polling station staff with food and water. Party agents should not be allowed to provide food."*

403. The Independent Review Commission on the General Elections report noted that the requirement of a voters card for voting is a redundant requirement, *"If their name is in the register, voters should be allowed to vote with the simple presentation of the national ID [Identification Card] or passport."*¹⁶⁰

404. Several challenges were identified with regard to the voting process in the 2013 General Elections. The Independent Electoral and Boundaries Commission employed the use of Biometric Voter Registration Kits, Electronic Voter Identification Devices, and the Electronic Results Transmission System for the first time in the March 2013 General Elections to enhance the credibility of the elections. However, in roughly half of polling stations observed, the Electronic Voter Identification Device was not used, largely due to the limited timeframe in which hardware was received, configured and deployed, alongside incomplete training for polling staff.

405. In addition, the Commission did not put in place arrangements for special voting, such as voting abroad, early voting, voting by persons involved in the administration of elections on Election Day, mobile or homebound voting, and absentee voting by voters who are away from their place of residence on Election

¹⁶⁰ Ibid Pg.157

Day.¹⁶¹ The Commission was also unable to make provisions or preparations for special voting for persons on election duty for the 2013 General Elections, especially in view of the fact that over 100,000 security and election personnel were deployed during the elections.¹⁶² Regulation 161 of the Election (General) Regulations which requires the Commission to make arrangements for special voting by officials on Election Day duty was therefore not effected. The Independent Electoral and Boundaries Commission has also not operationalized mechanisms to allow Kenyans living outside Kenya (the diaspora) to vote in the general elections.

406. Other challenges identified were that the secrecy of vote was not sufficiently protected, mainly because of the way polling booths were arranged and because provisions for assisted voting for disabled or illiterate voters were not adequately applied.¹⁶³

5.7.1. Current Legal Framework

407. The Constitution of Kenya, 2010 provides that ‘the people may exercise their sovereign power either directly or through their democratically elected representatives.’¹⁶⁴ The Constitution of Kenya, 2010 further offers protection for the civil and political rights which include the right for every adult to be registered as a voter and to vote by secret ballot and to be a candidate for public office,¹⁶⁵ access to information,¹⁶⁶ and freedom of the media,¹⁶⁷ and gives special attention to the rights of women, persons with disabilities, children, young persons, minorities and marginalised groups.

408. Article 81 on the General Principles of the Electoral System provides as follows—

The electoral system shall comply with the following principles—

- (a) freedom of citizens to exercise their political rights under Article 38;*
- (b) not more than two-thirds of the members of elective public bodies shall be of the same gender;*
- (c) fair representation of persons with disabilities;*
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and*
- (e) free and fair elections, which are—*

¹⁶¹ Institute of Education and Democracy, *Dynamics of Democracy: Strategies for Future Elections, An Audit Of The Legal, Institutional and Administrative Frameworks that Governed The 4th March 2013 General Elections* June 2014

¹⁶² African Union Commission, Report Of African Union Elections Observation Mission to the 4 March 2013 General, Elections In Kenya, 2013

¹⁶³ European Union Election Observation Mission to Kenya, General Elections 2013

¹⁶⁴ Article (1) (2) of the Constitution

¹⁶⁵ Article 38 (3) of the Constitution of Kenya, 2010

¹⁶⁶ Article 35 of the Constitution of Kenya, 2010

¹⁶⁷ Article 34 of the Constitution, 2010

- (i) by secret ballot;
- (ii) free from violence, intimidation, improper influence or corruption;
- (iii) conducted by an independent body;
- (iv) transparent; and
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

409. With regard to the voting process, Article 86 of Constitution of Kenya provides as follows-

At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) *whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
- (b) *the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
- (c) *the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
- (d) *appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*

410. Kenya has ratified the major international instruments which cover electoral rights. Under Article 2(6) of the Constitution of Kenya, such treaty obligations are incorporated directly into Kenyan law at ratification and can be relied on in court. They include the Universal Declaration of Human Rights which provides that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives” and that “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”¹⁶⁸

411. The Elections Act sets out comprehensive provisions on the voting process. It provides the right to vote as specified under Article 38 (3) of the Constitution¹⁶⁹ and the eligibility to vote which requires a person to have been registered as a voter, produce an identification document, the holding of elections by the returning officer¹⁷⁰ and determination and declaration of results.¹⁷¹ On the eligibility to vote, section 10 of the Elections Act provides as follows-

- (1) *A person whose name is entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station.*

¹⁶⁸ Article 21 of the Universal Declaration of Human Rights, 1948

¹⁶⁹ Section 3 of the Elections Act, 2011

¹⁷⁰ Section 38 of the Elections Act, 2011

¹⁷¹ Section 39 of the Elections Act, 2011

(2) The identification document produced in subsection (1) shall be the identification document used at the time of registration as a voter.

(3) Nothing in this section shall entitle a person who is prohibited from voting by any written law to vote or relieve that person from any penalties to which the person may be liable for voting.

412. The Independent Electoral and Boundaries Commission Act provides for the mandate of Independent Electoral and Boundaries Commission as the body responsible for the conduct of elections in Kenya pursuant to Article 88 of the Constitution. The Political Parties Act guides the functioning of political parties and establishes the National Consultative Forum and the Registrar's office;
413. The Elections (General) Regulations¹⁷² provides comprehensive guidelines on the voting process including on appointment of the returning officers and clerks and the designations of polling stations. It also makes provisions on voting at elections including the elections procedure, electronic voting, election material at the polling station including the specifications of the ballot box, admission to the polling station, keeping order at the polling station, polling time, prescribes ballot papers set out in the schedule, sealing of ballot boxes, voting procedure, assisted voters, among other procedures.¹⁷³
414. The International Covenant on Civil and Political Rights also enumerates the right of citizens to take part in public affairs directly or indirectly through freely chosen representatives, to vote and to be elected in genuine periodic elections as well as essential principles of political rights such as universal and equal suffrage, voting by secret ballot and the guarantee of freedom of expression.¹⁷⁴
415. Similarly, the African Charter on Human and People's Rights provides that every citizen shall have the right to participate freely in their government through freely chosen representatives in accordance with the provisions of the law.¹⁷⁵
416. The right to vote is also contained in other international conventions such as the International Convention on the Elimination of All Forms of Racial Discrimination which emphasizes on universal suffrage;¹⁷⁶ the Convention on the Elimination of All Forms of Discrimination Against Women which places obligations on the government to ensure that women, on equal terms with men, have the right to vote;¹⁷⁷ and the Convention on the Rights of Persons with Disabilities which

¹⁷² Kenya Gazette Supplement No. 161, Legislative Supplement No. 54, Legal Notice No. 128, 2nd November, 2012

¹⁷³ Section 59-72 of the Elections (General) Regulations, 2012

¹⁷⁴ Article 25 of the International Covenant on Civil and Political Rights

¹⁷⁵ Article 13 (1) of the African Charter on Human and People's Rights

¹⁷⁶ Article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination

¹⁷⁷ Article 7 (a) of the Convention on the Elimination of All Forms of Discrimination Against Women

specifies specific steps that governments should take to ensure Persons with Disabilities realize their right to vote.¹⁷⁸

5.7.2. Comparative Analysis

417. A comparative analysis on the voting process in the Philippines reveals that voting is done by biometrically registered voters. Citizens can use any two identification documents with the applicant's photograph, address and name. The accepted identifications documents include: current employee's ID with the signature of the employer or authorized representative; Postal ID; Student's ID or library card, signed by the school authority; Senior Citizen's ID; Driver's license; National Bureau of Investigation(NBI)/ Philippine National Police(PNP) clearance; Passport; Social Security System(SSS)/ Government Service Insurance System(GSIS) ID; Integrated Bar of the Philippines (IBP) ID; License issued by the Professional Regulatory Commission (PRC) and; any other ID which fits the criteria.¹⁷⁹
418. The ballot machine used is advanced as it is automated and it has internal vote counting system and rejects, automatically, ballot papers that have not been filled in well. This is helpful as counting is not done manually. The use of a voting machine that does counting as voting is on-going proves to be a sufficient method to curb rigging during elections in Philippines.
419. With regard to the method of voting, comparative data by the ACE (Administration and Cost of Elections) Project: Electoral Knowledge Network shows that of 209 countries surveyed, a majority, at 92.4 per cent manually mark ballot. Only 7.9 per cent of countries have adopted electronic voting including Argentina, Belgium, Brazil, Bhutan, Ecuador, France, Guam, India, Mongolia, New Caledonia, Peru, Philippines, Portugal, Paraguay, Singapore, United States of America and Venezuela. Other voting methods adopted include mechanical voting machine, punch cards and the internet.¹⁸⁰
420. With regard to conditions and restrictions imposed on the right to vote, the voting rights of citizens living outside their country of nationality is limited due to the requirement of prior registration. In Australia, the right to vote by overseas absentee voting may be exercised only within six years after leaving Australia. Failure to return within six years results in the loss of the right to vote. However, annual extensions of registration as an overseas absentee voter are also allowed. In Canada, the right to vote by overseas absentee ballot may be exercised only within five

¹⁷⁸ Article 29 of the Convention on the Rights of Persons with Disabilities

¹⁷⁹ Official Gazette, Voter Registration, <http://www.gov.ph/services/voters-id/> [accessed 6th August 2016]

¹⁸⁰ Ace Project, The Electoral Knowledge Network, *Voting method, How do electors cast their votes?* <http://aceproject.org/epic-en/CDTable?question=VO011> [accessed 4th August, 2016]

consecutive years after leaving Canada.¹⁸¹ However, Germany is less restrictive since an overseas voter only has to prove prior permanent residence in Germany for an interrupted period of three years. Additionally, once the residence requirement is satisfied, the overseas voter is allowed to vote for up to twenty-five years of leaving Germany. The right lapses thereafter.

421. With regard to the polling station for voting by citizens living outside their country, the polling place is often the embassy or consulate or rented halls. Countries like Moldova, Poland, Russia and Ukraine require in-person voting. However, postal voting which refers to the casting of votes by mail, is transmitted either directly to the electoral management body of the country of origin or delivery of the ballot to the embassy or consulate for transmission to the electoral management body. This is usually delivered with an inner envelope with the ballot and outer envelope addressed to the embassy or consulate. This method is exclusively used by Canada, Germany, Italy, Spain, United Kingdom and the United States. Postage is usually provided for free.
422. With regard to compulsory voting, comparative data by the ACE (Administration and Cost of Elections) Project :Electoral Knowledge Network shows that a survey of one hundred and ninety four countries indicates that in 85 per cent of countries including Kenya, voting is voluntary. However, in 8.3 per cent of the countries, voting is compulsory and regulated in the electoral law. These include Angola, Argentina, Australia, Bolivia, Brazil, Cyprus, Ecuador, Egypt, Greece, Honduras, Luxembourg, Nauru, Panama, Peru, Philippines, Paraguay, Rwanda, Singapore and Turkey. In 7.8 per cent of the countries, voting is compulsory and regulated in the constitution. These include Angola, Australia, Argentina, Austria, Belgium, Bolivia, Brazil, Cyprus (North), Costa Rica, Dominican Republic, Ecuador, Egypt, Greece, Honduras, Panama, Peru, Paraguay, Thailand, Uruguay.¹⁸² For example, in Australia voting has been compulsory since 1924 and the enforcement is strict with sanctions such as fines if the non-voter cannot provide a legitimate reason for abstention.¹⁸³
423. In Brazil, voting is compulsory for citizens above 18 years old but there are some exceptions. It is optional for citizens above 70 years old and for citizens above 16 years but less than 18 years old, for citizens who cannot read and write, for those who are sick, those who are not in their constituency of residence and civil servants and military staff in service on the polling day. Voters who do not exercise their

¹⁸¹ Henry S. Rojas , Development Associates Occasional Paper In Democracy And Governance, *A Comparative Study of the Overseas Voting Laws and Systems Of Selected Countries*, Development Associates Occasional Paper No. 17

¹⁸² Ace Project, The Electoral Knowledge Network, *Legislative Framework, Compulsory /Voluntary Voting*, http://aceproject.org/epic-en/CDTable?question=LF004&set_language=en [accessed 3rd August , 2016]

¹⁸³ Commonwealth Electoral Act 1918; Section 245 Australian Electoral Commission, http://aceproject.org/epic-en/CDCountry?set_language=en&topic=LF&country=AU#LF004 [accessed 3rd August , 2016]

duty to vote and do not justify this omission to the electoral judge within thirty days after the election, face a fine of 3 to 10 per cent of the minimum wage rate in the region.¹⁸⁴

5.7.3. Submissions Received by the Committee

(a) Incorporate Technology in the Voting Process

424. A number of stakeholders were of the view that the Independent Electoral and Boundaries Commission should incorporate technology in the voting process. These included the Evangelical Alliance of Kenya, Hon. Peter Kaluma, the East Africa Centre for Law and Justice, the Council of Governors and the Kenya Diaspora Alliance. They submitted that the Independent Electoral and Boundaries Commission should allow electronic voting and voting from any place and that voting tethered to a polling station disenfranchises some Kenyans.

425. The Kenya Diaspora Alliance submitted that electoral technologies, including electronic voter registration should be used and that competent, competitively sourced or referenced experts, both locally and abroad, with impeccable integrity should be brought on board to manage the systems. Further, the National Gender and Equality Commission submitted that in this regard, the Independent Electoral and Boundaries Commission should be generally prepared for the elections including ensuring timely procurement and testing of systems and procedures.

(b) Ensure Peace, Law and Order at Polling Stations

426. A majority of stakeholders submitted that the environment at the polling stations on elections day should be conducive and secure for voters. The Coalition for Reforms and Democracy submitted that the voting processes should have the following stages: provision of a counter to take attendance, identification of voters, issuing all the ballots to the every voter and a progress report given from every polling station.

427. Mkenya Daima submitted that Independent Electoral and Boundaries Commission should ensure a secure, peaceful, orderly, tightly controlled and independently monitored voting process and especially the counting of votes at the polling station. Further, that political party should ensure they conduct themselves in a manner that does not interfere with the security, peace, law and order in polling stations and in the counting of votes. They should also invest in sufficient, trained and committed party agents to observe both the voting and the counting and avoid issuing any inciting statements in the process of voting, counting and tallying of votes.

428. With regard to electoral offences, the Institute of Certified Public Accountants of Kenya submitted that there should be law a to criminalize voting or attempts to vote

¹⁸⁴ Constitution: "Constituição da República Federativa do Brasil" at Article 14, http://aceproject.org/epic-en/CDCountry?set_language=en&topic=LF&country=BR#LF004 [accessed 3rd August, 2016]

twice and setting the penalty at a jail term for a period not exceeding two years or a fine not exceeding 500,000 shillings or both.

429. In this regard, Mkenya Daima stated that any candidate or party cited by Independent Electoral and Boundaries Commission and independent observers as having interfered with or disrupted voting and or counting, should face severe penalties, including being banned from political or State office for life.

(c) Monitoring and Validation of Election Results

430. A number of stakeholders submitted that there should be monitoring of the counting and tallying process and validation or an audit of the results before they are announced. Mkenya Daima submitted that the Independent Electoral and Boundaries Commission should procure the services of an independent assurance party to assist in validation of the results before they are announced. This, they stated, assures the public of the integrity of the election.
431. With regard to monitoring, the Amani National Congress submitted that the Political Parties Act be amended to provide for political party funding or election agents (one agent per polling station) to reduce cases of malpractices such as ballot stuffing in some parties' strongholds. In this respect, the Coalition for Reforms and Democracy also submitted that a periodic report from polling stations would help cure ballot stuffing.
432. On a similar note, the Editors Guild submitted that the vote tallying to be adopted must be one that is open and therefore available for audit and verification by the media and all citizens at all levels of vote tallying process right from the polling centres to the national tallying centre.

(d) Mainstream Issues of Special Interest Groups

433. Several stakeholders noted that there was need to place measures to cater for Special Interest Groups and especially different categories of persons with disability in the voting process. The Kenya National Commission on Human Rights, the Kenya National Association for the Deaf, the National Gender and Equality Commission, the Ethics and Anti-corruption Commission and the Multi-Sectoral Forum submitted that the Independent Electoral Boundaries Commission should put in place measures to ensure voters with disability are adequately facilitated.
434. Specifically, Kenya National Commission on Human Rights and the Kenya National Association for the Deaf stated that the Independent Electoral Boundaries Commission should provide braille voting materials for the blind and sign language interpreters for the deaf. In addition, the Multi-Sectoral Forum submitted that persons with disability be involved in civic education and other electoral processes. The Kenya National Commission on Human Rights further submitted that the

Elections Act should be amended and guidelines enacted obligating provision of these facilities while the Multi-Sectoral Forum further submitted that Independent Electoral and Boundaries Commission should define who a person of unsound mind and have specific provisions that persons with disabilities be provided with persons to assist them at the polling station.

435. Further the National Gender and Equality Commission submitted that the Independent Electoral and Boundaries Commission should prepare election management staff to facilitate persons with disability and to mainstream issues concerning Special Interest Groups at every polling station, for instance for persons with disabilities to cast votes on priority basis and training staff to manage help desks managed by persons who are adequately trained to deal with different scenarios that may arise. Similarly, the Ethics and Anti-corruption Commission submitted that polling stations should be accessible to all voters especially to vulnerable groups such as the elderly

(e) Training of Polling Officials

436. A number of stakeholders including the Council of Governors and the Kenya National Commission on Human Rights submitted that the Independent Electoral and Boundaries Commission should ensure comprehensive training of polling officials to ensure proper management of elections.

(f) Limit Number of Voters Per Polling Station

437. Several stakeholders including the Kenyan National Commission on Human Rights, the National Gender and Equality Commission and the Council of Governors noted that the number of people per polling stations should be reduced and the number of polling centers increased to reduce congestion. On a similar note, the National Gender and Equality Commission and the Law Society of Kenya submitted that the number of polling stations should be increased so as to reduce congestion and ease the flow and control of voters.

438. The Kenya National Commission on Human Rights submitted that clause 13 of the Election Laws (Amendment) Bill, No. 3 of 2015¹⁸⁵ which proposed a maximum of seven hundred (700) people per polling station be adopted and passed. The Jubilee Coalition also submitted that Polling stations should not have more than seven hundred (700) voters per voting station. Clause 13 of the Election Laws (Amendment) (No. 3) Bill of 2015 provides as follows-

The Elections Act, 2011 is amended by inserting the following new section immediately after section 38—

¹⁸⁵ Kenya Gazette Supplement No. 189 (National Assembly Bills No. 63)

38A. For the purposes of conduct of elections, the number of voters per polling station shall not exceed seven hundred or such other number as the Commission may determine.

439. On the same matter, the Council of Governors submitted that Polling stations should have not more than five hundred (500) voters. On a similar note the Office of the Registrar of Political Parties submitted that there should be a buy-in on the recommended polling stations before an election. In addition, the locations should be gazetted before the elections.

(g) Interference by Political Parties and Politicians

440. The Kenya National Commission on Human Rights submitted that Members of Parliament and political parties should cease interfering with the political processes and that laws and regulations and procedures relating to elections should be finalized and passed before the election. They submitted that this will help avoid the confusion and uncertainty that was witnessed in 2013 and allow the Independent Electoral and Boundaries Commission ample time to effectively implement those laws.

(h) Staggering of Elections

441. Several stakeholders noted that the Independent Electoral and Boundaries Commission had the immense responsibility of handling six elections in one day and gave proposals on how the elections could be staggered. The Amani National Congress submitted that the election of the six representatives should be staggered in two elections to allow effective and efficient management of elections and reduce cases of malpractices.
442. The Political Parties Liaison Committee submitted that elections should be staggered and done in two consecutive days as follows: election of county representatives (Member of County Assembly, Women representatives and Governor); and the election of national representatives (Members of Parliaments and President).

(i) Video Recording at Polling Centers

443. The Council of Governors and the Jubilee Coalition submitted that there should be video recording of the counting and the results announcement at all polling stations. Further that party agents and observers should be allowed to video record the counting and results declaration process.

(j) Deployment of Returning Officers and Presiding Officers

444. The Council of Governors submitted that the deployment of Returning Officers and Presiding Officers should be through open balloting by the persons concerned in the presence of political party agents and observers.

(k) Voting of Kenyans Living Outside Kenya (the Diaspora)

445. A number of stakeholders raised concern of how the Independent Electoral and Boundaries Commission would realise the rights of Kenyans living outside Kenya. The Multi-Sectoral Forum submitted that the Elections Act be amended to provide for a mechanism and framework within which registration of citizens in the Diaspora will be undertaken, who to oversee the exercise and the manner in which the elections in the diaspora will be undertaken. Further, the Kenya Diaspora Alliance submitted that the Independent Electoral and Boundaries Commission should explore electronic voting for the Kenyans in the Diaspora.

(l) Consequences for Withdrawal from the Electoral Process

446. The Multi-Sectoral Forum submitted that the Elections Act be amended to provide that any person withdrawing beyond a particular stage in the electoral process be subject to penalties, taking into consideration the financial implications undertaken by the Commission in preparation for the election.

(m) Mandatory Voting

447. A number of stakeholders proposed that voting should be mandatory for registered citizens. The Institute of Certified Public Accountants Kenya submitted that voting be made mandatory for all registered citizens, to address voter apathy. Over twenty six countries in the world, such as Belgium, Australia, Argentina and Netherlands, have made voting compulsory. This has resulted in over 70% voter turnout. This, it was stated, would help address voter apathy.

5.7.4. Recommendations of the Committee

448. The Committee recommends as follows-

1. That the Elections Act be amended to limit the number of voters in each polling station to a maximum of five hundred (500); and
2. That the Independent Electoral and Boundaries Commission puts in place adequate arrangements to facilitate voting by persons with disabilities.

5.8. TRANSMISSION AND DECLARATION OF ELECTION RESULTS

449. The completion of the voting process is usually followed by the official counting of votes at the polling stations supervised by the Presiding Officer and in the presence of elections agents and accredited observers. This entails the correct allocation of votes to candidates, determining valid and invalid votes and the procedures for disputed votes and the overall conduct of operations was good and that the recorded results reflected the will of voters. This is followed by the transmission and declaration of election results. In this regard, a distinction is made between announcement of results at the polling station versus a formal declaration of final results by the Independent Electoral and Boundaries Commission by a gazette notice.

450. The Report of the Independent Review Commission on the General Elections with regard to the 2007 elections made the comprehensive recommendations with regard to the transmission and declaration of election results as well as counting and tallying-

- (1) IREC [The Independent Review Commission on the General Elections] recommends that the ECK [Electoral Commission of Kenya] integrate the various descriptions of the entire counting and tallying procedure into one document - and one document only - which will then be the principal description and must be adhered to. The need for such descriptive regulations does not depend on possible changes in the counting and tallying system.
- (2) IREC [The Independent Review Commission on the General Elections] recommends that without delay ECK [Electoral Commission of Kenya] start having developed an integrated and secure tallying and data transmission system which will allow computerised data entry and tallying at constituencies, secure simultaneous transmission (of individual polling station level data too) to the national tallying centre, and the integration of this results-handling system in a progressive election result announcement system.
- (3) IREC [The Independent Review Commission on the General Elections] recommends that the media must have full access to this new system, which will not be a problem if it is properly constructed. This will assist the media in obtaining fully reliable results at high speed from all over the country and will also place the ECK [Electoral Commission of Kenya] in the driver's seat in relation to providing the media with fast and reliable data.
- (4) IREC [The Independent Review Commission on the General Elections] recommends that ample time be allowed for verifying, provisional results, so that there is no risk that errors may still be found or no frivolous objections raised. Most countries allow one or two weeks for this-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. Given a clear explanation of what a provisional result is, there is no problem in making voters understand that election results are so important that they can be declared final only once they have been properly scrutinised and checked¹⁸⁶.

451. The Independent Electoral and Boundaries Commission adopted the Results Transmission System (RTS) technology in the 2013 General Elections to transmit provisional results to an observations centre. At the end of voting and when votes

¹⁸⁶ Report of the Independent Review Commission on the General Elections (IREC) held in Kenya on 27th December, 2007, pg.138

have been counted and tallied, the Presiding Officers enter the data on the signed results sheet (Form 35) into a specially configured mobile phones and transmits the results simultaneous to the election results centers at the constituency, county and national level¹⁸⁷.

452. There were challenges experienced with the electronic transmission of the results including that only 17,000 of the 33,000 polling stations managed to transmit results before it was overwhelmed by some technical hitches. This alternative method of getting results had to be discontinued when it became too slow and although the problem was identified and fixed, a number of officials had abandoned the transmission as they took hard copies of the same to tallying centres.¹⁸⁸ There were also network failures and suspicions of system hacking which necessitated a reversion to physical submission of the results.¹⁸⁹
453. The cumbersome procedures and the length of time required to complete the counting of the six ballots which went late into the night and was conducted with poor lighting. The Africa Union Election Observer Mission also noted that the poor lighting in some polling stations further complicated the process of verification of valid and invalid ballots.¹⁹⁰

5.8.1. Current Legal Framework

454. Article 86 of the Constitution of Kenya, 2010 provides as follows with regard to the counting, tabulation and announcement of results at the polling station by the presiding officer and subsequent announcement of results by the returning officer.

At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*

¹⁸⁷ IEBC, Results Transmission System (RTS), <http://www.iebc.or.ke/index.php/results-transmission-and-presentation-rts> [accessed 23rd July, 2016]

¹⁸⁸ IEBC, <http://www.iebc.or.ke/index.php/results-transmission-and-presentation-rts> [accessed 23rd July, 2016]

¹⁸⁹ African Union Commission, Report Of African Union Elections Observation Mission To The 4 March 2013 General Elections In Kenya, 2013

¹⁹⁰ *Ibid*

455. Article 138 of the Constitution provides on the procedure at presidential elections as follows-

- (1) If only one candidate for President is nominated, that candidate shall be declared elected.*
- (2) If two or more candidates for President are nominated, an election shall be held in each constituency.*
- (3) In a presidential election—*
 - (a) all persons registered as voters for the purposes of parliamentary elections are entitled to vote;*
 - (b) the poll shall be taken by secret ballot on the day specified in Article 101 (1) at the time, in the places and in the manner prescribed under an Act of Parliament; and*
 - (c) after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result.*

456. On the determination and declaration of results, the Elections Act provides as follows-

- (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.*
- (2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.*
- (3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.*

457. The Elections (General) Regulations, 2012¹⁹¹ provides comprehensive guidelines on the Transmission and Declaration of results including the procedure on the close of polling by the presiding officer¹⁹², the attendance of agents at the counting of votes¹⁹³, the procedure for counting of votes as done by the presiding officer in the presence of candidates and agents¹⁹⁴ and the rejection of ballot papers.

458. The regulations further provide for the signing of the declaration in respect of the elections by candidates or agents, that is, Form 34 for the Presidential election and Form 35 for the National Assembly, county women representative, Senator, county governor and county assembly elections.¹⁹⁵ The Regulations further provide for the procedure for announcement of results before communicating the results to the

¹⁹¹ Kenya Gazette Supplement No. 161, Legislative Supplement No. 54, Legal Notice No. 128, 2nd November, 2012

¹⁹² Section 73 of the Elections (General) Regulations, 2012

¹⁹³ Section 74 of the Elections (General) Regulations, 2012

¹⁹⁴ Section 76 of the Elections (General) Regulations, 2012

¹⁹⁵ Section 79 (1) of the Elections (General) Regulations, 2012

returning officer,¹⁹⁶ procedure for a recount¹⁹⁷ and the sealing of the ballot papers by the presiding officer.¹⁹⁸

459. Following the sealing of ballot papers at the polling station, the Regulations further provide for the transmission of provisional results electronically,¹⁹⁹ the tallying and announcement of election results by the returning officer.²⁰⁰ At this stage the returning officer declares the election results in the presence of candidate or agents and delivers to the Commission the original Forms 34 and 35 together with Forms 36 and 37 as the case may be.

460. The Regulations further provide for the venue of the final tallying which shall be gazetted by the Commission,²⁰¹ the sealing of the ballot papers by the returning officer²⁰² and returns of persons elected to the county returning officer, that is, a certificate in Form 37 for the presidential elections and a certificate in Form 38 for a member of National Assembly, county woman, representative, Senate, county assembly, county governor or county assembly election each showing the total number of votes cast for each candidate.²⁰³

5.8.2. Comparative Analysis

461. With regard to the method of sorting and counting of votes, comparative data by the ACE (Administration and Cost of Elections) Project: Electoral Knowledge Network indicates that for a majority of countries surveyed, counting takes place at the polling stations. Out of 168 countries surveyed 76.7 per cent carried out counting at the polling stations. This was followed by 12.3 per cent of countries that have special polling centres. They include Belgium, Botswana, Egypt, United Kingdom of Great Britain and Northern Ireland, Ireland, India, Japan, Namibia among others.²⁰⁴

462. A comparative data analysis by the International Institute for Democracy and Electoral Assistance indicates that with regard to the processing of results, a number of countries have adopted technology to ensure accountability in the form of an electronic tabulation system. Out of 134 countries surveyed, 57.5 percent of

¹⁹⁶ Section 79 (2) of the Elections (General) Regulations, 2012

¹⁹⁷ Section 80 of the Elections (General) Regulations, 2012

¹⁹⁸ Section 81 of the Elections (General) Regulations, 2012

¹⁹⁹ Section 82 of the Elections (General) Regulations, 2012

²⁰⁰ Section 83 of the Elections (General) Regulations, 2012

²⁰¹ Section 84 of the Elections (General) Regulations, 2012

²⁰² Section 86 of the Elections (General) Regulations, 2012

²⁰³ Section 87 of the Elections (General) Regulations, 2012

²⁰⁴ Ace Project, The Electoral Knowledge Network, *Voting are sorted/counted at? Following the close of voting, where are the votes first sorted and counted?* <http://aceproject.org/epic-en/CDTable?question=VC004> [accessed 4th August, 2016]

countries have adopted an electronic tabulation of results, while 35.8 percent have not.²⁰⁵

463. With regard to the number of days it takes to establish final results, the numbers vary across the countries surveyed by the International Institute for Democracy and Electoral Assistance. There was also a distinction made between establishing the results for the presidential elections and legislative elections in the last elections carried out as well as the announcing of final results and the announcing of certified results. The comparative data with regard to the number of days it took to announce certified results was as follows in selected countries-

²⁰⁵ International Institute for Democracy and Electoral Assistance (IDEA), *Are official election results processed by an electronic tabulation system?* <http://www.idea.int/db/fieldview.cfm?field=496®ion=-1> [accessed 4th August, 2016]

Table 6: Number of Days it Took to Announce Certified Results in Selected Countries²⁰⁶

	COUNTRY	DATA SOURCE	NO. OF DAYS	REMARKS
1.	Kenya	2013 General Elections	5 days for presidential elections; 9 days for legislative elections	During the Presidential (2013) elections certified results were established within 5 days, while the results for the Legislative (2013) elections were established after 9 days. The Constitution only provides timelines for the counting, tallying and announcement of presidential results ²⁰⁷ . The counting and announcement of results for other elective post follows the procedure that is provided under the Article 75(2) of the Elections general regulations.
2.	Canada	2011 General Elections	13 days	During the General (2011) election, certified results were established within 13 days. The publication of official voting results was done after 3 months (August 17, 2011). The validation of results is done by returning officers in the few days after polling day, but it can be delayed up to three weeks if necessary. The validated results are published as they become available. Elections Canada collects and publishes the final official voting results without delay, as specified by section 533 of the Canada Elections Act.
3.	India	2014 Elections	1 day	Certified results were established after 1 day.
4.	Liberia	2011 Elections	7 days for presidential elections; 14 days for legislative elections	During the Presidential (2011) elections certified results were established within 7 days, while the results for the Legislative (2011) elections were established after 14 days.
5.	Mexico	2012 Elections	Approximately two months	During 2012 elections held on 1 July, the certified results of legislative elections were announced on 31 August, while certified results of presidential elections were announced on 23 August.
6.	Namibia	2009 Elections	7 days	During the Presidential (2009) and Legislative (2009) elections certified results were established within 7 days.
7.	New Zealand	2011 Elections	14 days	After the official results were announced on 10 December 2011 there were two applications for judicial recounts, which were completed on the 13 and 14 December 2011 respectively. Amended official results were declared on 14 December and 17 December 2011. The Commission declared the allocation of list seats and returned the writ on 17

²⁰⁶ International Institute for Democracy and Electoral Assistance (IDEA). *In the last national election, how many days did it take for the EMB to establish certified results?* <http://www.idea.int/elections/ict/field.cfm?field=498®ion=-1> [accessed 4th August, 2016]

²⁰⁷ This is provided under Article 138 (10) of the Constitution of Kenya, 2010

8.	Rwanda	2010 Elections 2013 Elections	Presidential Legislative	2 days	December 2011. During the Presidential (2010) and Legislative (2013) elections certified results were established within 2 days For the 2013 elections provisional results were to be announced no later than 20 September 2013, while final election results were announced before 25 September 2013 ²⁰⁸ .
9.	South Africa	2009 Elections		2 days	During the Legislative (2009) elections certified results were established after 2 days.
10.	Switzerland	2011 Elections 2013 Referendum	Optional Referendum	43 days	For the legislative election (2011) the certified results were presented after 43 days. In Switzerland, up to 4 votes a year take place. Persons who are eligible to vote may accept or reject a proposal made by one or more persons or an authority. They vote on popular initiatives and on referendums (mandatory and optional). The last validated vote on an optional referendum took place on the 24 November 2013. The validation of the results by the Federal Council took place on the 20 February 2014. For the verification, the Federal Council has to wait until it is established that no appeal against the vote has been filed with the Federal Supreme Court, or as soon as a decision has been made on such an appeal.
11.	Zambia	2013 General Elections		2 days	For both the Presidential (2011) and Legislative (2011) elections the certified results were reported within 2 days while elections for the Local Government (2011) established certified results after 14 days.

²⁰⁸ In line with Article 136 of the 2013 'Instructions to the National Electoral Commission' and Article 70 of law Number 03/2010/OL of 18/06/2010, Organic Law Repealing the Organic Law n°17/2003 of 07/7/2003 governing presidential and legislative elections

5.8.2 Submissions Received by the Committee

(a) Use an Electronic Transmission System

464. A number of stakeholders noted that that electronic system should be used for results transmission. The Evangelical Alliance of Kenya and Ambassador Jack Tumwa submitted that the Independent Electoral and Boundaries Commission should use a thoroughly tested real-time election results relay system and that enough time should be allowed for ICT agents to audit the transmission system to ensure transparency and credibility.
465. With regard to the security of the system, the National Gender and Equality Commission submitted that the Independent Electoral and Boundaries Commission should invest in secure and robust approach to counting and tallying which will not cause significant delays and in electronic equipment that will ensure timely transmission of results whilst ensuring the integrity of the same. The process, they submitted, must remain open, transparent and traceable to all. Further, the Ethics and Anti-Corruption Commission submitted that Independent Electoral and Boundaries Commission should ensure that it encrypts election data that is being transmitted over the ICT systems.
466. In addition, several stakeholders noted the need for regulation with regard to the use of technology. The Electoral Institute for Sustainable Democracy in Africa submitted that Regulations should be clear and specify the integration of technology in the transmission and tallying. This, they stated, would remove distinction of rejected ballots as 'rejected objected to' and remove the category of disputed valid votes.
467. There were also suggestions to expand the use of technology in the results transmission process. Mr. Joseph Nduhiu submitted that the Independent Electoral and Boundaries Commission should work with Ushahidi to map voting stations and showcase results. He further submitted that the Commission should also use the government open data portal and Results should be sent by secure mobile phones Short Message Service (SMS) from every polling station to the Independent Electoral and Boundaries Commission Headquarters and relayed automatically to all news rooms and observers systems at the same time to prevent rigging.
468. Some stakeholders further submitted that the system of transmission and declaration of results should be maintained since it had worked in the past. This view was shared by the Jubilee Coalition, Kuza Uchumi wa Africa, Light Up Africa, Nomad Link Kenya and Kenya Young Voters Alliance.

(b) Announcement and Declaration of Results to the Public

469. A number of stakeholders submitted that the announcement and declaration of results should be done solely by the Independent Electoral and Boundaries

Commission. In this regard, Mkenya Daima submitted that Political Parties should be free to maintain their own tallying centers but be prohibited from announcing any results. Further, Young Kenyan Patriots submitted that the Independent Electoral and Boundaries Commission should have the sole authority to announce, after verification, the final presidential elections at the national level. This, they stated, would assure the accuracy and security of the vote tallying process.

470. On the same note, Mzalendo Saba Saba Party submitted that results to be transmitted and declared must be fully witnessed by agents just like actual counting while the Office of the Registrar of Political Parties submitted that all party agents must forward results to their respective parties.

(c) Place of Declaration of Results

471. Several stakeholders were concerned about the locations where there should be conclusive determinations of elections results, the announcement of results and the declaration of results. The Coalition for Reform and Democracy submitted that results announced at the polling station should be final and should only be challenged in a court of law. The Coalition submitted that the form filled out for the declaration of results at the polling station is the primary election form and all other forms can only be tallies of the final results rather than confirmation forms. Each form filled and verification stage passed is an extra opportunity to manipulate election results.
472. Similarly, the Amani National Congress submitted that the declaration of election results be done at the polling stations while the Electoral Institute for Sustainable Democracy in Africa submitted that regulation 76, 77 and 78 of the Elections (General) Regulations 2012 be amended to provide conclusive determination of ballots at polling stations, and amend the relevant electoral forms in line with this. The Multi-Sectoral Forum further concurred in their submissions and proposed that the Elections Act be amended to provide that the results announced at the polling station shall be final and definite. The Multi-Sectoral Forum noted that this was a concern arising out of the provisions of Article 138(3)(c) of the Constitution²⁰⁹ is that returning officers have previously annulled results that have been announced at polling stations causing uncertainty and tension in the electorate.
473. This view was also shared by the Ethics and Anti-corruption Commission and the Central Organization of Trade Unions. The Ethics and Anti-corruption Commission submitted that there should be real-time tallying of votes. Further, that declaring results at the polling station and displaying them in the tallying center through a standard poster and that the first level of declaration of results is at the polling

²⁰⁹ Article 138(3) (c) of the Constitution provides that “after counting the votes in the polling stations, the Independent Electoral and Boundaries Commission shall tally and verify the count and declare the result”

stations. The Central Organization of Trade Unions submitted that results declared at every polling station should remain to be the true results; results at the national tallying center should be a true reflection of the polling station results.

474. On the contrary, the Council of Governors and Hon. Peter Kaluma submitted that the constituency should be the focal point for electoral results transmission. Hon. Peter Kaluma submitted that the Elections Act should be amended to make results announced by Returning Officers at the two hundred and ninety Constituencies the final results of the elections. On the other hand, the Electoral Institute for Sustainable Democracy in Africa submitted that the accounting and publication of results to be done at the county level.
475. With regard to the recount of votes, the Electoral Institute for Sustainable Democracy in Africa submitted that regulation 80 of the Elections (General) Regulations, 2012 should provide for automatic recount at the motion of the Presiding Officer where it is found that the votes cast exceed the number of voters in the principal register, or where there is 100% voter turnout, or where the difference between the two leading candidates is less than 1%. Further, that the law should provide for mandatory filling-in of Form 34 as required under the Regulations.
476. The Office of the Registrar of Political Parties submitted that Article 86(c) of Constitution which requires the returning officers to announce results at all stages, that is, constituencies should be operationalized. The county Returning Officer must announce presidential results at the County level (Article 138(4)(b)) supported by regulation 84 and 87 of the Elections (General) Regulations.

(d) Persons with Disabilities

477. The Kenya National Association for the Deaf submitted that the Independent Electoral and Boundaries Commission should allow the Kenya National Association for the Deaf to appoint sign language interpreters during transmission of results. They further stated that some of the interpreters, who have been hired before, do not interpret correctly and as a result, the deaf persons do not understand.

(e) Remove Inconsistencies in Practice

478. The Electoral Institute for Sustainable Democracy in Africa submitted that in 2013, the Constituency Returning Officers proceeded to the national tally centre to account for their returns in disregard of the regulations which provided for collation at the county level. The Regulations should be amended to remove any opportunities for inconsistent practice.
479. Despite the chairman being the national returning officer in respect of presidential elections, the architecture of elections is still based on the practice that returns are

made at the constituency level and are not subject to review. The process should be determined at the national level especially when allegations of arithmetic changes or rectification of constituency returns are made at the national level.

(f) Time Limit for Vote Counting and Declaration of results

480. A number of stakeholders noted that there should be a time limit to the results transmission. The Amani National Congress submitted that Independent Electoral and Boundaries Commission should ensure that voter/staff distribution at polling station is done in such a way to ensure vote counting is complete within six (6) hours of closure, and all results sent within 24 hours of start of the voting process. Similarly, Hon. Peter Kaluma submitted that there should be a law to obligate declaration of presidential results within 15 hours of close of polling.

(g) Training of Agents on Results Transmission

481. Mzalendo Saba Saba Party submitted that due to the technical nature of transmission of results the Independent Electoral and Boundaries Commission should facilitate the training of chief party agents at constituency level who will in turn train their agents at lower levels. This, they stated, would ensure that agents have the capacity to provide checks and balances at the polling stations and the tallying centers.

(h) Valid Votes Versus Votes Cast

482. The Attorney-General submitted that Article 138(4)(a) of the Constitution be amended to include the word 'valid' immediately before the words 'votes cast'.

(i) Use of the Results Transmission System (RTS) Adopted in 2013

483. The Chairperson of the Independent Electoral and Boundaries Commission, Mr. Ahmed Issack Hassan, submitted that in the 2010 Referendum, the Commission used a Short Message Service (SMS)- based platform in the transmission of results which operated like a phone and was dependent on the availability of the mobile network to transmit. The Chairperson stated that when there was a problem with the server or congestion or a network error, ultimately, when servers were rectified, all the messages with elections results from the polling stations were received and displayed on the screen. The Chairperson noted that the results at the referendum were also configured to receive one result since it was a ballot which a 'Yes' or 'No' question.
484. The Chairperson stated that in the 2013 General Elections, on account of security and advice by the ICT team, the Commission switched from the SMS platform adopted Unstructured Supplementary Service Data (USSD) system. The Chairperson further submitted that the Results Transmission System (RTS) worked in some parts of the country for example Masinga and Ruaraka Constituencies. The Chairperson further stated that an internal evaluation of the system revealed that the

server crashed because the server disks were full of data from the Electronic Voter Identification Device (EVID).

485. The Chairperson further submitted that the results received under the system were provisional results under the Elections Act and the Election (General) Regulations because every Returning Officer had to bring the physical form to the County Returning Officer. He stated that *"...So, they do not replace the official legal announcement of the results by the Returning Officer and the paperwork on forms 36, 37 and 38. These are forms in the Elections Act, they are prescribed and form part of the laws."*²¹⁰

486. With regard to the current transmission and declaration of results, the Chairperson of the Independent Electoral and Boundaries Commission stated that-

"... a presiding officer is the first point of call for results. He opens the ballot box, counts the ballot papers first for President and declares the results there. He then gives a copy to the judges and then sends the results to the national centre, the county and the constituency. After he completes counting results for the governor, Senator, National Assembly Member, Woman and Ward Representative, he will then take the physical results of all the six ballot papers to the constituency headquarters where the Returning Officer for the constituency is based. The Returning Officer for the constituency will then collect and tabulate. This is where I think you rightly pointed out Article 86(b) which says:-

"At every election, the Independent Electoral and Boundaries Commission shall ensure that—

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;"

Article 86(c) says:-

"The results from the polling stations are openly and accurately collated and promptly announced by the returning officer;"

487. The Chairperson of the Independent Electoral and Boundaries Commission clarified that-

"It is no longer tabulation or announcing. They are now collated and announced by the Returning Officer. So, the Returning Officer collates all the results from all the polling stations. All the Presiding Officers come with the results and there, he announces the Member of Parliament (MP) for the constituency and also the Member of County Assembly (MCA). That is the only thing that he can announce in terms of the winner of the election for that constituency. However, he will still announce the votes received by

²¹⁰ Parliament of Kenya, Hansard record of the Meeting of the Joint Parliamentary Select Committee on Matters Related to the Independent Electoral and Boundaries Commission held on Tuesday, 2nd August, 2016 in County Hall – Mini Chamber, Parliament Buildings, Nairobi, pg.15

each presidential, gubernatorial, senatorial and woman representative candidates in that constituency. So, he will announce what others have gotten in that constituency but make a final declaration for the MP and MCA because there, he is the Returning Officer under Article 96(b).

He now becomes another officer and takes the results for the governor, senator woman representative and the President to the County Returning Officer who is now at another level of a Returning Officer under the Elections Act. The County Returning Officer will then declare the winners for Governor, Senator and Woman Representative. He also announces the presidential results as received in the county and then brings the results to the national level in Nairobi. This is a roadmap through which the results travel²¹¹."

488. With regard to the declaration of results, the Chairperson stated that-

"Ultimately, all the 290 Returning Officers from each constituency came to Nairobi with the presidential results which they had announced at their constituency. The 47 County Returning Officers also brought their results from each county. These results were published on line on the Commission's website. Even as the Commissioners were reading the results as given to them by the officers, the officers were seated in the auditorium.²¹²"

5.8.3. Recommendations of the Committee

489. The Committee recommends that the Elections Act be amended to provide for the electronic transmission of the tabulated results of an election for the President from a polling station to the constituency centers and to the national tallying center.

5.9. ALLOCATION OF SPECIAL SEATS

490. The allocation of special seats is the means through which political parties nominate individuals to represent interests which have not been adequately taken care of by the election process and which are vital to the effectiveness of democratic elections in terms of adequate representation for all.²¹³

491. The history of allocation of special seats in Kenya dates back to 1919 when the Legislative Council Ordinance of 1919 gave effect to European settler representation in the Legislative Council. Under the Royal Instructions of 1919, Indians were permitted two nominated members in the Council while Arabs had one

²¹¹ Ibid. pg.16

²¹² Ibid. pg.16

²¹³ This description was given by the High Court in Miscellaneous Civil Application, 305 of 2004 Rangal Lemeiguran and others Versus Attorney-General and others. The applicants approached the High Court of Kenya to preserve the fundamental right of participation in public affairs of the indigenous community of the Il Chamus <http://kenyalaw.org/caselaw/cases/view/80436/>

unofficial nominated member to represent their interests. In 1924, Dr John Arthur, a Presbyterian Church missionary was nominated to represent African interests in both the Legislative and Executive Councils. It was not until 1944 that the first African, Eliud Mathu, was nominated to represent Africans in the Council after L.J. Beecher, a European missionary, resigned from that post. In 1948, the number of nominated Africans in the Council was increased to four.²¹⁴

492. Section 33 of the Independence Constitution provided for twelve nominated members of the National Assembly appointed by the President following a general election, to represent special interests. Such persons were required to be persons who, if they had been nominated for a parliamentary election, would be qualified to be elected as members of the National Assembly. The nominated members were to be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality. The proportions were to be determined by the Electoral Commission after every general election.
493. The Constitution of Kenya Review Commission viewed affirmative action as a means of responding to historical concerns of gross inequalities that characterized Kenya's social and economic environment.²¹⁵ One of the concerns noted by the Commission was the unequal participation in decision-making and management of public affairs especially by women, people with disabilities, the youth, pastoralists and minority communities.²¹⁶
494. The Commission therefore recommended that the new Constitution should *"emphasize affirmative action for the historically marginalized and disadvantaged groups and areas including women, people with disability; the youth, pastoralists; older people, and minority communities, in representation, management of public affairs and sharing benefits of development."*²¹⁷

5.9.1. Current Legal Framework

495. The allocation of special seats in Kenya is founded on various provisions of the Constitution. Article 10 of the Constitution provides for the national values and principles of governance which include inclusiveness, non-discrimination and protection of the marginalized. Article 27 provides for equality and freedom from discrimination. In particular, Article 27(3) of the Constitution provides that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. Article 27(4) further provides that the *"State shall not discriminate directly or indirectly against any person on*

²¹⁴Report of the Constitution of Kenya Review Commission, 2005. Retrieved from www.kenyalaw.org

²¹⁵Report of the Constitution of Kenya Review Commission-2005 Retrieved from www.kenyalaw.org

²¹⁶ Ibid

²¹⁷ Ibid

any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religions, conscience, belief, culture, dress, language or birth."

496. Article 27(6) requires the State, in order to give full effect to the realisation of the rights guaranteed under Article 27, to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. Article 27(8) of the Constitution further requires that in addition to the measures under Article 27(6) of the Constitution, the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.
497. Article 81 of the Constitution, in providing for general principles for the electoral system, requires that the electoral system shall comply with, amongst other principles, the principle that not more than two-thirds of the members of elective public bodies shall be of the same gender and fair representation of persons with disabilities. On the specific allocation of special seats in the Constitution, Article 90(1) provides as follows—*"Elections for the seats in Parliament provided for under Articles 97(1) (c) and 98(1) (b), (c) and (d), and for the members of county assemblies under 177 (1) (b) and (c), shall be on the basis of proportional representation by use of party lists."*
498. Article 97(1)(c) of the Constitution in setting out the membership of the National Assembly provides for *"twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers"*. Similarly, for the Senate, Article 98(1) (b) of the Constitution further provides for *"sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90"*. Article 98(1)(c) and (d) of the Constitution further provides for *"two members, being one man and one woman, representing the youth"* and *"two members, being one man and one woman, representing persons with disabilities."*
499. Article 100 of the Constitution requires Parliament to enact legislation to promote the representation in Parliament of women, persons with disabilities, youth, ethnic and other minorities and marginalized communities.
500. With respect to the representation of women in Parliament, pursuant to Articles 81(b) and 100 of the Constitution, a number of Bills have been introduced in Parliament. These include: the Constitution (Amendment) Bills by Hon. Aden

Duale (two Bills)²¹⁸, Hon. Samuel Chepkonga²¹⁹ and Sen. Judith Sijeny²²⁰. Save for Hon. Chepkonga's Bill which seeks to provide for the progressive implementation of legislation to ensure that the two-thirds gender principle is achieved, all the other Bills propose varying, though largely similar, formulae for the immediate attainment of the principle under Article 81(b). The Two-Thirds Gender Rule Laws (Amendment) Bill, 2015 by Hon. Chepkonga also seeks to amend various laws so as to give effect to Article 100 of the Constitution, to promote the representation in Parliament of women, youth, persons with disabilities, ethnic minorities and marginalized communities in elective and appointive positions.

501. In the case of the County Assemblies, the Membership of County Assemblies as set out in Article 177(1) (b) of the Constitution requires *"the inclusion of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender"*. Further, Article 177(1) (c) of the Constitution provides for *"the number of members of marginalized groups, including persons with disabilities and the youth, prescribed by an Act of Parliament"*. Article 177(2) of the Constitution further requires that *"the members contemplated in clause (1) (b) and (c) shall, in each case, be nominated by political parties in proportion to the seats received in that election in that county by each political party under paragraph (a) in accordance with Article 90"*.
502. Section 36 of the Elections Act sets out the procedures relating to the allocation of special seats. It provides for the number of candidates to be included in the party lists for the respective special seats. It further requires that the Commission, within thirty days after the declaration of the election results, designates, from each qualifying list the party representatives on the basis of proportional representation.
503. There are various international instruments to which Kenya is a party that provide standards for electoral processes and require State parties to promote the rights of all citizens in electoral processes. These include: Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of Persons with Disabilities, African Charter on Human and People's Rights, Declaration on the Principles Governing Democratic Elections in Africa and the African Charter on Democracy, Elections and Governance.
504. In particular, Article 21 of the Universal Declaration of Human Rights guarantees that *"everyone has the right to take part in the government of his country, directly or through freely chosen representatives."*²²¹

²¹⁸ The Constitution of Kenya (Amendment) Bill No 4 of 2015

²¹⁹ Constitution of Kenya (Amendment) Bill No 50 of 2015

²²⁰ Constitution of Kenya (Amendment) Bill No 143 of 2015

²²¹ Universal Declaration of Human Rights, 1948

505. Article 7 of the Convention on the Elimination of All Forms of Discrimination Against Women requires that States parties take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, ensure that women have, on equal terms with men, the right, to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.²²² The Convention further requires that women be afforded the opportunity to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government and that they participate in non-governmental organizations and associations concerned with the public and political life of the country. Article 3 of the African Union Declaration on the Principles Governing Democratic Elections in Africa further provides that member states commit their governments to encourage the participation of African women in all aspects of the electoral process in accordance with the national laws.²²³

506. Article 29 of the Convention on the Rights of Persons with Disabilities requires that States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives.²²⁴ This includes the right and opportunity for persons with disabilities to vote and be elected.

507. Article 8 of the African Charter on Democracy and Elections and Governance states that “*State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups.*”²²⁵

5.9.2. Comparative Analysis

508. Regionally, a number of jurisdictions provide for allocation of special seats. In Rwanda, of the eighty members of the Chamber of Deputies, fifty-three members are elected while twenty-four women are elected by a joint assembly comprising members of the respective District, Municipality, Town or Kigali City Councils and members of the Executive Committees of women’s organizations at the Province, Kigali City, District, Municipalities, Towns and Sector levels. In addition, two members are elected by the National Youth Council, while one member is elected by the Federation of the Associations of the Disabled.²²⁶ In the Senate, of the

²²²Convention on the Elimination of All Forms of Discrimination Against Women, 1979

²²³African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002

²²⁴Convention on the Rights of Persons with Disabilities, 2006

²²⁵African Charter on Democracy Elections and Governance, 2007

²²⁶Article 76 of the Constitution of Rwanda, 2003

twenty-six members of the Senate, at least thirty percent of the members are required to be women.²²⁷

509. In Uganda, Article 78(1) of the Constitution provides that Parliament shall consist of, among others, one woman representative for every district and such numbers of representatives of the army, youth, workers, persons with disabilities and other groups as Parliament may determine. Section 8(2) of the Parliamentary Elections Act, 2005 states that in line with Article 78(1) of the Constitution, there shall be representatives of special interest groups in Parliament as follows: for the Uganda Peoples Defence Forces there shall be ten representatives at least two of whom shall be women, for workers there shall be five representatives at least one of whom shall be a woman, for the youth there shall be five representatives at least one of whom shall be a woman, for persons with disabilities, there shall be five representatives, at least one of whom shall be a woman.

510. In India, the constitution guarantees women the reservation of not less than a third of the total number of seats to be filled by direct elections in local government bodies in villages and municipalities. In addition, within seats reserved in every village council (*panchayat*) or municipality council for scheduled castes and tribes not less than a third of the seats be reserved for women belonging to these groups. At least a third of the offices of chairpersons of councils are also reserved for women. Reserved seats are allotted to different territorial constituencies on a rotational basis. The Constitution further stipulates that 'the offices of the chairpersons in *panchayats*, municipal councils and at any other level shall be reserved for castes, tribes and women in such manner as the legislature of a State may, by law, provide'.²²⁸

511. In Mexico, Article 41 of the Federal Constitution requires that political parties develop "...rules to ensure gender parity in the nomination of candidates in federal and local congressional elections." According to the Article 219 of the Federal Code of Institutions and Electoral Procedures, political parties are required to guarantee that at least forty percent of the candidates on the lists are of the same gender. This applies to both lists of candidates for the proportional representation election, and candidates for the constituency elections. However, parties that democratically elect their candidates are exempt from these requirements of the Electoral Code.²²⁹

5.9.3. Submissions Received by the Committee

512. A number of proposals were received by the Committee on the matter of allocation of special seats. These are summarized as below-

²²⁷Ibid, Article 82

²²⁸ Constitution of India, Article 243D (2)(3)(4) and 243t

²²⁹ www.quotaproject.org/country/mexico

(a) Supervision of Processes Relating to Allocation of Special Seats

513. The Kenya National Commission on Human Rights in their submissions observed that allocation of special seats had historically been used by political actors to reward their loyalists. They stated that although the Constitution had sought to put in place measures to ensure that the most vulnerable persons in society had an equal opportunity to engage in the political arena of the country, the process of allocation of special seats for the 2013 General Elections had been marred with irregularities which prompted recourse to the courts in Petition 147 of 2013.²³⁰ The Commission therefore recommended that the Independent Electoral and Boundaries Commission should discharge its mandate in this regard in such a manner as to ensure that the process was transparent, accountable and credible. This view was shared by the National Gender and Equality Commission.

514. The Kenya National Commission on Human Rights further recommended the review of the Elections Act to elaborate on the supervisory role of the Independent Electoral and Boundaries Commission including roles relating to compliance by political parties with party lists, timelines of when party lists are to be submitted, due diligence and scrutiny of the names submitted, rejection of non-compliant names and publication of the same to avoid tampering. The Office of the Registrar of Political Parties further proposed that guidelines on the preparation of party lists be published by the Independent Electoral and Boundaries Commission.

515. The CORD Coalition further proposed that the Independent Electoral and Boundaries Commission should scrutinize the lists submitted by the political parties so as to ensure that all names submitted were of persons eligible to vie for elections. This, they stated, would save public funds expended in litigation on account of legal challenges relating to poor allocation of special seats.

(b) Implementation of the Two-Thirds Gender Principle under Article 81(b) of the Constitution

516. A number of stakeholders submitted that there should be more concerted efforts to ensure implementation of the provisions of Article 81 of the Constitution on ensuring that not more than two-thirds of the members of elective public bodies shall be of the same gender, particularly in the National Parliament. This was the view held by the Kenya National Commission on Human Rights and the East African Centre for Law and Justice, among others. On this matter the Kenya National Commission on Human Rights proposed that the Political Parties Act and

²³⁰ Petition 147 of 2013: In the case of the National Gender and Equality Commission Versus the Independent Electoral And Boundaries Commission, the petitioner sought conservatory orders from the High Court to issue a temporary prohibitory injunction restraining the respondents from proceeding to allocate special seats to political parties under Article 90 of the Constitution on the basis of the party lists so far submitted by the political parties under Article 90 of the Constitution pending hearing and final determination. www.kenyalaw.org

the Elections Act be amended so as to require that party lists that are submitted by the respective political parties, conform to the two-thirds gender principle.

517. Fears were expressed by Civil Society Reference Group in their submissions to the Committee that, the Eleventh Parliament would be in breach of the Constitution if a legal mechanism was not put in place to implement the two-thirds gender rule by 27th August, 2017.

(c) Time for Submissions of Party Lists

518. The prevailing view was that party lists should be submitted before the start of the General Elections, as is currently provided for in election laws to avoid replacing the initial persons on the list with those who had lost in the elections. This was the view of, among others, National Gender and Equality Commission, CORD Coalition, and East African Centre for Law and Justice.
519. A contrary view was submitted to the effect that the party lists should be submitted after a general election. This view was held by the Jubilee Coalition and the Amani National Congress.
520. Concern was also raised by the National Gender and Equality Commission that party lists should be submitted in good time so as to allow for dispute resolution.

(d) Publication of Party Lists

521. The National Gender and Equality Commission recommended that party lists should be published and publicized. This view was shared by the Multi-Sectoral Forum and the Council of Governors.
522. The Registrar of the Political Parties proposed the development of electronic formats of legal forms to assist political parties effectively submit party lists, allow stakeholders to keep track of nominations and dissuade arbitrary changes to the party lists.

(e) Formula for Allocation of Special Seats

523. The Jubilee Coalition, the Coalition for Reforms and Democracy and the Council of Governors proposed that the allocation of special seats should be on the basis of total votes received by political parties as opposed to total seats won so as to ensure equality of the vote.

(f) Recall of Nominated Members

524. The Coalition for Reforms and Democracy proposed that in the event that a party was not happy with the representation of any of its nominated members, the affected party should be free to recall and replace the member in question with another party member.

(g) Ensuring Inclusivity in the Nomination Process

525. The Multi-Sectoral Forum recommended that the Political Parties Act be amended so as to ensure that affirmative action seats truly enhanced participation of the youth, persons with disabilities, minority groups and women. And further that mechanisms be put in place to ensure that non-representative and illegitimate persons do not take up the seats. They further suggested that in identifying candidates for the special seats, political parties be required to provide for democracy and competition by the affected constituencies within their respective parties. The submission of the Cornertribe of Mandera County also urged that special seats be reserved for the minority groups.
526. On the matter of nomination of persons with disability, a number of stakeholders proposed that the National Council for Persons with Disability be mandated to vet and certify the persons who qualify to be nominated for the positions of persons living with disabilities. This was the view of the Multi-Sectoral Forum, the Judiciary Committee on Elections and the Elections Observation Group.
527. Further, the Kenya National Association for the Deaf in their submission suggested that nomination of people living with disabilities should take into account the various categories of disabilities. This would ensure that the various special and unique interests are represented at Parliament.
528. The Central Organization of Trade Unions also submitted that the Independent Electoral and Boundaries Commission together with other arms of government should provide acceptable criteria for nominating workers' representatives in the National Assembly under Article 97(1)(c) of the Constitution.

(h) Representation of Kenyans Living Abroad

529. The Kenya Diaspora Alliance submitted that there should be provisions regarding the nomination of representatives from Diaspora among the "Special Interest Groups", by political parties. The alliance noted that there are countries that have special provisions for Diaspora Members of Parliament as follows: South Africa (2), Mozambique (2), Algeria and Cape Verde (6 each), France (12), Iraq (10), among others.

5.9.4. Recommendations of the Committee

530. The Committee recommends that in order to ensure transparency in the allocation of special seats, regulation 54(8) of the Elections (General) Regulations, 2012 be amended to require that the Independent Electoral and Boundaries Commission publishes the party lists submitted by political parties under Article 90 of the Constitution forty-five days before the General Elections.

5.10. ELECTION OBSERVATION, MONITORING AND EVALUATION

531. The Independent Electoral and Boundaries Commission defines election observation as the systematic collection of information on the electoral process without interference with the process itself.²³¹ Based on the information collected, election observation bodies issue objective evaluation on the electoral process.
532. According to the Guidelines for African Union Electoral Observations and Monitoring Missions, observation involves gathering information and making an informed judgement, monitoring includes the authority to observe an election process and to intervene in that process if relevant laws or standard procedures are being violated or ignored, while election assessment involves on-spot, preliminary evaluation of the conditions within which elections will take place.²³²
533. The history of election observation and monitoring in Kenya dates back to 1992 when the National Elections Monitoring Unit, a joint initiative of the International Commission of Jurists- Kenya, Federation of Women Lawyers-Kenya and the Law Society of Kenya observed the multi-party General Elections. This was under the Electoral Commission of Kenya guidelines for election observers. The guidelines did not provide for election monitoring and were restrictive to observers.²³³

5.10.1. Current Legal Framework

534. Election observation in Kenya is anchored in the Constitution. Article 88(4)(h) gives the Independent Electoral and Boundaries Commission the responsibility of facilitating the observation, monitoring and evaluation of elections. This is also set out as one of the functions of the Commission in section 4 of the Independent Electoral and Boundaries Commission Act.
535. In line with its mandate, the Independent Electoral and Boundaries Commission has provided the IEBC Guidelines and Code of Ethics for Election Observers. The guidelines harmonize and give direction on operations of observers as they participate in the electoral process in Kenya. They specifically define an observer, describe and differentiate the rights and roles of domestic and international observers, stipulate the code of conduct of observers as per the international standards and explain the accreditation process in Kenya. They also highlight the legal provisions on elections observation and the polling procedures.²³⁴

²³¹ IEBC Guidelines and Code of Ethics for Election Observers online www.iebc.or.ke

²³² <http://www.achpr.org/instruments/guide-elections/>

²³³ Makulilo et al (2016). Election management bodies in East Africa. A review by AfriMAP and Open Society Initiative for East Africa. Cape Town, South Africa: Africa Minds (p107)

²³⁴ IEBC Guidelines and Code of Ethics for Election Observers

536. In Kenya the Independent Electoral and Boundaries Commission accredits observers only²³⁵. Accreditation is mandatory for all observers in order to allow them to observe the elections processes or referendum. The IEBC Guidelines and Code of Ethics for Election Observers sets out the role of election observers.

537. Domestic observers are expected, in the performance of their functions, to maintain strict non-partisanship at all times and to work independently of Government in support of a genuine democratic election process. They are further required to cooperate closely with other election observers, and report impartially, accurately and in a timely manner on all observations and findings. International observers are expected, in discharging their functions, to respect sovereignty and international human rights, respect the laws of the country and the authority of electoral bodies, maintain strict political impartiality at all times, maintain accuracy of observations and professionalism in drawing conclusions, refrain from making comments to the public or the media before the Mission speaks, cooperate with other election observers, and maintain proper personal behaviour.²³⁶

538. The accredited observers are expected to observe the entire electoral process and make a report to the Independent Electoral and Boundaries Commission on the following-

- (a) whether the environment allowed peaceful election campaigns;
- (b) whether voters had freedom to attend campaign functions free of intimidation, coercion and violence;
- (c) whether the election management body was autonomous, impartial and administered the election efficiently and without fear or favour;
- (d) whether the registration of voters was carried out in order to allow all eligible persons to participate in the national election and elections, whether there was fairness in the exercise and whether the register of votes was reliable and accurate;
- (e) whether the media enjoyed the freedom accorded to it internationally and how they exercised their professionalism;
- (f) the presence and role of security officers during the election; and
- (g) the levels of voter turnout for the election.

5.10.2.Comparative Analysis

539. There are various international organizations that are actively involved in election monitoring. These include: the Commonwealth, the African Union, the European Union, and the Organization for Security and Co-operation in Europe.

²³⁵ Supra note 1 (p.2)

²³⁶ Ibid (p 27-31)

540. The Commonwealth Charter recognises the ‘inalienable right of individuals to participate in democratic processes, in particular through free and fair elections in shaping the society in which they live.’ To date, the Commonwealth has observed more than one hundred and thirty elections in thirty-six countries. The Commonwealth’s approach to election observation is rooted in the Guidelines for the Establishment of Commonwealth Groups to Observe Elections in Member Countries, which was adopted at the Commonwealth Heads of Government Meeting in Harare in 1991. Each Commonwealth Observer Group is constituted by the Commonwealth Secretary-General upon the invitation of a country’s election commission or government.

541. The observer missions are composed of eminent persons such as former Heads of Government and Ministers, serving and former election commissioners, parliamentarians and representatives of civil society, human rights bodies and the media. There are also Commonwealth Observer Missions or Expert Teams which comprise two to four independent observers. All teams are supported by a small team from the Commonwealth Secretariat. The Commonwealth election observers make an independent assessment of an electoral process and come up with recommendations for practical action to strengthen the quality of future elections. For the Commonwealth, elections observation supplements the long-term assistance provided to national electoral commissions, including support for the Commonwealth Electoral Network and training for junior election professionals.²³⁷

542. For the African Union, the Democracy and Electoral Assistance Unit was established by the Executive Council of the African Union Commission in 2006. The Unit is mandated to coordinate and organize the participation of the African Union in the observation of elections, and implement the African Union Commission’s program for the promotion of democracy and democratic elections in the continent as enshrined in the African Charter on Democracy, Elections and Governance. It also provides technical and electoral assistance to Election Management Bodies of Member States of the African Union for the enhancement of the national electoral processes. The long-term election observation methodology has reinforced the confidence and credibility placed by member States on the African Union Commission election observer reports.²³⁸

543. The European Union views Election observation as a vital component of European Union activities to promote democracy, human rights and the rule of law worldwide. Since 2000 over one hundred and twenty European Union Election Observation Missions have been deployed to all continents.²³⁹ Election Observer Missions are conducted by the European Union in third countries upon invitation of

²³⁷ <http://thecommonwealth.org/agv/observing-elections#sthash.OlgtSzn5.dpuf>

²³⁸ <http://pages.au.int/elections/welcome>

²³⁹ http://eeas.europa.eu/eueom/index_en.htm

the country holding the election. They are headed by a Member of the European Parliament, who acts as the Mission's Chief Observer. The European Commission also provides technical or material support to electoral processes.

544. The Organization for Security and Cooperation in Europe (OSCE) has fifty-six participating states from Europe, Central Asia and North America. It has established the Office for Democratic Institutions and Human Rights which is tasked with monitoring elections in the Organisation's region to assess compliance with election-related commitments and other international standards. The Office has developed a handbook that sets out the Office's observation methodology and serves as a reference for election observers.²⁴⁰

5.10.3. Submissions Received by the Committee

545. A number of proposals were received by the Committee on the matter of election observation, monitoring and evaluation. These are summarized as below-

(a) Inclusion in Election Observation, Monitoring and Evaluation

546. A number of stakeholders submitted that more organizations should be invited to act as observers during the General Elections. This was the view of the Evangelical Alliance of Kenya, the Ethics and Anti-Corruption Commission, Transparency International, the National Gender and Equality Commission, the Central Organization of Trade Unions and the Political Parties Liaison Committee.

(b) Timelines for Accreditation of Observers

547. The Central Organisation of Trade Unions in their submissions observed that the accreditation of observers should be done in good time. This would allow them to be active throughout the electoral process. This view was shared by the National Gender and Equality Commission who submitted that accreditation should be done at least three months to the election.

(c) Training and Capacity Building of Observers

548. A number of submissions focussed on the need to adequately train and build the capacity of local election observers, including political party agents. This, it was submitted, would give credence to their reports and manage their conduct. This was the view of the Ethics and Anti-Corruption Commission, Mkenya Daima and the Office of the Registrar of Political Parties.

(d) Election Observer Reports

549. Various stakeholders emphasised the importance of the reports of election observers in auditing of elections, legitimizing the elections' results and informing

²⁴⁰ Brahm, Eric. (September, 2004). "Election monitoring." Beyond Intractability. Retrieved from <http://www.beyondintractability.org/essay/election-monitoring>

the conduct of future elections. The prevailing view was that the reports should be published and publicized. Further, that there should be strict timelines to address issues arising from election observations. This was the view held by the Commission on Administrative Justice, the Jubilee Coalition, the Central Organization of Trade Unions, Mkenya Daima, and the Office of the Registrar of Political Parties.

550. The Independent Electoral and Boundaries Commission in their submissions observed that the accreditation of observers should oblige them to share their reports with the Commission.

(e) Use of Technology in Election Observation Monitoring and Evaluation

551. The East African Centre for Law and Justice submitted that technology should be employed in election observation. This, they proposed, could be in the form of Closed Circuit Television (CCTV) or audio recordings so that a better record of what goes on at polling stations can be available.

(f) Post-Election Audit

552. The International Governance Institute in their submissions recommended that a multi-agency team comprising of the Ethics and Anti-Corruption Commission, the Commission on Administrative Justice, the Public Service Commission, and the Office of the Auditor-General should be formed to conduct a post-election audit. The audits, it was proposed, should be conducted within twelve months of a general election and the report thereof submitted to the Senate and the National Assembly for consideration. Transparency International in their submissions further proposed that an audit report on general elections should be prepared immediately after the elections.

5.10.4. Recommendations of the Committee

553. The Committee recommends that the Independent Electoral and Boundaries Commission accredits election observers and monitors in good time before an election so as to facilitate the work of the observers and monitors.

5.11. DISPUTE RESOLUTION (INCLUDING NOMINATION AND PETITIONS)

554. Effective election dispute resolution mechanisms ensure the integrity of the electoral process. An expeditious and fair system for dealing with complaints related to the electoral process lends legitimacy to election results. Election dispute resolution deals with issues of the legitimacy of the result, the administrative action

of election officials to correct a problem and trial of those who have corrupted or attempted to corrupt the election process.²⁴¹

555. Key elements in election dispute resolution include the jurisdiction of the Courts and the election commission as provided for in election law, relevant acts and other regulations, the time set aside by election laws for resolution of disputes, the enforcement of the decisions of the courts and electoral bodies to ensure the effectiveness of the election dispute resolution system and the prosecution of criminal election offences as stipulated in the criminal code with the attendant legal sanctions.²⁴²

556. Some of the categories of electoral disputes include disputes relating to political rights of citizens, disputes relating to delimitation of electoral area boundaries, political party disputes, disputes relating to nominations, disputes relating to voter registration, disputes relating to issues associated with or arising out of campaigns— election offences and breaches of the Electoral Code of Conduct and disputes relating to election petitions.²⁴³

5.11.1. Current Legal Framework

557. Chapter Seven of the Constitution of Kenya contemplated the need to establish robust mechanisms for the settlement of disputes arising from the electoral process. Article 87 of the Constitution provides—

- (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.*
- (2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.*
- (3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.*

558. Further, Article 88(4)(e) of the Constitution provides that the Independent Electoral and Boundaries Commission is responsible for “*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.*”

559. From the above constitutional requirements, electoral disputes fall within two broad categories which are resolved by separate bodies as and when they occur. Pre-election disputes are placed under the jurisdiction of the Independent Electoral and

²⁴¹ Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System. Retrieved from <http://www.osce.org/odihr/elections/17567>

²⁴² Ibid

²⁴³ Handbook on election disputes in Kenya. Retrieved from <http://www.judiciary.go.ke/>

Boundaries Commission and the Political Parties Dispute Tribunal, while, post-election disputes, being petitions arising subsequent to the declaration of election results, are placed under the sole jurisdiction of the Judiciary.

5.11.2. Pre-Election Disputes

(a) Mandate of the Independent Electoral and Boundaries Commission

560. Section 4 of the Independent Electoral and Boundaries Commission Act restates the mandate of the Commission of resolving pre-election disputes as provided in Article 88(4)(e) of the Constitution. Section 71 of the Elections Act similarly restates this constitutional provision and prescribes a timeline for the resolution of the disputes as follows—

“(1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for 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.

(2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.

(3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.”

561. Rule 4 of the Rules on Settlement of Disputes made by the Commission vide Legal Notice No. 139 of 2012, provides further insight as to the nature of pre-election disputes handled by the Commission by stating—

(1) These rules shall apply to disputes or complaints arising from—

(a) registration of persons;

(b) nomination of candidates;

(c) violations of the Code of Electoral Conduct; and

(d) any other election related complaint.

(2) These rules shall not apply to election petitions or disputes and complaints subsequent to the declaration of election results.

562. The Elections (Registration of Voters) Regulations, 2012 and the Rules on Settlement of Disputes set out the procedure applicable for the determination of questions concerning the registration of voters. Under the Regulations, a person who has applied to be registered and whose name is not included in the register of voters may submit a claim to the registration officer.²⁴⁴ However, a claim cannot be made during the ninety-day period before a General Election or the sixty-day period before a by-election.²⁴⁵ The registration officer is required, within seven days of

²⁴⁴ Regulation 17(1) of the Election (Voter Registration) Regulations, 2012.

²⁴⁵ Regulation 17(2) of the Election (Voter Registration) Regulations, 2012.

receipt of a claim, to publish a notice of the claim and thereafter consider and determine each claim.²⁴⁶ The decision of the officer must be in writing²⁴⁷ and is appealable to the Resident Magistrates Court on matters of fact and law and to the High Court on matters of law.²⁴⁸ After an appeal has been determined the registration officer is required to—

- (a) make any changes to the register of voters that are necessary as a result of the appeal;
- (b) prepare a list of the changes made;
- (c) post the list at the place where the list of changes was posted; and
- (d) submit the list to the Commission for inclusion in the Principal Register of Voters.²⁴⁹

563. A person objecting to the registration of a voter may file a complaint with the Commission.²⁵⁰ The Commission may uphold or dismiss the objection within the seven-day period provided under section 74 of the Elections Act. The Rules do not provide for a right of appeal.

564. With regard to disputes over nomination of candidates, an aggrieved candidate or an interested party may file an objection against the submission of the name of any other candidate to the relevant Returning Officer.²⁵¹ The Returning Officer may, in writing and within seven days, either uphold the nomination or allow the objection and, where appropriate, require that the affected party conduct a fresh nomination exercise.²⁵² The decision of the Returning Officer may be appealed to the Commission.²⁵³

565. The Rules of Procedure on Settlement of Electoral Disputes further allow an aggrieved person to file a written complaint against any political party participating in an election for violation of the provisions of the electoral code of conduct to the Commission.²⁵⁴ In the event the complaint is upheld, the Commission may impose sanctions provided for under paragraph 7 of the Electoral Code of Conduct²⁵⁵ which provides—

Where, in the opinion of the Commission, any political party or referendum committee participating in any election or referendum or the leader, office-bearer or member of a political party or person who supports the political

²⁴⁶ Regulation 19 and 20(1) of the Election (Voter Registration) Regulations, 2012.

²⁴⁷ Regulation 20(3) of the Election (Voter Registration) Regulations, 2012.

²⁴⁸ S. 11(2) of the Elections Act, 2011.

²⁴⁹ Regulation 25 of the Election (Voter Registration) Regulations, 2012.

²⁵⁰ Rule 7 of the Rules on Dispute Settlement.

²⁵¹ Rule 5(1) of the Rules on Settlement of Disputes.

²⁵² Rule 5(2) of the Rules on Settlement of Disputes.

²⁵³ Rule 13 of the Rules on Settlement of Disputes.

²⁵⁴ Rule 15(1) of the Rules on Settlement of Disputes.

²⁵⁵ Rule 15(4) of the Rules on Settlement of Disputes.

party or referendum committee or any candidate at any election, in any way infringes any provision of this Code, the Commission may—

(a) in the case of a political party and, subject to sub-paragraph (b), and in the case of the leader, any office-bearer or member of a political party or person who supports the political party referendum committee or candidate, impose upon that political party one or more of the following penalties or sanctions which any or all may be suspended on specific conditions—

(i) a formal warning;

(ii) a fine determined by the Commission;

(iii) notwithstanding the provisions of any other written law, an order prohibiting the political party, whether permanently or for a specified period, from utilizing any public media time, through the television or radio broadcasting service of such media as have been or may be allocated to the political party for electoral purposes;

(b) Where a political party, referendum committee, leader or any office bearer, member or person who supports the political party, referendum committee or any candidate at an election fails, neglects or refuses to comply with the orders of the Commission issued under paragraph 7(a), the Commission shall impose upon the defaulting party any of the following sanctions which may be suspended on specific conditions—

(i) in case of fine imposed, prohibit the defaulting party from participating in ongoing and future elections as candidates in case of a defaulting candidate or prohibit the political party or the referendum committee official from participating in ongoing elections and referendum, and future elections or referendum or any activity facilitated by the Commission until such fine has been paid;

(ii) in case of failure to comply with any other sanctions imposed, cancel the right of such political party or candidate to participate in the next election; and

(iii) file execution proceedings in the High Court to enforce the recovery of the fine.

566. The High Court has pronounced itself on the jurisdiction of the Commission to handle pre-election disputes and its reluctance to hear matters where the available statutory avenues of redress have not been exhausted. In Constitutional Petition No. 356 of 2012 *Francis Gitau Parsimei v. The National Alliance Party & Another* the Court noted that Article 88(4)(e) of the Constitution and section 74 of the Elections

Act vest the Commission with the responsibility of settling disputes relating to or arising from nominations save for election petitions. The Court stated—

“It is also my view that Article 88(4)(e) and section 74(1) of the Elections Act, 2011 provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or where it has been demonstrated that the process has failed.”

(b) Mandate of the Political Parties Dispute Tribunal

567. In addition to the dispute resolution mechanism under the Commission, section 39 of the Political Parties Act establishes the Political Parties Dispute Resolution Tribunal. The Tribunal is an independent quasi-judicial body with the mandate of resolving—

- (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;
- (f) appeals from decisions of the Registrar of Political Parties; and
- (g) disputes arising out of party primaries.²⁵⁶

568. The mandate of the Tribunal of resolving disputes arising out of party primaries overlaps that granted to the Commission under Article 88(4)(e) of the Constitution on pre-election disputes. Except for disputes between independent candidates and a political party and appeals from decisions of the Registrar of Political Parties, the jurisdiction of the Tribunal may only be invoked once an aggrieved person or party has exhausted the internal party dispute resolution processes.²⁵⁷ Under section 41 of the Political Parties Act, the Tribunal is required to determine any dispute before it within three months from the date it is lodged. A party aggrieved by the decision of the Tribunal may appeal to the High Court on points of law and fact with subsequent appeals to the Court of Appeal and the Supreme Court restricted to points of law.²⁵⁸

569. Majority of submissions to the Committee pointed to a need for a review of current legislation on dispute resolution to clearly demarcate the roles of different institutions involved in the electoral process. A number of stakeholders submitted that there was need to amend Article 88(4) of the Constitution to vest the exclusive jurisdiction to determine pre-election nomination disputes on the Political Parties Dispute Tribunal with a view to restricting the Independent Electoral and Boundaries Commission to the core mandate of conducting and managing elections.

²⁵⁶ S. 40 of Political Parties Act, 2011.

²⁵⁷ S. 40(2) of the Political Parties Act, 2011.

²⁵⁸ S. 41(2) of the Political Parties Act, 2011.

It was further submitted that the Tribunal should be adequately resourced to carry out its mandate. This was the view held, by among others, Mkenya Daima, Kenya National Commission on Human Rights, International Commission of Jurists-Kenya Section, Mr. Barasa Nyukuri, the Electoral Institute for Sustainable Democracy, the Judiciary Committee on Elections, the Multi-Sectoral Forum, the Political Parties Dispute Tribunal and the Director of Public Prosecutions.

570. In this regard, the Judiciary Committee on Elections stated—

“Besides the confusion this overlapping jurisdiction creates, there is a conflict of interest because IEBC is the body charged with the responsibility of ensuring that Political Party Nomination Lists under Articles 90(1), 97(1)(c), 98(1) (b), (c) & (d) and 177(1) (b) & (c) of the Constitution comply with the Constitutional requirements of gender balance as well as representations of persons with disabilities, the youth and marginalized groups. In the circumstances, save for IEBC, all the other stakeholders (especially the Civil Society and the Political Parties) recommended that Article 88(4)(e) as well as Section 4(e) of the IEBC Act and Section 74(1) of the Elections Act be amended to give the PPDT exclusive jurisdiction to determine pre-election nomination (Party Primaries & Party Lists) disputes. As stated, IEBC should be left to deal with disputes that relate to compliance with the Constitution.”

571. The Tribunal, in submissions before the Committee, supported the view of amending Article 88(4)(e) of the Constitution to vest it with the exclusive mandate of resolving nomination disputes. They recommended that section 74(2) of the Elections Act and section 41(1) of the Political Parties Act be amended to increase the timeline for the resolution of nomination disputes from seven to fourteen days.

572. While submitting that internal party mechanisms should be the first tier of resolution of pre-election disputes, the Coalition for Reforms and Democracy and the Jubilee Coalition both urged that the second tier in the process should rest with the Tribunal. On his part, the Attorney-General was of the view that disputes arising from party primaries should be dealt with by the Tribunal and that there is need to provide a clear definition of what the nomination disputes referred to under article 88(4)(e) of the Constitution entail.

573. A contrary view was held by Independent Electoral and Boundaries Commission during their oral submissions. They noted that the Nomination Dispute Committee of the Commission that had been set up to deal with nomination disputes had been successful at handling the disputes in line with Article 88(4)(e) of the Constitution.

574. The Committee noted that in other jurisdictions, the role of determining pre-electoral disputes is vested in dedicated electoral management bodies. Section 111

of the Electoral Act of Zambia mandates the Electoral Commission of Zambia to manage electoral conflicts and resolve disputes. In pursuance of this mandate the Commission has established Conflict Management Committees at national and district levels. The committees are authorised to manage and decide electoral conflicts in a judicious and timely manner, with a view of achieving peaceful elections and mutual resolutions through mediation of conflicts that arise in the electoral process.²⁵⁹ In the United States of America, the Federal Election Commission established the Alternative Dispute Resolution Office to promote compliance with the federal election law by encouraging settlement of disputes outside of the traditional enforcement or litigation processes.²⁶⁰ In Pakistan, the Election Commission of Pakistan has implemented various initiatives to deal with specific complaint areas including, appellate tribunals for nomination, monitoring teams for the campaign period and magistrate powers to the polling staff during polling.²⁶¹

575. The Committee observed that transferring the mandate of resolving disputes relating to party primaries from the Commission to the Tribunal would require a Constitutional Amendment to either amend or repeal Article 88(4)(e) of the Constitution. Drawing from the Judgment of the Court in *Petition 689 of 2008 Priscilla Ndululu Kivuitu & Musili Kivuitu (Suing as the Personal Representatives of Samuel Mutua Kivuitu (Deceased)) & 22 Others vs. The Attorney-General & 2 Others* [2015] eKLR as previously cited, such an amendment would require approval through a referendum.

5.11.3. Post-Election Disputes

(a) *Petition against the election of the President*

576. Article 163(3)(a) of the Constitution vests the Supreme Court with exclusive original jurisdiction to hear and determine disputes relating to the election of the President. Article 140 of the Constitution sets out the procedure for addressing questions of the validity of the election of a President. It provides—

- (1) *A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.*
- (2) *Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.*

²⁵⁹https://www.elections.org.zm/conflict_management.php

²⁶⁰<http://www.fec.gov/em/adr.shtml>

²⁶¹http://www.pk.undp.org/content/pakistan/en/home/library/hiv_aids/development-advocate-issue-4-english/debate-electoral-justice-resolving-election-disputes-and-compl.html

(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.

577. The issue of the adequacy of the fourteen-day period provided for the filing and resolution of the presidential petition was raised before the Committee. The Judiciary Committee on Elections urged that Article 140(3) of the Constitution be amended to extend the period to thirty days stating—

“(i) The lawyers, both for the Petitioners and Respondents in the Raila v. Uhuru (citation) petition complained that they did not have enough time to prepare and present their respective clients’ cases. You will recall that the Supreme Court rejected the application by Raila’s lawyers to amend their petition for lack of time.

(ii) The Supreme Court did not have sufficient time to prepare its judgment forcing it to give its verdict and reserved its reasoned judgment to a later date. That proved very unsatisfactory. Kenyans, particularly those in the legal fraternity including even universities, complained that a dispute of this magnitude, which is of great public importance, requires a reasoned judgment to be delivered at once and not in piecemeal.

(iii) Other countries give their courts more reasonable time to dispose of Presidential petitions. For instance in Ghana, Presidential Petitions are filed within twenty-one days of the declaration of election results and determined within fifteen days from the close of hearing. This gives the Ghanaian Supreme Court 15 days to prepare its judgment. In Uganda, Presidential Petitions are filed within ten days of declaration of election results and determined within thirty days from the date the petitions are filed. In Namibia, there is no period set within which Presidential petitions should be heard and determined. They are heard expeditiously and determined within fourteen days from the conclusion of the hearing.”

578. The Electoral Institute for Sustainable Democracy in Africa, the Amani National Congress, the Council of Governors, Hon. Peter Kaluma and the Elections Observation Group supported the view of extension of the period to thirty days. However, the Commission on Administrative Justice, the Jubilee Coalition and the Kenya Law Reform Commission submitted that the current period is sufficient for the hearing and determining the petition. According to the Kenya Law Reform Commission,

“The 14 day period serves two useful purposes:

(a) It precludes vexatious petitioners so that only those with genuine grievances can approach the court. Presidential elections and

- subsequent petitions consume massive public resources which should not be wasted on the basis of conjecture; and*
- (b) *It obviates the need to put the country in a perpetual state of uncertainty which is a very grave matter."*

579. The Supreme Court, in determining the election petition in *Raila Odinga vs The Independent Electoral and Boundaries Commission and 3 Others* stated the rationale for the fourteen day period as follows—

[217] The rigid time-frame for the resolution of Presidential-election disputes was not, in our opinion, conceived in vain at the time of the constitution making process. From the terms of Article 140 of the Constitution, it is clear that expedition is of the essence, in determining petitions relating to Presidential elections. As the electoral process had, in this case, led to the declaration of a winner, but one who could not assume office pending the determination of the petition, the protracted holding-on of a President-elect, as well as a retiring President, would, in our opinion, present a state of anticipation and uncertainty which would not serve the public interest. Expedition in the resolution of the dispute was all-important: if the Court affirmed the election of the President-elect, then the transition process would be responsibly accomplished; and if the Court annulled the election, the electorate would pacifically attune itself to the setting for fresh election – to be held within sixty days.

580. The Committee noted that Article 140 of the Constitution as framed took into account the need for expeditious determination of questions as to the validity of the election of the President in order to prevent a power vacuum as the swearing into office of the President depends on the outcome of the petition.

581. The Committee observed that other jurisdictions employed wider timelines for the determination of questions as to the validity of the election of the President while allowing for the swearing in of the President prior to the determination of the questions. In the Republic of Ghana, the Constitution, in Article 64, stipulates that the validity of the election of the President may be challenged by a citizen of through a petition to the Supreme Court within twenty-one days after the declaration of the result. There is no defined timeline for the hearing but Rule 71 of the Supreme Court Rules provides that the Court shall at the conclusion of the hearing of the petition deliver its judgment and within fifteen days. A declaration by the Supreme Court that the election of the President is not valid does not prejudice anything done by the President before the declaration.

582. In the Republic of Uganda, Article 104 of the Constitution allows an aggrieved candidate to petition the Supreme Court on the validity of the election of the President within ten days of the declaration of the election results. The Supreme

Court is required to inquire into and determine the petition expeditiously and declare its findings not later than thirty days from the date the petition is filed. The President assumes office in the interim.

583. In the Republic of India, Article 71 of the Constitution provides that all doubts and disputes arising out of or in connection with the election of a President or Vice President shall be inquired into and decided by the Supreme Court, whose decision is final. The petition may be presented at any time after the date of publication of the declaration of the election result but not later than thirty days from the date of such publication.²⁶² The President assumes office in the interim period and a declaration by the Court invalidating his or her election does not prejudice any actions done during his or her stay in office.
584. In the Federal Republic of Nigeria, Article 139 of the Constitution vests in the Court of Appeal original jurisdiction to hear and determine presidential election petitions. Article 233 of the Constitution vests jurisdiction on the Supreme Court to hear and determine appeals from the Court of Appeal on the election of the president. The petition is to be filed within twenty-one days from the date of declaration of results, heard and determined within one hundred and eighty days from the date of filing, and any appeals heard and determined within ninety days from the date of judgment.²⁶³
585. With regard to the procedure applicable during the determination of presidential petitions, the Kenya Law Reform Commission further submitted that there is need to review the Supreme Court Presidential Election Petition Rules to make it easier for the Supreme Court to entertain applications for *amicus curiae* from persons other than the Attorney-General and to require that the Court give a reasoned judgment at the conclusion of the hearing as, with reference to the decision delivered after the hearing on of the presidential petition in the March, 2013 elections “a 5 minute cameo is hardly judicious”.

(b) Petitions on the Election of Members of Parliament, Governors and Members of County Assemblies

586. The High Court is mandated to hear election petitions concerning election to the offices of Members of Parliament²⁶⁴ and County Governors²⁶⁵, while petitions on the election of a Member of a County Assembly are heard and determined by the Resident Magistrates’ Courts.²⁶⁶

²⁶² S.12 of the Presidential and Vice-Presidential Elections Act, 1952

²⁶³ S.134 of the Electoral Act, 2010.

²⁶⁴ Article 105(1)(a) of the Constitution.

²⁶⁵ Section 75(1) of the Elections Act, 2011.

²⁶⁶ Section 75(1A) of the Elections Act, 2011

587. Article 87(1) of the Constitution requires that petitions against the election of Members of Parliament be filed within twenty-eight days from the date of declaration of the election results and, pursuant to Article 105(2) of the Constitution, the petitions are to be heard and determined by the High Court within six months.

588. The Elections Act requires that petitions against the election of Governors and Members of County Assemblies be filed within twenty-eight days of the publication of the election results.²⁶⁷ Section 75 of the Act defines the period within which the petitions should be determined, stating—

(1) A question as to validity of an election of a county governor shall be determined by the High Court within the county or nearest to the county.

(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

(3) In any proceeding brought under this section, a court may grant appropriate relief, including—

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.

(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—

(a) filed within thirty days of the decision of the Magistrate's Court; and

(b) heard and determined within six months from the date of filing of the appeal.

589. On the issue of the timeline applicable to the filing of a petition against a Member of Parliament, Governor or Member of a County Assembly, the Attorney-General urged that section 76 of the Elections Act be amended to align it with the decision of the Supreme Court in Hassan Ali Joho & Another Vs. Suleiman Said Shahbal & 2 Others [2014] eKLR. In the decision, the Supreme Court held that the section, in providing for the filing of an election petition within twenty-eight days of the publication of election results in the Gazette does not reflect the prescription set under Article 87(1) of the Constitution which refers to the “declaration” of the results. In clarifying the operative words, the Court further interpreted what “declaration” entails, stating—

²⁶⁷ Section 76 of the Elections Act, 2011.

“[99] We are of the view that gazetteement (Section 76 of the Elections Act) is one of the mechanisms through which the State publishes information to the public. The public nature of elections demands that the outcome of the polling is shared with the public. This is done in various ways, but most importantly, through a Gazette Notice, which forms part of Government records. Further, public information thus published, can be adduced as evidence in a Court of Law, pursuant to the provisions of the Evidence Act (Cap.80, Laws of Kenya). The purpose of the Gazette Notice, in view of the process detailed in this judgment, cannot be termed as the instrument of declaration of the election results.

D. CONCLUSION

[100] After considering the relevant provisions of the law, as well as the submissions made before us, and after taking due account of the persuasive authorities from a number of jurisdictions, we have come to the conclusion that the ultimate election outcome, for the gubernatorial office which is in question here, is the one declared at the county level by the County Returning Officer who issues the presumptive winner with a certificate in Form 38.”

590. The need for the alignment of the Act with the decision of the Supreme Court was supported by the Electoral Institute for Sustainable Democracy in Africa.

591. The Committee observed that though the Constitution and the Elections Act, 2011 provide timelines for the resolution of questions on the validity of the election of Members of Parliament, Governors and Members of County Assemblies, there is no set limit as to the available avenues of appeal. This creates a potential situation where all electoral disputes may end up on appeal at the Supreme Court.

592. In its submissions to the Committee, the Judiciary Committee on Elections proposed that section 75 of the Elections Act be amended to provide that all petitions relating to party lists under Article 90 of the Constitution be heard by the High Court in the first instance, even if they relate to county elections as the decision of the Court affects the entire party list. It was their further submission that Article 163(4) of the constitution and section 75(4) and 85A of the Elections Act should be amended to preclude parties from second appeals. They stated—

“having reflected on the matter, the Judiciary has come to the conclusion that we should adopt the two tier system and have only one right of appeal. This therefore calls for amendments to the Constitution and the Elections Act to limit appeals to only one. It is therefore proposed that Article 163(4) of the Constitution be amended by adding, at the start of that sub-article the following words: “Save in electoral disputes”. Sections 75(4) and 85A of

the Elections Act should also be amended to make the appellate decisions of the High Court and the Court of Appeal in election matters final."

593. The view of the Judiciary Committee on avenues of appeal was supported by the East African Centre for Law and Justice. The Commission on Administrative Justice, the Elections Observation Group and the Electoral Institute for Sustainable Democracy in Africa, however, submitted that the appeals should terminate at the Court of Appeal.
594. The Council of Governors were of a contrary view and submitted that the right of appeal should not be restricted and should be open to aggrieved parties up to the level of the Supreme Court as long as the appeals invoke the jurisdiction of the Supreme Court provided at Article 163(4) of the Constitution, which provides—
- (4) *Appeals shall lie from the Court of Appeal to the Supreme Court—*
 - (a) *as of right in any case involving the interpretation or application of this Constitution; and*
 - (b) *in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).*
595. The Committee noted that, comparatively, there is a restriction on the available avenues of appeal with regard to the determination of election petitions. The practice in India and Nigeria allows only one avenue of appeal. In India, an election petition challenging the election of a member of either House of Parliament or House of Legislature of State is required to be filed in the High Court and decisions of the High Court are appealable to the Supreme Court.²⁶⁸ In Nigeria, the National Assembly Election Tribunal and the Governorship and Legislative Houses Election Tribunal, respectively, have original jurisdiction to hear and determine petitions arising from the election of the Governor or Deputy Governor and Members of Parliament, respectively. Article 246 of the Constitution of Nigeria provides that appeals from the Tribunals lie with the Court of Appeal whose decision is final.
596. The Committee observed, however, that in Uganda, section 60 of the Parliamentary Elections Act provides for the determination of election petitions by High Court and that appeals are allowed to both the Court of Appeal²⁶⁹ and the Supreme Court.
597. In further submissions to the Committee, the Judiciary Committee on Elections proposed amendment of section 16(3) of the Elections Act to provide for automatic stay of by-elections pending appeal *"to avoid wastage of public funds when orders of stay are granted after IEBC has printed ballot papers and incurred huge costs in*

²⁶⁸ S.116A of the Representation of the People Act, 1951.

²⁶⁹ S. 66 of the Parliamentary Elections Act.

preparation for by-elections following nullification of elections” and that section 76(1) of the Elections Act be amended to provide for publication of the election results shortly after the announcement of results to settle the uncertainty over the issue of which date the results of a particular election were declared.

5.11.4. Recommendations of the Committee

598. The Committee recommends that within forty-eight hours of the service of a petition challenging the election of a President-elect under Article 140 of the Constitution, the Independent Electoral and Boundaries Commission delivers documents supporting the presidential election results to the Supreme Court.

5.12. ELECTION OFFENCES

599. Election related offences in Kenya are spread over a number of legislation including the Elections Act²⁷⁰, Political Parties Act²⁷¹, the Independent Electoral and Boundaries Commission Act²⁷², the Electoral Code of Conduct²⁷³, the Leadership and Integrity Act²⁷⁴, the Election Campaign Financing Act²⁷⁵, the Penal Code²⁷⁶ and the Anti-Corruption and Economic Crimes Act.²⁷⁷
600. The power to investigate and prosecute election related offences is vested in different institutions as follows-
- (a) under Article 157(6) of the Constitution, the Director of Public Prosecutions is empowered to exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
 - (b) section 4(1) of the Independent Electoral and Boundaries Commission Act provides that the Independent Electoral and Boundaries Commission is responsible for *the investigation and prosecution of electoral offences by candidates, political parties or their agents pursuant to Article 157(12) of the Constitution*. The Commission is therefore responsible for the investigation and prosecution of offences under the Elections Act, the Election Campaign Financing Act and the Independent Electoral and Boundaries Commission;
 - (c) under Section 34(g) of the Political Parties Act, the Registrar of Political Parties is responsible for investigation of complaints received under the Political Parties Act; and

²⁷⁰ Cap. 7, Laws of Kenya

²⁷¹ Cap 7B, Laws of Kenya

²⁷² Cap. 7A, Laws of Kenya

²⁷³ Second Schedule to the Elections Act

²⁷⁴ Cap. 182, Laws of Kenya

²⁷⁵ Act No. 42 of 2013

²⁷⁶ Cap. 63, Laws of Kenya

²⁷⁷ Cap. 65, Laws of Kenya

(d) under section 11(1)(d), the Ethics and Anti-Corruption Commission is mandated to investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution.

601. The consequences for commission of electoral offences are prescribed in law. Under Article 83 of the Constitution, a person who is convicted for an election offence is ineligible for registration as a voter in an election or referenda for five years. Further, under Article 87 of the Elections Act, where an electoral court finds that an election offence has been committed by an elected person, the relevant Speaker is required to publish a report made under the section in the *Gazette*, and the Independent Electoral and Boundaries Commission is required to consider the report and *"delete from the register of voters, the name of a person who is disqualified from being registered in that register of voters."*

5.12.1. Issues raised

602. Various stakeholders, including the Director of Public Prosecutions, the Judicial Committee on Elections, Hon. Kabando wa Kabando and Mr. Barasa Nyukuri submitted on the area of election offences and identified the following challenges-

- (a) the law on some specific offences
- (b) fragmented legislation;
- (c) investigative and prosecutorial role of the Commission;
- (d) lack of inter-agency cooperation;
- (e) delays in dealing with electoral offences;
- (f) deterrent measures on election offences ;
- (g) the Public Collections Act

(a) *The Law on Specific Offences* ***The Offence of Bribery***

603. Section 64 of the Elections Act prohibits bribery as follows-

64. (1) *A candidate who—*

- (a) *directly or indirectly in person or by any other person on his behalf gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure any money or valuable consideration to or for any voter, or to or for any person on behalf of any voter or to or for any other person in order to induce any voter—*
 - (i) *to vote or refrain from voting for a particular candidate;*
 - (ii) *to attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for an political party or candidate;*

- (iii) *corruptly does any such act on account of such voter having voted for or refrained from voting at any election, for a particular candidate; or*
- (b) *directly or indirectly, in person or by any other person on his behalf, gives or procures or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter—*
 - (i) *to vote for or refrain from voting for a particular candidate; or*
 - (ii) *corruptly does any such act on account of such voter having voted for or refrained from voting;*
- (c) *in any manner unlawfully influences the result of an election;*
- (d) *directly or indirectly, in person or by any other person on his behalf, makes any gift, loan, offer, promise, procurement, or agreement to or for any person in order to induce that person to—*
- (e) *procure or endeavour to procure the election of any person; or (ii) procure the vote of any voter at any election;*
- (f) *upon or in consequence of any gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any voter at an election;*
- (g) *advances, pays or causes to be paid any money to, or to the use of any other person with the intent that such money or any part thereof shall be used in bribery at any election, or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part used in bribery at any election;*
- (h) *being a voter, before or during any election directly or indirectly, in person or by any other person on his behalf receives, agrees or contracts for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting for a particular candidate at any election;*
- (i) *after any election, directly or indirectly in person or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting for a particular candidate at the election;*
- (j) *directly or indirectly, in person or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or an account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to the candidate or to the agent of the candidate for a gift or loan of any money or valuable consideration, or for the promises of the gift or loan of any money or valuable*

consideration or for any office, place or employment or for the promise of any office, place or employment; or

- (k) *directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, gives or procures any office, place or employment to endeavour to procure any office, place or employment, to or for such other person, or gives or lends or agrees to give or lend, or offers or promises to procure or to endeavour to procure any money or valuable consideration to or for any person or to or for such other person on behalf of such other or to or for any person, commits the offence of bribery.*

(2) *Any person who in consequence of that person's acceptance of any consideration votes or refrains from voting commits an offence."*

604. The Director of Public Prosecutions observed that this provision is too long and convoluted and that the elements of the crime are too wide and vague. The mental element for that crime is difficult to discern. He further observed that this provision is similar to section 113 of the Representation of the People's Act (1983) of the UK where it has been proposed that the offence of bribery should be simplified with its mental element stated as intention to procure or prevent the casting of a vote at an election.²⁷⁸

605. Indeed in the case of **Kalembe Ndile, Machakos High Court Election Petition No. 7 of 2013, Majanja, J.**, stated as follows -

"Evidence of bribery needs to be reasonably precise and capable of being quantified if it is to be considered to affect the results. For instance, how many votes were procured as a result of bribery; were they two, ten or a whole polling station or what number? If it were even to be assumed that such amorphous crowd was bribed to either vote in a particular way or abstain from voting, aside from the criminal aspect of it, what number is the court to attribute to such illegal conduct in order to say that such conduct affected results of the election?"

606. The Director of Public Prosecutions therefore recommended that Kenya adopts the same recommendations as the United Kingdom by amending section 64 of the Elections Act to simplify the offence of bribery by stating its mental elements as intention to procure or prevent the casting of a vote at an election.

²⁷⁸ <http://www.lawcom.gov.uk/wp-content/uploads/2016/02/electoral-law-interim-report.pdf> dated 4th February, 2016

The Offence of Treating

607. Section 62 of the Elections Act provides for the offence of treating as follows-

“62. (1) A candidate who corruptly, for the purpose of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election—

(a) before or during an election—

(i) undertakes or promises to reward a voter to refrain from voting;

(ii) gives, causes to be given to a voter or pays, undertakes or promises to pay wholly or in part to or for any voter, expenses for giving or providing any food, drinks refreshment or provision of any money, ticket or other means or device to enable the procurement of any food, drink or refreshment or provision to or for any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or being about to vote or refrain from voting, for a particular candidate, at the election; or

(b) after an election, gives, provides or pays any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting as aforesaid, commits the offence of treating.

(2) A voter who accepts or takes any food, drink, refreshment, provision, any money or ticket, or adopts other means or devices to enable the procuring of food, drink, refreshment or provision knowing that it is intended to influence them commits the offence of treating.”

608. The Director of Public Prosecutions made the observation that the offence as stated in section 62 of the Elections Act is substantially a replica of the offence of treating under section 114 of Representation of the People Act, 1993 of the United Kingdom. He further observed that as it stands, this definition of treating of voters would cover the provision of food and drink to voters and would criminalise hospitality even if there is no intention to corruptly influence the voters.

609. The Director of Public Prosecutions further informed the Committee that the offence of treating had been recently considered in the United Kingdom where an electoral candidate had been accused of treating voters because his agent had organised a dinner for some 600 influential constituents for “the sole purpose of promoting a mayoral campaign and “the guests did not pay for the meal”. It was observed that though this act fit within the definition treating, it was “distant” from the election (being four months before it), and there was no evidence that any of the guests were persuaded by this hospitality, however lavish, to “award him their vote”. It was therefore held that this did not constitute treating. In his Judgment, Commissioner Mawrey QC called for serious consideration to be given “to

amalgamating treating – surely an obsolescent if not obsolete concept in the modern world – with the overall offence of bribery.”²⁷⁹

610. In the circumstances, it was also proposed that section 62 of the Elections Act be deleted and the elements of the offence of treating be included in the offence of bribery and deleting the offence of treating from the Elections Act. This view was also supported by the Jubilee coalition which proposed the repeal of section 62 of the Elections Act.

The Offence of Undue Influence

611. Section 63 of the Elections Act provides for the offence of undue influence as follows-

A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception in order to induce or compel that person to vote or refrain from voting, or on account of that person having voted or refrained from voting.”

612. The Director of Public Prosecutions opined that this offence is complex and widely drafted and further informed the Committee that the compound nature of the offence makes it difficult to prosecute. He therefore proposed that the offence be broken down into three components-

- (a) *pressure and duress*: to include any means of intimidation, whether it involves physical violence or the threat of it and duress should be defined to include any form of physical intimidation or harassment;
- (b) *trickery*: to cover devices and contrivances such as publishing a document masquerading as a rival campaign’s; and
- (c) *abuse of a position of influence*: where a special relationship of power and dependence exists between the person exerting the influence and the voter²⁸⁰.

Use of Public Resources During Elections

613. Section 68 of the Elections Act provides for use of public offences during elections as follows-

- (1) *Except as authorised under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.*

²⁷⁹ Erlam & Ors v Rahman & Anor [2015] EWHC 1215 (QB)

²⁸⁰ As proposed in Electoral Law (2014) Law Commission Consultation Paper No 218; Scottish Law Commission Discussion Paper No 158; Northern Ireland Law Commission No 20, paras 11.45 to 11.53.

- (2) *For the purposes of this section, the Commission shall, in writing require 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.*
- (3) *A person who is requested to supply information required under subsection (2) shall submit the information within a period of fourteen days from the date of the notice.*
- (4) *The provisions of subsection (2) shall apply with necessary modifications, to an employee of a statutory corporation or of a company in which the Government owns a controlling interest.*
- (5) *A person who fails to comply with the provisions of this section commits an offence and is liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding six years or to both.*
- (6) *A member of the Commission or any person designated by the Commission shall have the power to impound or to order the impounding of any state resources that are unlawfully used in an election campaign.*
- (7) *A candidate, who after conviction under this section repeats the offence, shall—*
 - (a) be disqualified by the Commission and shall not be eligible to participate in the ongoing election and the next election; and*
 - (b) be disqualified from holding any public office.*

614. Abuse of public resources is also criminalized or prohibited under the Anti-Corruption and the Economic Crimes Act,²⁸¹ the Public Finance Management Act,²⁸² the Public Officer Ethics Act²⁸³ and the Leadership and integrity Act.²⁸⁴

615. The Director of Public Prosecutions made reference to the Report of the Law Commission of India (2015)²⁸⁵ where the offence was stated to include-

- (e) “arbitrary use” of taxpayers’ money in projects by political personalities or governments or parties without attendant public interest, and to promote private interests and recommended banning or severely restricting government advertisements that glorify political personalities or the ruling party, particularly on the eve of elections.
- (f) It also endorsed the Electoral Commission of India suggestions on the “severe” restrictions on government advertisements six months prior to elections.

²⁸¹ Act No. 3 of 2003, Laws of Kenya

²⁸² Act No. 18 of 2012

²⁸³ Act No. 4 of 2003.

²⁸⁴ Act No. 19 of 2012

²⁸⁵ Law Commission of India, Report No. 255, Electoral Reforms, March 2015

616. The Law Commission proposed the following amendment to their statute-

"No Central or State government, as the case may be, shall, publish any advertisements of achievements of the Central or State government either in the print media, electronic media, or by way of banners or hoardings in public places for a period of six months prior to the date of expiry of the term of the House of the People or the Legislative Assembly of the concerned State. Provided that the restrictions above shall not apply to the advertisements of achievements of the governments relating to their poverty alleviation programmes or any health related schemes; however, such advertisements shall not carry any symbol of a political party or the names or photographs of any Minister or leader of any political party."

617. The Director of Public Prosecutions therefore proposed that clear mechanisms should be put in place to prevent, detect, investigate and prosecute this offence, including imposition of severe sanctions on those found culpable.

Interpretation of Section 87 of the Elections Act

618. Section 87 (1) of the Elections Act, 2011 stipulates as follows-

87. (1) An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence.

...

(3) The relevant Speaker shall publish a report made under this section in the Gazette, and the Commission shall consider the report and delete from the register of voters, the name of a person who is disqualified from being registered in that register of voters."

619. The question of interpretation of section 87 of the Elections Act arose in Bungoma High Court Election Petition No. 2 of 2013, Moses Lukoye v Benard Alfred Sambu & 3 Others where the Court stated as follows-

[43] A necessary detour; without making a decision, section 87 of the Elections Act may invite legal arguments. The words used in the section...proved at the hearing to have been guilty of an election offence gives room for an argument that, by virtue of that section, the election court also sits as a trial (criminal) court. But that argument will be oblivious of; 1) that an election proceeding is a proceeding Sui generis; it is not a criminal proceeding; and 2) that an election proceeding is not clothed with the staple criminal protections available in a criminal proceeding. This court is aware of the requirement under section 87(1) of the Elections Act that the person cited, in the petition, for allegedly having

committed electoral criminal offences should be afforded an opportunity to be heard and to give and call evidence to show why he should not be reported. However, that requirement alone is not a sufficient protection as is provided in a real criminal trial. That is not the end of the discourse. More trouble is found in a rogue imagination that the words in section 87(1) of the Elections Act assigns the decision of the election court the vitality of a finding of guilty as in a criminal trial. If that thinking prevails, the requirement to make a report to DPP does not make any sense in law. Yet another critical matter; the person so found to have committed an offence may rightly raise a defence of double jeopardy in the subsequent criminal prosecution by the DPP.

[44] *That is not all. Conceptually, the subordinate court before which the person will be being prosecuted for an offence based on a finding by the High Court under section 87(1) of the Elections Act, will not avoid to ponder at least two things; 1) that the matter had been proved before a higher court; and 2) that proof was on a standard of beyond any reasonable doubt; that the person have been guilty of an election offence. Take for instance a practical example in Kimilili PMCCRC No 365 of 2013 R V Patrick Wanjala Siketi where an IEBC official was arrested and charged with an election offence; which is also an issue before the election court. The two proceedings-the petition and the criminal trial-are proceeding contemporaneously. Many questions abound which I suppose should re-ignite a critical rethink on the way the section should be couched in a manner that reconciles all these concerns. My own view is, however, that the finding by the election court should be understood as a finding within a petition for purposes of a decision in that petition. Which in turn means; the record of the petition and the report to the DPP on commission of election offences, become sources of information which may found a criminal investigation and or prosecution of the person concerned. That way, any legal contradiction in or objection to the section may be avoided. Invariably, a legislative recast of the words ...proved to have been... guilty of an election offence may be necessary. At the moment, courts of law are experienced in dealing with such statutory situations by assigning an interpretation that cures the mischief, removes any serious legal objection and gives effect to the intention of Parliament.*

620. The intricacies surrounding the interpretation and implementation of section 87 of the Elections Act also arose in the case of *Musikari Nazi Kombo v Moses Masika Wetangula & 2 others* [2013] eKLR (at the High Court) which was an appeal in the Court of Appeal in Civil Appeal No. 443 of 2013 and finally in the Supreme Court in Supreme Court Petition No. 12 of 2014.

621. The Court of Appeal attempted to give the rationale for the reporting mechanism provided for under section 87 as follows-

Part VI of the Election Act creates several election offences and provides a sentence for each offence. In our view, the reporting requirement is intended to

ensure that the court decision is enforced. The reporting to the DPP of a candidate who has committed an election offence is intended to cause the DPP to institute criminal charges, if he has not yet done so, against such candidate and if such candidate is proved guilty, he should be punished in accordance with the relevant section of the Election Act criminalizing his act or omission. As we have stated, that is over and above the disqualification, under Section 72(3)(b), of such candidate from participating in the following election. The report to the IEBC is for it to comply with that section and bar the candidate from participating in the following election. The report to the Speaker is to doubly ensure that such person does not sneak back into his House without first being absolved of the criminal offence(s).

622. The Supreme Court rendered its decision on the Petition on 17th March, 2015.

[135] There is an apparent difficulty in the interpretation of Section 87(1) of the Elections Act. As the Court observed in *Moses Wanjala Lukoye v. Benard Alfred Sambu*, there appears to be different interpretations to this Section. After considering the merits of such positions, we have come to the position that the nature of the relevant proceedings should be borne in mind: proceedings in an election petition. In such proceedings, what is at stake is the sanctity of a people's expression of their sovereign will. Consequently, all the findings seek in the first place, to establish whether the election was uncompromised by mischief or corrupt action. Election offences have the tendency to undermine the popular will that is the foundation of the governance system declared in the Constitution. The Court, as guardian of the solemn rights of that charter, is duty-bound to set its face firmly against any violation of the Constitution. Within the framework of the electoral law, the proper course of action has been prescribed; but as regards the operation of the ordinary criminal law, it falls to the Director of Public Prosecutions to move the Courts appropriately.

[136] The Elections Act, indeed, recognises that an election offence has the trappings of a crime at large, and stands to be further prosecuted within the realm of the general criminal law; hence the provision of Section 87(1) of the Act, that in addition to any other Orders, a report has to be sent to the Director of Public Prosecutions, who will then act within the criminal law process. The reference to the DPP, apparently, is by no means compromised by a principle such as double jeopardy. Double jeopardy as a principle, while it has a proper place in criminal law, is inapposite in the domain of election petitions, which are the subject of detailed statute law. Hence a finding by an election Court cannot be subsequently raised as a shield, when a party has to answer to criminal charges in the ordinary sense.

...

[138] The election Court's contribution in that regard is that it is a source of relevant information for a possible criminal trial; but whether or not such trial

takes place, falls to the prosecutorial discretion of the Director of Public Prosecutions.

[139] Such a scenario by no means turns the election Court into a criminal Court; and hence does not amount to a subjection of the affected party to "double jeopardy", in the manner suggested by the appellant herein.

...
[143] In that context it is clear that the earlier proceedings, to be of relevance in subsequent trial, are to have taken place before a Court or judicial tribunal—not just administrative or civil proceedings. Now such proceedings in this instance are election proceedings—which are of a sui generis nature; such proceedings, in our perception, do not fall in the category of "trial for an offence" and so would not attract the defence of "double jeopardy". The appellant, we believe, is not able to demonstrate that the proceedings before the election Court led to either a conviction or an acquittal.

...
[148] It stands to reason, therefore, in the scheme of legislation, that the election Court may send a report to the Director of Public prosecutions to initiate substantive criminal trial in respect of a culpability that originates from election proceedings. So the penalty meted out at the election Court is to be regarded as confined to the wrong of undermining the electoral voice of the citizens.

623. The concurring Judgement of Rawal, JSC., stated-

[162] While the Elections Act creates election offences, and prescribes punishment upon a finding of guilt, it neither delineates the trial forums, nor prescribes the procedure to be followed when the report is handed over to the Director of Public Prosecutions. An accused person ought not to be subjected to double jeopardy. Section 87(1) is unclear, insofar as it signals the possibility of a re-trial, within the criminal process. This ambiguity ought to be clarified through legislation.

[163] An election Court may however make a finding, after a careful evaluation of the evidence, that an election offence has been committed. The burden and standard of proof in this instance (election offences) is now well established by this Court [See the Raila Odinga (para 203) and Outa cases]. Once this is established within the mechanisms of an election Court, which are not equivalent to those of a criminal trial, the inevitable remedy by the Court is the nullification of the election in question, and the handing-over of a report to the Office of the Director of Public Prosecutions for any further action.

624. In accordance with Section 87(1) of the Elections Act, the Supreme Court, in its Judgement, directed the Registrar of the Supreme Court, to serve a report of the commission of the election offence of bribery by the appellant, upon the Director of Public Prosecutions; the Independent Electoral and Boundaries Commission; and the Speaker of the Senate.

625. The Supreme Court further directed that the Judgment be brought to the attention of the Attorney-General, the Kenya Law Reform Commission, and the Speakers of the two Chambers of Parliament, for information, and *“to the intent that re-formulated legislation be considered, delimiting the respective mandates of the election Court and the ordinary criminal Court, with due attention paid to the issues of jurisdiction for the different Courts adjudicating upon the two sets of matters”*.
626. Pursuant to the said Judgement, the Speaker of the Senate published the Report of the Supreme Court on 23rd October 2015 through *Kenya Gazette Notice No. 7852 of 2015*. Upon gazettment of the report by the Speaker of the Senate, under section 87 (3) of the Elections Act, 2011, the Independent Electoral and Boundaries Commission was required to **consider** the report and delete the name of the person who is disqualified from being registered in the register of voters. The Commission therefore established a Special Committee of three of its Commissioners, through *Gazette Notice No. 9195 of 2015*, dated 3rd December, 2015, to consider the report gazetted by the Speaker of the Senate.
627. The Committee delivered its Ruling on 19th January, 2016. The Commission clarified that in discharging its mandate under the provisions of section 87(3) of the Elections Act, it was not exercising any appellate or review function and that its role was limited to 'considering' the report gazetted by the Speaker, the judgment and Order from Court, the law and any other factor that would be material for purposes of giving effect to section 87(3) of the Act.
628. In declining to remove the name of Senator Moses Wetangula removed from the register of voters, the Commission observed that section 87 of the Elections Act provides for the removal from the register of voters of a person who is proved to have been “guilty of an election offence”. It further noted that Article 83(1)(c) of the Constitution provides for the disqualification from registration as a voter, for a person who has been convicted of an election offence in the last five years. It therefore found that the word “conviction” could not be used interchangeably with the phrase “a finding of guilt” or “found guilty” or “proved to have been guilty” and that the Report of the Supreme Court had stated that that election offences of treating and bribery were established, nowhere in the report did the Judges of the Supreme Court or any other Court that considered this matter convict Senator Moses Wetangula within the meaning of section 9 of the Elections Act.
629. The Commission further noted that *“under Article 157(6) of the Constitution, the process leading to a "conviction" is initiated by the office of the DPP and such other offices that may have been conferred with prosecutorial powers under Article 157 (12) of the Constitution. As it were, the matter is before the DPP who maintains the position that Senator Moses Wetangula is yet to be prosecuted. The DPP in his*

official correspondence to this Committee dated 11th January 2016 stated that election offences were established by the Court. He does not indicate that Senator Moses Wetangula was convicted by a Court for committing the election offences referred to." The Commission finally found that the provisions of the Constitution dictate that a conviction on charges relating to election offences should be made within the context of a criminal trial so as to satisfy the strict constitutional requirements of a fair trial. The Commission also recommended the amendment of section 87 of the Elections Act, so as to bring clarity to these issues.

630. The Judicial Committee on Elections in its memorandum, asked the Joint Committee to clarify the following issues and address the extent of the role of an election court, the nature of an electoral offence, the linkages between the Judiciary and other players in elections, especially the Director of Public Prosecutions and Independent Electoral and Boundaries Commission -

- (a) the use of the word "guilty" in Section 87 in a section that is "*sui generis*" and quasi-criminal and not fully criminal;
- (b) the roles of the Director of Public Prosecutions once the election Court finalizes its determination; and
- (c) the role of Independent Electoral and Boundaries Commission once the court makes a determination.

631. Efforts have been made to amend section 87 of the Elections Act through the Elections (Amendment) Bill²⁸⁶ which provides as follows-

- (1) *An election Court shall, at the conclusion of hearing of a petition, in addition to any other orders, send to the Director of Public Prosecution and the Commission a report in writing indicating whether an election offence is likely to have occurred in connection with the election.*
- (2) *Upon receipt of the report, the Director of Public Prosecutions shall—*
 - (a) *direct investigation to be carried out by the Inspector General of the National Police Service; and*
 - (b) *based on the outcome of the investigations, commence prosecution or close the matter.*

632. The Director of Public Prosecutions noted that while this amendment will substantially clarify the role of the Director of Public Prosecutions upon receipt of the report from the court, however, there was need to relook at the amendment

²⁸⁶ The Election Laws (Amendment) (No.3) Bill, 2015, National Assembly Bills No. 63 of 2015, sponsored by Hon. Samuel Chepkonga

“especially section 87(1) with a view to ensuring that the DPP may also direct any other agencies other than the Inspector General to undertake such investigations.”

(b) Investigative and Prosecutorial role of the Commission

633. Section 4(1) of the Independent Electoral and Boundaries Commission Act confers on the Commission the powers of investigation and prosecution of electoral offences by candidate, political parties or their agents pursuant to Article 157(2) of the Constitution.
634. The Director of Public Prosecutions submitted that the Commission lacks the “capacity and resource” to deal with electoral malpractices and offences. In this regard, he noted that most countries give the police the mandate to investigate electoral malpractices and the Director of Public Prosecutions the mandate to prosecute the electoral offences. He further noted that there is a clear distinction between the election petition and the criminal process on the same electoral offence. The Director of Public Prosecutions further observed that the investigation of offences created potential for conflict of interest as the some offences are committed by electoral officers.
635. The Director of Public Prosecutions therefore recommended a review of the Electoral Laws on the role of the Independent Electoral and Boundaries Commission with a view to restricting the Commission to the core mandate of conducting and managing elections. It was further recommended that the prosecution of electoral offences be under taken by his office and referred to the practice in the following jurisdictions to fortify this recommendation-
- (a) in New Zealand, different institutions have the responsibility for specific electoral tasks. The Chief Electoral Officer is responsible for running elections. The Electoral Enrolment Center handles voter registration of voter list maintenance. The Electoral Commission registers political parties and their logos and allocate public funds for campaign broadcasting. The police are responsible for investigating breaches of electoral law and prosecuting offenders; and
 - (b) in the United Kingdom, the police are responsible for investigating any allegations of electoral fraud. Every police force in the United Kingdom has an identified Single Point of Contact Officer or SPOC for electoral fraud, who provides specialist support and advice to investigators. Prosecuting authorities (the Crown Prosecution Service in England and Wales, the Crown Office in Scotland, and the Public Prosecution Service in Northern Ireland) are responsible for taking cases of alleged electoral fraud to court. They work closely with police forces to examine evidence about alleged electoral fraud before deciding whether or not to bring a prosecution.

636. This view was also supported by Mr. Barasa Nyukuri who proposed that the law should be amended to expressly vest prosecutorial powers with regard to election offences in the Office the Director of Public Prosecutions.

(c) Fragmented Legislation

637. Election related offences in Kenya are found in a number of legislations. The Director of Public Prosecutions observed that that this situation is not ideal as an electoral law that is fragmented is not accessible. He further stated that due to the fragmentation, there are sometimes inconsistencies between the electoral law and election-related provisions in other laws. In this regard, he cited the *Interim Report on Electoral Law by the Scottish Law Commission and the Northern Ireland Commission* which recommends that “to attain the goal of equality of access to electoral law or to facilitate people’s participation in the electoral process, the rules governing elections should be located in as few places as possible. It encourages consistency and unity of approach in electoral law, and simplifies drafting and the amendment process.”²⁸⁷

638. It was therefore recommended that the current laws governing electoral offences should be consolidated into a single, unified, consistent legislative framework for ease of interpretation, implementation and adjudication.

(d) Lack of Effective inter-Agency Collaboration and Capacity Challenges

639. The agencies involved in electoral matters include the Independent Electoral and Boundaries Commission, the Police, the Judiciary, the National Cohesion and Integration Commission and the Office of the Director of Public Prosecutions. In this regard, the Director of Public Prosecution stated that there was a lack of effective inter-agency collaboration before, during and after the general elections amongst institutions and agencies charged with handling elections and incidental matters, including, during the 2013 general elections where “the meetings were episodic, there was lack of coordination, duplication of roles, blame games and lack of information sharing mechanisms”.

640. The Director of Public Prosecutions therefore proposed that there is effective coordination and collaboration, all agencies must establish effective mechanisms. In addition, the cooperation and collaboration mechanism must be anchored in law.

641. It was further noted that in seeking to effectively implement their collective and respective mandate during the electioneering period, a key challenge that confronts the Agencies is been capacity constraints in terms of human resource, specialized

²⁸⁷ Interim Report on Electoral Law by the Scottish Law Commission and the Northern Ireland Commission dated 4th February, 2016, available at: <http://www.lawcom.gov.uk/wp-content/uploads/2016/02/electoral-law-interim-report.pdf>

knowledge and skills, financial resources and IT equipment. It was therefore proposed that there should be enhanced budgetary allocation for Agencies involved in the electoral process, particularly during the electioneering period.

(e) Delays in Dealing with Electoral Offences

642. The Director of Public Prosecutions also recommended that timelines be imposed for the consideration of electoral offences. In this regard, he recommended that election offences be commenced within one year of the commission of the offence. Similarly, like corruption and economic crimes cases, electoral offences should be tried on a day-to-day basis until conclusion.

643. It was further observed that another factor which contributed to delays in the prosecution of electoral offences is the fact that offences committed during the election period are not reported early. It was therefore recommended that agencies should report election offences as soon as they happen and should not wait until the end of the electioneering period.

644. He cited the United Kingdom and the Philippines as examples. In the United Kingdom, under section 176 Representation of the Peoples Act (1983), prosecutions under the Act must commence within one year after the offence was committed. This may be extended to not more than 24 months after the offence was committed, on application made within one year of commission of the offence, if: there are exceptional circumstances and where there has been no undue delay in the investigation. In the Philippines, the investigation and prosecution of cases involving violations of the election laws are given preference. Their investigation are commenced without delay, and are resolved by the investigating officer within five days from submission and give preference to election offenses over all other cases, except petitions for writ of habeas corpus. Their trials are conducted continuously until terminated, and the case shall be decided within thirty days from its submission for decision.²⁸⁸

645. It was therefore recommended that the Judiciary should create specialized ad hoc courts to deal with election offences.

(f) Deterrent Measures on Electoral Offence

646. The Director of Public Prosecutions also noted that in Kenya, the existing measures and penalties do not adequately deter perpetrators of electoral offenders. The sentences range between two to six years and the fines range between one million to five million shillings. To underscore the gravity of the offence his office recommended that the sentence be enhanced to range between six and ten years and fines of between five and ten million or both. It was also proposed that in addition

²⁸⁸ Section 269, Republic Act No. 9369

to the criminal sanction, where the criminal conduct has occasioned a quantifiable financial loss or personal injury, compensation be awarded or restitution made to the victim. This is the in Canada under the Election Offences²⁸⁹.

(g) *Amendment to the Public Collections Act, cap 106*

647. Hon. Kabando was Kabando, in his memorandum to the Committee, recommended the amendment or re-enactment of the Public Collections Act so as not only to regulate the recipients of public collections of money or *harambee* money but also the donors of such money. He noted that the Act does not address present day challenges relating to *harambees* and particularly referred the Committee to sections 5, 6 and 12 of the Act which prescribe a relatively small sentence compared to the magnitude of the offence²⁹⁰. This Act should not only apply to public collectors and promoters, but also donors in public collections, who fall in the category of public officers under the Public Officers Act. The same should be reflected in the Public Collections Act and the Public Officers and Ethics Act, the Electoral Code of Conduct, to regulate public donors who are public officers and prohibit them from participating in donations within the election year.

648. He further proposed that the law should be amended to provide that at least twelve months to the elections, no cash should be given to the public by any public officer or aspirants.

5.12.2. Recommendations of the Committee

649. The Committee recommends as follows-

- (a) That a 'stand-alone' Elections Offences Bill consolidating all elections offences be enacted;
- (b) That the rendition of the offence of bribery under section 62 of the Elections Act be simplified;
- (c) That the offence of treating be deleted from the Elections Act and that its elements be incorporated in the offence of bribery;
- (d) That section 4(l) of the Elections Act that mandates the Independent Electoral and Boundaries Commission to investigate and prosecute election offences by candidates, political parties or their agents under be deleted so that the function resides with the Office of the Director of Public Prosecutions; and
- (e) That section 87 of the Elections Act be amended to provide clarity on the procedures relating to the submission and disposal of a report of an election court following its determination on whether an election offence is likely to have been committed.

²⁸⁹ *The Municipal Councils and School Boards Elections Act of 2012*

²⁹⁰ Section 5 provides for an imprisonment term not exceeding 3 years, section six provides for a fine not exceeding fifty thousand Kenya shillings and section 12 provides for a general penalty of a fine not exceeding five thousand shillings or an imprisonment term not exceeding six months or both.

- (f) That the law be amended to provide for the commencement of prosecution for electoral offences within twelve months of the date of the election to which the offence relates. In the case of an offence arising out a determination of an electoral court under section 87 of the Elections Act, the twelve months to run from the date of the final judgement.

CHAPTER SIX

FINAL RECOMMENDATIONS OF THE COMMITTEE

6.0 THEMATIC AREA 1

650. *Allegations against Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission, specifically on—*

- (a) Credibility;*
- (b) Impartiality;*
- (c) Integrity; and*
- (d) Independence.*

6.1.1. Recommendations of the Committee

651. The Committee took into account the following factors-

- (1) The provisions of the Constitution and the law on the process for disposal of allegations against the Commissioners and the Secretariat;
- (2) The views received from the public and the stakeholders;
- (3) The time remaining to the August, 2017 General Elections;
- (4) The need to ensure stability, public confidence and an orderly transition in the Commission; and
- (5) The offer by the Commissioners to vacate from office in the event of a negotiated settlement;

The Committee made no findings on the allegations against members of the Commission and the Secretariat.

6.2. THEMATIC AREA 2

652. *Recommendations on legal mechanisms for the vacation from office of the current Commissioners and the Secretariat of the Independent Electoral and Boundaries Commission in accordance with the Constitution.*

6.2.1. Recommendations of the Committee

653. The Committee recommends as follows-

- (1) That a dignified vacation from office of the current Commissioners of the Independent Electoral and Boundaries Commission be negotiated and agreed upon in accordance with the law within two weeks of the adoption of this Report of the Committee by Parliament;
- (2) That the current Commissioners leave office when the new Commissioners are sworn-in, which should not be later than 30th September, 2016; and
- (3) That in respect of the Secretariat of the Commission, the existing human resource policies and capacity building mechanisms of the Commission be applied, as appropriate, by the new Commission.

6.3. THEMATIC AREA 3

654. *Recommendations on legal, policy and institutional reforms to strengthen the Independent Electoral and Boundaries Commission so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner.*

6.3.1. Recommendations of the Committee

655. The Committee recommends as follows –

- (1) That the number of Commissioners of the Independent Electoral and Boundaries Commission be seven and that the Commissioners serve on a full-time basis;
- (2) That for the appointment of the first Commissioners after the tabling of this report, a Selection Panel be established and appointed by the President, consisting of-
 - (a) four persons, being two men and two women, nominated by the Parliamentary Service Commission;
 - (b) one person nominated by the Kenya Conference of Catholic Bishops (KCCB);
 - (c) one person nominated by the National Council of Churches of Kenya (NCCCK);
 - (d) one person nominated by the Evangelical Alliance of Kenya; and
 - (e) one person nominated by the Supreme Council of Kenya Muslims (SUPKEM), the National Muslim Leaders Forum (NAMLEF) and the Kenya Council of Imams and Preachers of Kenya; and
 - (f) one person nominated by the Hindu Council of Kenya;
- (3) That the Parliamentary Service Commission provides secretariat services to the Selection Panel;
- (4) That after the August, 2017 General Elections, the law be amended to provide for a different composition for future selection panels;
- (5) That on the roles of the Commission vis-à-vis the Secretariat-
 - (a) The Commissioners shall perform their functions in accordance with the Constitution and, in particular, shall be responsible for strategy, policy direction and oversight;
 - (b) The Secretariat implements policies designed by the Commissioners and performs day-to-day administrative functions of the Commission;
- (6) That in light of the fast-approaching date of the next General Elections, the processes relating to the appointment of the new Commissioners be undertaken with expedition and be concluded by 30th September, 2016;
- (7) That for the future, the processes of recruitment of new Commissioners be commenced at least six months before the expiry of their term; and

- (8) That the Independent Electoral and Boundaries Commission Act be amended to include provisions on vacation from office by the Commissioners other than by way of removal from office in line with similar legislation.

6.4. THEMATIC AREA 4

656. *Recommendations on legal, policy and institutional reforms to improve the electoral system and processes so as to ensure the August, 2017 elections are free and fair and are administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner.*

6.4.1. Voter Registration

657. The Committee recommends as follows –

- (1) That for purposes of the 2017 General Elections-
 - (a) The Independent Electoral and Boundaries Commission engages a professional reputable firm to conduct an audit of the Register of Voters for the purpose of verifying the accuracy of the Register, updating the Register and recommending mechanisms to enhance the accuracy of the Register;
 - (b) The audit in (a) above be completed not later than 30th November, 2016.
 - (c) The Commission submits the Audit Report to Parliament within fourteen days of receipt of the Report; and
 - (d) The Commission implements the recommendations of the audit and thereafter reports to the National Assembly and the Senate on such implementation within thirty days of receipt of the Audit Report.
- (2) That the Elections Act be amended to enable the Commission to conduct an audit of the Register of Voters for the purpose of verifying the accuracy of the Register, updating the Register and recommending mechanisms to enhance the accuracy of the Register.
- (3) That for purposes of the conduct of the audit and in the future for the maintenance of the Register of Voters, the National Registration Bureau, the Kenya Citizens and Foreign Nationals Management Service and all other relevant agencies and institutions that hold information on Kenyan citizens should avail the information to the Independent Electoral and Boundaries Commission electronically for cross-referencing and information sharing.
- (4) That the Elections Act be amended to increase the period for verification of the Register of Voters and scrutiny and closing of the register before elections from the current sixty (60) days to ninety (90) days;
- (5) That verification of the Register of Voters be only by means of biometric voter data and that this be done at the polling stations;
- (6) That the Independent Electoral and Boundaries Commission makes provision for online inspection of the Register of Voters by individual voters through a public portal;

- (7) That the Independent Electoral and Boundaries Commission ensures that the registration of prisoners as voters for presidential elections is implemented and that a progress report on this matter be included in the Commission's Annual Report to the President and Parliament submitted under Article 254 of the Constitution;
- (8) That the Independent Electoral and Boundaries Commission ensures that mechanisms and targets for the progressive realization of registration of Kenyans abroad as voters are put in place and that a progress report on this matter be included in the Commission's Annual Report to the President and Parliament submitted under Article 254 of the Constitution;
- (9) That the Elections Act be amended by deleting section 5(3A) and (3B) to disallow the use of an acknowledgment of registration certificate for National Identity Card (waiting card) in elections;
- (10) That the National Registration Bureau facilitates the expeditious issuance of Identity Cards and, in particular, that-
 - (a) in the case of a fresh application for an identity card, the application be processed within a period of thirty (30) days; and
 - (b) in the case of an application for replacement of an identity card, the application be processed within a period of fourteen (14) days;
- (11) That the National Registration Bureau develops simple guidelines for vetting of applicants for issuance of Identification Cards.

6.4.2. Voter Education

658. The Committee recommends that the Independent Electoral and Boundaries Commission-

- (1) Partners with other agencies and non-state actors in the provision of voter education; and
- (2) Ensures the inclusion of Persons With Disabilities when carrying out voter education.

6.4.3. Nomination and Registration of Candidates

659. The Committee recommends as follows-

- (1) That list of party members be submitted to the Commission at least 90 days before the date of the general election;
- (2) That party membership lists be used for party primaries;
- (3) That political parties forward to the Independent Electoral and Boundaries Commission the names of their candidates for nomination twenty-one days before the nominations and that the Independent Electoral and Boundaries Commission publishes the names in the *Kenya Gazette* within seven days of receipt;
- (4) That the Independent Electoral and Boundaries Commission publishes the dates of party primaries of all political parties in the *Kenya Gazette*;

- (5) That the names of party candidates and independent candidates who will contest in a general election be submitted to the Commission at least sixty (60) days before the election;
- (6) That independent candidates forward their names to the Independent Electoral and Boundaries Commission fourteen (14) days before the nomination date in the same manner as candidates participating in the party nominations;
- (7) That after the names of candidates are forwarded to the Independent Electoral and Boundaries Commission, a candidate who changes their party shall not be eligible to contest in an election as a candidate of the new party or as an independent candidate.
- (8) That any amendments with regard to timelines for the nomination processes be concluded at least six months before the August, 2017 General Elections so as not to interfere with preparations for the elections;
- (9) That at the request of a political party, the Independent Electoral and Boundaries Commission shall conduct and supervise party nominations in accordance with Article 88 of the Constitution;
- (10) That the Office of the Registrar of Political Parties continuously updates party membership lists so that only registered members are allowed to participate in party nominations;
- (11) That the Political Parties Act be further amended to provide for fiscal incentives be put in place in the law to encourage the implementation of the two-thirds gender principle in the nomination processes by political parties; and
- (12) That the sanctions prescribed in the Political Parties Act be enforced by the Registrar of Political Parties and that the Office of the Registrar of Political Parties be strengthened to enable the Office to effectively carry out its functions.

6.4.4. Publicity and Media

660. The Committee recommends that the Independent Electoral and Boundaries Commission-

- (1) Liaises with the Media Council in developing and implementing Regulations on media coverage and conduct during campaigns as well as electoral polls; and
- (2) Mainstreams the needs of persons with disabilities in the publications of the Commission on election matters.

6.4.5. Use of Information Communication Technology in Elections

661. The Committee recommends as follows-

(1) Guiding Principles for Use of ICT

- (a) That the ICT systems used be impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent;

- (b) That the processes for the identification, procurement and deployment of ICT systems be conducted in an open and transparent manner; and
- (c) That no new technology should be introduced in the election process later than one year before an election.

(2) Legislative Framework for ICT

- (a) That section 44 of the Elections Act be amended to require the use of technology in the electoral process;
- (b) That pursuant to sections 44 and 109 of the Elections Act, the Independent Electoral and Boundaries Commission, in consultation with all relevant stakeholders, including political parties, agencies or institutions, makes regulations to govern the use of technology in the elections, and that the regulations be tabled in Parliament within thirty days from the date of enactment of the Election Laws (Amendment) Bill;
- (c) That the regulations to be made provide for, among other things-
 - (i) acquisition and disposal of ICT assets and systems;
 - (ii) testing and certification of the system;
 - (iii) mechanisms for the conduct of a system audit;
 - (iv) data storage and information security;
 - (v) data retention and disposal;
 - (vi) access to electoral system software source codes;
 - (vii) development and implementation of a disaster recovery and operations continuity plan;
 - (viii) telecommunication service provision;
 - (ix) inventory of ICT assets and systems;
 - (x) capacity building of staff of the Commission and stakeholders on the use of technology in the electoral process;
 - (xi) telecommunication network for voter validation and result transmission; and
 - (xii) the establishment of an ICT oversight technical committee comprising of key stakeholders.

(3) ICT for the 2017 General Elections and Beyond

- (a) That for purposes of the 2017 General Elections, the technology to be applied shall be for registration, identification and results transmission (BVR, EVID and RTS);
- (b) That the Independent Electoral and Boundaries Commission puts in place mechanisms to ensure-
 - (i) Electronic submission of names and other information required in the nomination processes;
 - (ii) Electronic transmission of all poll results; and

- (iii) Polling result forms be made available to the public through a public portal; and
- (iv) Voter identification through biometrics.
- (c) That the Independent Electoral and Boundaries Commission ensures that the necessary hardware and software are in place to support the use of technology in the 2017 General Elections;
- (d) That where procurement of new equipment may be necessary, the Independent Electoral and Boundaries Commission, in consultation with all relevant agencies and institutions, ensures the timely procurement of appropriate equipment;
- (e) That all procurement of ICT equipment for the 2017 General Election to be concluded at least eight months before the election.
- (f) That all existing equipment and any new equipment procured be transparently tested and deployed in good time in readiness for the next General Elections;
- (g) That the equipment to be used in the election be tested sixty (60) days before the next General Elections;
- (h) That a structured and scheduled capacity building programme be put in place and implemented for training of staff and other stakeholders on the technology to be used in the electoral process; and
- (i) That the Independent Electoral and Boundaries Commission urgently puts in place a Disaster Recovery and Business Continuity Plan.

6.4.6. Voting Process

662. The Committee recommends as follows-

- (1) That the Elections Act be amended to limit the number of voters in each polling station to a maximum of five hundred (500); and
- (2) That the Independent Electoral and Boundaries Commission puts in place adequate arrangements to facilitate voting by persons with disabilities.

6.4.7. Transmission and Declaration of Election Results

663. The Committee recommends that the Elections Act be amended to provide for the electronic transmission of the tabulated results of an election for the President from a polling station to the constituency centers and to the national tallying center.

6.4.8. Allocation of Special Seats

664. The Committee recommends that in order to ensure transparency in the allocation of special seats, regulation 54(8) of the Elections (General) Regulations, 2012 be amended to require that the Independent Electoral and Boundaries Commission publishes the party lists submitted by political parties under Article 90 of the Constitution forty-five days before the General Elections.

6.4.9. Election Observation, Monitoring and Evaluation

665. The Committee recommends that the Independent Electoral and Boundaries Commission accredits election observers and monitors in good time before an election so as to facilitate the work of the observers and monitors.

6.4.10. Dispute Resolution (Including Nomination and Petitions)

666. The Committee recommends that within forty-eight hours of the service of a petition challenging the election of a President-elect under Article 140 of the Constitution, the Independent Electoral and Boundaries Commission delivers documents supporting the presidential election results to the Supreme Court.

6.4.11. Election Offences

667. The Committee recommends as follows-

- (1) That a 'stand-alone' Elections Offences Bill consolidating all elections offences be enacted;
- (2) That the rendition of the offence of bribery under section 62 of the Elections Act be simplified;
- (3) That the offence of treating be deleted from the Elections Act and that its elements be incorporated in the offence of bribery;
- (4) That section 4(1) of the Elections Act that mandates the Independent Electoral and Boundaries Commission to investigate and prosecute election offences by candidates, political parties or their agents under be deleted so that the function resides with the Office of the Director of Public Prosecutions; and
- (5) That section 87 of the Elections Act be amended to provide clarity on the procedures relating to the submission and disposal of a report of an election court following its determination on whether an election offence is likely to have been committed.
- (6) That the law be amended to provide for the commencement of prosecution for electoral offences within twelve months of the date of the election to which the offence relates. In the case of an offence arising out a determination of an electoral court under section 87 of the Elections Act, the twelve months to run from the date of the final judgement.

6.5. OTHER RECOMMENDATION

668. The Committee recommends that Parliament establishes a mechanism by which it shall oversight the implementation of the recommendations in this Report and the electoral processes until the 2017 General Elections.

ANNEXES

ANNEX 1

DRAFT BILLS: THE DRAFT ELECTIONS LAWS (AMENDMENT) BILL, 2016 AND THE DRAFT ELECTION OFFENCES BILL, 2016

THE ELECTION LAWS (AMENDMENT) BILL, 2016

A Bill for

**AN ACT of Parliament to amend various laws relating to elections
and for connected purposes**

ENACTED by the Parliament of Kenya, as follows —

Short title.

1. This Act may be cited as the Election Laws (Amendment) Act, 2016.

Amendment of
section 2 of No. 24
of 2011.

2. Section 2 of the Elections Act, 2011 is amended—

- (a) in the definition of “county” by inserting the words “one of” immediately after the word “means”;
- (b) in the definition of “election court” by deleting the word “and” appearing immediately after the words “of the Constitution” and substituting therefor the word “or”;
- (c) in the definition of “nomination day” by inserting the words “at least sixty days before an election” immediately after the words “day gazetted”;
- (d) in the definition of “Principal Register of Voters” by deleting the expression “Principal Register of Voters” and substituting therefor the expression “Register of Voters”;
- (e) inserting the following new definitions in their proper alphabetical sequence —
 - “biometric” means unique identifiers or attributes including fingerprints, hand geometry, earlobe geometry, retina and iris patterns, voice waves, DNA, and signatures; and
 - “integrated electronic electoral system” refers to a system that includes biometric voter registration, biometric voter identification and electronic result transmission system;

Amendment of

3. Section 5 of the Elections Act, 2011 is amended by—

The Election Laws (Amendment) Bill, 2016

section 5 of No. 24 of
2011.

(a) deleting subsection (3A); and

(b) deleting subsection (3B).

Amendment of
section 6 of No. 24 of
2011.

4. Section 6 of the Elections Act, 2011 is amended by -

(a) deleting subsection (2) and substituting therefor the following new subsection -

(2) The Commission shall, for purposes of subsection (1), maintain a public web portal for inspection of the register of members of the public.

(b) deleting subsection (3).

Insertion of new
section 6A in No. 24
of 2011.

5. The Elections Act, 2011 is amended by inserting the following new section immediately after section 6 -

Verification of
biometric data.

6A. (1) The Commission shall, not later than ninety days before the date of a general election, open the Register of Voters for verification of biometric data by members of the public at their respective polling stations for a period of thirty days.

(2) The Commission shall, upon the expiry of the period for verification under subsection (1), revise the Register of Voters to take into account any changes in particulars arising out of the verification process.

(3) The Commission shall, upon expiry of the period for verification specified under subsection (1) publish-

(a) a notice in the *Gazette* to the effect that the revision under subsection (2) has been completed; and

(b) the Register of Voters online and in such other manner as may be prescribed by regulations.

Insertion of new
section 8A in No.
24 of 2011.

6. The Elections Act, 2011 is amended by inserting the following
new section immediately after section 8—

Audit of the
register of voters.

8A. (1) The Commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

- (a) verifying the accuracy of the Register;
- (b) recommending mechanisms of enhancing the accuracy of the Register; and
- (c) updating the register.

No. 3 of 2011.

(2) The Kenya Citizens and Foreign Nationals Management Service established under section 3 of the Kenya Citizens and Foreign Nationals Management Service Act shall make available to the Commission the information held by it in the national population register for the purpose of the conduct of an audit under subsection (1).

(3) For purposes of the first general election after the commencement of this section, the Commission shall, within thirty days of the commencement of this section, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of—

- (a) verifying the accuracy of the Register;
- (b) recommending mechanisms of enhancing the accuracy of the Register; and
- (c) updating the register.

(4) The firm engaged under subsection (3) shall conduct the audit and report to the Commission within a period of thirty days from the date of engagement.

(5) The Commission shall, within fourteen days of receipt of the report under subsection (4),

submit the report to the National Assembly and the Senate.

(6) The Commission shall implement the recommendations of the audit report within a period of thirty days of receipt of the report and submit its report to the National Assembly and the Senate.

Amendment of
section 10 of No.
24 of 2011.

7. Section 10 of the Elections Act, 2011 is amended in subsection (1) by deleting the word “is” and substituting therefor the words “and biometric data are”.

Amendment of
section 13 of No.
24 of 2011.

8. Section 13 of the Elections Act, 2011 is amended in subsection (1) by deleting the words “forty-five” appearing immediately after the words “at least” and substituting therefor the word “sixty”.

Amendment of
section 28 of No. 24
of 2011.

9. Section 28 of the Elections Act, 2011 is amended by deleting the words “forty-five” appearing immediately after the words “at least” and substituting therefor the word “ninety”.

Amendment of
section 31 of No. 24
of 2011.

10. Section 31 of the Elections Act, 2011 is amended by—

(a) deleting subsection (2) and substituting therefor the following subsection—

(2) The Commission shall, upon the request of a political party, conduct and supervise the nomination of candidates by the political party for presidential, parliamentary or county elections in accordance with Article 88 of the Constitution.

(b) inserting the following new subsections immediately after subsection (2)—

(2A) Every political party shall submit the names of the party candidates who have been selected to participate in the general elections under this Act at least sixty days before the elections.

(2B) A political party shall, at least twenty-one days before the nomination day, submit to the Commission the names of the persons contesting in its party primary and the date of its party primary.

(2C) The Commission shall publish, in the *Gazette* the names of the persons contesting in a party primary under subsection (1) and the date of the party primary within seven days of receipt of the names of party

candidates.

(2D) 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.

Amendment of
section 33 of No. 24
of 2011.

11. Section 33 of the Elections Act, 2011 is amended by –

- (a) renumbering the existing provision as subsection (1);
- (b) in subsection (1) by-
 - (i) deleting paragraph (b) and substituting therefor the following new paragraph -

(b) has submitted to the Commission, at least sixty days before a general election, a duly filled nomination paper in such form as may be prescribed by the Commission;

- (ii) deleting paragraph (c) and substituting therefor the following new paragraph—

(c) has, at least ninety days before the date of a general election or at least twenty one days before the date appointed by the Commission as the nomination day for a by-election, submitted to the Commission the name that the person intends to use during the election.

(2) inserting the following new subsection immediately after subsection (1)-

(2) The Commission shall publish in the *Gazette*, the names of persons intending to contest in the election as independent candidates at least fourteen days before the nomination day.

Amendment of
section 35 in No.
24 of 2011.

12. The Elections Act, 2011 is amended by deleting section 35 and substituting therefor the following section -

Submission of
party lists.

35. A political party shall submit its party list to the Commission at least forty-five days before

the date of the general election.

Insertion of new
section 38A in No.
24 of 2011.

13. The Elections Act, 2011 is amended by inserting the following new section immediately after section 38—

Number of voters
per polling station.

38A. For the efficient and effective conduct of elections, the Commission shall determine the number of voters per polling station but such number shall not exceed five hundred voters.

Amendment of
section 38 of No.
24 of 2011.

14. Section 39 of the Elections Act, 2011 is amended by inserting the following new sub-sections immediately after subsection (1) —

(1A) The Commission shall 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.

(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C) For purposes of a presidential election 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 centre and to the national tallying centre;

- (b) tally and verify the results received at the national tallying centre; and
- (c) publish the polling result forms on an online public portal maintained by the Commission.

(1D) The chairperson of the Commission shall declare the results of the election of the President in accordance with Article 138(10) of the Constitution.

Amendment of
section 40 of No.
24 of 2011.

15. Section 40 of the Elections Act, 2011 is amended by—

- (a) renumbering the existing provision as subsection (1); and
- (b) inserting the following new subsection immediately after subsection (1)—
 - (2) The mechanisms under subsection (1) shall include provision for partnership with other agencies and non-state actors in the provision of voter education.

Amendment of
section 43 in No.
24 of 2011.

16. Section 43 of the Elections Act, 2011 is amended—

- (a) by deleting subsections (1), (2), (3) and (4); and
- (b) in subsection (6), by deleting paragraph (b).

Amendment of
section 44 of No.
24 of 2011.

17. The Elections Act, 2011 is amended by deleting section 44 and substituting therefor the following new section—

Use of
technology.

44. (1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(2) The Commission shall, for purposes of subsection (1), develop a policy on the progressive use of technology in the electoral process.

(3) The Commission shall ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and

transparent.

(4) The Commission shall, in an open and transparent manner –

- (a) procure and put in place the technology necessary for the conduct of a general election at least eight months before such elections; and
- (b) test, verify and deploy such technology at least sixty days before a general election.

(5) The Commission shall, for purposes of this section and in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section and in particular, regulations providing for–

- (a) the transparent acquisition and disposal of information and communication technology assets and systems;
- (b) testing and certification of the system;
- (c) mechanisms for the conduct of a system audit;
- (d) data storage and information security;
- (e) data retention and disposal;
- (f) access to electoral system software source codes;
- (g) capacity building of staff of the Commission and relevant stakeholders on the use of technology in the electoral process;
- (h) telecommunication network for voter validation and result

transmission;

- (i) development, publication and implementation of a disaster recovery and operations continuity plan; and
- (j) the operations of the technical committee established under subsection (7).

(6) Notwithstanding the provisions of section 109(3) and (4), the Commission shall prepare and submit to Parliament, the regulations required made under subsection (4) within a period of thirty days from the date of commencement of this section.

(7) The technology used for the purpose of the first general elections upon the commencement of this section shall –

- (a) be restricted to the process of voter registration, identification of voters and results transmission; and
- (b) be procured at least eight months before the general election.

(8) For the purposes of giving effect to this section, the Commission shall establish a technical committee of the Commission consisting of such members and officers of the Commission and such other relevant agencies, institutions or stakeholders as the Commission may consider necessary to oversee the adoption of technology in the electoral process and implement the use of such technology.

Insertion of new section 55A, 55B and 55C in No. 24 of 2011.

18. The Elections Act, 2011 is amended by inserting the following new sections immediately after section 55–

Maintenance of secrecy at elections.

55A. (1) Every elections officer, candidate or agent authorized to take part in any proceedings relating to the issue or receipt of ballot papers or to attend at a polling station or at the counting of the votes shall, before so attending, make an oath of secrecy prescribed in the Third Schedule.

(2) Every officer, candidate or agent in attendance at a polling station shall—

(a) maintain and aid in maintaining the secrecy of the ballot; and

(b) not communicate, except for a purpose authorized by law before the poll is closed, any information as to the name or number on the register of voters, of any voter who has or has not applied for a ballot paper or voted at that station or as to the official mark.

(3) A presiding officer may, upon request, divulge to a candidate or to the agent of a candidate the total number of voters who have voted in the station at any time before the poll is closed.

Postponement of
elections by the
Commission.

55B (1) The Commission may, where a date has been appointed for holding an election, postpone the election in a constituency, county or ward for such period as it may consider necessary where—

(a) there is reason to believe that a serious breach of peace is likely to occur if the election is held on that date;

(b) it is impossible to conduct the elections as a result of a natural disaster or other emergencies,

(c) that there has been occurrence of an electoral malpractice of such a nature and gravity as to make it impossible for an election to proceed.

(2) Where an election is postponed under subsection (1), the election shall be held at the earliest practicable time.

(3) Notwithstanding the provisions of this section, the Commission may, if satisfied that the result of the elections will not be affected by voting in the area in respect of which substituted

dates have been appointed, direct that a return of the elections be made.

Amendment of
section 76 of No.
24 of 2011.

19. Section 76 of the Elections Act, 2011 is amended—

- (a) in subsection (1)(a) by deleting the words “publication of the results of the election in the *Gazette*” appearing immediately after the words “date of” and substituting therefor the word “declaration of the results of the election”; and
- (b) in subsection (1)(c) by inserting the words “or a county assembly” immediately after the word “Parliament”.

Amendment of
section 85A of No.
24 of 2011.

20. Section 85A of the Elections Act, 2011 is amended by—

- (a) renumbering the existing provision as subsection (1);
- (b) inserting the following new subsection—

(2) An appeal under subsection (1) shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.

Amendment of
section 87 of No.
24 of 2011.

21. The Elections Act is amended by deleting section 87 and substituting therefor the following new section—

Report of Court
on electoral
malpractices.

87. (1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.

(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.

(2) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —

- (a) direct an investigation to be carried out by such State agency as it considers appropriate; and
- (b) based on the outcome of the investigations, commence prosecution

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or close the matter.

Replacement of
section 104 in No.
24 of 2011.

22. The Elections Act is amended by deleting section 104 and substituting therefor the following new section—

Facilitation of
persons with
special needs
including persons
with disabilities.

104. The Commission shall, for the purpose of ensuring that persons with special needs including persons with disabilities realise their right to vote —

(a) put in place appropriate infrastructure including special voting booths; and

(b) have in each polling station such officers as the Commission considers necessary to facilitate voting.

Amendment of
section 106 of No.
24 of 2011.

23. The Elections Act, 2011 is amended by deleting section 106.

Amendment of
section 109 of No.
24 of 2011.

24. Section 109 of the Elections Act is amended in subsection (1) by inserting the word “prisoner” immediately after the word “citizens living abroad” appearing in paragraph (b).

Amendment of
section 110 of No.
24 of 2011.

25. Section 110 of the Elections Act, 2011 is amended by—

(a) deleting subsection (3);

(b) deleting subsection (4); and

(c) deleting subsection (6) .

General
amendment to Act
No. 24 of 2011.

26. The Elections Act, 2011 is amended by deleting the expression “Principal Register of Voters” wherever it appears and substituting therefor the expression “Register of Voters”.

Insertion of new
Schedule.

27. The Elections Act, 2011 is amended by inserting the following new schedule immediately after the Second Schedule—

THIRD SCHEDULE

(s. 55A)

OATH OF SECRECY

I,
I.D./Passport No. swear that I
shall maintain the secrecy of the ballot and shall not communicate,
except for a purpose authorized by law before the poll is closed,

any information as to the name or number on the register of voters, of any voter who has or has not applied for a ballot paper or voted at that station or as to the official mark with respect to the constituency/county/ward or do anything that compromises the secrecy of the vote.

.....
Signature of person taking the oath

Before me

.....
(Signature)
Commissioner for Oaths/Magistrate

Date:

Amendment of
section 25 of No. 11
of 2011.

28. Section 25 of the Political Parties Act is amended in subsection (1) by deleting paragraph (a) and substituting therefor the following new paragraphs –

- (a) eighty per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election;
- (aa) fifteen per cent of the Fund proportionately to political parties qualifying under paragraph (a) based on the number of candidates of the party from special interest groups elected in the preceding general election ; and

Amendment of
section 3 of No. 9
of 2011.

29. Section 3 of the Independent Electoral and Boundaries Commission Act, 2011 is amended in paragraph (b) by deleting the expression “12(b)” appearing immediately after the words “pursuant to Article” and substituting therefor the expression “88(1), (2) and (3)”.

Amendment of
section 4 of No. 9
of 2011.

30. Section 4 of the Independent Electoral and Boundaries Commission Act, is amended in subsection (1) by deleting paragraph (I).

Amendment of
section 5 of No. 9
of 2011

31. The Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting section 5 and substituting therefor the

following section—

Composition and
appointment of the
Commission

5. (1) The Commission shall consist of a chairperson and six other members appointed in accordance with Article 250(4) of the Constitution and the provisions of this Act.

(2) The chairperson and members of the Commission shall be appointed in accordance with the procedure set out in the First Schedule.

(3) The process of replacement of a chairperson or a member of the Commission shall commence at least six months before the lapse of the term of the chairperson or member of the Commission.

(4) The procedure set out in the First Schedule shall apply, with the necessary modifications, whenever there is a vacancy in the Commission

Amendment of
section 6 of No. 9 of
2011

1 32. Section 6 of the Independent Electoral and Boundaries Commission Act, 2011 is amended in subsection (2) by deleting paragraph (a).

Insertion of section
7A in No.9 of 2011.

1 33. The Independent Electoral and Boundaries Commission Act, 2011 is amended by inserting the following new section immediately after section 7-

Vacancy in
the office of
chairperson
and members

7A. (1) The office of the chairperson or a member of the Commission shall become vacant if the holder—

- (a) dies;
- (b) resigns from office by notice in writing addressed to the President; or
- (c) is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall publish a notice of a vacancy in the *Gazette* within seven days of the occurrence of such vacancy.

(3) Whenever a vacancy arises under subsection (1), the recruitment of a new chairperson or member, under this Act, shall commence immediately after the declaration of the vacancy by the President under subsection (2).

Amendment of
section 10 of No. 9 of
2011.

1 **34.** The Independent Electoral and Boundaries Commission Act, 2011 is amended by inserting the following new section immediately after section 10-

Vacancy of
office of
secretary

10A. (1) The office of the secretary shall become vacant if the holder—

- (a) dies;
- (b) resigns from office by notice in writing addressed to the Commission; or
- (c) is removed from office under any of the circumstances set out under section 10.

Insertion of new
section 11A of No. 9
of 2011.

1 **35.** The Independent Electoral and Boundaries Commission Act, 2011 is amended by inserting the following new section immediately after section 11-

Relationship
between the
Commissione
rs and
Secretariat.

11A. For the effective performance of the functions of the Commission—

- (a) the chairperson and members of the Commission shall perform their functions in accordance with the Constitution and in particular, shall be responsible for the formulation of policy and strategy of the Commission and oversight; and
- (b) the secretariat shall perform the day-to-day administrative functions of the Commission and implement the policies and strategies formulated by the Commission.

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Amendment of
section 24 of No. 9 of
2011.

36. Section 24 of the Independent Electoral and Boundaries Commission Act, 2011 is amended in subsection (2) by inserting the following new paragraphs immediately after paragraph (b) –

- (ba) progress made in the continuous registration of citizens as voters and the progressive realisation of the right to vote of citizens residing outside Kenya and prisoners;

Amendment of
section 31 of No. 9 of
2011.

37. Section 31 of the Independent Electoral and Boundaries Commission Act, 2011 is amended in subsection (2) by deleting paragraph (e).

Amendment of the
First Schedule No. 9
of 2011.

38. The Independent Electoral and Boundaries Commission Act, 2011 is amended by deleting the First Schedule and substituting therefor the following new Schedule-

FIRST SCHEDULE

(S. 5)

**PROCEDURE FOR APPOINTMENT OF CHAIRPERSON
AND MEMBERS OF THE COMMISSION**

Selection
panel

1. (1) At least six months before the lapse of the term of the chairperson or member of the Commission or within fourteen days of the declaration of a vacancy in the office of the chairperson or member of the Commission under the Constitution or this Act, the President shall appoint a selection panel consisting of such persons as Parliament shall determine for the purposes of appointment of the chairperson or member of the Commission.
- (2) For the purpose of the first appointment of commissioners upon the commencement of section 5, the selection panel shall consist of –
 - (a) four persons, being two men and two women, nominated by the Parliamentary Service Commission;
 - (b) one person nominated by the Kenya Conference of Catholic Bishops;
 - (c) one person nominated by the National Council of Churches of Kenya;

- (d) one person nominated by the Supreme Council of Kenya Muslims, the National Muslim Leaders Forum and the Council of Imams and Preachers of Kenya;
 - (e) one person nominated by the Evangelical Alliance of Kenya; and
 - (f) one person nominated by the Hindu Council of Kenya.
- (3) The respective nominating bodies under subparagraphs (2)(b) to (f) shall submit the names of their nominees to the Parliamentary Service Commission for transmission to the President for appointment.
- (4) The selection panel shall, at its first sitting, elect a chairperson and vice-chairperson from amongst its number.
- (5) Subject to the provisions of this Schedule, the selection panel shall determine its own procedure.
- (6) The Parliamentary Service Commission shall provide the secretariat services and facilities required by the selection panel in the performance of its functions.
- Oath or affirmation of office 2. The chairperson and members of the selection panel shall, before assuming office, take and subscribe the oath or affirmation of office prescribed in the Third Schedule.
- Selection of nominees 3. (1) The selection panel shall, within seven days of its appointment, invite applications from qualified persons and publish the names of all applicants and their qualifications in the *Gazette*, two newspapers of national circulation and on the website of the Parliamentary Service Commission.
- (2) The selection panel shall consider the applications, shortlist and interview the applicants.
- (3) The interviews under subparagraph (2) shall be conducted in public.

- (4) After conducting interviews under subparagraph (2), the selection panel shall select two persons qualified to be appointed as chairperson and nine persons qualified to be appointed as members of the Commission and shall forward the names to the President for nomination of one person for appointment as the chairperson and six persons for appointment as members.
- (5) The President shall, within seven days of receipt of the names under sub-paragraph (4), forward the list of nominees to the National Assembly for approval in accordance with the Public Appointments (Parliamentary Approval) Act.

Appointment
by the
President.

4. The President shall, within seven days of receipt of the names approved by the National Assembly, by notice in the *Gazette*, appoint the Chairperson and the members of the Commission.

Gender equity
and regional
balance.

5. In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel, the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender and shall ensure regional balance.

Dissolution of
Selection
Panel

6. The selection panel shall stand dissolved upon the requisite appointments being made under paragraph 4.

Amendment of
section 12 of No. 7
of 2011.

39. Section 12 of the Supreme Court Act is amended—

- (a) by renumbering the existing provision as subsection (1);
- (b) by inserting the following new subsection immediately after subsection (1) –

(2) The Independent Electoral and Boundaries Commission shall, within a period of forty-eight hours from the date of the service of a presidential election petition, submit to the Supreme Court certified copies of the documents used to declare the results of the presidential election, including the forms used to announce the results of the election at the polling station and the constituency tallying centre and to declare the result at the national tallying centre.

Amendment of
section 9 of Cap. 107.

40. Section 9 of the Registration of Persons Act is amended –

- (a) in subsection (1) by inserting the words “within a period of thirty days from the date of registration” immediately after the words “registration officer shall”;
- (b) in subsection (6) by inserting the words “within a period of fourteen days from the date of payment of the fees” immediately after the words “a new identity card”.

Amendment of
section 16 of Cap.
107.

41. Section 16 of the Registration of Persons Act is amended by inserting the following new paragraph immediately after paragraph (b)–

- (ba) providing simple guidelines for the vetting of applicants prior to the issuance or replacement of an identity card;

MEMORANDUM OF OBJECTS AND REASONS

Statement of objects and reasons

The principal object of this Bill is to amend the Elections Act, 2011, the Independent Electoral and Boundaries Commission Act, 2011, the Political Parties Act, 2011, the Supreme Court Act, 2011 and the Registration of Persons Act, Cap 106, in order to address concerns noted by the Joint Committee on matters relating to the Independent Electoral and Boundaries Commission and the conduct of elections.

Clause 2 of the Bill seeks to amend section 2 of the Elections Act, 2011 to clarify the fact that there is only one register of voters by substituting the term “Principal Register of Voters” with “Register of Voters”. It also defines the terms “biometric” and “integrated electronic electoral system”.

Clause 3 of the Bill seeks to amend section 5 of the Elections Act, 2011 to disallow the use acknowledgement of registration certificate (waiting card) as an identification document for the purposes of an election.

Clause 4 of the Bill seeks to amend section 6 of the Elections Act, 2011 to require the Commission to maintain a public web portal to allow for online inspection of the Register of Voter.

Clause 5 of the Bill seeks to amend the Elections Act, 2011 by inserting a new section 6A to provide for a ninety-day period for the biometric verification of the Register of Voters before a general election.

Clause 6 of the Bill seeks to amend the Elections Act, 2011 to insert a new section 8A to provide for an audit of the Register of Voters and to require that for the purposes of the August 2017 General Election, the Commission engages an independent firm to conduct an audit to verify the accuracy of the Register and to update the Register. The Commission is also required to submit the report of the audit to Parliament, implement the recommendations set out in the report and to submit the report of such implementation to Parliament.

Clause 7 of the Bill seeks to amend section 10 of the Elections Act, 2011 to provide that a person shall be eligible to vote if his or her name and biometric voter data are entered in a Register of Voters and, in addition, produces the identification document used at the time of registration.

Clause 8 of the Bill seeks to amend section 13 of the Elections Act, 2011 to alter the period for the conduct of party primaries from at least forty-five days before a general election to at least sixty days before a general election.

Clause 9 of the Bill seeks to amend section 28 of the Elections Act, 2011 to alter the date for the submission of party membership lists to the Commission from at least forty-five days before the date of a general election to at least ninety days before the date of a general election.

Clause 10 of the Bill seeks to amend section 31 of the Elections Act, 2011 to require that the Commission conducts and supervises a party primary upon the request of a political party. It further requires political parties to submit the names of persons contesting in their primaries and the date of their primaries at least twenty one days before the nomination day. The names and dates are to be published in the *Gazette* within seven days of receipt by the Commission. Only members of political parties are allowed to vote for candidates at party primaries.

Clause 11 of the Bill seeks to amend section 33 of the Elections Act, 2011 to require independent candidates to submit to the Commission, their names at least ninety days before the general election and that the Commission publishes the names in the *Gazette* at least fourteen days before the nomination day.

Clause 12 of the Bill seeks to amend section 35 of the Elections Act, 2011 by requiring political parties to submit their Party Lists required under Article 90 of the Constitution at least forty-five days to the general election.

Clause 13 of the Bill seeks to amend the Elections Act, 2011 to insert a new section 38A to limit the number of voters per polling station to five hundred.

Clause 14 of the Bill seeks to amend section 39 of the Elections Act, 2011 to require the electronic transmission of election results from polling stations, constituency tallying centres and county tallying centres to the National Tallying Centre as appropriate.

Clause 15 of the Bill seeks to amend section 40 of the Elections Act, 2011 to allow the Commission to partner with non-state agencies in the provision of voter education.

Clause 16 of the Bill seeks to amend section 43 of the Act to delete references to election offences which are proposed to be contained in a separate election law on offences.

Clause 17 seeks to amend section 44 of the Elections Act, 2011 to require the establishment of an integrated electronic electoral system that allows for the biometric registration of voters, electronic voter identification and electronic transmission of results. For the purposes of the August, 2017 elections, the use of technology is to be limited to the registration and identification of voters and the transmission of results.

Clause 18 is a consequential provision following the repeal of election offences from the Elections Act, 2011 to the proposed new Election Offences Bill, 2016.

Clause 19 seeks to amend section 76 of the Elections Act, 2011 so as to clarify that the period for the filing of petition against the election of Member of Parliament, county Governor or Member of County Assembly begins to run from the date of the declaration of results.

Clause 20 of the Bill seeks to amend section 85A of the Elections Act, 2011 to provide that an appeal against the judgment of an election court acts as an automatic stay of the holding of a by-election.

Clause 21 of the Bill seeks to amend section 87 of the Elections Act, 2011 to require that a separate criminal process be pursued by the Director of Public Prosecutions in the event an election court makes a finding that an electoral malpractice of a criminal nature may have occurred during an election.

Clause 22 of the Bill seeks to repeal section 104 of the Act which relates to election offences and replace it with a new section to require that the Commission puts mechanisms in place to facilitate the voting of persons with special needs including persons with disabilities.

Clause 23 of the Bill seeks to repeal section 106 of the Elections Act, 2011 as offences under the Act are proposed to be re-enacted in the Election Offences Bill, 2016.

Clause 24 of the Bill seeks to amend section 109 of the Elections Act to require the making of regulations for the progressive realization of the registration of prisoners as voters and their right to vote.

Clause 25 of the Bill seeks to amend section 110 of the Elections Act, 2011 to delete references to election offences.

Clause 26 of the Bill seeks to amend the Elections Act, 2011 to substitute references to the "Principal Register of Voters" with the "Register of Voters".

Clause 27 of the Bill retains the form of the oath of secrecy to be taken by officers of the Commission previously provided for under Part VI of the Act.

Clause 28 of the Bill seeks to amend section 25 of the Political Parties Act, 2011 to provide fiscal incentives to political parties in order to assist in implementing the two-thirds gender principle. Fifteen percent of the Political Parties Fund is proposed to be distributed among parties based on the number of elected special interest candidates.

Clause 29 of the Bill seeks to amend section 3 of the Independent Electoral Commission and Boundaries Act, 2011 to correct an erroneous reference.

Clause 30 of the Bill seeks to amend section 4 of the Independent Electoral Commission and Boundaries Act, 2011 to remove the investigative and prosecutorial powers previously granted to the Commission which are proposed to be exercised by the Office of the Director of Public Prosecutions.

Clause 31 of the Bill seeks to amend section 5 of the Independent Electoral Commission and Boundaries Act, 2011 to provide for the composition and appointment of the members of the Commission who are proposed to be reduced to seven members from the current nine members.

Clause 32 of the Bill seeks to amend section 6 of the Independent Electoral Commission and Boundaries Act, 2011 to remove the requirement that Commissioners be citizens of Kenya.

Clause 33 of the Bill seeks to amend the Independent Electoral Commission and Boundaries Act, 2011 by inserting a new section 7A to provide for other modes of vacation from office of members of the Commission including death and resignation from office as this is not covered under the Independent Electoral Commission and Boundaries Act, 2011.

Clause 34 of the Bill seeks to amend the Independent Electoral Commission and Boundaries Act, 2011 by inserting a new section 10A to provide for the vacation from office of the secretary of the Commission through death or resignation as this is also not covered under the Independent Electoral Commission and Boundaries Act, 2011.

Clause 35 of the Bill seeks to amend the Independent Electoral Commission and Boundaries Act, 2011 by inserting a new clause 11A to delineate the functions of the members of the Commission and the secretariat.

Clause 36 of the Bill seeks to amend section 24 of the Independent Electoral Commission and Boundaries Act, 2011 to require the Commission to include in its annual report to Parliament, a report on progress made in the realization of the registration of citizens as voters and the progressive realization of the right to vote of Kenyans in the Diaspora and prisoners.

Clause 37 of the Bill seeks to amend section 31 of the Independent Electoral Commission and Boundaries Act, 2011 to delete a provision already provided for under section 109 of the elections Act, 2011.

Clause 38 of the Bill seeks to amend the First Schedule to the Independent Electoral Commission and Boundaries Act, 2011 to provide for the procedure for the appointment of the chairperson and members of the Commission.

Clause 39 of the Bill seeks to amend section 12 of the Supreme Court Act, 2011 to require the submission of certified copies of the documents used to declare the results of the election of the President to the Supreme Court within forty-eight hours of the service of a petition challenging the election of the President.

Clause 40 of the Bill seeks to amend section 9 of the Registration of Persons Act to require the issuance of an Identification Card within thirty days of the date of registration and replacement of an Identification Card within fourteen days.

Clause 41 of the Bill seeks to amend section 16 of the Registration of Persons Act to require the Kenya Citizens and Foreign Nationals Management Service to prescribe simple guidelines for the vetting of applicants prior to issuance or replacement of an Identity Card.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

This Bill delegates legislative powers to the Independent Electoral and Boundaries Commission Act for the purpose of requiring the Commission to develop regulations on the use of technology in elections. It also delegates legislative powers to the Kenya

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Citizens and Foreign Nationals Management Service to prescribe guidelines on the vetting of applicants for the issuance and replacement of Identification Cards.

The Bill does not limit any fundamental rights or freedoms.

Statement that the Bill concerns county governments

The Bill concerns county governments as it contains provisions relating to the election of members of a county assembly and a county executive.

Statement that the Bill is a money Bill within the meaning of Article 114 of the Constitution

The Bill is not a money bill within the meaning of Article 114 of the Constitution.

Dated the.....2016.

.....

Section 2 of No. 24 of 2011 which it is proposed to be amended.

“county” means the counties into which Kenya is divided under Article 6(1) of the Constitution and specified in the First Schedule of the Constitution;

“election court” means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution and the Resident Magistrate’s Court designated by the Chief Justice in accordance with section 75 of this Act;

“nomination day” in respect of an election, means the day gazetted by the Commission as the day for the nomination of candidates for that election;

“Principal Register of Voters” means a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically.

Section 5 of No. 24 of 2011 which it is proposed to be amended.

5. Registration of voters

(1) Registration of voters and revision of the register of voters under this Act shall be carried out at all times except—

- (a) in the case of a general election or an election under Article 138(5) of the Constitution, between the date of commencement of the sixty day period immediately before the election and the date of such election:

Provided that this applies to the first general election under this Act;

- (b) in the case of a by-election, between the date of the declaration of the vacancy of the seat concerned and the date of such by-election; or
- (c) in any other case, between the date of the declaration of the vacancy of the seat concerned and the date of such election.

(2) Notwithstanding subsection (1), where an election petition is filed in respect of an electoral area, between the date of the filing of the petition and the date of the by-election, where a court determines that a by-election is to be held, a voter shall not be allowed to transfer his or her vote to the affected electoral area.

(3) Any citizen of Kenya who has attained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application, in the prescribed manner, to the Commission.

(3A) Despite subsection (3), a citizen who has attained the age of eighteen years and has registered for an identification card and is in the possession of an acknowledgement of registration certificate shall, upon application, be registered as a voter using the acknowledgement of registration certificate, but may only vote using an identification card.

(3B) For purposes of this section, an acknowledgement of registration certificate means a certificate issued by a registration officer under the Registration of Persons Act to a person who has applied for an identification card, pending the issuance of that card.

(4) All applicants for registration under this section shall be registered in the appropriate register by the registration officer or any other officer authorised by the Commission.

(5) The registration officer or any other authorised officer referred to in subsection (3) shall, at such times as the Commission may direct, transmit the information relating to the registration of the voter to the Commission for inclusion in the Principal Register of voters.

Section 6 of No. 24 of 2011 which it is proposed to be amended.

6. Inspection of register of voters

(1) The Commission shall cause the Principal Register of Voters to be opened for inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the Commission may consider appropriate.

(2) The Commission shall, within sixty days from the date of the notice for a general election, open the Principal Register of Voters for inspection for a period of at least fourteen days or such period as the Commission may consider necessary.

(3) The Commission shall, upon expiry of the period for inspection specified under subsection (1), compile the amendments to the register of voters and as soon as practicable thereafter, being at least fourteen days before an election—

(a) publish a notice in the Gazette to the effect that such compilation has been completed; and

(b) cause to be transmitted to every registration officer, a copy of the part of the Principal Register of Voters relating to the constituency for which the registration officer is responsible to be kept in safe custody.

(4) The Principal Register of Voters shall be kept at the headquarters of the Commission and copies of the part of the Principal Register of Voters relating to the constituency for which the registration officer is responsible shall be kept at all the constituency offices of the Commission.

Section 10 of No. 24 of 2011 which it is proposed to be amended.

10. Eligibility to vote

(1) A person whose name is entered in a register of voters in a particular polling station, and who produces an identification document shall be eligible to vote in that polling station.

(2) The identification document produced in subsection (1) shall be the identification document used at the time of registration as a voter.

(3) Nothing in this section shall entitle a person who is prohibited from voting by any written law to vote or relieve that person from any penalties to which the person may be liable for voting.

Section 13 of No. 24 of 2011 which it is proposed to be amended.

13. Nomination of candidates by a political party

(1) A political party shall nominate its candidates for an election under this Act at least forty-five days before a general election under this Act in accordance with its constitution and nomination rules.

(2) A political party shall not change the candidate nominated after the nomination of that person has been received by the Commission: Provided that in the event of the death, resignation or incapacity of the nominated candidate or of the violation of the electoral code of conduct by the nominated candidate, the political party may after notifying the candidate that the party seeks to substitute, where applicable, substitute its candidate before the date of presentation of nomination papers to the Commission.

(3) Notwithstanding subsection (1), in the case of any other election, the Commission shall by notice in the prescribed form, specify the day or days upon which political parties shall nominate candidates to contest in a presidential, parliamentary or county election in accordance with its constitution or rules, which shall be at least forty-five days before such election.

Section 28 of No. 24 of 2011 which it is proposed to be amended.

28. Submission of party membership lists

A political party that nominates a person for any election under this Act shall submit to the Commission a party membership list of the party at least forty-five days

Section 31 of No. 24 of 2011 which it is proposed to be amended.

31. Nomination of political party candidates

(1) A person qualifies to be nominated by a political party for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—

(a) is selected in the manner provided for in the constitution or rules of the political party concerned relating to members of that party who wish to contest presidential, parliamentary and county elections; and

- (b) subject to subsection (4), the party certifies the nomination to the Commission.

(2) Each political party shall bear the expenses relating to the nomination of candidates to contest in presidential, parliamentary, county governor and county assembly elections and a political party may, at its own expense and on such terms as may be agreed between the party and the Commission, request the Commission to supervise party nominations of candidates.

Section 33 of No. 24 of 2011 which it is proposed to be amended.

33. Nomination of independent candidates

A person qualifies to be nominated as an independent candidate for presidential, parliamentary and county elections for the purposes of Articles 97, 98, 137, 177 and 180 of the Constitution if that person—

- (a) has not been a member of any political party for at least three months preceding the date of the election;
- (b) has submitted to the Commission on the day appointed by the Commission as the nomination day, a duly filled nomination paper as the Commission may prescribe;
- (c) has submitted the symbol that the person intends to use during the election; and
- (d) is selected in the manner provided for in the Constitution and by this Act.

Section 35 of No. 24 of 2011 which it is proposed to be amended.

35. Submission of party lists

- (1) A political party shall submit its party list to the Commission on the same day as the day design

Section 39 of No. 24 of 2011 which it is proposed to be amended.

39. Determination and declaration of results

- (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(2) Before determining and declaring the final results of an election under subsection (1), the Commission may announce the provisional results of an election.

(3) The Commission shall announce the provisional and final results in the order in which the tallying of the results is completed.

Section 40 of No. 24 of 2011 which it is proposed to be amended.

40. Voter education

The Commission shall, in performing its duties under Article 88(4)(g) of the constitution establish mechanisms for the provision of continuous voter education and cause to be prepared a voter education curriculum.

Section 43 of No. 24 of 2011 which it is proposed to be amended.

43. Participation in elections by public officers

(1) A public officer shall not—

- (a) engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;
- (b) publicly indicate support for or opposition against any party, side or candidate participating in an election;
- (c) engage in political campaigns or other political activity; or
- (d) use public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party in that constituency or county.

(2) A public officer who contravenes subsection (1) commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both.

(3) A person who knowingly aids in contravention of subsection (1) commits an offence and is liable, on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

(4) A candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.

(5) A public officer who intends to contest an election under this Act shall resign from public office at least six months before the date of election.

(6) This section shall not apply to—

- (a) the President;

- (b) the Prime Minister;
- (c) the Deputy President;
- (d) a member of Parliament;
- (e) a county governor;
- (f) a deputy county governor;
- (g) a member of a county assembly.

Section 44 of No. 24 of 2011 which it is proposed to be amended.

44. Use of technology

The Commission may use such technology as it considers appropriate in the electoral process.

Section 55 of No. 24 of 2011 which it is proposed to be amended.

55. General power of the Commission

Nothing in this Act shall preclude the Commission from taking any administrative measures to ensure effective conduct of the referendum.

Section 76 of No. 24 of 2011 which it is proposed to be amended.

76. Presentation of petitions

- (1) A petition—
 - (a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation;
 - (b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or
 - (c) to seek a declaration that a seat in Parliament has become vacant may be presented at any time.

Section 85A of No. 24 of 2011 which it is proposed to be amended.

85A. Appeals to the Court of Appeal

An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be—

- (a) filed within thirty days of the decision of the High Court; and
- (b) heard and determined within six months of the filing of the appeal.

Section 87 of No. 24 of 2011 which it is proposed to be amended.

87. Report of court on election offences

(1) An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence.

(2) Before a person, not being a party to an election petition or a candidate on whose behalf the seat is claimed by an election petition, is reported by an election court, the elections court shall give that person an opportunity to be heard and to give and call evidence to show why he should not be reported.

(3) The relevant Speaker shall publish a report made under this section in the Gazette, and the Commission shall consider the report and delete from the register of voters, the name of a person who is disqualified from being registered in that register of voters.

Section 104 of No. 24 of 2011 which it is proposed to be amended.

104. Certification of referendum

In any prosecution for an offence under this Act alleged to have been committed at or in connection with a referendum in any constituency, the certificate of the returning officer for that constituency stating that the referendum

Section 106 of No. 24 of 2011 which it is proposed to be amended.

106. General penalty

(1) A person who contravenes a provision in this Act for which a penalty has not been provided for, commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

(2) An offence under this Act relating to an election shall, with necessary modifications, be an offence during a referendum.

(3) A person who is convicted of an offence under this Act shall not be eligible for election or nomination in an election under this Act for a period of five years following the date of conviction.

Section 106 of No. 24 of 2011 which it is proposed to be amended.

109. Regulations

(1) The Commission may make regulations generally for the better carrying out of the purposes and provisions of this Act, and in particular, but without prejudice to the generality of the foregoing, may make regulations to—

- (a) prescribe the manner in which registers of voters shall be compiled and the manner in which they shall be revised;
- (b) prescribe the procedure for registration and issuance of voters cards and provide for the progressive registration of Kenyan citizens living abroad;

Section 110 of No. 24 of 2011 which it is proposed to be amended.

110. Electoral code of conduct

(1) Every political party and every person who participates in an election or referendum under the Constitution and this Act shall subscribe to and observe the Electoral Code of Conduct set out in the Second Schedule in such manner as the Commission may, subject to paragraph 6 of that Schedule, determine.

(2) A political party that is eligible to nominate candidates under the Constitution, this Act or any other written law shall not be eligible to contest in any election unless the political party and the candidate have subscribed to the Electoral Code of Conduct referred to in subsection (1).

(3) Every officer of a political party or a referendum committee which, and every nominated candidate who, attempts to participate in or participates in an election or referendum without subscribing to the Electoral Code of Conduct commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both.

(4) Any person who contravenes the Electoral Code of Conduct commits an offence.

(5) The trial of an offence under this section shall be without prejudice to any proceedings in or consequent upon a petition.

Paragraph 18 of the Second Schedule of No. 24 of 2011 which it is proposed to amend

18. This Code shall take effect from the date of dissolution of parliament until polling day.

Section 110 of No. 24 of 2011 which it is proposed to be amended.

25. Distribution of the Fund

- (1) The Fund shall be distributed as follows—

- (a) ninety-five per cent of the Fund proportionately by reference to the total number of votes secured by each political party in the preceding general election; and
- (b) five per cent for the administration expenses of the Fund.

- (2) Notwithstanding subsection (1), a political party shall not be entitled to receive funding from the Fund if—

- (a) the party does not secure at least five per cent of the total number of votes at the preceding general elections; or
- (b) more than two-thirds of its registered office bearers are of the same gender.

- (3) For purposes of subsections (1)(a) and (2)(a), the total number of votes secured by a political party shall be computed by adding the total number of votes obtained in the preceding general election by a political party in the election for the President, members of Parliament, county governors and members of county assemblies.

Section 3 of No. 9 of 2011 of which it is proposed to amend —

3. Object and purpose of the Act

The object and purpose of this Act is to—

- (a) provide for the operations, powers, responsibilities and functions of the Commission to supervise elections and referenda at County and National government levels;
- (b) provide a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article (12)(b) and 250(2) of the Constitution;

- (c) provide for the manner of the exercise of the powers, responsibilities and functions of the Commission pursuant to Article 88(5) of the Constitution;
- (d) establish mechanisms for the Commission to facilitate consultations with interested parties pursuant to Article 89(7) of the Constitution; and
- (e) establish mechanisms for the Commission to address the issues arising out of the first review.

Section 4 of No. 9 of 2011 of which it is proposed to amend –

4. Functions of the Commission

As provided for by Article 88(4) of the Constitution, the Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards in accordance with the Constitution;
- (d) the regulation of the process by which parties nominate candidates for elections;
- (e) 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;
- (f) the registration of candidates for election;
- (g) voter education;
- (h) the facilitation of the observation, monitoring and evaluation of elections;
- (i) 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;
- (j) the development and enforcement of a code of conduct for candidates and parties contesting elections;

- (k) the monitoring of compliance with the legislation required by Article 82(1)(b) of the Constitution relating to nomination of candidates by parties;
- (l) the investigation and prosecution of electoral offences by candidates, political parties or their agents pursuant to Article 157(12) of the Constitution;
- (m) the use of appropriate technology and approaches in the performance of its functions; and
- (n) such other functions as are provided for by the Constitution or any other written law.

Section 6 of No. 9 of 2011 of which it is proposed to amend –

6. Qualifications for appointment as chairperson or member of the Commission

- (1) The chairperson of the Commission shall be a person who is qualified to hold the office of judge of the Supreme Court under the Constitution.
- (2) A person is qualified for appointment as a member of the Commission if such person—
 - (a) is a citizen of Kenya;
 - (b) holds a degree from a recognised university;
 - (c) has proven relevant experience in any of the following fields—
 - (i) electoral matters;
 - (ii) management;
 - (iii) finance;
 - (iv) governance;
 - (v) public administration;
 - (vi) law; and
 - (d) meets the requirements of Chapter Six of the Constitution.

Section 24 of No. 9 of 2011 of which it is proposed to amend -

Section 31 of No. 9 of 2011 of which it is proposed to amend -

31. Regulations

- (1) The Commission may make regulations for the better carrying out of the provisions of this Act.
- (2) Without prejudice to the generality of subsection (1), such regulations may provide for—

- (a) the appointment, including the power to confirm appointments of persons, to any office in respect of which the Commission is responsible under this Act;
- (b) the disciplinary control of persons holding or acting in any office in respect of which the Commission is responsible under this Act;
- (c) the termination of appointments and the removal of persons from any office, in respect of which the Commission is responsible under this Act;
- (d) the practice and procedure of the Commission in the exercise of its functions under this Act;
- (e) the progressive registration of Kenyan citizens residing outside Kenya and putting into effect the progressive realisation of their right to vote;
- (f) the delegation of the Commission's functions or powers; and
- (g) any other matter required under the Constitution, this Act or any other written law.

(3) The purpose and objective for making the rules and regulations under subsection (1) is to enable the Commission to effectively discharge its mandate under the Constitution and this Act.

PROCEDURE FOR APPOINTMENT OF CHAIRPERSON AND MEMBERS OF THE COMMISSION

(1) Within fourteen days of the commencement of this Act, the President shall, in consultation with the Prime Minister and with the approval of the National Assembly, appoint a Selection Panel comprising of—

- (a) two persons, being one man and one woman, nominated by the President;
- (b) two persons, being one man and one woman, nominated by the Prime Minister;
- (c) one person nominated by the Judicial Service Commission;
- (d) one person nominated by the Kenya Anti-Corruption Advisory Board;
and

(e) one person nominated by the Association of Professional Societies of East Africa.

(2) The respective nominating bodies under subparagraph (1)(c), (d) and (e) shall, for purposes of making their nominations, each propose and submit two names of nominees, being one man and one woman, to the Clerk of the National Assembly.

(3) The National Assembly shall, upon receipt of the names of the nominees, consider them and—

(a) approve one of the nominees; or

(b) reject both of the nominees.

(4) The Clerk of the National Assembly shall notify the respective nominating bodies of the approval or rejection under subparagraph (3).

(5) If the National Assembly approves a nominee, the Clerk of the National Assembly shall forward the name of the nominee to the President and the President shall appoint the nominee as a member of the Selection Panel.

(6) If the National Assembly rejects the names of both nominees submitted by a nominating body, the Clerk of the National Assembly shall request the nominating body to submit the names of new nominees to the National Assembly for consideration and subparagraphs (2), (3), (4) and (5) shall apply, with necessary modifications, to the consideration of the new nominees.

Section 12 of No. 7 of 2011 which it is proposed to amend—

12. Determination of disputes arising out of presidential elections

An application to the Supreme Court in respect of a dispute to which Article 163(3)(a) of the Constitution applies shall be submitted by petition and shall further comply with the procedures prescribed by the rules.

Section 9 of Cap. 107 which it is proposed to amend—

9. Registration officer to issue identity cards

(1) Upon the registration of a person under this Act, the registration officer shall issue an identity card in the prescribed form to that person.

(2) Every identity card shall contain—

(a) a photograph, of the prescribed size and type, of the registered person; and

(b) such of the finger and thumb or palm or toe impressions of the registered person as the registration officer may require, and for the purpose of obtaining them the registered person shall permit his photograph and his finger and thumb or palm or toe impression to be taken: Provided that a registered person may elect, or be required by a registration officer, to supply a photograph of himself in duplicate where the registration officer is satisfied that the photographs are of the prescribed size and type and have been taken within the prescribed time.

(3) A registered person whose identity card is torn, worn out, mutilated, tampered with or otherwise rendered unserviceable may attend upon a registration officer and apply for renewal of the identity card upon payment of such fee, if any, as may be prescribed and shall at the time surrender the torn, worn out, mutilated, tampered with or otherwise unserviceable identity card.

(4) Upon the re-registration of a person under subsection (3), the registration officer shall issue a new identity card to that person, and the provisions of subsection (2) shall apply thereto.

(5) Every person to whom an identity card has been issued shall keep the card in safe custody.

(6) Any person who loses his identity card shall, without undue delay, report the loss to the nearest registration officer, who, on payment of such fee, if any, as may be prescribed and subject to such conditions as may be prescribed, shall issue to that person a new identity card: Provided that if the registration officer is satisfied that the loss was through no fault or neglect of that person the new identity card shall be issued free of charge.

(7) Any person who finds, or who comes into possession of, an identity card which does not belong to him shall without undue delay and without charging any fee therefor, return it either to its owner or to the nearest registration officer or alternatively to the nearest police station.

Section 16 of Cap. 107 which it is proposed to amend—

16. Rules

The Minister may make rules—

- (a) prescribing anything required to be prescribed under this Act;
- (b) prescribing the form of identity card;
- (c) providing for the insertion in, or removal from the register of the particulars of any person, and for the procedure to be followed in the issue, surrender or cancellation of any identity card, the issue of duplicate identity card and the renewal of identity cards;
- (d) providing for the procedure to be followed where any registered person has changed his name or changes his place of residence or postal address or leaves Kenya or dies;

- (e) prescribing the fees, if any, which may be charged for a duplicate identity card or for initial registration the renewal or alteration of an identity card;
- (f) generally for the better carrying out of the provisions of this Act.

THE ELECTION OFFENCES BILL, 2016

ARRANGEMENT OF CLAUSES

Clause

- 1—Short title.
- 2—Interpretation.
- 3—Offences relating to register of voters.
- 4—Offences relating to multiple registration as a voter.
- 5—Offences relating to voting.
- 6—Offences by members and staff of the Commission.
- 7—Maintenance of secrecy at elections.
- 8—Personation.
- 9—Bribery.
- 10—Undue influence
- 11—Use of force or violence during election period
- 12—Use of national security organs.
- 13—Offences relating to elections.
- 14—Use of public resources.
- 15—Participation in elections by public officers.
- 16—Unlawful expenditure.
- 17—Offences relating to the use of technology in elections.

- 18—Employers to allow employees reasonable period for voting.
- 19—Aiding and abetting offences.
- 20—Breach of Electoral Code of Conduct.
- 21—Powers of prosecution.
- 22—Proceedings to be commenced within two years.
- 23—Power to appoint special magistrates.
- 24—General penalty.
- 25—Repeal of Part VI of No. 24 of 2012.

THE ELECTION OFFENCES BILL, 2016

A Bill for

AN ACT of Parliament to provide for election offences; and for connected purposes.

ENACTED by the Parliament of Kenya, as follows —

Short title.

1. (1) This Act may be cited as the Election Offences Act, 2016.

Interpretation.

2. In this Act, unless the context otherwise requires—

“ballot box” means a transparent container with a slot on the top sufficient to accept a ballot paper in an election or in a referendum but which prevents access to the votes cast until the closing of the voting period;

“ballot paper” means a paper used to record the choice made by a voter and shall include an electronic version of a ballot paper or its equivalent for purposes of electronic voting;

“candidate” means a person contesting for an elective post;

“Commission” means the Independent Electoral and Boundaries Commission established under Article 88 of the Constitution;

“constituency” means one of the constituencies into which Kenya is divided under Article 89 of the Constitution;

“county” means one of the counties into which Kenya is divided under Article 6(1) of the Constitution and specified in the First Schedule to the Constitution;

“election” means a presidential, parliamentary or county election and includes a by-election;

No. 24 of 2011.

“election court” means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163(3)(a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165(3)(a) of the Constitution or the Resident Magistrate’s Court designated by the Chief Justice in accordance with section 75 of the Elections Act, 2011;

“election period” means the period between the publication of a notice by the Commission for a presidential, parliamentary or county election under sections 14, 16, 17 and 19 of the Elections Act, 2011 and the Gazettement of the election results;

“referendum committee” has the meaning assigned to it under the Elections Act, 2011;

“Register of Voters” has the meaning assigned to it under the Elections Act, 2011;

“voter” means a person whose name is included in a current register of voters;

“ward” means an electoral area within a county delimited in accordance with Article 89 of the Constitution.

Offences relating
to register of
voters.

3. A person who—

- (a) without authority makes, prepares, prints or is in possession of a document or paper purporting to be a register of voters;
- (b) knowingly makes any false statement on, or in connection with any application to be registered in any register of voters; or
- (c) aids, abets, counsels or procures the commission of or attempts to commit any of the offences referred to in paragraphs (a) and (b),

commits an offence and is liable on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years, or to both.

Offences relating
to multiple
registration as a
voter.

4. (1) A person who—

(a) being registered as a voter in a register of voters
applies to be registered as a voter—

(i) in any other register of voters, otherwise than
in substitution of his subsisting registration;
or

(ii) in the same register of voters;

(b) having applied to be registered in a register of voters
which application has not been either granted or rejected,
applies to be registered in the same register of voters or in
another register of voters;

(c) simultaneously makes two or more applications to be
registered as a voter; or

(d) having been disqualified by an election court, applies to
be registered as a voter,

commits an offence is liable on conviction, to a fine not exceeding
one million shillings or to imprisonment for a term not exceeding one
year or to both.

(2) Any person who commits an offence under subsection (1)
shall, in addition to the penalty provided in subsection (1), not be
eligible to vote in that election or in the next election.

(3) A member or officer of the Commission or a person who aids
another person to register as a voter more than once commits an
offence and is liable on conviction, to a fine not exceeding one
million shillings or to imprisonment for a term not exceeding one
year or to both.

(4) A candidate who aids a person to register as a voter more
than once, commits an offence and is liable on conviction, to a
fine not exceeding one million shillings or to imprisonment for
a term not exceeding one year or to both and shall not be
eligible to contest in the ongoing general election.

Offences relating
to voting.

5. A person who—

- (a) forges, counterfeits, defaces or destroys any ballot paper or the official perforation, stamp or mark on any ballot paper;
- (b) without authority supplies any ballot paper to any person;
- (c) sells or offers for sale any ballot paper to any person;
- (d) purchases or offers to purchase any ballot paper from any person;
- (e) not being a person entitled to be in possession of any ballot paper which has been marked with any official perforation, stamp or mark has any such ballot paper in his possession;
- (f) puts into any ballot box anything other than the ballot paper which he is authorised by law to put in;
- (g) without authority takes out of a polling station any ballot paper or is found in possession of any ballot paper outside a polling station;
- (h) not being an election official and not being authorised, removes election material from a polling station before, during or after an election;
- (i) without authority destroys, takes, opens, disposes of or otherwise interferes with any election material in use or intended to be used for the purposes of an election;
- (j) without authority prints any ballot paper or what purports to be or is capable of being used as a ballot paper at an election;
- (k) for the purposes of an election, manufactures, constructs, imports, has in his possession, supplies or uses, or causes to be manufactured, constructed, imported, supplied or used, any appliance, device or mechanism by which a

ballot paper may be extracted, affected or manipulated after having been deposited in a ballot box during the polling at any election;

- (l) not being authorised to do so under this Act, makes any mark on any ballot paper issued to any person other than to himself;
- (m) votes at any election when they are not entitled to vote;
- (n) votes more than once in any election;
- (o) interferes with a voter in the casting of his vote in secret;
- (p) pretends to be unable to read or write so as to be assisted in voting; or
- (q) pretends to be visually impaired or suffering from any other disability so as to be assisted in voting,

commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both.

Offences by
members and staff
of the
Commission.

6. A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election who—

- (a) makes, in any record, return or other document which they are required to keep or make under such written law, an entry which they know or have reasonable cause to believe to be false, or do not believe to be true;
- (b) permits any person whom they know or have reasonable cause to believe to be able to read or write to vote in the manner provided for persons unable to read or write;
- (c) permits any person whom they know or have reasonable cause to believe not to be visually impaired or a person with disability to vote in the

manner provided for persons who are visually impaired or persons with disability, as the case may be;

- (d) wilfully prevents any person from voting at the polling station at which they know or have reasonable cause to believe such person is entitled to vote;
- (e) wilfully rejects or refuses to count any ballot paper which they know or have reasonable cause to believe is validly cast for any candidate in accordance with the provisions of such written law;
- (f) wilfully counts any ballot paper as being cast for any candidate which they know or have reasonable cause to believe was not validly cast for that candidate;
- (g) interferes with a voter in the casting of his vote in secret;
- (h) where required under the Elections Act or any other law to declare the result of an election, fails to declare the results of an election;
- (i) except in the case of a member, officer or person authorised to do so, purports to make a formal declaration or formal announcement of an election result;
- (j) without reasonable cause does or omits to do anything in breach of his official duty;
- (k) colludes with any political party or candidate for purposes of giving an undue advantage to the political party or candidate;
- (l) wilfully contravenes the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or any other unlawful considerations; or

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- (m) fails to prevent or report to the Commission or any other relevant authority, the commission of an electoral offence committed under this Act,

commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

Maintenance of
secrecy at
elections.

7. (1) An election officer, candidate, agent or other person who —

- (a) without authority, obtains or attempts to obtain, in a polling station, information as to the candidate for whom any voter in the station is about to vote or has voted;
- (b) communicates at any time to any person, any information obtained in a polling station as to the candidate for whom any voter in the station is about to vote or has voted; or
- (c) discloses the serial number of the ballot paper issued to any voter at the station,

commits an offence.

(2) Every election officer, candidate, or agent in attendance at the counting of votes who fails to maintain or aids in violating the secrecy of the ballot or attempts to ascertain at such counting the number of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given by any particular ballot paper, commits an offence.

(3) A person attending any proceedings relating to an election and who, without lawful excuse, —

- (a) communicates, before the poll is closed, to any person any information obtained at those proceedings as to any official perforation, stamp or mark to be used in connection with any paper;
- (b) communicates to any person at any time any information

obtained at those proceedings as to the number of ballot papers issued to any person;

- (c) attempts to ascertain at the proceedings in connection with the receipt of ballot papers, the number on any ballot paper;
- (d) attempts to ascertain at the proceedings in connection with the receipt of the ballot papers the candidate for whom any vote is given in any particular ballot paper or communicate any information with respect thereto obtained at those proceedings; or
- (e) captures an image of any marked ballot for purposes of financial gain or for showing allegiance,

commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

Personation.

8. (1) A person, who at an election—

- (a) applies for a ballot paper in the name of another person, or of a fictitious person;
- (b) having voted once at any such election, votes again or applies at the same election for a ballot paper in his own name;
- (c) votes with the knowledge that he is not entitled to vote in that election; or
- (d) presents himself as an election official knowing that he is not,

commits the offence of personation, which shall be cognizable.

(2) For the purposes of this section, a person who has applied for a ballot paper for the purpose of voting shall be deemed to have voted.

Bribery.

9. (1) A person who, during an election period, -

- (a) directly or indirectly offers a bribe to influence a voter to—
 - (i) vote or refrain from voting for a particular candidate or political party;
 - (ii) attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;
- (b) in any manner unlawfully influences the result of an election;
- (c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates

commits an offence.

(2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.

(3) A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

Undue influence

10. (1) A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of—

- (a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;

- (b) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or
- (c) impeding or preventing a person from being nominated as a candidate or from being registered as a voter,

commits the offence of undue influence.

(2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election commits an offence.

(3) A person who directly or indirectly by duress or intimidation—

- (a) impedes, prevents or threatens to impede or prevent a voter from voting; or
- (b) in any manner influences the result of an election,

commits an offence.

(4) A person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election—

- (f) to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or
- (g) to display the ballot paper on which the voter has marked his vote,

commits an offence.

Use of force or
violence during
election period

11. A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person—

- (a) so as to induce or compel that person to support a particular candidate or political party;
- (b) on account of such person having voted or refrained from voting; or
- (c) in order to induce or compel that person to vote in a particular way or refrain from voting,

commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

Use of national
security organs.

12. A candidate or any other person who uses a public officer, or the national security organs to induce or compel any person to support a particular candidate or political party commits an offence and is liable on conviction to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding six years or to both.

Offences relating
to elections.

13. A person who—

- (a) prints, publishes, distributes or posts up, or causes to be printed, published, distributed or posted up, any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names and addresses of the printer and publisher;
- (b) makes or publishes, before or during any election, for the purpose of promoting or procuring the election of any candidate, any false statement of withdrawal of any other candidate at such election;
- (c) forges, defaces or destroys any nomination paper, or delivers to a returning officer any nomination paper knowing it to be forged;
- (d) interferes with election material by removing destroying, concealing or mutilating or assists in the removal, destruction, concealment or mutilation of any such material save on the authority of the Commission or under the provisions of the Elections Act;

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- (e) directly or indirectly prints, manufactures or supplies or procures the printing, manufacture or supply of any election material in connection with the election save on the authority of the Commission;
- (f) interferes with free political canvassing and campaigning by—
 - (i) using language which is threatening, abusive or insulting or engages in any kind of action which may advocate hatred, incite violence or influence the voters on grounds of ethnicity, race, religion, gender or any other ground of discrimination;
 - (ii) directly or indirectly, using the threat of force, violence, harassment or otherwise preventing the conduct of any political meeting, march, demonstration or other event of a political nature or any other person from attending or participating therein;
 - (iii) creating a material disruption with the intention of preventing a political party from holding a public political meeting;
 - (iv) impeding, preventing or threatening to impede or prevent the right of any representative of any political party from gaining access, in the manner and during the hours prescribed to voters in any particular area, whether public or private for the purposes of canvassing and campaigning and soliciting membership and support; or
 - (v) impeding, preventing or threatening to impede or prevent a member of the Commission, a representative of the Commission or any other authorised person or organisation engaged in voter education from gaining access, in the refuses or fails to effect

a direction, instruction or lawful order issued by or on behalf of the Commission;

- (h) refuses or fails to leave an election counting centre or any area designated by the Commission for electoral purposes when so ordered in accordance with the Elections Act;
- (i) enters or remains in an election centre or in any area designated by the Commission for electoral purposes in contravention of Elections Act;
- (j) obstructs or hinders any elections officer, candidate or agent in the execution of their lawful duties;
- (k) makes a false statement or furnishes false particulars in any statement which is required under Elections Act knowing the statement or particulars to be false or without reasonable grounds for believing the same to be true; or
- (l) publishes, repeats or disseminates in any manner whatsoever, information with the intention of—
 - (i) disrupting or preventing the election;
 - (ii) creating hostility or fear in order to influence the process or outcome of the election; or
 - (iii) otherwise unlawfully influencing the process or outcome of the election, or aids, abets counsels or procures the commission of or attempts to commit any such offence; or
- (m) forges, defaces or destroys any campaign or promotional material of an opposing candidate or political party,

commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.

Use of public
resources.

14. (1) Except as authorised under this Act or any other written law, a candidate, referendum committee or other person shall

not use public resources for the purpose of campaigning during an election or a referendum.

(2) No government shall publish any advertisements of achievements of the respective government either in the print media, electronic media, or by way of banners or hoardings in public places during the election period.

(3) For the purposes of this section, the Commission shall, in writing require 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.

(4) A person who is requested to supply information required under subsection (3) shall submit the information within a period of fourteen days from the date of the notice.

(5) The provisions of subsection (3) shall apply with necessary modifications, to an employee of a statutory corporation or of a company in which the Government owns a controlling interest.

(6) A person who fails to comply with the provisions of this section commits an offence and is liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding six years or to both.

(7) A member of the Commission, any person designated by the Commission or any authorised agency shall have the power to impound or to order the impounding of any state resources that are unlawfully used in an election campaign.

Participation in
elections by
public officers.

15. (1) A public officer who —

- (a) engages in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;
- (b) publicly indicates support for or opposition against any party, side or candidate participating in an election;
- (c) engages in political campaigns or other political activity;

or

- (d) uses public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party in that constituency or county.,

commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both.

(2) A person who knowingly aids in contravention of subsection (1) commits an offence and is liable, on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

(3) A candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.

Unlawful
expenditure.

16. (1) A person who makes payment, contracts for payment or gives any other consideration of any kind for the purpose of promoting or procuring the election of a candidate at any election,—

- (a) on account of the conveyance of voters to or from the poll, whether for the hiring of vehicles, vessels or animals of transport of any kind whatsoever, or for railway fares, or otherwise; or
- (b) to or with a voter on account of the use of any house, land, building, or premises for the exhibition of any address, bill or notice, or on account of the exhibition of any address bill or notice,

commits an offence.

(2) A person who, upon the filing of an election petition in respect of an electoral area and prior to the conclusion of a by-election in respect of that electoral area where a court determines that a by-election is to be held,—

- (a) knowingly register voters in the electoral area in which

the by-election is to be held;

- (b) knowingly cause the registration of voters in the electoral area in which the by-election is to be held; or
- (c) transfer voters in substantial numbers to the electoral area in which a by-election is to be held,

commits an offence.

(3) A person who knowingly receives payment under the circumstances provided for under subsection (1) commits an offence.

(4) A person who lets, lends or employs a vehicle, vessel, aircraft, or animal of transport knowing that it is intended to be used to convey voters to and from a poll commits an offence.

(5) A person who hires, borrows or uses a vehicle, vessel, aircraft, or animal of transport knowing that it is intended to be used to convey voters to and from a poll commits an offence.

(6) Nothing in subsection (4) or subsection (5) shall prevent an owner of a vehicle, vessel or animal of transport of any kind from letting, hiring or being employed or used by a voter or several voters at their joint cost for the purpose of conveying the voters to or from a poll.

(7) Notwithstanding anything in this section—

- (a) where it is the ordinary business of a voter as an advertising agent to exhibit for payment bills and advertisements, a payment to or contract with such voter if made in the ordinary course of business, shall not be deemed to be an offence within the meaning of this section; and
- (b) where voters are unable at an election to reach their polling stations from their place of residence without crossing the sea or a tributary thereof or a river, means may be provided for conveying the voters to their polling stations or to enable them to cross in order to reach their polling stations.

(8) The means of conveyance referred to in subsection (7)(b) shall be made available equally to all voters who wish to be conveyed to vote.

Offences relating
to the use of
technology in
elections.

17. A person who, in relation to the electoral process,-

- (a) steals or intentionally causes damage to electronic equipment;
- (b) knowingly or intentionally conceals, destroys, alters or knowingly or intentionally causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network;
- (c) with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person, destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility;
- (d) accesses the whole or any part of a computer system without authorisation;
- (e) intercepts, by technical means and without authorisation, any non-public transmission of computer data to, from, or within a computer system including electromagnetic emissions from a computer system carrying such computer data;
- (f) intentionally or recklessly alters or interferes with the functioning of a computer or computer network by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data or a computer program, electronic document, or electronic data message without authority, including by the introduction or transmission of viruses;
- (g) uses, produces, sells, procures, imports, distributes, or otherwise makes available, without

lawful authority-

- (i) a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences under this Act; or
 - (ii) a computer password, access code, or similar data by which the whole or any part of a computer system may be accessed with intent that it be used for the purpose of committing an offence under this Act;
- (h) knowingly inputs, alters, or deletes computer data with the intent that the result be considered or acted upon for legal purposes as if it were authentic, regardless of whether or not the data is directly readable and intelligible; or
- (i) intentionally acquires, uses, misuses, transfers, alters or deletes another person's identification information,

commits an offence and shall be liable, on conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding ten years or to both.

Employers to
allow employees
reasonable period
for voting.

18. (1) Every employer shall, on polling day, allow a voter in his employ a reasonable period for voting, and no employer shall make any deduction from the pay or other remuneration of any such voter or impose upon or exact from them any penalty by reason of his absence during such period.

(2) An employer who directly or indirectly refuses, or by intimidation, undue influence, or in any other manner interferes with the granting to any voter in his employ of a reasonable period for voting as specified in subsection (1) commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both.

(3) This section shall not extend to such categories of employees as the Commission may, from time to time by notice in the *Gazette* designate, or to an employee who at the election in question is acting as an election officer within the meaning of the Elections Act.

(4) The provisions of this section shall bind the Government.

Aiding and
abetting offences.

19. (1) A person who aids, abets, counsels or procures the commission of or attempts to aid, abet, counsel, or procure the commission of an offence specified in this Act commits an offence.

(2) An offence under subsection (1) shall be cognizable.

Breach of
Electoral Code of
Conduct.

20. (1) Every officer of a political party and every nominated candidate who, attempts to participate in or participates in an election without subscribing to the Electoral Code of Conduct commits an offence and is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding six years or to both.

(2) Any person who contravenes the Electoral Code of Conduct commits an offence.

(3) The trial of an offence under this section shall be without prejudice to any proceedings in or consequent upon a petition.

Powers of
prosecution.

21. The Director of Public Prosecutions shall have the power to order investigations and to prosecute offences under this Act.

Proceedings to be
commenced
within two years.

22. (1) The Director of Public Prosecutions shall commence a proceeding in relation to an offence under this Act within twelve months of the date of the election to which the offence relates.

(2) In the case of an offence arising out of the determination of an electoral Court under section 87 of the Elections Act, 2011, the time provided under subsection (1) shall start to run from the date of final judgment.

Power to appoint
special
magistrates.

23. (1) The Chief Justice may, by notification in the *Gazette*, appoint as many special Magistrates as may be necessary to hear and determine matters relating to offences under this Act.

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Cap. 75. (2) Notwithstanding anything contained in the Criminal Procedure Code, a special Magistrate shall, as far as practicable, hold the trial of an offence under this Act on a day-to-day basis until completion.

General penalty. 24. (1) A person who contravenes a provision in this Act for which a penalty has not been provided for, commits an offence and is liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.

(2) An offence under this Act relating to an election shall, with necessary modifications, be an offence during a referendum.

(3) A person who is convicted of an offence under this Act shall not be eligible for election or nomination in an election for a period of five years following the date of conviction.

Repeal of Part VI
of No. 24 of 2012.

25. The Elections Act is amended by repealing Part VI.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The Bill seeks to consolidate the offences relating to elections into one Act in order to enhance the administration of elections and prosecution of offences relating to elections. The Bill also seeks to ensure clarity with respect to some of the existing provisions which, as currently set out in the Elections Act, make it difficult to prosecute. The Bill sets a time limit within which the Director of Public Prosecutions may commence proceedings in relation to an election offence.

In particular, the Bill prohibits the use of public resources by candidates during elections and empowers the Commission to demand a full account of all public resources ordinarily at the disposal of the candidates, where the candidates are members of parliament, county governors, deputy county governors, or members of county assemblies. The Bill also provides for offences related to the use of Information and Communication Technology in elections. It further generally enhances penalties for election offences in order to make them more deterrent.

Clause 3 of the Bill provides for offences relating to the Register of Voters.

Clause 4 of the Bill provides for offences relating to multiple registration as a voter.

Clause 5 of the Bill provides for offences relating to the voting process.

Clause 6 of the Bill provides for offences by members and staff of the Commission during the electoral process.

Clause 7 of the Bill provides for the maintenance of secrecy at elections by members and staff of the Commission and sets out a penalty for the breach of the obligation.

Clause 8 of the Bill provides for the offence of personation in relation to the electoral process.

Clause 9 of the Bill provides for the offence of bribery.

Clause 10 of the Bill provides for the offence of undue influence.

Clause 11 of the Bill outlaws the use of force or violence during an election period.

Clause 12 of the Bill precludes the use of national security organs during the election period.

Clause 14 precludes the use of public resources during the election period.

Clause 15 precludes public officers from participation in elections.

Clause 16 outlines and outlaws expenditure related to the conveyance of voters with the intent of influencing an election result.

Clause 17 of the Bill provides for offences relating to the use of technology in elections.

Clause 18 of the Bill requires employers to allow employees a reasonable period for voting.

Clause 19 of the Bill provides for offences relating to persons who aid or abet in the commission of offences under the Bill.

Clause 20 of the Bill provides that the breach of the Electoral Code of Conduct constitutes an offence.

Clause 21 of the Bill provide for the powers of prosecution under the Bill to be exercised by the Director of Public Prosecutions.

Clause 22 of the Bill requires the commencement of proceedings under the Bill within two years from the date of the election to which an offence relates. Where the offence is with regard to a determination of an election court, the time period is to run from the date of final judgment.

Clause 23 empowers the Chief Justice to appoint special magistrates to hear and determine matters relating to offences under the Bill and empowers such magistrates to hear the matters on a day-to-day basis.

Clause 24 of the Bill provides for a general penalty for offences to which a specific penalty has not been prescribed.

Clause 25 of the Bill repeals Part VI of the Elections Act, 2011, which currently provides for offences relating to elections.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates legislative powers to the Chief Justice to gazette special court for the hearing and determination of matters relating to offences under the Bill. The Bill further limits the freedom of movement of persons convicted of offences and sentenced to imprisonment.

Statement on how the Bill concerns county governments

This Bill concerns counties in terms of Article 110 of the Constitution as it touches on electoral processes relating to the election of members of a county assembly of county executive.

Statement that the Bill is not a money Bill, within the meaning of Article 114 of the Constitution

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the, 2016.

