



UNIVERSITY OF NAIROBI

COLLEGE OF HUMANITIES AND SOCIAL SCIENCES

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

**THE NEXUS BETWEEN CONDUCT OF ELECTIONS AND DELIMITATION
OF ELECTORAL BOUNDARIES IN KENYA**

SUBMITTED BY:

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R52/81689/2015

**A Research Project submitted in partial fulfilment of the requirement of the award
of Master of Arts in International Conflict Management**

2017

DECLARATION

Declaration by Student

This project is my original work and has never been presented to any other examination
bobby

Sign.....

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Declaration by Supervisor

This project has been submitted for examination to my supervisor Dr. Ouma.

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DEDICATION

This research project is a special dedication to my mum Veronica and dad Ronald, my sisters Beatrice, Lydia, Lucy and my brother Josphat, my twin nieces Elsie and Elsa and my Nephew Ezra who gave me the necessary support and encouragement to complete this research project without so much strain.

Special thanks to my friends Kageni and Abraham for being there for me and inspiring me and nudging me to complete this project.

ACKNOWLEDGEMENTS

I would like to acknowledge and appreciate the scholarly and professional guidance and support I received from my supervisor Dr. Martin Ouma.

Gratitude also goes to all my course instructors during my course work who laid the foundation that made this research project possible.

To all those in IDIS and the University community that facilitated my progress in this course, I, thank you. I also acknowledge my classmates who supported me and made the entire Masters period worthwhile.

To the Independent Electoral and Boundaries Commission I want to convey my utmost gratitude specifically Ms. Salome Oyugi and Ms. Nancy Kariuki who made it possible for me collect data that made this research project possible.

I would also like to acknowledge my professional colleagues especially Mr. George Murugu and Mr. Wambua Kilonzo whose invaluable counsel made it possible for me to identify gaps leading to this research project.

Most of all I thank God for giving me life and the time to complete the proposal because “For from Him and for him are all things. To Him be the Glory forever, Amen.” Romans (11:36)

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Raila Odinga v.The Independent Electoral and Boundaries Commission and 3 others. Supreme Court Petition Number 5 of 2013 as consolidated with Petitions 3 of 2013 and 4 of 2013.

John Kimathi Maingi vs Andrew Ligale and 4 others High Court Petition No. 72 of 2010
Republic V Independent Electoral and Boundaries Commission and Another Ex-Parte
Councillor Eliot Lidubwi Kihusa & 5 Others [2012] eKLR

ABBREVIATIONS AND ACRONYMS

AG	Attorney General
CA	Court of Appeal
Cap	Chapter
EACA	East African Court Of Appeal
EDR	Electoral Dispute Resolution
EMB	Electoral Management Bodies
HC	High Court
IEBC	Independent Electoral & Boundaries Commission
ICCPR	International Covenant on Civil and Political Rights
IIEC	Interim Independent Electoral Commission
IREC	Independent Review Commission
KLR	Kenya Law Reports
LSK	Law society Of Kenya
NCLR	National Council for Law Reporting
ODPP	Office of the Director of Public Prosecutions
ORPP	Office of the Registrar of Political Parties
PPDT	Political Parties Disputes Tribunal
R	Republic
SCK	Supreme Court of Kenya
UN	United Nation
V	Versus

DEFINITIONS OF TERMS

Boundary; Something such as a river, fence or imaginary line that shows where an area ends and another area begins.

Bureaucracy; A form of administrative organization characterized by depersonalized, rule-bound and hierarchical structured relationships that efficiently produces highly predictable rationalized results.

Delimitation; The act or process of fixing limits or boundaries of territorial constituencies in a country or a province having a legislative body.

Due Process; A requirement that providing that all persons be treated fairly and justly by government officials and institutions.

functus officio; a branch of the doctrine of *res judicata* that prevents the re-opening of a matter. before the same Court, tribunal or other statutory actor which rendered the final decision in the absence of statutory authority.

Justice; the maintenance or administration of what is just by law by judicial or other proceedings.

Jurisdiction; The territory within which control may be exercised hence, the legal and geographical range of a court's authority.

Jurisprudence; The philosophy of law and the principles within which law is based.

ABSTRACT

Traditionally conflicts arising from the process of review and/or delimitation of boundaries¹ have been approached in a very theoretical and compartmentalised way, such that theory is emphasized and the practical aspect is shadowed. This is what motivated the researcher in that there is a need for the practical aspect of the process to be emphasized. It is for this reason that the researcher realized that the citizenry need to be informed constitutional aspects of the process of delimiting and reviewing electoral units/ boundaries and made to be aware of their constitutional rights. This project was used to ascertain the nexus between elections and delimitation of electoral boundaries in Kenya. The most applicable instrument in this research was the questionnaire and interview guide since it is covered a large sample of respondents. Primary data was the original data collected through other researchers for the same purpose. Stratified sampling design was used since the population of interest is not homogenous. The elements of interest were divided into groups to form strata and a random sample of 206 drawn out of the population of 427 representing a sample ratio. The study also analysed the gaps in the boundary delimitation legal framework and show the administration of the Courts during disputes emanating from this process. The researcher also examined the dominant characteristics of electoral boundaries and the circumstances under which disputes over their location have generated conflict and to deduce some general propositions about their conflict potential in elections and better means of settlement of disputes. The researcher also endeavoured to explain how the day today Kenyan politics and ethnicity affect resolution of boundary disputes and how this in turn affects, if at all, elections in Kenya.

¹ Something such as a river, fence or imaginary line that shows where an area ends and another area begins.

CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.0 Introduction

The effectiveness that a country manages its electoral system is widely understood to be as a result of the feasibility of its legal framework governing elections which ultimately provides indicators for a society's democratic strength. Through elections the electorate's voice can be heard. At the same time, it is argued that political power is either maintained or pursued through electoral processes. Consequently, if not appropriately thought-out and administered conflict and violence can emanate from elections. Invariably elections are the most visible feature of democracy as they link the electorate to the government and bring about sovereignty of the people. However, this in itself is not a guarantee for democracy.

This research project bridges this gap, looking at how the disputes arising from delimitation of electoral boundaries are resolved. Using the Independent Electoral & Boundaries Commission (IEBC) of Kenya as a case study, the research examines the perceptions of election observers and interview respondents on the efficiency of the proceedings, impartiality and experience of the arbiter, and standard of evidence and burden of proof use in resolving electoral disputes in the country's 2007 and 2013 elections because election observers usually leave before petitions are finalised which may lead to ingrained biases.² This chapter covers the introduction, gives a background of the study and puts the topic of research in perspective. It elucidates the statement of the problem while stating the purpose of study. In addition it describes the objectives, justification of the study, theoretical framework and the scope of the study.

1.1 Background to the Study

The legislative framework for conduct and managements of elections should seek to guarantee that electoral units are demarcated in a way as to ensure that the primary

² Heidi Evelyn and Waikwa Nyoike, 'A New Dawn Postponed' The Constitutional Threshold for Valid Elections in Kenya and Section 3 of the Elections Act, International Law Development Organisation and the Judiciary Training Institute, (2015) 46.

objective of according equivalent weight to each vote to the greatest degree possible to ensure effective representation is met. At a glance of the current Kenyan scenario, it will be found that Kenya has a complex body of law which goes ahead to describe the electoral process as complex and befuddling.

It should be noted that the electoral laws need to circumvent the subject of how electoral boundaries for the constituencies or county assembly wards are defined and drawn for purposes of election. The overriding consequence of this issue is that it is so vital that it is usually enshrined in the country's Constitution. When regulating the delimiting and reviewing of electoral units the following best international practices are adhered to: the regularity of the process ; clarity of the criteria; public participation by electorate; delineation of roles of the three arms of government (legislature, judiciary and executive); and the final authority to determine the electoral units.³ The provisions of Articles 88 and 89⁴ provide the criteria for reviewing and delimiting electoral boundaries or units. The thrust of this study will be to analyse the connection between conducting elections and dispute resolution arising from delimitation of electoral units in Kenya.

The researcher also finds that ethnic clashes which arise from the review of electoral boundaries have largely been characterised by politics in Kenya and are not only tribal but constitute politically organised conflicts orchestrated to achieve long-short term political and ultimately economic advantages. Notably, the Commission's underlying task is to correct historical injustices and gerrymandering of the past in the electoral processes which highly contributed to the 2007 general election chaos in Kenya as singled out by IREC.⁵ The Kriegler Report⁶ concluded that there existed gross inequalities in the voting populace and gross disparity in sizes of Kenya's constituencies.

For a number of Kenyan citizens the upshot of the presidential election held in 2007 represented an extension of the duplicity of the promise made by Hon. Mwai Kibaki's

³ Migai Akech, '*Institutional reform in the New Constitution of Kenya*' (2010) International Centre for Transitional Justice, 11-14 < <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>> accessed 20 June 2016.

⁴ The Constitution of Kenya, 2010

⁵ Migai Akech, '*Institutional reform in the New Constitution of Kenya*' (2010) International Centre for Transitional Justice, 11-14 < <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>> accessed 20 June 2016.

⁶ Kriegler Report, 2008(revised edition, 2009)

government, which was elected in 2002, whose main promise was to midwife the drafting and passing of a new Constitution to enhance Kenya's political, cultural and social gaps. Following the disputed general election of 2007 and its aftermath, efforts to reform the electoral process in Kenya were renewed. This saw the disbandment of the then Electoral Commission of Kenya (ECK) and the establishment of the IIEC.

Notably, there are different ways in which delimitation of boundaries is conducted. Whereas the whole process is politically charged and sensitive, other jurisdictions provide that the EMBs are not involved in this process and appoint a different Commission to undertake the process and have the EMB offer support. In Kenya however, the Constitution squarely mandates the IEBC the role of reviewing and delimiting electoral units. Pursuant to this and subject to the 5th Schedule of the Independent Electoral and Boundaries Commission Act, 2011 (IEBC Act) in tackling concerns brought about from the first Review proceeded to review the existing boundaries and launched its Preliminary Report on Delimitation of Boundaries on 9th February, 2012.⁷

Kenya is constantly countenanced with situations where organizations and the established legal order have been deliberately undermined to serve the certain political interests and not for posterity. For example, an amendments to the elections act to have voters registered with waiting cards was passed before the 2013 elections just to serve as a means to an end. Notably, the challenges that are faced in planning, conduct and managing elections during conflict situations are usually not purely technical. This research seeks to highlight how these challenges that arise not only in Kenya but also in other democracies are indicative of larger political and institutional issues related to egalitarian alteration that are either extremely hard analyse or address. This research endows to establish the fundamentals of the politics, ethnicity and compare how the two affect the process of boundary review/delimitation during elections in Kenya.

The consequence of the 2017 general election was an election closely challenged which led to the electorate being divided ethnically. Eventually, the flawed electoral process gave rise to serious conflict arising from these underlying factors that fuelled and

⁷ Article 89 of the Constitution of Kenya 2010 gives the IEBC the mandate of creating and delimiting constituencies and wards.

led to a catastrophic violence following the declaration of the presidential result. This study juxtaposes the latent political nature of Kenya that midwife the fundamental reforms to the Kenyan system, including the Constitution, necessary to forestall the recurrence of violence following an election.⁸

The IIEC conducted the constitutional referendum in 2010 that led to the passage of the Constitution of Kenya on the 27th August 2010. The Constitution established IEBC, as the successor of IIEC. Following these recommendations and with the promulgation of the Constitution in 2010 and as discussed above the entrenched new provisions which gave IEBC the mandate to deal with disputes arising from the review and gave the High Court the power to deal with the appeals from the disputes dealt with by the IEBC.⁹

The dispute resolution process arising from the review or delimitation of boundaries though entrenched in the Constitution should not only ensure that the wheels of justice are propelled but also ensure that the process of meting out justice is achieved without the detriment of the interest of the parties involved while observing constitutional timelines. Owing to the fact that the review was conducted in 2012, being the first time a matter of that nature and volume was being experienced in the Courts all of which had to be heard and determined within a strict constitutional timeframe. The Court developed a novel idea to hear all matters from the pre-trial conference with petitioners, lawyers and applications and have all matters consolidated into one matter to be heard before the 5- judge bench¹⁰. These disputes were accompanied by unprecedented interest.¹¹

Noting the above, this study will critique and analyse whether (if at all) the methodology applied during the said hearings served justice for all parties. If not, it will make recommendations on what may be done to improve access to justice and acceptability of the decisions. The study attempts to tease out the complex transaction between the key elements and how they bring about conflict fuelled by the current political system. Justice

⁸ *The Journal of Elections*, June, 2009, Vol 8, Issue 1, Leonard David K, Owuor, Felix Odhiambo and George, Katherine.

⁹ Ibid

¹⁰ R v Independent electoral and Boundaries Commission & Another Exparte Eliot Lidubwi Kihusa & 5 Others (2012) eKLR, 9th July, 2012

¹¹ The decision of the High Court of Kenya on the delimitation of electoral and administrative boundaries by the Independent Electoral and Boundaries Commission.

becomes a vital issue in this study; the dispute resolution process arising from the review or delimitation of boundaries should also endeavour to impel justice without the detriment of the interest of the litigants.

1.2 Statement of the Research Problem

The Constitution as promulgated drastically transformed the existing legal framework on elections and established into the ambit of electoral statutes, instruments that hitherto were never part of the Laws of Kenya at the time. It provided that the;

*“general regulations and principles of international law shall form part of the Laws of Kenya and further that any treaty or convention ratified by Kenya shall form part of the Laws of Kenya under the Constitution.”*¹²

The IEBC has been in the forefront trying to provide for Kenya elections that are free, fair, and credible and in accordance to the constitution. In preparation for the 4th March, 2013 general election, the IEBC in consultation with stakeholders came up with electoral laws that had unparalleled standards for elections such as political rights and fundamental freedoms provided for in the Universal Declaration of Human Rights.¹³ The standards, for example, requires the creation of an autonomous (devolved system of governance) counties which are insulated from political control or influence of national governments, security of tenure for members of the Electoral Commission, guarding against bribery and fraud, upholding the principle of secret ballot, provision of credible voters’ register, avoidance of manipulation of election results and intimidation of voters, and ensuring transparency in the entire electoral processes to elicit confidence from participating political parties and general acceptance of elections outcomes.

Electoral malpractice still provides a path to political power. In Kenya, Raila Odinga, challenged the return of Uhuru Kenyatta as the duly elected president¹⁴ with

¹² The International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights

¹³ López-Pintor, ‘*Election Management Bodies as Institutions of Governance*’ (UNDP) accessed 05 June 2017.

¹⁴ Petition Nos. 5, 3 & 4 of 2013 (Consolidated), Raila Odinga v Independent Electoral & Boundaries Commission & 3 Others.

50.07% of the total votes in the March 4, 2013 presidential elections.¹⁵ The Ghanaian presidential candidate of the New Patriotic Party (NPP) also challenged the presidential results alleging irregularities in 10,119 polling stations during the 2012 presidential elections.¹⁶ The experience was not different in the 2013 general elections in Guinea and Nigeria. While democratisation literature highlights the significance of electoral courts in the defence of people's right of participation and checking excessive abuses in transitional regimes, this is yet to be examined in-depth and what possible effects, if any, on election quality.

The significant role of electoral rules and regulations in managing elections in developed and developing democracies have however either been ignored or neglected in the studies on election management in Kenya. The extent to which these rules and regulations contribute to the governance of elections are classified into three levels that include the construction of the rules; defining the rules applicability and the rules mode of adjudication which are very critical in understanding the successes and challenges of IEBC. They also depict how they contributed to the success or otherwise on election management in Kenya which still remain inconclusive, therefore requiring deeper interrogation.

This study aims to countenance the encroaching silent injustices that have been in the judicial process in Kenya. In juxtaposition the constitutionality of the hearings and determination of the disputes arising therefrom is of essence, more so, however, the parties in dispute should have access to the Court. Further, it is their constitutional right to be heard and have their day in Court. This is thus a grave issue that ultimately requires us to identify the issue of injustice in the litigation process. This enhances a peculiar position and it is in this case that the problem becomes the government's responsibility.

The research aims at establishing the efficacy of the statutory provisions regarding the dispute resolution of review process with respect to the Constitution, the aspect at which justice is achieved through the Courts.

¹⁵ "Kenya's Odinga challenges election result." Aljazeera, March 17, 2013 and "Raila Odinga files Kenya election appeal." BBC, March 16, 2013

¹⁶ "Guinea's Supreme Court upholds election result." BBC, November 16, 2013.

While it is noted that Kenya's boundary delimitation and its determination of disputes arising therefrom is at its infancy stage, there is need to plan towards the next process of delimitation by enhancing capacity and setting up mechanisms on how to serve Kenyans better.¹⁷ It should be noted that pursuant to section 89(2)¹⁸ the IEBC is mandated to periodically delimit or review the names and boundaries of constituencies and wards at intervals not less than 8 years and not more than 12 years.

1.3 Research Questions

- i. How does the legal framework affect the review of electoral units in Kenya?
- ii. What is the contribution of the justice system in meting out justice during dispute resolution arising from the process of boundary delimitation in Kenya?
- iii. To what extent politics and ethnicity affect review of electoral units and their impact on elections in Kenya?

1.4 Objectives of the Study

1.4.1 General Objective

The general objective of the study is to examine the conduct of elections and the processes of delimitation of boundaries in Kenya.

1.4.2 Specific objectives

- i. To explore the legal framework on the review of boundaries and how it influences review of Kenyan electoral units.
- ii. To investigate the contribution of the justice system in meting out justice during dispute resolution arising from the process of boundary delimitation in Kenya.
- iii. To establish to what extent politics and ethnicity affect review of electoral units and their impact on elections in Kenya.

¹⁷ Problems compounded during elections held in the multi- party era, 1992, 1997, 2002, 2007, and 2013.

¹⁸ Constitution of Kenya, 2010

1.5 Literature Review

In Africa, most electoral processes have failed to achieve credible elections outcome calling into question the capacities of these bodies. Thus election results have been challenged severally as a result of poor organization of the electoral process, suspicion of collusion with incumbent governments to cheat or simply poor management practices. In African emerging democracies, opposition parties and candidates continue to honour the judiciary as the illegitimate route to redress.

The need to establish independent and impartial electoral bodies to supervise the electoral process has been stressed by the Human Rights Committee.¹⁹ It is expected that the integral and most vital part in establishing the electoral body is to specifically ensure that it has technical capacity to define coordinates of boundaries, supported by conclusive research and consultation. Additionally, it is expected that upon completion of the exercise the report published should entail descriptions, complete details of the methodology employed and the connection to the implementation process.

1.5.1 Legal Framework on the Review of Boundaries

Generalisation on how politics and political systems of the African continent become a challenge depending on the extent to which the African states vary from one another and how they may have changed since gaining independence. This study discusses whether it is nevertheless possible to understand the conduct of elections and its relation to reviewing electoral units for elections.

Globally, legal framework binding political boundaries are difficult as states differ from one another and also due to how much they may have changed since independence. In Europe for instance, the party politics of Berlin has paralleled the broader patterns of political life in Germany as a whole. As in many other industrialized metropolitan communities, the Left has enjoyed substantial strength, evidenced by a Socialist majority in the city government after 1910. Berliners have taken their politics seriously. When in 1919 the Communists tried to overthrow the Social Democratic-controlled German Government

¹⁹ Kenya Human Rights Commission, *The Democratic Paradox: A Report on Kenya's 2013 General Elections* (KHRC 2014).

under Friedrich Ebert, street protests and violence erupted in Berlin, which resulted in the assassination of Karl Liebknecht and Rosa Luxemburg, the two originators of the Spartacus Union, founded during World War I, which later became the German Communist Party.²⁰ In the United States, the white America identified with the fact that justice for black people could not be attained without immediate and drastic changes in the organization of the society. Factors such as poor housing, inadequate health care, inferior education and unemployment, all, of which were a bitter element of the repression that had been their heritage. Each issue required billions of dollars to mitigate. Delayed justice had built up interest and the price for the society was a recognisable considerable monetary and human need. By not appreciating this fact it was important to note that those gains of that past decade were obtained at bargain rates.²¹

In the continent of Africa, South African has been known to championing boundary review, particularly due to apartheid regimes. Duard Kleyn a South African Professor in law stated that constitutional change influences the law fundamentally. He elaborates in his book *Beginners' Guide for Law students* the aspects of the South African constitution and the various aspects of criminal procedure and how they interrelate and affect each other in the South African aspect. He enlightens how the constitution should encompass the human rights that have been stated by international instruments.²² In addition the Courts have been highlighted to be given various jurisdictions and that leaves room for abuse of power as all courts can hear any matter apart from treason which is heard by the Supreme Court being the highest court of the Land. This clearly depicts the fact that all the people encourage the aspect of justice for all. Justice should not be safeguarded for the rich but should be available for all. All persons should be equal before the law as nobody should be above it.

In Kenya, the IEBC is established under Constitution of Kenya. The IEBC is mandated under the Elections Act, 2011 and the IEBC Act to formulate regulations for

²⁰ Joe Baxter 'Techniques of effective election management' (1994) *African Election Colloquium* 1.

²¹ Heidi Evelyn and Waikwa Nyoike, 'A New Dawn Postponed' *The Constitutional Threshold for Valid Elections in Kenya and Section 3 of the Elections Act*, International Law Development Organisation and the Judiciary Training Institute, (2015) 46.

²² Duard Kleyn "The Role of Judicial Policy in setting the Limits of a General Enrichment Action", in: Ellison Kahn (ed.), *The Quest for Justice; Essays in Honour of Michael McGregor Corbett, Chief Justice of South Africa*, Juta & Co., Cape Town, 1995, 342-65

carrying out of electoral processes. Once the IEBC has the final drafts following stakeholder consultations the same are subjected to the National Assembly for approval before publication in the Kenya Gazette. There are seemingly certain factors that induce discontent towards electoral process which the IEBC has no control over, such as, pre-existing chieftaincy disputes which serve as a significant hotbed for electoral related violence. To deal with these problems requires that the agencies of state such as the National Service Police and the Courts in particular mandated to address these problems must be proactive in punishing people involved in these crimes. This is the surest way of deterring people who would want to engage in such nefarious activities.

1.5.2 Independence of Elections Management Bodies and the Contribution of Dispute Resolution Arising from the Process of Boundary Delimitation

Electoral bodies around the world are established with the responsibility of managing elections. Nonetheless, the creation of these bodies for purposes of managing election do not merely exude public confidence and create an assurance for the electorate in the electoral process. Its establishment and operations are expected to meet key and minimum requirements in electoral administration. One important requirement is that electoral bodies must be autonomous and non-partisan of any party. The independence of electoral commissions, does not guarantee in itself surety for elections that are credible, free and fair, however, it does to a great degree enhance the general legality and acceptability of the elected government by the electorate. The independence of electoral commissions attracts engagement and assurances by key electoral stakeholders and creates reliability in the process.²³

Justice was first discovered by the Greek Philosopher Pythagoras who understood it to mean a square number or a number multiplied by itself simply referred to in Greek as *idakis idos*. According to Pythagoras a square number was considered to constitute a perfect synergy since it is comprised of identical parts and the number of parts is equal to

²³ Joe Baxter 'Techniques of effective election management' (1994) *African Election Colloquium* 1.

the numerical value of each part.²⁴ In circumstances where justice is conceived as a number, it must follow that justice in itself based on the assumption that any civil state will be composed of equal parts in terms of its citizenry. Therefore, justice in this construction is the preservation of the equality of parts which here represent the citizens that make up the state.

In the globosphere, border conflicts occur anywhere and arise from anything. For instance, the Korean War amongst North and South Korea started, with assistance from the Soviet Union and China on one side, and the US and the United Nations on the other. It ought to be noticed that in spite of the fact that the said war finished after a truce understanding was marked the issues were very convoluted, in this way coming about because of contrasts over the legitimacy of the Northern Limit Line (NLL) and the proper sea limit, exacerbated by rivalry for the profitable blue crab.²⁵

An interesting and potentially lucrative dispute between Kenya and Somalia over the triangular stretch of 100,000 square kilometres offshore territory is believed to have large oil and gas deposits. From the International Court of Justice (ICJ) Proceedings, the researcher found that Somalia in its submissions wants the court to demarcate the maritime boundary and to make a determination as to the exact geographical coordinates as an extension of its south-eastern land borders.²⁶ On its part, Kenya, insists that the border should be maintained in its parallel set up running along the line of latitude on its eastern border. Additionally, Kenya's authoritative stand is that it has for the longest time exercised uncontested jurisdiction in the same area since the first proclamation of its Exclusive Economic Zone in 1979. This dispute between Kenya and Somalia was set to proceed to full trial at the ICJ.

An analysis of the dispute emanating from the Mau Forest which is a focus of an intense conservation fight. Of importance to note is that the turf war and saving trees are

²⁴ Migai Akech, *'Institutional reform in the New Constitution of Kenya'* (2010) International Centre for Transitional Justice, 11-14 < <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>> accessed 20 June 2016.

²⁵ Hyung Gu Lynn (2007). *Bipolar Orders: The Two Koreas since 1989*. Zed Books. p. 3.

²⁶ Leah Oyake-Ombis, (2017) *Kenya-Somalia maritime boundary dispute proceeds to full trial, ICJ rules*. Part-time lecturer and Director, University of Nairobi

totally unrelated. However, It is a struggle to delineate between one tribe's claim to land that has been acquired under questionable authority and the reliance on a main water source by the rest of a region. Notably, political nepotism and the Lax conservation enforcement have contributed to the systemic destruction of the largest montane forest in East Africa. From the research conducted and published records it is important to highlight that reports state that pieces of land were highly grabbed by politicians who either gave the land away to tribes mates who in turn sold off the land to poor settlers. This has contributed to the pushing back of the forest's boundary.²⁷

1.5.3 Politics, Ethnicity and Elections

Ethnicity can be said to be the general perception of sharing an origin and traditions amongst a group of people in a society. It has also been defined as an overstated sense of diversity in relating to other ethnic communities. Apparently, ethnicity is experienced in every facet of a human being's both locally and nationally. It has been said it is also responsible for afflictions that have befallen Nigeria. In essence ethnicity in itself creates room that give rise to electoral misconduct and incapacity to practice democratic governance.²⁸

In Africa, most countries have perhaps witnessed political violence perpetuated by ethnic political rivalry. A cursory look at Nigeria depicts that ethnicity was evident during the struggle amongst the leaders of the three major ethnic groups, Hausa-Fulani of the Northern Region, Yoruba of the Western Region and the Igbo of the Eastern Region. Various writers on Nigerian elections and politics have identified that ethnic electoral behaviour in Nigeria is as old as election in Nigeria itself. The Nigeria polity is plagued by many impediments to its political growth.²⁹ It is also evident that ethnicity has been identified as a main factor that militates against the development of modern and democratic

²⁷ Nkako, F.M., C. Lambrechts, M. Gachanja, and B. Woodley 2005. Maasai Mau Forest Status Report. Available at www.new.unep.org/dewa/assessment/Ecosvstem/land/mountain/pdf/maasaimau_report.

²⁸ Joe Baxter 'Techniques of effective election management' (1994) *African Election Colloquium* 1.

²⁹ Cohen Abner 'Custom and Politics in Urban Africa' in Sanda A.O (Ed) *Ethnic Relations in Nigeria*, Department of Sociology, University Of Ibadan, Nigeria 2014.

nations where the interest, wellbeing of the citizen's rights are protected, irrespective of their ethnic, social and economic backgrounds.³⁰

In the study of ethnicity in Kenya, voting patterns have greatly exhibited alignments of certain ethnic communities. Most of the times the election results usually paint an image of ethnic lines instead of the candidates. Hardly to voters analyse the manifestos launched by various candidates let alone compare the previous manifestos and the new ones to verify the candidate's intentions for the electorate. In some instances, a voter's decision of who to cast their vote for is influenced by community leaders. The elite members of the society who are held in high self-esteem and are expected to give directions by virtue of their standing in society and their level of education are intrinsically expected to advance enlightenment to the electorate on how to go about their civic duty (voting), instead majority are instrumental in making the electorate more narrow-minded in election matters. Those in power would want to retain social and political power and thus influence the ethnic cleavages at the expense of national development manipulating them and use them to become a stepping stone to promoting ethnic interest.

1.6 Summary of Gaps in the Literature

It is noted that frequent references are made, in the growing literature on political modernization and nation-building, to the "natural" or "unnatural" qualities of electoral units and the absence of careful general studies of this subject were noted. The literature established that delimitation of electoral boundaries pose potent reasons that escalate disputes over their location. From the above literature the study has established that whereas there is a legal framework established in the statutory legislation there is still insufficient rules and regulations governing the process of boundary delimitation of electoral units. The literature deduced some general propositions about their conflict potential in elections and better means of settlement of disputes. The literature has also established that the influence of politicians and the elites on the electoral choice of voters can also be said to be less, in the more recent elections as time lapses between electorates

³⁰ Ibid

seemed to have given the people useful political education beside the general increase in the literacy rate of the people.

1.7 Hypotheses of the Study

- i. If the legal framework governing delimitation of boundaries is improved it will enhance accessibility and inclusivity of the electorate in the process.
- ii. If the time of hearing and determining electoral disputes arising from delimitations of boundaries is not reviewed it will cause conflict and lack of trust in the justice system.
- iii. If the extent to which politics and ethnicity affect review of electoral units are not considered their impact on elections will lead to conflict and possible violence.

1.8 Justification of the Study

The research describes and highlights the procedure used in the electoral system and with it relates the same to the politicization of the review of the electoral units. Free and convincing elections constitute a key element of the demarcation of boundaries of constituencies and are essential ingredients of resolving disputes arising from delimitation of electoral boundaries and promotion of peace, security, stability, development and the respect for human rights. This study may help the readers, lawmakers, election stakeholders and the IEBC to compare the findings of the research and may inform policy to amend or review statutory instruments relating to the boundary delimitation process in the country.

Findings from this research may assist academics broadening of curriculum with respect to the concept of conduct of elections and influence of politics as a mechanism for resolving disputes arising from delimitation of electoral boundaries. The study will generate some new literature in the field of academia.

Election management is a very complex activity and requires specialist skills for an effective management of the electoral process. In addition, it will further enhance the knowledge of the reader and members of the public and will also generate critical thinking in regards to the findings of the research, which will give knowledge to the reader about

their constitutional rights and how they are breached or enforced through the judicial processes.

1.8.1 Limitations of the Research

Several factors will come into play while am at the field doing my research, thus affecting the accuracy of the study.

Time may be limited to a case that the researcher may not be able to get adequate information. This may be because of work (noting that this is an election year), studies and technically slow respondents who may not know the urgency of the questionnaire or interview. Studies indicate the researcher is often left with a little time to compile the study.

Financial resources may be a disadvantage since the researcher will spend a lot of money on transport due to the geographical coverage between home and case study. Expenses may be incurred while seeking the services of a research assistant when need be and also binding the proposal and many copies to relevant departments.

Inadequate data may be collected due to biasness of the respondents or ignorance. Despite the significance of this research, very few researchers who have carried out similar research have had inadequate secondary data.

1.9 Theoretical Framework

This study is anchored on democracy theory that seeks to analyse the interconnectedness of the area of research. The theory advances the requirement that all citizens have the same opportunity to express their opinion. The fundamental principle of democracy is freedom, which has two main aspects: first, being ruled and ruling in turn, since everyone is equal and should be accorded room to rule and be ruled; secondly to be able to live without fear and any restrictions. Most countries have periodic elections based on equality principles with the prevalent system being a representative democracy through which features of an ideal democracy are realized through free, fair and frequent elections; freedom of expression, association, equality in voting and access to information. The elected representatives make decisions on behalf of electorate via majority vote. This

system guarantees a peaceful transition from one leadership to another hence fostering peaceful handing over of power. The logic of the democratic model makes an assumption that public officials are responsible for their conduct and accountable to citizens.³¹

The theory is applicable to this study as it aids the researcher to find out whether when people are forced to accept things against their own desire and when they do and consider that justice has not been served they are likely to advance the need to "*get even*" at the first available prospect. It seeks to explain various scenarios within which politics and ethics affect processes that in turn influence the voting nature or patterns of the electorate.³² He reasoned those experts of clinching elective posts and nothing else will ultimately control autonomous politics. Aristotle took a more constructive view of democracy by his observation that the basis of a democracy is liberty whereas Montesquieu conceived democracy as a popular government where the body of people is possessed of the supreme power. Thomas Hobbes asserted that democracy is inferior to monarchy because it tends to foster destabilizing dissension.

John Locke contends that when a person sanctions in the formation of a dogmatic society, he approves to the use of mainstream rule in determining its organization. On the other hand Schumpeter affirms that democratic method is an arrangement by an institution which endows persons to attain power to select by a competitive scuffle for the vote of the people vote.³³ Dworkins was of the view that when it comes to distribution of political supremacy amongst society members, the idea of parity cannot be inherently fair or just. Consequentialists such as Arneson posits that distribution of power can never be justified except by locus to the quality of the process of decision making.

³¹ Morgenthau, Hans J. 1985. *Politics Among Nations: The Struggle for Power and Peace*. New York: Alfred A. Knopf. 6th Ed. p.1. 2005 edition

<http://www.amazon.com/Politics-Among-Nations-Hans-Morgenthau/dp/007289539X>.

³² Plato, *The Republic*, revised by Desmond Lee 1974, 2nd ed.-; Harmondsworth, Penguin Books. ch. VI

³³ Locke J (1690) *Second Treatise on Civil Government*, ed. C.B MacPherson 1980; Indianapolis: Hackett sec. 96.

1.10 Research Methodology

This gives the elements of research used to gather the information required. The study was confined within the analysis of the interconnectedness of the politics and ethnicity during dispute resolution arising from review of electoral boundaries.

1.10.1. Research Design

The research design utilized as a part of the investigation was a clear study plan. This plan was favored in light of the fact that it permitted judicious correlation of the exploration discoveries. An illustrative research gathered information from individuals from the populace and enabled the examination to get the elucidating existing marvels by getting some information about their observation or qualities. The descriptive study then described characteristics associated with the subject population.

Research Site

IEBC being the case study comprises of at least 830 members of staff who are employed on permanent terms whereas a few are on contract terms. The researcher devoured to sample information from different levels of management. Further, the researcher also sampled information from non- members of staff who are affected by the process of delimitation, politicians, experts in boundary delimitation, lawyers and members of the Judiciary and citizens who were either positively or negatively affected by the decisions of the electoral units.

Sample and Sample Size

Sampling implied choosing a given number of subjects from a characterized populace as illustrative of that populace. Simple random sampling was utilized to wipe out biasness and guarantee objectivity. The quantity of polls was apportioned to different respondents speaking to various units. The likelihood of choice of every respondent was to be relative to their populace, so departmental units with bigger populaces had a proportionately more prominent shot of being incorporated into the specimen.

Sampling Procedure

A sample of 206 respondents was picked using simple stratified random sampling techniques based on strata in the departmental units. This was important on the grounds that the system gives all the departmental units issue shot of being chosen. The specimen measure was derived by computing the example from the objective populace by applying Cooper and Schindler, (2003) formula.

$$n = \frac{N}{1 + N(e)^2}$$

Where: n= Sample size, N= Population size e= Level of Precision.

At 95% level of confidence and P=5

$$n = 427 / 1 + 427 (0.05)^2$$

$$n = 206$$

Table 1: Sampling Procedure

Category	Category	No.	Sample Size
Commissioners	Commission Services Office	7	3
CEO	Chief Executive Officer (CEO)	1	1
Secretariat	Legal and Public Affairs	15	9
	Boundaries Department	15	7
	Communication & Public Affairs	15	3
	Legal Services	90	5
	Research and Development	20	5
	Voter Registration and Electoral Operations	137	20
Stakeholders	Judiciary	50	5
	Political Parties	67	5
	Experts (registrar of political parties)	10	4
Total	Total	427	206

Source: Ruth Makuthu, 2017

The staff were selected using a simple random sampling technique in which the Respondents were picked. The stakeholders were also randomly picked to an external balanced approach.

Data Collection Methods

The research required the researcher to include in both secondary and primary (field work) in order to realize the aims and objectives of the research. Primary data was the original data collected by the researcher for the purpose of the inquiry. Primary data was collected using a structured questionnaires and interview guides through personal contact which was either closed or open.

Secondary data was collected through other researchers for the same purpose. It's data that had already been collected and made available in public report(s). The one used

here is collected from the internet, Daily Nation, textbooks, reports, journals and magazines, IEBC website and library, university library, relevant books, school work, seminars and case law. The researcher compiled this information and related it to the area of research and then brought out a new idea that represents original work.

Data Processing and Analysis

The finished polls were altered for fulfilment, checked for blunders and oversights and after that and examined subjectively and quantitatively. Subjectively the information was looked for into topics, classifications and examples. This empowered the analyst to put forth broad expressions as far as the watched properties henceforth conceptualization).

Coded information was then sustained into the measurable bundle for sociologies (SPSS) variant 21. This variant of SPSS was chosen for investigation since it offers a more easy to use interface and can without much of a stretch be connected with Microsoft office utility projects. Illustrative measurements were utilized. Altering includes experiencing the polls to check whether respondents reacted to inquiries and check whether there are clear reactions. Classification included checking the quantity of cases that fall into different classifications. Engaging insights, for example, mean, standard deviation will then be produced.

Legal and Ethical Considerations

The researcher needed cooperation from other organizations especially IEBC in order to access information, attend conferences or seminars relating to the research. The researcher obtained a permit from National Council for Science and Technology based on authorization letter from The University of Nairobi. The researcher faced time limits due to unavailability of materials especially those of the related case studies depending on the confidentiality of information to be given by any informer.

1.11 Scope of the Research

The study was confined within the process of dispute resolution anchored in the Constitution and related statutes in Kenya. The essence of this is to ensure that there is a

comparison of the Kenyan politics, ethnicity and how they affect the resolution of disputes emanating therefrom. The study population comprised of target respondents who included key electoral stakeholders, among them IEBC, Political Parties, Judiciary, CSOs, Political Parties Dispute Tribunal (PPDT), Registrar of Political Parties, among others.

We have seven continents in the world and Africa has 53 countries in its own. It's therefore, impossible for the researcher to embark on countries outside Kenya due to data collection, time and financial constraints. This is a more suitable topic and an applicable case study which is manageable to the researcher.

1.12 Chapter Outline

Chapter one introduces the topic of our research study by first setting the broad context of our research study, the statement of the problem, justification, theoretical framework, literature review, scope and the methodology of the study.

Chapter Two provides the background of the situation in Kenya and the relations with other judicial institutions on the legal framework on the review of boundaries and how it is responsible for meting out justice during dispute resolution for review of Kenyan electoral units.

Chapter Three looks at the extent of how conduct of election affect the process of boundaries delimitation and further analyse international principles and best practices were or were not observed during the last process of boundary delimitation

Chapter Four analyses the rules and regulations of the Electoral and boundaries Commission to management of elections within the study's period and its impact on the outcome of elections in Kenya.

Chapter Five provides conclusions of the study, gives recommendations and provides suggestions on areas for further study.

CHAPTER TWO

THE LEGAL FRAMEWORK ON DELIMITATION OF BOUNDARIES IN KENYA

2.1 Introduction

This chapter examines the conduct of General Elections and the role of IEBC during the elections under the 2010 Constitution. From the standpoint of democratisation, a general election in itself is not a guarantee for sustainable democracy. The researcher believes that there must be more. This means that the need to develop a sound legal, administrative and institutional reforms create strong pillars to secure democratic gains. The general election held on 8th August, 2017 was the sixth in the series of multi-party elections in Kenya. For instance, and as mentioned before in this research, the elections held on the 4th March 2013 were conducted in the wake of the disputed elections held in 2007 and owing to the election violence that ensued immediately after. Additionally, the said elections were held under a new constitutional dispensation that gave rise to legal and administrative and the anticipated electoral legislation.³⁴

The dispensation of a new Constitution and the establishment of IEBC, a new dawn reigned and it was envisioned that Kenyans will have free and fair elections since there was technological advances made in preparation for the 2013 General Elections. In the run up to the General Election, IEBC had presided over various by-elections and it asserted credibility in the eyes of Kenyans giving a good sense that the process was under reform.³⁵

The legal framework therefore reflects particular indifference in according the IEBC full financial autonomy. Section 17 of the IEBC Act provides for allocation of assets of the Commission operations which comprise of: monies apportioned by Parliament for motivations behind the Commission; any stipends, blessings, gifts or different enrichments given to the Commission should be saved in the reserve; Such supports as may confer in or gather to the Commission in the execution of its capacities under this Act or under some other composed law. Section 18 of the Act additionally builds up the Independent Electoral and Boundaries Commission Fund which is relied upon to be directed by the Commission

³⁴ Problems compounded during elections held in the multi- party era, 1992, 1997, 2002, 2007, and 2013.

³⁵ Heidi Evelyn and Waikwa Nyoike, *'A New Dawn Postponed'* The Constitutional Threshold for Valid Elections in Kenya and Section 3 of the Elections Act, International Law Development Organisation and the Judiciary Training Institute, (2015) 46.

Secretary/CEO.³⁶ It is expected that the monies to be paid into the finance incorporate pay rates, recompenses and other compensation of representatives of the Commission, and some other operational and "different costs acquired by the Commission in the execution of its capacities." However, it should be noted that this commission fund is yet to be realised noting that all constitutional institutions are allocated funds through the consolidated fund managed by Treasury.

2.2 The Promise of the Constitution of Kenya, 2010

The Constitution endowed all sovereign power on the people of Kenya, which power could be exercised either directly or through representatives elected democratically. In addition to the Constitution, the Elections Act, 2011, The Independent Electoral and Boundaries Commission Act, 2011 and the Political Parties Act, 2011 were all enacted so as to provide a reformed legal and administrative setting for the conduct of elections. This is the background against which the 2013 elections were conducted.³⁷ Those elections were unique in various aspects. About 14,352,545 Kenyans registered as voters while 12,330,028 voted, representing 85.91% voter turnout, the highest ever recorded. This huge voter turnout marked the first time that Kenyans were exercising their sovereign rights to elect their representatives under the Constitution of Kenya, 2010. Secondly it was the first general election to be held following the disputed 2007 General Elections.³⁸ There was a lot of anxiety as many feared a reoccurrence of the events of 2007. Finally, it was a litmus test for the efficacy of the changes that were brought about by the Constitution.

The Constitution brought about four key reforms relevant to the electoral process. Firstly, it provided with clarity the principles that are expected to govern elections by stating that all elections are to be free and fair, free from violence and administered in a

³⁶ Collins Odote and Linda Musumba, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, International Development Law Organisation and the Judiciary Training Institute (2015).

³⁷ Biegon J and Musila G (eds), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

³⁸ López-Pintor, '*Election Management Bodies as Institutions of Governance*' (UNDP) accessed 05 June 2017.

neutral, impartial, accurate, efficient and accountable manner.³⁹ This sought to take care of the issues that arose in all past elections which used to be judged against the standard of whether they were free and fair or not, the Constitutional provisions now illuminated what free and fair would comprise of in the Kenyan context.

Secondly, it introduced the devolved system of governance. As such, during the 2013 General Election the electorate cast votes for six positions; President, County Governor, Senator, County Woman Member to the National Assembly, Member of the National Assembly and Member of the County Assembly. This was unlike the previous elections when one was required to vote only for President, Member of Parliament and Councillor. In addition to the increase in elective positions, devolution would also be fully implemented only after the 2013 elections.⁴⁰ Article 88 of the Constitution established the IEBC and clearly prescribes how Commissioners will be appointed. It also provides for the independence of the Commission in the management and conduct of elections.⁴¹

The IEBC was also given an additional mandate to handle disputes relating to or arising from nominations but with the exclusion of election petitions and disputes subsequent to the declaration of election results. These disputes were to be settled within seven days. Electoral dispute settlement mechanisms were the fourth area of reform.⁴² These mechanisms were categorized into two. The first category handled pre-election disputes. These included courts, the IEBC and the Political Parties Disputes Tribunal (PPDT). The second category heard and determined post-election disputes; which was left exclusively to the courts.

³⁹ Heidi Evelyn and Waikwa Nyoike, *'A New Dawn Postponed'* The Constitutional Threshold for Valid Elections in Kenya and Section 3 of the Elections Act, International Law Development Organisation and the Judiciary Training Institute, (2015) 46.

⁴⁰ Biegon J and Musila G (eds), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

⁴¹ Collins Odote and Linda Musumba, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, International Development Law Organisation and the Judiciary Training Institute (2015).

⁴² López-Pintor, *'Election Management Bodies as Institutions of Governance'* (UNDP) accessed 05 June 2017.

2.3 Results Transmission and Management System

In its publication on the 2013 General Elections in Kenya titled, *The Democratic Paradox: A Report on Kenya's 2013 General Elections*, the Kenya Human Rights Commission (KHRC) gives a detailed exposition on the poor management of the electoral process, especially the conduct of the IEBC in the various stages of election administration but more so the handling and transmission of presidential results.⁴³ KHRC identifies fault lines at the level of preparation of the IEBC to deal with glaring logistical and administrative challenges that marred the electoral preparation and the impact on results transmission.

KHRC report lamented that while some of the operational problems experienced by IEBC, like the electronic results transmission had been identified, very little remedial measures were put in place by the IEBC to address these challenges and to avert a possible catastrophe on Election Day. Other failures identified by KHRC include incomplete and inaccurate voter register; problems with counting, tabulation and transmission of results and resolution of election disputes by the IEBC.⁴⁴

The KHRC exposes institutional and structural weaknesses of the IEBC that contributed to weak electoral administration in 2013 elections.⁴⁵ However, the gap that exists in the KHRC publication is that, it does not sufficiently establish the linkage between weak institutional framework of the IEBC and the legal framework under which the IEBC operates. The report did not audit the discrepancy between the voter register and the results declared by the IEBC. It doesn't challenge the results as declared and say that the elections were not free and fair. This research will demonstrate the linkage and provide recommendations for addressing the two dimensions.

⁴³ Kenya Human Rights Commission, *The Democratic Paradox: A Report on Kenya's 2013 General Elections* (KHRC 2014).

⁴⁴ Heidi Evelyn and Waikwa Nyoike, *'A New Dawn Postponed'* The Constitutional Threshold for Valid Elections in Kenya and Section 3 of the Elections Act, International Law Development Organisation and the Judiciary Training Institute, (2015) 46.

⁴⁵ Raila Odinga v. The Independent Electoral and Boundaries Commission and 3 Others Supreme Court Petition Number 5 of 2013 as consolidated with Petitions 3 of 2013 and 4 of 2013.

2.4 Boundaries Delimitation

A recent article publication by Hindley's on challenging the Norms and Standards of Election Administration provides a comprehensive comparative analysis. That publications makes reference to pre-2007 Kenya experience, among other case studies, as a key lesson on how boundaries delimitation can be used as a scheme to compromise representation as a key element in free and fair elections.

The International Foundation for Electoral Systems (IFES) comparative work, *Challenging the Norms and Standards of Election Administration* provides great insight on the conceptual and practical considerations in boundaries delimitation.⁴⁶ The work by IFES is largely corroborated by another comprehensive work by the International IDEA, *Electoral System Design*. The publications give useful insights on the connection between electoral system and representation.⁴⁷ These two works are in tandem with the expressions contained in the international norms including Universal Declaration of Human Rights. Both IFES and International IDEA publications suggests the key principles as necessary for effective boundaries delimitation as including, among others: supervision by independence institution; certain and determinate criteria set out in the law; equality of voting strength and non-discrimination; effective public participation; integration of technology and determinate process for dispute resolution.

In most African countries, elections management is the core functions of bodies which are either constitutionally created or are creations of the executive. These elections management bodies as institutions tend to be weak or unprofessional in their conduct of elections due to lack of experience, inadequate capacity, insufficient resources, both human and financial, and unfavourable electoral turf among others.

The recent Kenya's experience on boundaries delimitation in Kenya is based on the Constitution (Amendment) Act, No. 10 of 2008 that established the Independent Boundaries Commission, the successor of the ECK, which discharged the boundaries

⁴⁶ López-Pintor, '*Election Management Bodies as Institutions of Governance*' (UNDP) accessed 05 June 2017.

⁴⁷ Collins Odote and Linda Musumba, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, International Development Law Organisation and the Judiciary Training Institute (2015).

delimitation mandate prior to establishment of the IEBC. The Constitution of Kenya 2010 provided the mechanism to complete the process of the first review and entrenched the function as part of the IEBC mandate. Article 89⁴⁸ outlines the criteria and process for boundaries delimitation while Transitional Provisions provide the interim stipulations relating to the first review. The criteria underscore the principles expressed in the UN Charter on Political and Civil Rights.⁴⁹

Upon launching of the Preliminary Report the Commission was immediately served with nine (9) court cases challenging the process towards publication of the report. The Court subsequently consolidated the issues raised to be heard as one case before a 3 Judge Bench. Consequently, the Commission published the Final Report on Delimitation of Boundaries on 6th March, 2012 vide Gazette Notice Number 14 of 2012 pursuant to procedures spelt out under the 5th Schedule of the IEBC Act following parliamentary discussions on the Preliminary Report. In exercise of the provisions for Review under section 4 and 5 of the 5th Schedule to the IEBC Act which provide for review of the Commission's decision, dissatisfied parties filed applications for Judicial Review before various High Courts which has elicited a myriad of cases filed against the Commission's publication of the final report. These totalled 135 cases which were to be heard and determined within 30 days. The IEBC moved with haste to mount its defences composed of a Principal Replying Affidavit supported by documentation of 3487 pages in electronic and print evidence.

⁴⁸ The Constitution of Kenya, 2010

⁴⁹ Migai Akech, *'Institutional reform in the New Constitution of Kenya'* (2010) International Centre for Transitional Justice, 11-14 < <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>> accessed 20 June 2016.



The IEBC preparing its defence following the publication of its Report on Review of Boundaries on 7th March, 2012

To understand the circumstances relating to the first review, the research has made a comparison between the principles espoused in the IFES and IDEA publications, and the steps taken in Kenya to address perennial problems associated with delimitation of constituencies.⁵⁰ To this end, an analysis has been made on the Report of the Interim Independent Boundaries Delimitation Commission, the Report of the Departmental

⁵⁰ López-Pintor, '*Election Management Bodies as Institutions of Governance*' (UNDP) accessed 05 June 2017.

Committee on Justice and Legal Affairs (10th Parliament Fourth Session); the ruling in *John Kimathi Maingi vs Andrew Ligale and 4 others* (2010), the Report of the Independent Boundaries and Boundaries Commission and the ruling of the consolidated cases on Boundaries Delimitation rendered by the High Court - *Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others*.

2.5 Judiciary Performance in Management of Electoral Disputes

The results of the Kriegler Commission committee's work were to be reflected in the improved performance of the Judiciary especially in the management of electoral disputes.⁵¹ Part of the evaluation details the findings on the extent to which the committee's achievements contributed to the Judiciary's management of the electoral disputes. The evaluation of the Judiciary's performance focused on timeliness in the disposal of election petitions, the fairness and impartiality of the Judiciary and the extent to which the Judiciary was perceived as independent and transparent.

2.5.1 Timeliness in Disposal of Election Petitions

Litigants are entitled to a swift resolution of their disputes. More so, speed of dispute resolution is all the more important when it comes to electoral disputes as lingering contests and delay in dispute resolution can render the process a mere academic exercise; and result in violent conflict that threatens state stability. This evaluation only assesses the timeliness in disposal of election petitions arising from the March 2013 elections by the Judiciary.⁵² The timeline were statutory, so there were no flexibility to alter. All election petitions were completed within six months. Therefore, the focus of the evaluation is on the strategy that the Judiciary applied to meet this requirement. The petition rules set out

⁵¹ The Kriegler Commission (2008). The Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007.

⁵² Enactment of Section 2A; Francis Away, Constitutional and Legal Context for Elections in Kenya (IED 2012).

timelines for various stages of the litigation process to ensure petitions were disposed within the six months.⁵³

The setting of the time within which all election petitions needed to be disposed of was an enormous improvement from previous elections when disputes were finalised towards the next elections and contributed to the speedy disposal of the petitions. Most stakeholders interviewed viewed the set time for parliamentary and county elections as adequate.⁵⁴

Amendments to the Elections Act, 2011: The amendment to allow magistrates to hear and determine County Assembly election petitions expanded the capacity of the Judiciary to meet the timelines.⁵⁵

The Election (Parliamentary and County Election) Petition Rules: Judicial officers and lawyers were aware of the rules and the courts were bound by the rules. The rules defined the procedures for handling petitions focusing on substantive aspects of petitions and not on technicalities. These rules played a key role in enabling the Judiciary to dispose petitions within the set timelines.⁵⁶

Administrative rules improved management of petitions at court level and also improved overall timeliness of the Judiciary. Key features of these rules included judges being allowed not to hear other matters during the period of the petitions, not being allowed to take leave, reconciling their Court Diaries with the electoral cycle and being moved to hear petitions in different stations from where they work among others. Most aspects of these rules were applied to very positive effect. However, the posting of judges to new stations to hear petitions did not take place in all areas due to logistical challenges and financial constraints. Only 12 judges moved to new stations. Dealing with electoral matters in the area where a judge serves makes it sensitive and poses a security risk.

⁵³ Collins Odote and Linda Musumba, *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence*, International Development Law Organisation and the Judiciary Training Institute (2015).

⁵⁴ Biegon J and Musila G (eds), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

⁵⁵ Heidi Evelyn and Waikwa Nyoike, *'A New Dawn Postponed' The Constitutional Threshold for Valid Elections in Kenya and Section 3 of the Elections Act*, International Law Development Organisation and the Judiciary Training Institute, (2015) 46.

⁵⁶ Enactment of Section 2A; Francis Away, *Constitutional and Legal Context for Elections in Kenya* (IED 2012).

2.5.2 Fairness

Fairness is a key building block for public confidence in an electoral disputes resolution system, including the Judiciary. It is only when citizens perceive the system as fair or impartial that they can be willing to use it as an avenue for resolving electoral disputes. In the 2007 post-election violence, the disputing parties did not bring disputes to the Judiciary partly because they perceived it not to be impartial.⁵⁷

Fairness of the Judiciary in the management of electoral disputes resolution was focused on; clarity of the procedures for handling election petitions, treatment of all “parties” the same way, certainty or predictability of the rules, timely disposal of election petitions, and being treated with respect and given a chance to be “listened to”.

2.5.3 Transparency

Sharing of information pertaining to the operations and procedures of an EDR determines transparency. This evaluation sought to establish the extent to which the Judiciary provided information on the electoral disputes resolution mechanism that was put in place as a key determinant of transparency of the system. Findings were; Engagement with stakeholders during preparation period: The wide consultations held with stakeholders – Political parties, IEBC, ODPP, NCLR, NCAJ, PPDT and LSK among others improved the transparency of the Judiciary.⁵⁸ Stakeholders had confidence in the Judiciary’s preparedness and had expectations on how the Judiciary will handle election petitions.

Engagement with the public: The dissemination of information on various stages of the Judiciary’s preparedness and the pre-emptive exertion made to have a different Judiciary from 2007, increased public poise.⁵⁹ It made the Judiciary to be seen as transparent and accountable. The media coverage of the presidential petition also promoted this perception of transparency. Regular reporting in the media kept the public and the

⁵⁷ Enactment of Section 2A; Francis Away, *Constitutional and Legal Context for Elections in Kenya* (IED 2012).

⁵⁸ Migai Akech, *‘Institutional reform in the New Constitution of Kenya’* (2010) International Centre for Transitional Justice, 11-14 < <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>> accessed 20 June 2016.

⁵⁹ Enactment of Section 2A; Francis Away, *Constitutional and Legal Context for Elections in Kenya* (IED 2012).

parties abreast. The information was available because all concerned entities engaged in a robust media campaign to sensitise and raise awareness.

2.5.4 Independence

Independence is key in establishing the legitimacy and integrity of the Judiciary as an electoral dispute resolution system. Independence means that the Judiciary is free from any outside influence, intimidation and control and it should be seen to be independent by the parties using it to resolve disputes. Independence can be influenced by factors such as the system for appointment of judicial officers, laws, regulations and procedures governing the electoral dispute resolution process and financing of the Judiciary among others. This evaluation assessed the actions taken to ensure independence of the Judiciary as an Election Dispute Resolution (EDR) system and the perception of the Judiciary's independence by stakeholders.⁶⁰ Findings (i) There was a general perception that the Judiciary was independent in handling elections disputes: The Judiciary affirmed and re-affirmed its independence but there were challenges of always being perceived as independent in a political process: The general perception was that the Judiciary did well to maintain its political independence. This is true for all except in the presidential election petitions. (ii) The new legal framework provided optimism of an independent Judiciary: The Constitution (2010), vetting of judges and many electoral laws created an impression of high levels of professionalism.

2.5.5 Relevance

Relevance refers to the extent to which an EDR system takes into consideration the political and social culture in which it operates. The procedures, regulations and sanctions and their enforcement should be informed by the political and social realities. This evaluation assessed how the electoral dispute resolution process established by the

⁶⁰ Biegon J and Musila G (eds), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

Judiciary took into consideration the Kenyan political and social realities in general and the specific contextual issues that prevailed at various stages of the electoral process.⁶¹

Petitions rules developed responded to the sensitivity of elections as a political process. Hence, the focus on substantive aspects of law and not technicalities. Secondly, Kenyans, through the constitution, demonstrated the need to resolve election disputes with speed. The petitions rules made this a reality.⁶²

The administrative rule that required judges to be moved to hear cases in different courts responded to the local sensitivity of election petitions, though this was not fully implemented.

Sensitivity to the mistrust between political parties: The Judiciary engaged with the public and stakeholders to emphasise its independence and preparedness to play its role in resolving election disputes.

2.6 Assessing Dispute Resolution in 2013

In light of the foregoing, this publication assesses the workings of the electoral dispute resolution mechanisms as they were deployed following the 2013 General Elections and connected issues. While the book appreciated that dispute resolution involves other agencies, notably the IEBC, PPDT and Political Parties Internal mechanisms, the publication focusses largely on dispute resolution by the Judiciary. The Book provides among other things gave proposal that maybe are in future electoral disputes resolution processes.⁶³

2.7 Conclusion

The Judiciary's management of electoral disputes responded to a constitutional imperative. The timelines had been set and the Judiciary had no choice but to comply. The issue was how, not whether to comply. The setting up of the committee and all the

⁶¹ Enactment of Section 2A; Francis Away, Constitutional and Legal Context for Elections in Kenya (IED 2012).

⁶² Ibid

⁶³ Collins Odote and Linda Musumba, Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence, International Development Law Organisation and the Judiciary Training Institute (2015).

preparations that went into building the capacity of the Judiciary focused on “how to comply” with its constitutional mandate. Several conclusions can be drawn based on the manner in which the Judiciary managed electoral disputes resolution.

Election preparations put in place scored many “firsts” for the Judiciary. It was the first time for most judicial officers and administrative staff to be trained on electoral law and processes, first time to develop comprehensive petitions and administrative rules, first time to engage stakeholders and the public in an open and transparent manner and first time to complete petitions in a short period. However, being the first time to undertake these processes gave room for innovation, experimentation as well as high social capital from the public and stakeholders. The Judiciary may not have the same space post the 2017 election. There is need to learn lessons and improve on the management of electoral disputes.

The Judiciary faces a new challenge of sustaining the perception of fairness, transparency and independence created through the management of electoral disputes pre-2017 general election. Therefore there is a need to focus on how this perception can be developed beyond election petitions.

CHAPTER THREE
CONDUCT OF ELECTION ON THE EFFECT OF BOUNDARIES
DELIMITATION UNDER BEST PRACTICES OF INTERNATIONAL
PRINCIPLES

3.1 Introduction

This chapter traces the evolution of electoral management and administration in Kenya by examining the election management since independence to the multi-party era and finally, election management under the 2010 Constitution.

It is noted that different electoral areas produce different election results, even though once in a while the basic vote trends are similar. Electoral manipulations such as malapportioned constituencies or wards⁶⁴ and others that have been “gerrymandered”⁶⁵ can have significant effects on the outcome of an election and the representation in Parliament. In instances where the voters and key stakeholders believe that electoral boundaries have been unfairly developed leading to a specific dogmatic outcome, it leads to doubt and the whole process discredited.⁶⁶

Despite the validity of the electoral outcome being probed, the possible political results of the process would lead to conflict and possible violence where voters believe that their rights to inclusivity and fairness have been infringed. Notably majority of the world’s countries conduct periodic delimitation of boundaries, little in adopted international standards has been proposed on how to handle political implications that come to sway boundary delimitation processes.⁶⁷ So important are these standards that they direct public expectations; serve as a objective for reform and serve as a benchmark on best practices for stakeholders to scale the impartiality of the delimitation practices in a country.

⁶⁴ Electoral units that have been generated and vary substantially in population.

⁶⁵ Constituency boundaries intentionally drawn to advantage one political group at the expense of others.

⁶⁶ General Elections in Kenya (2013); Report of the African Union Election Observation Mission to the 2015 General Elections in the Federal Republic of Nigeria (2015).

⁶⁷ Japhet Biegon and Geoffrey Musila (2011), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

3.2 The Concept of Election Management and Election Management Bodies

Election management or election administration, as it is commonly called, is an administrative undertaking of considerable size and complexity involving a series of operations, actors and institutions and intricate monitoring activities. According to the Kriegler Commission:

*Election administration is the broad institutional frame work within which voting and electoral competition takes place. It involves rule making i.e. designing the basic rules of the electoral process, rule application i.e. applying those rules to organize the electoral process and rule implementation i.e. resolving disputes arising within the electoral process.*⁶⁸

Election management is essentially the mechanics of how elections are run as per the electoral cycle, ranging from electoral and system reform, audit of electoral processes, procurement of goods and services, trainings persons for the election, sensitizing stakeholders, providing the methods by which people cast their ballots to how the winners are declared. It also involves a whole range of activities including running elections on election day as well as all pre and post-election activities such as reviewing and updating the Register of Voters, reviewing or delimiting electoral boundaries, mapping polling stations, recruiting and deployed poll officials, and implementing the electoral law.⁶⁹

Election management is a very complex activity and requires specialist skills for an effective management of the electoral process. This makes the establishment of specialized institutions responsible for election management very necessary.⁷⁰ The term ‘electoral management body’ is a generic term that has been coined to refer to the body or bodies that are accountable for the supervision of elections; the differences in form, size and title notwithstanding.⁷¹ Simply put, an electoral management body is the formal unit which is

⁶⁸ The Kriegler Commission (2008). The Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007.

⁶⁹ Nahomi Ichindo and Mathias Schunden, ‘*Deterring or Displacing Electoral Irregularities? The Spillover Effects of Observers in a Randomised Field Experiment*’, (15 July 2011), 3.

⁷⁰ Michael Yard, *Direct Democracy: Progress and Pitfalls of Election Technology* (International Foundations for Electoral Systems 2010).

⁷¹ Interview conducted with Robert, a representative of Constitutional Commission, 2015

primarily responsible for the administration, facilitation and behaviour of elections in a country.

The essential elements referred to above include activities such as establishing who is eligible to vote, in receipt of and authenticating the nominations of electoral contestants, conducting polling, counting votes and tallying of votes from various polling stations. Depending on the legal framework, the mandate of most EMBs also include the authority to conduct voter registration, boundary delimitation, voter education, electoral dispute resolution, oversight of campaign financing and procurement of electoral materials.⁷²

3.2.1 Types of Electoral Management Bodies

Studies on EMB types around the globe have come up with three broad categories into which any EMB can be classified depending on aspects such as institutional arrangements, composition, formal accountability, funding and the terms of office of members of the EMB.⁷³ These categories are the non-self-sufficient EMB (situated inside the formal government administration), the semi-self-governing EMB (situated inside the formal government organization however under the supervision of a self-ruling body built up for that reason) and the independent EMB, commonly referred to as an Independent Electoral Commission.

EMBs that are non-autonomous are said to generally follow a governmental approach due to the fact that elections are mostly conducted by regular civil servants and the electoral process is entirely in the hands of the government. These types of EMBs are very common in Western European countries with more developed democratic culture.⁷⁴ This EMB type is exemplified by France where election management at the national level is entirely in the hands of the Ministry of the Interior. The semi-autonomous or mixed model is an EMB type in which races are overseen by the official branch through a service with some level of supervisory role given by an autonomous segment of the EMB.

⁷² General Elections in Kenya (2013); *Report of the African Union Election Observation Mission to the 2015 General Elections in the Federal Republic of Nigeria* (2015).

⁷³ Kenya Human Rights Commission, *The Democratic Paradox: A Report on Kenya's 2013 General Elections* (KHRC 2014).

⁷⁴ Nahomi Ichindo and Mathias Schunden, 'Deterring or Displacing Electoral Irregularities?' *The Spillover Effects of Observers in a Randomised Field Experiment*, (15 July 2011), 3.

The autonomous EMB or what is commonly called the Independent Electoral Commission is the most prevalent among EMB types in the world today. A survey carried out by R Lopez-Pintor reveals that 53% of EMBs in the world follow the autonomous model. First introduced in India and Costa Rica, this type of EMB is completely dissociated from the government and has full responsibility over the entire election process. Decisions are overseen by an EMB which is institutionally free and autonomous from the official division of government.⁷⁵

In Kenya most of the institutions are highly subservient to the executive and the President of the Republic wields extraordinary and sometimes arbitrary powers which he can use to manipulate the institutions. This is generally due to the fact that he nominates the appointees who are ratified by Parliament for formal appointment. Since the advent of political pluralism in Kenya, the government has constantly demonstrated its zeal for manipulating elections and public confidence in the government to organize credible elections is very low. It is therefore of utmost importance, in the present dispensation to establish an EMB that has all the guarantees of independence and credibility. A fully autonomous EMB would therefore be most suited for the system in order to inspire confidence in a largely distrustful, polarized and previously disenfranchised electorate.⁷⁶

3.3 Standards of Election Management

Normative benchmarks for electoral management can be gleaned from international and regional human rights instruments and internationally observed best practices. Although the Universal Declaration of Human Rights and the ICCPR provide for important normative benchmarks on elections as a whole, how elections should be managed is not the subject of any specific provision in any of these international instruments. This notwithstanding, the Human Rights Committee in a general comment to article 25 of the ICCPR on the Right to Participate in Public Affairs, has set out very important standards on

⁷⁵ Crispin Odhiambo Mbai, 'The Rise and Fall of The Autocratic State in Kenya' in Walter Oyugi, Peter Wanyande and Crispin Odhiambo-Mbai, Politics of Transition in Kenya: From KANU to NARC (Heinrich Böll Foundation 2003) 51-60

⁷⁶ General Elections in Kenya (2013); Report of the African Union Election Observation Mission to the 2015 General Elections in the Federal Republic of Nigeria (2015).

election management and the minimum requirements to which EMBs should adhere.⁷⁷ The General Comment provides for the *'establishment of an independent electoral authority to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant'*.

At the African Regional level, many standards have equally been elaborated that have a great bearing on election management and EMBs. The African Charter on Democracy, Elections and Governance, provides that all parties to the Charter to re-confirm their responsibility regarding routinely holding free, reasonable and straightforward decisions and for this likewise coordinates they reason in building up and reinforcing and autonomous and unbiased national appointive bodies in charge of overseeing races.⁷⁸ Perhaps the most important and unambiguous standards of election management are set out in the 2002 Durban Declaration on the Principles Governing Democratic Elections in Africa. It provides that *'democratic elections should be conducted...by impartial, all-inclusive, competent accountable institutions staffed by well trained personnel and equipped with adequate logistics'*.

In a resolution adopted in 1996, the African Commission on Human and Peoples' Rights has advised state parties to preserve the credibility of the electoral process particularly the administration of elections and to provide EMBs with sufficient resources to organize free and convincing elections.⁷⁹ In addition to the above, many international nongovernmental organizations working on issues of governance and democracy have come up with various codes of conduct, principles and best practices for election management and EMBs, which essentially elucidate on the standards set out in the above instruments.

Of importance to note that the International Institute for Democracy and Electoral Assistance (IDEA) provides for codes, principles and practices as well as the Electoral

⁷⁷ Japhet Biegon and Geoffrey Musila (2011), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

⁷⁸ Interview conducted with Robert, a representative of Constitutional Commission, 2015

⁷⁹ Nahomi Ichindo and Mathias Schunden, *'Deterring or Displacing Electoral Irregularities?'* *The Spillover Effects of Observers in a Randomised Field Experiment*, (15 July 2011), 3.

Institute of Southern Africa (EISA) and the ACE Electoral knowledge Network.⁸⁰ The standards of election management have been summed up by Kriegler Commission in an Inter-Parliamentary Union publication as follows:

*Elections ought to be sorted out and directed by autonomous, unbiased and prepared authorities, inside a national race commission or other capable organization. Decision overseers ought to be free from impedance by government or parties and ought to be given adequate assets to enable them to satisfy their duties. The standards of receptiveness and responsibility, straightforwardness and divulgence apply similarly to the discretionary organization as to political gatherings and hopefuls.*⁸¹

3.4 International Standards for Delimitation of Boundaries

In order to guide the delimitation process several international election principles have been recommended by regional and nongovernmental organizations for consideration. These organizations which include the OSCE, the European Commission for Democracy through Law, the Commonwealth Secretariat, and the EISA.⁸² In the nineteenth century, in Europe and in sovereign European colonies around the world, the drawing of electoral boundaries was the charge of the legislative arm of government. The research depicts that bigoted politics and gerrymandering were a major element of the delimitation process. Interestingly, the idea of exclusion of politicians in the delimitation processes has emerged Western democracies. However, the legislature in the United States, a long-standing democracy still maintains an overriding role in the progression.

Further research in the history of United states shows a spectrum that has two components: on the one side, the electoral boundaries are delimited by politicians through

⁸⁰ International Foundations for Election Systems (IFES, 2007). *Challenging the Norms and Standards for Election Administration: Boundaries Delimitation*. Pp 59

⁸¹ The Kriegler Commission (2008). *The Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007*.

⁸² International Foundations for Election Systems (IFES, 2007). *Challenging the Norms and Standards for Election Administration: Boundaries Delimitation*. Pp 59

gerrymandering since they have a stake in the outcome whereas on the other side, are those states that have established independent institutions to carry out the process of delimitation.⁸³ Notably, majority of Commonwealth countries, have improved their delimitation procedure by allowing nonpartisan commissions the specialist to delimit limits. An a valid example is Britain which spearheaded the limit commission approach a few ages back, this has likewise been trailed by United Kingdom which embraced limit commissions: Australia, New Zealand, and Canada, and additionally a considerable lot of the Caribbean nations (Barbados Bahamas, St. Lucia, St. Vincent, and the Grenadines). A few Anglophone African nations (Namibia, Botswana and Zimbabwe) have likewise received limit commissions for delimiting voting public.⁸⁴

Evidently, these commissions are not only composed of fair open authorities yet in addition experts with essential aptitudes in decision organization, geology, cartography, demography, and measurements. In Australia, New Zealand, and the United Kingdom, for instance, the commissions join discretionary officers or recorder commanders, and also the Director of Ordnance Survey (United Kingdom) and the Surveyor-General (Australia and New Zealand). In Canada, scholastics knowledgably in decisions and in different conditions geology might be made a request to serve on constituent commissions. Individuals from the legal are additionally very much spoke to the said commissions in numerous nations, including Australia, Canada, India, New Zealand, and the United Kingdom.⁸⁵

Perceptibly absent from these commissions in many nations are administrators and delegates of political gatherings intentionally to keep up the political impartiality of the commissions. New Zealand is one special case to this run the show. It constitutes two political deputies, one a delegate for the administering party and the other an agent for the restriction parties, serve on the seven-part Representation Commission. It is contended that the method of reasoning for their required nearness is to ensure acknowledgment and

⁸³ Michael Yard, *Direct Democracy: Progress and Pitfalls of Election Technology* (International Foundations for Electoral Systems 2010).

⁸⁴ Nahomi Ichindo and Mathias Schunden, 'Deterring or Displacing Electoral Irregularities?' *The Spillover Effects of Observers in a Randomised Field Experiment*, (15 July 2011), 3.

⁸⁵ General Elections in Kenya (2013); Report of the African Union Election Observation Mission to the 2015 General Elections in the Federal Republic of Nigeria (2015).

amendment of any terrible political inclination characteristic in a body electorate limit design.⁸⁶ All in all their appointment is anchored in fact that since the two political appointees constitute a minority of the commission, they cannot outnumber the non-political commissioners, hence the objectivity of the commission is maintained.

Generally a number of the proposed guidelines are universally applicable and in other instances, significant guiding principles have been derelicted. The following constitute the fundamental principles in boundary delimitation:

Impartiality: The institution conducting the delimitation should be a neutral, autonomous, and professional body;

Equality: The populace amount of voting public ought to be as equivalent as conceivable to furnish voters with uniformity of voting quality;

Representativeness: Constituencies ought to be drawn considering minimized groups, characterized by such factors as managerial limits, geographic highlights, and groups of intrigue;

Non-discrimination: The delimitation procedure ought to be without constituent limit control that victimizes voters because of race, shading, dialect, faith, or connected position; and

Transparency: The delimitation procedure ought to as straightforward and open to people in general as could be expected under the circumstances.

3.5 Election Dispute Resolution

The Political Parties Act, 2011 bestows the power to settle disagreements that arise from political party processes upon the Political Parties Disputes Tribunal whilst the Constitution and the IEBC Act confer upon the IEBC, the energy to settle discretionary debate, identifying with or emerging from designation yet bars race petitions consequent to the affirmation of race comes about. All question documented at the PPDT must be resolved inside a time of three months. As is hone, the choices of the Tribunal are not last and complainants to the debate have the response of Review to the High Court. In spite of

⁸⁶ Japhet Biegon and Geoffrey Musila (2011), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

the fact that the law requires first the weariness of inner instruments of settling debate inside gatherings, and on account of disappointment, that inquiries go to the Political Parties Tribunal. In the keep running up to the general decision held in August, 2017 many competitors who were disappointed with inward gathering instruments deserted to different gatherings or ended up plainly free applicants to take an interest in the races.⁸⁷

From the interviews conducted and the analysis of publications on electoral dispute resolutions post 2013, the Judiciary did a great job in hearing and determining electoral disputes.⁸⁸ The mandate of the High Court is established under Article 165(3) and (5) of the Constitution, it also provides the ward to hear pre-decision debate and to decide the inquiry whether a privilege or major flexibility in the Bill of Rights has been denied, disregarded, encroached or debilitated. The Elections Act was amended to provide appeal process for election petitions.⁸⁹ Amendments also allocated jurisdiction on county assembly elections to the magistrates' courts. The judiciary determined disputes across all phases of the electoral cycle, including boundaries delimitation disputes, disputes on the election date, disputes relating to voter registration including registration of persons residing in the diaspora, the gender quota dispute and election petitions.

The challenges on resolution of election disputes witnessed in 2013 elections led to the questioning of whether the jurisdiction of the IEBC in determining disputes arising out of party nominations was misplaced. In a bid to fulfil the constitutional mandate of resolving nomination disputes, the IEBC formed a Dispute Resolution Committee, which determined the nomination disputes that were lodged upon the conclusion of party primaries.⁹⁰ In the run-up to the 8th August, 2017 general election a total of 350 disputes were filed with the IEBC Dispute Resolution Committee and determined within the seven days period provided for in law. The PPDT also heard and determined 306 disputes filed by

⁸⁷ Japhet Biegon and Geoffrey Musila (2011), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

⁸⁸ Report of the Independent Review Commission on the General Elections Held in Kenya on 4th March, 2013 (17 September 2013) 29.

⁸⁹ Crispin Odhiambo Mbai, 'The Rise and Fall of The Autocratic State in Kenya' in Walter Oyugi, Peter Wanyande and Crispin Odhiambo-Mbai, *Politics of Transition in Kenya: From KANU to NARC* (Heinrich Böll Foundation 2003) 51-60

⁹⁰ Japhet Biegon and Geoffrey Musila (2011), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

disputants from the parties against their party in the same period.⁹¹ The IEBC Committee faced challenges due to the time and logistical constraints the Commission worked under. The complex nature of the exercise of the IEBC mandate on dispute resolution arose during the Kethi Kilonzo case.⁹² The complaints had been filed before the IEBC Dispute Resolution Committee on the 1 July 2013 challenging the nomination of Diana Kethi Kilonzo by the Returning Officer of Makueni County to run for the Senate post in the Makueni by-election that had been scheduled for the 22 July 2013. A preliminary objection to the proceedings on the Jurisdiction of the Committee to hear the matter was raised on the ground that the complaint before it was not contemplated under the provisions of Article 88 (4)(e) of the Constitution and Section 87 (4) of the Elections Act, 2011.

The Kilonzo case highlighted the unhealthy situation arising as a result of the fact the exercise of the dispute resolution mandate elevated IEBC to be a judge, jury, and a prosecutor in its own case. This was exemplified by the fact that the IEBC Returning Officer made a decision regarding the validity of the registration of Kethi Kilonzo as a voter, and thereby subject the determination of the issue to the IEBC Dispute Resolution Committee.⁹³

3.6 Conclusion

From the research conducted and the various respondents it is established that there is no sole best example for delimiting supporters or ward limits. It is noted with gratefulness that incalculable delimitation hones, a large number of them broadly effective, authenticate this. Notwithstanding, it is basic to set up measures to which the delimitation procedure may flourish, in situations where the present practices don't effectively meet them. In doing this the models built up should apply adaptability keeping in mind the end goal to be apropos to both develop and transitional majority rules systems, however essentially every one of the norms as set up should bear the standards imagined in this of unbiasedness, balance, representativeness, non-segregation, and straightforwardness.

⁹¹ General Elections in Kenya (2013); Report of the African Union Election Observation Mission to the 2015 General Elections in the Federal Republic of Nigeria (2015).

⁹² Diana Kethi Kilonzo and another v IEBC and 2 others, High Court in Petition No. 359 of 2013.

⁹³ Diana Kethi Kilonzo and another v IEBC and 2 others, High Court in Petition No. 359 of 2013.

Establishing criteria that comprise an impartial electoral boundary institution guided by basic ideologies of electioneering, as well as enhancing a procedure that has clarity and offers integrity and legitimacy to the electorate.

CHAPTER FOUR
A CRITICAL ANALYSIS ON ELECTION MANAGEMENT AND
ADMINISTRATION OF ELECTORAL BOUNDARIES IN KENYA

4.1 Introduction

Chapter three discussed the conduct of election on the effect of boundaries delimitation under best practices of international principles. This chapter will critically analyse the impact of election management and administration of electoral boundaries in Kenya. The process has been one of somewhat sluggish evolution as opposed to radical transformation. The discourse has focused on re-modelling the electoral legal and management framework, accountability and oversight arrangements, reengineering the electoral system, ascertaining the proper place and scope of technology and attending to the key environmental issues with direct implications to the electoral management.⁹⁴ The rise of an era of accountability set in during the passage of the Constitution on 27th August 2010 when His Excellency the President of Kenya Hon. Mwai Kibaki promulgated the Constitution of Kenya whose prelude placed great pride the kenya's ethnic, cultural and religious diversity.

The early stages of evolution of Kenya's electoral process achieved minor incremental reforms including the 1997 settlement by the Inter-Party Parliamentary Group (IPPG), minor patchwork to the electoral legal framework and essential tinkering with the National Assembly and Presidential Regulations in 2002. It was not until the wake of the unfortunate crisis in 2007-08 disputed electoral process that the national conscience was pointed to the inevitable mark of transformational initiatives. This research project shall contribute to the ongoing process by tracing the common threads of the reform interventions, and hopefully pointing the key reform players to common grounds which may serve as a foundation to more permanent solutions.

⁹⁴ Research Findings in cap 3 (Amendments instituted by the 10th parliament had a collateral impact on election administration and management).

4.2 Election Dispute Resolution Process and Emerging Jurisprudence

In its initial reflections, the Independent Review Commission on the General Elections held in December 2007, IREC posed the question on whether there was the failure due to the insufficient statutory laws to govern the management of elections. In its analysis, IREC recognized that a legal structure existed to restrain virtually all the electoral violations and malpractices. The Kriegler Report also found that “the genuine reason of the disappointment for the 2007 decisions was the inability to shield the discretionary procedure from these unsatisfactory deeds.”

With respect to institutional disappointment, the Kriegler Report was exceptionally reproachful of the dependable workplaces and the absence of an open culture to regard the control of law. The report basically commented that "the Attorney-General surely didn't lie conscious around evening time agonizing over every one of those wrongdoings being submitted without any one raising any questions whatsoever to stop them. On the off chance that the police were worried about this situation, they were surely extremely tolerant. The ECK, with its forces under the National Assembly and Presidential Elections Act, the Code of Conduct thereto and the Electoral Offenses Act which incorporate forces to arraign never truly bit anyone.”⁹⁵

In fulfilling its mandate the Kriegler Commission reviewed the electoral process wholesomely and proposed recommendations to be considered before the next general election. The recommendations comprised the establishment of an autonomous and neutral interim electoral commission, an independent interim boundary commission and most importantly recommended the review, amend and consolidate all electoral laws in one statute.⁹⁶, the Kriegler Commission on the issue of delimitation noted with worry that there were gross inconsistencies in the voting populaces of Kenya's voting demographics and that this situation ruptured the "one-individual one-vote" key correspondence rule of popular government revered in segment 42(3) of the previous Constitution. This they observed to be a long past due bias in itself which prompted the hindrance of the honesty of the way toward leading races.

⁹⁵ Kriegler Report on the 2007 General election.

⁹⁶ The interviews by Mary and Koech, Party leaders on 10th July 2017

The Kriegler Commission noticed that,

"The delimitation of boundaries in Kenya as by and by set up does not regard the essential standard of the uniformity of the vote. The distinctions are unsatisfactory as far as global norms. The Kenyan Legal Framework does not set up, just like the acknowledged global practice, the greatest conceivable takeoff from the standard of uniformity of the vote."

4.2.1 Streamlining Election Dispute Resolution Regime in Kenya

The major problem with Electoral Dispute Resolution in Kenya (EDR) in the run up to 2013 and subsequent elections was the overlap of jurisdiction between the Political Parties Dispute Tribunal, the High Court's unlimited jurisdiction on all matters including Constitutional interpretation and the enforcement of fundamental rights and freedoms and the IEBC jurisdiction with regard to the resolution of electoral disputes.⁹⁷ A cardinal principle of EDR is the speedy and expeditious resolution of disputes. Given the foregoing principle, a fundamental question that arises is whether the jurisdiction vested in the IEBC to determine disputes arising from party nominations is misplaced.

Considering the fact that IEBC the only EMB the conduct 6 elections in one day is also mandated to conduct six elections simultaneously and the recently enacted Election Campaign Finance Act, 2013, it is clear that IEBC is overstretched and therefore amendments to the Election Laws to cure the conflicting jurisdiction is necessary.⁹⁸ To strengthen EDR in Kenya, Article 88 (4) of the Constitution and Sections 74 of the Elections Act, 2011 and Section 40 of the Political Parties Act, 2011 needs to be streamlined. The Political Parties Dispute Tribunal should be empowered to handle the larger chunk of party nomination disputes, while IEBC can retain the jurisdiction to determine disputes arising after the clearance by the

⁹⁷ International Foundations for Electoral System, '*Principles of Electoral Disputes Resolution*' 3 accessed 07 July 2015.

⁹⁸ AfriCOG, '*Election Day and Its Aftermath*' (2013), AfriCOG/KPTJ Election Series.

Returning Officers.⁹⁹ This approach is consistent with the preamble of the Elections Act 2011 that defines nominations to mean clearance by the Returning Officers.

4.2.2 Adequate resource allocation

Since the management of elections requires a lot of resources, the allocation of adequate resources is paramount in the operations of the two commissions under consideration. Resources in this regard would include financial and human resources. The allocation of resources needs to take into account continuous electoral activities such as the continuous voter registration and voter education constitutional requirement. It also needs to enable the electoral commissions to appoint, train and deploy their staff independently and adequately. In this regard, the following measures should be adopted to strengthen the financial independence of the EMBs, particularly the IEBC.¹⁰⁰ First, the EMBs need to have independent budget allocation which is different from the budgets of the governments. The approval and release of funds should be done by Parliament. However, before the allocation is made, the EMBs should be able to defend their budgets before the relevant Parliamentary Committee. In this sense, the financial independence of the two EMBs would be enhanced and they would also be shielded from undue political interference.¹⁰¹

Secondly, adequate financial allocation can be enhanced by providing for a minimum allocation of funds by the two governments. This can be done through a legal provision that puts an obligation on the governments to provide a certain percentage of the commissions' budgets. The legal provision is important since it makes it obligatory to provide minimum funding and at the same time it is enforceable. The economic constraints and the political culture in many African countries make the legal guarantee relevant and important. It is my view that the

⁹⁹ The interviews by Mary and Koech, Party leaders on 10th July 2017

¹⁰⁰ D Kew 'Building democracy in 21st century Africa: Two Africas, one solution' *Whitehead Journal of Diplomacy and International Relations* (2005) 149.

¹⁰¹ Interview conducted with Robert, a representative of Constitutional Commission, 2017

adoption of these legal measures can further strengthen the financial independence of the two EMBs under consideration.

4.2.3 Integration of Technology, Voter Registration and Result Transmission.

The predecessor Commission had been tasked to begin from a clean slate and enhance the use of technology in electoral administration. The assumption was that this would eliminate the prevalence of human error, improve efficiency, increase verifiability and integrity of the elections operations.¹⁰² In the 2010 referendum, the IIEC integrated technology in the electronic transmission of electoral results and used Optical Marker Readable Forms for voter registration. In addition, the Commission conducted a pilot of Biometric Voter Registration in selected constituencies.

Based on the short pre-test by IIEC and presumed expectation of voters, the IEBC enhanced the initial steps by the IIEC and adopted a full BVR system of voter registration, introduced electronic identification of voters and electronic transmission of electoral results. IEBC also used elements of technology in the Boundaries Delimitation process through the use of digitized maps. The integration of ICT in elections did not cover the full aspects of election operation. There was a hybrid use of human activity and technological integration.¹⁰³ This was in itself not controversial since it is almost impossible to achieve full electronic based voting, registration, identification and result transmission system.

Key steps of integration of election technology should focus on conducting a comprehensive needs assessment, appreciating the environmental issues including the special circumstances of each county, adequate participation of political parties and key stakeholders, adequate time for planning, procurement, and testing, training and logistical preparedness.¹⁰⁴ Attention should also be made to security and substantial voter education. In addition, the legal framework should have sufficient

¹⁰² AfriCOG, *'Election Day and Its Aftermath'* (2013), AfriCOG/KPTJ Election Series.

¹⁰³ Independent Electoral and Boundaries Commission Post-Election Evaluation Report on the 4 March 2013 General Election (October 2014) 104.

¹⁰⁴ AfriCOG, *'Election Day and Its Aftermath'* (2013), AfriCOG/KPTJ Election Series.

clarity on the integration of technology and verifiability by electoral officials and stakeholders.

Lack of a clear policy and strategy to attend to the elements above may undermine integration of technology and expose interventions to criticism or make initiatives vulnerable to abuse by a few people. Wide informational asymmetry begets discretion which is not conducive to electoral management.¹⁰⁵ This inevitably leads to unnecessary suspicion and lack of acceptance thus impacting on the integrity of the electoral process. Going forward, it is therefore essential to comprehensively evaluate the successes and failures of technology in the 2013 General Elections and develop a strategy that will remedy the failures, achieves the dual objectives of transparency and efficiency, and assuage the perceived weaknesses.

Such a strategy should involve stakeholders through the decision making process including sustained monitoring of the implementation process. The strategy will assess the merits of sustaining the use of technology in the three main elements of electioneering or expanding integration to full electronic registration. The risks, challenges, available technology, comparative cost advantages should be critically evaluated. Assuming the policy choice is made to keep the current practice, the following steps need to be taken.

Firstly, all evidence shows that the EVID system was hurriedly planned and implemented. IEBC was therefore exposed to unconscionable demands by the chosen supplier. The late delivery of the equipment curtailed testing, training and deployment of equipment.¹⁰⁶ It is therefore important for IEBC to go back to the drawing board on this. The technology should be evaluated, adequate time should be allowed for planning, procurement, training, testing and logistical issues. The technology should be simple enough, and more importantly, opportunities for integrating the chosen technology with the BVR voters register and the electronic

¹⁰⁵ Independent Electoral and Boundaries Commission Post-Election Evaluation Report on the 4 March 2013 General Election (October 2014) 118.

¹⁰⁶ Interview conducted with Robert, a representative of Constitutional Commission, 2017

transmission of result system is important. This will allow segregation of polling station data, management of queues, reconciliation of ballots, and management of election results data thereby engendering verifiability and election integrity.

Secondly, it is clear that the substantial failures of the Result Transmission System (RTS) could have been foreseeable and eliminated through more accountable decision making, better planning, and testing, training and more deliberate execution.¹⁰⁷ The process seemed to have been undertaken through great assumptions based solely on the reputation of the IIEC on account of the referendum conducted in 2010 which was in itself not perfect. Any lessons that were learned in the referendum process were not taken into account. Similar complacency would be risky in relation to the conspicuous failures experienced in 2013.

The IEBC must take initiative to fully own the process, develop comprehensive specifications and develop a reliable system, engage the political parties and other actors during the entire process, allow adequate window for planning, testing, training and deployment.¹⁰⁸ Lastly, integration of technology must be aligned to the legal procedures governing key aspects of election. In 2013, the disconnect led the courts to relegate the investments on technology as having no consequence in the integrity of the elections.

Since electronic data is superseded by manual data, the BVR system or the RTS were not considered conclusive or persuasive evidence of election accountability trails. In 2013, Constituency Returning Officers proceeded to the national tally centre to account for their returns. This practice did provide for collation of election results at the County Level. The accounting and publication of result at the county level is important for accountability and administrative efficiency.

¹⁰⁷ Interview conducted with Robert, a representative of Constitutional Commission, 2017

¹⁰⁸ AfriCOG, *'Election Day and Its Aftermath'* (2013), AfriCOG/KPTJ Election Series.

4.2.4 Boundaries Delimitation

Boundaries delimitation is of utmost importance, especially in electoral systems adopting the First-Past the Post System. The variables and criteria for delimitation, and the methodology should therefore implement the objectives of the Constitution and the international instruments which Kenya is party to. The key considerations in designing the legal framework seek to address at least four aspects. First, there is need to achieve a balance of representativeness among electoral units. Secondly, effective boundaries delimitation should attempt to achieve, as much as possible, an equality of the vote.¹⁰⁹ This is an ideal that is not usually precisely attainable in practice therefore its drastic effects are usually counterbalanced or mitigated, not replaced, by the other factors. Thirdly, the legal and institutional framework must establish an institutional framework whose independence is insulated from inevitable political interests. Fourthly, there is need for adequate public education on the criteria, process and outcomes of boundaries delimitation. These processes are further strengthened through a process that engenders public participation and structured process for evaluation and resolution of credible disputes.

Article 89 of the Constitution provides for the boundaries delimitation criteria and process. The Article is a marked improvement from Section 42 in the repealed Constitution. As a criteria, it establishes a chapeau whereby populace egalitarianism is the starting point but tempered using various methods including terrestrial structures and metropolitan centres; community of interest, ancient, pecuniary and cultural ties; and means of communication. The progressive tone of Article 89 was superseded through the transitional provisions intended to anchor the First Review conducted by the Interim Independent Boundaries Commission (IIBRC) and completed by the IEBC.¹¹⁰ The transitional provisions suspended the strict application of the standards set out under Article 89 and specifically saved some constituencies which would have been extinguished by a stricter or even a more balanced application of the population criteria.

¹⁰⁹ Wachira Maina '*Energising the Electoral Process in Kenya*' in Institute for Education in Democracy, The Electoral Environment in Kenya: IED Research Project Report (1997) 82.

¹¹⁰ IEBC Act, s 2 (Defined the first review as „the review conducted by the former Boundaries Commission taking into account any outstanding work of that Commission and issues arising from that review.“ This limited interpretation was intended to unlock the stalemate in the review process and forestall protracted controversy).

Specifically, the intervention of parliament or indeed any other institution which was sanctioned under Schedule Five should be structured so as not to contradict the autonomy of the IEBC in boundaries delimitation.¹¹¹ Given the political and social controversy regarding boundaries delimitation, this thesis proposes an oversight through a temporary Bicameral Committee. Such a Committee should be chaired by the Speaker of the Senate and incorporate equal members of each house.¹¹² The Committee should consider reports of the IEBC generated in the preliminary stages of boundaries delimitation, consider representations from Members of Parliament and County Assemblies and report to the Commission giving recommendations and reasons therefore. Such recommendations shall be persuasive but not determinate in respect to final IEBC work.

Further provisions should provide clarification on time frame or any other triggers, necessity of any reference material or information to be received from other state agencies, for example data on population, demography and survey may be provided to the IEBC.¹¹³ Additionally, the provisions should provide clearer methodology on how the criteria under Article 89 should be applied to enforce the chapeau within the circumstances of Kenya. The provisions should also elaborate provisions on civic education, public participation and dispute resolution.

4.2.5 Transparent and Accountable Voter Registration Exercise

Given the competitive nature of elections in Kenya, this reality will continue to dominate the political landscape with considerable impact on future elections.¹¹⁴ While the legal framework appears sound with respect to voter registration, operational and logistical challenges impacted negatively during the last voter registration exercise that rendered the process questionable. The Constitution requires no amendment in relation to the voter registration. It engenders adequate clarity in relation to the right to vote; qualifications for registration as a voter; and the mandate of the Commission in relation to voter registration.

¹¹¹ IEBC Act s 36(2) (Provides that the Fifth Schedule shall elapse upon publication of the Report on the First Review).

¹¹² The interviews by Mary and Koech, Party leaders on 10th July 2017

¹¹³ Interview conducted with Robert, a representative of Constitutional Commission, 2017

¹¹⁴ AfriCOG, *'Election Day and Its Aftermath'* (2013), AfriCOG/KPTJ Election Series.

The probable lurking constitutional question is whether pre-condition to have an identification card or a passport can be sustained. These two documents are undoubtedly of immense practical importance.

There is an arguable case for less prominent value of these two documents given the normative rights based approach of the Constitution. To cure this ambiguity, the right to register as a voter enshrined in Article 38 of the Constitution should be upheld and given effect.¹¹⁵ There is also the need to articulate a comprehensive framework for the implementation of voter registration for diaspora. The High Court and the Court of Appeal asserted the IEBC's position that Article 38(3) though not absolute is subject to reasonable limitations. The Courts guided the IEBC as follows: that considering that the right to vote is to be enjoyed without limitation Kenyan citizens in the Diaspora who have dual citizenship are eligible to be registered as voters and that the IEBC needs to develop mechanisms that progressively set up more registration centres for Kenyans citizens living outside the country.

The research also recommends a shift to a new voter registration system that is more aligned to other citizen registration databases. This means rendering the current register unaccountable.¹¹⁶ The IEBC need not procure new equipment but rather redesign the BVR system based on greater controls and inbuilt parameters of exceptions to forestall reliance on multiple reference materials. As the Kriegler Commission concluded,

'A permanent solution will necessarily involve moving to an alternative system, based on other population databases, particularly that related to the national Identity Card and, when implemented, to the proposed Integrated Population Registration Systems (IPRS).'

4.3 Constitutional and legal frameworks on the Review of Electoral disputes

The inscribed devolution plan provided for under the Constitution of Kenya established a legal framework and courses of action to confront a myriad of challenges including but not limited to electoral malpractices, corruption, ethnic divisions and ill-

¹¹⁵ The interviews by Mary and Koech, Party leaders on 10th July 2017

¹¹⁶ Supreme Court Decision in Petition No. 5 of 2013, on Voter Registration

defined property rights. Political parties are required to observe good governance, practice democracy and promote integrity under chapter six and seven of the Constitution in elections.¹¹⁷

Of utmost importance is to note that rule-based legal regimes are key for an election to thrive. As a consequence, strengthening the rule of law should constitute a central element of Kenya's strategies to fight extensive and evident corruption. Legislative and judicial reform should become a core component of a democracy's governance portfolio, which should be primarily motivated by its concern with finding durable solutions to elections and electioneering period.¹¹⁸ Enhancing good governance necessitates the need to ensure effective separation of powers. This requires dealing with factors behind the impartiality of the judiciary, guaranteeing the fair administration of justice and cutting down the prospects for corruption by reducing discretionary powers.

The judgement by the Kenya's Supreme Court that annulled the presidential election held on 8th August, 2017 on 1st September, 2017 and for the first time in Kenya and even in the history of African elections, the weighing scale tilted in favour of the petitioner in a presidential election petition. This sent shock waves across the continent and the world. The Supreme Court judgement that nullified the presidential election held on 8th August, 2017 and directed that the IEBC conducts afresh presidential election within 60 days took many in Africa and abroad by surprise.

Implementing the recommendations of the Kriegler Commission presented a conundrum for politicians and society at large in Kenya. The contribution to transitional justice by the Commission's Report was largely measured by the extent to which the implementation of its recommendations enabled the establishment of an electoral legal framework, administrative and dispute resolution reforms that would avert any kind of future electoral crises.

¹¹⁷ Interview conducted with Robert, a representative of Constitutional Commission, 2017

¹¹⁸ AfriCOG, '*Election Day and Its Aftermath*' (2013), AfriCOG/KPTJ Election Series.

4.4 Lessons learned

Constitutional and legal reform recommendations can be implemented effectively only in circumstances where the letter and the intention (spirit) of the law is observed. The jurisdiction of interpretation of constitutional and statutory provisions by the judiciary is considered critical in realising the anticipated desires of Kenyans, predominantly with respect to elections results. In relation to the structure and composition of the electoral management body, doubts about the integrity and effectiveness of the electoral body still linger owing to the myriad of slips and errors witnessed in the 2007 election.¹¹⁹

Political parties, civil societies, faith based organisations, observers and the media are essential to authenticate the lucidity and validity of the course of election especially in Kenya. However, attaining this, requires the stakeholders to conduct their roles in a professional and non- bigoted means. From the research, respondents largely believed that political parties have a duty to the country ensure that just conduct, practice and factual information direct their deeds, while civil societies and observers (local and international) need to conduct themselves in a non-partisan manner to ensure that pellucidity and reliability are constructed into the process. Internal Observers are often called upon to be non-partisan and not to advance their political interests to the electorate. On its part, the government is expected facilitate and put in place adequate instruments that foster free and fair elections.¹²⁰

As elucidated in Chapter 2 and 3, one of the central features entrenched in the constitution is the devolution system. This system allows this allows for the dissemination and segregation of political power vertically to the Counties across country and in effect bringing the government closer to the people.¹²¹ Proponents of this system contend that dissimilar to the previous brought together framework which had a tendency to advance a 'champ adopts all strategy' discretionary culture at the national level, left disappointed however unfaltering vanquished parties with restricted alternatives to secure power.

¹¹⁹ AfriCOG, *'Election Day and Its Aftermath'* (2013), AfriCOG/KPTJ Election Series.

¹²⁰ Interview conducted with Robert, a representative of Constitutional Commission, 2017

¹²¹ *Ibid*

Consequently, this framework secures the same at lapsed levels of the nation subsequently allowing encouragement through expansive power sharing mechanism at the counties.

4.5 Conclusion

Despite significant reforms on electoral democracy in Kenya following the promulgation of the 2010 Constitution, legal and institutional shortcomings were noted. Of crucial importance was the information and recommendation observed during the various forums held with key stakeholders. The multi sectoral workshops by the Judiciary, IEBC, and political parties not only reflected on the issues, but made practical recommendations for reforms. Contextualising reforms proposals within the theory of liberal democracy and new institutionalism, this chapter has made proposals and recommendations required to strengthen and enhance electoral democracy in Kenya.

The reforms proposals contained in this chapter are by no means conclusive, but are based on the need to enact minimum reforms needed to strengthen electoral governance in Kenya both in the short and medium term.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary of the Study

The thrust of the study was to examine the nexus between the conduct of elections and the processes of delimitation of boundaries in Kenya. The nexus between sound election management and administration and the credibility of election which was the research hypothesis has been established and tested. Contextualising the study within the constitutional and legal framework enacted since 2010 and the 2013 elections, the study interrogated the legal framework governing election as well as the organizational framework underpinning the formation of the IEBC.

The literature review and the targeted interviews conducted provided answers to the research questions and the conclusion that as presently constituted the IEBC cannot procure a credible and democratic electoral process without constructive and meaningful reforms. Undoubtedly, the 2010 Constitution and the Election Sector Laws enacted as part of constitutional implementation agenda heralded a paradigm shift in the transformative nature of the Constitution with regard to elections was elaborated in the Chapters on the Bill of Rights, Representation of the people, Legislature, the Executive and Devolved Government.

5.2 Conclusion

An important question that the study sought to answer was gaps that inhibit the performance of IEBC. A recurrent gap in election management in Kenya is the affliction to treat election as an event and not a process, recently held by the Supreme Court of Kenya in its judgement in nullifying the presidential election. Given the challenges noted in the past elections, Kenya should shift to an electoral cycle approach in dealing with election management issues.¹²² Increasingly, the adoption of the electoral cycle approach as a means to strengthening electoral management has gained acceptance around the world. Election cycle approach takes cognisance of the fact that elections are not an event but a

¹²² Research Findings in cap 3 (Amendments instituted by the 10th parliament had a collateral impact on election administration and management).

process, and that democratic consolidation in Kenya can only be achieved through holistic approaches involving institutional strengthening and legal sector law reforms pursued in a peaceful environment.

For the most part, the deterrence that existed in the run up to 2013 elections which somehow guaranteed a peaceful outcome have all dissipated. The confidence in the legal and institutional framework, the criminal proceedings at the International Criminal Court and expectations of impartial resolution of election disputes have all waned. In the recent past, the country has witnessed a sharp and intransigent political statements, lack of national healing and reconciliation owing to the fact that the divide created in 2013 has not been bridged.

The hypothesis of the study was predicated on sound constitutional, legal and institutional framework as a means of enhancing the credibility of election management in Kenya. The transformative nature of the Constitution of Kenya 2010 obliges all the stakeholders to stick to the constitutional implementation agenda. The yardstick for compliance with the constitutional implementation agenda should embrace both democratic liberalism and constitutional liberalism. Elections management and administration in Kenya must of essence comply with the progressive provisions enshrined in the Constitution and other statutes. The shortcomings noted in the legal framework inevitably calls for electoral reforms to consolidate electoral democracy and strengthen the credibility of the election management and administration in Kenya. The central thesis of this study is premised on the need to reform and strengthen election management and administration.

The conduct of 2013 elections raised the question whether the new constitution and legal framework impacted positively on election administration. The research established that despite the progressive constitution and election laws, the character, attitude and behaviour of the IEBC personnel were not in sync with the new constitutional standards. Accordingly, it is important to revive and nurture the culture of rule of law and constitutionalism as a strategy to addressing behavioural and attitudinal change, as an important part of the constitutional implementation and agenda.

5.3 Recommendations

On the basis of the foregoing findings the researcher makes the following recommendations on how the conduct of elections can be improved through enriched processes of delimitation of boundaries in Kenya;

5.3.1 Reviewed Legislative Framework on Boundary Delimitation

From the research conducted it is evident that the National Assembly reviewed the law pursuant to the Elections (Amendment) Laws Act, 2017. Pursuant to these amendments the IEBC needs to consider developing Rules of Procedure and or guidelines that provide the mechanisms in which the Commission will conduct the delimitation process before the 2022 general election. Additionally, once that is provided for IEBC to create awareness and sensitize key stakeholders in good time, on the legal framework governing delimitation of boundaries to advance acceptability and consensus amongst the electorate.

5.3.2 Need to Enhancing Accessibility to Courts by Disputants

The research conducted revealed that following the last boundary review some ethnic communities felt marginalised hence the reason why inert-ethnic conflict arose leading to violence in some instances. The research depicts that there is need to establish mechanisms that use mediators known to the people and scaled experts in boundary review to handle disputes. In addition it was noted that the period for handling the review cases to be enhances from 30 days to 60 days. This will enable every disputant to present their case before the court. It is also proposed that the Courts do devolve the hearing of this disputes to county levels such that every person can be heard and where there are not courts, the judiciary to consider establishing Mobile Courts specifically for the pastoralist communities.

5.3.3 Need to Enhance Public Participation the Role of Other Stakeholders

The nexus between sound election management and administration and the credibility of election recognizing the role of other stakeholders in consolidating electoral democracy in Kenya, the research generated recommendations that can be considered by

the Government of Kenya, Parliament, Political Parties, Civil Society Organisations and the Judiciary. Promoting focused public participation mostly at county levels in delimitation processes will not only enhance but promote inclusivity thereby guaranteeing credence in electoral processes. While noting that the protected constituencies (for smaller populated constituencies) will cease to have that protection in the next review there is need to review the population quota in order to ensure that those constituencies do not lose their representation in various forums.

5.3.4. Need to Strengthen and Institutionalize Sustainable Democracy in Kenya

Application of the Chapter on the Bill of Rights applies both horizontally and vertically imposing binding obligation on the state and the institutions created under it. Conduct of credible elections will require concerted and collaborative efforts between state and non-state actors. The government of Kenya through relevant ministries and departments should ensure that the IEBC is allocated adequate funding to initiate the process of election preparations early enough. This is consistent with the electoral cycle approach that requires strengthening of the key processes associated with elections. The government should ensure fidelity to the constitutional implementation agenda. Consolidating electoral democracy in Kenya will require implementation of the constitution as well as instituting electoral reforms proposals suggested in the study.

5.3.5 Need for Enhanced Voter Education and Civic Education

In achieving its mandate of conducting continuous voter education the IEBC to consider working with the Ministry of Education in order include the electoral process content in the curriculum for upper primary and secondary schools. There is need to develop a clear Ministry/ Department to develop policies that introduce civic education in schools on electoral processes. Further, the research proposes that the IEBC generates simplified pocket booklets on electoral processes and specifically those touching on boundary delimitation process. This will ensure the inculcation of a democratic culture early in life which might in turn contribute to the strengthening of democracy in Kenya.

Finally, the Commission may need to establish a structured engagement of all key stakeholders at small areas levels for example, at County Assembly Ward level where the constituency elections Coordinators of the Commission will use alternative Dispute resolution mechanisms to resolve disputes that may arise from the engagement forums.

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Yieke, F. (2010). The decision of the High Court of Kenya on the delimitation of electoral and administrative boundaries by the Independent Electoral and Boundaries Commission.

APPENDICES

APPENDIX 1: TRANSMITTAL LETTER

Ruth K. Makuthu

ACI Arb, Dip. KSL, LL.B.(Hons), C.U.E.A

P.O. Box 56229 – 00200

NAIROBI

Email Address: ruthiekav03@gmail.com

Mobile No. 0722 321 679

Date:

Dear Sir/Madam

RE:

I am Ruth Makuthu, a student from the University of Nairobi who would like to conduct research on the nexus between conduct of elections and influence of politics; a case study of resolving disputes arising from delimitation of electoral boundaries in Kenya and I chose the IEBC as my case study. Owing to the foregoing I would like you to respond to my questionnaire or interview you (depending on the Respondent).

The information amassed will be termed as private and confidential and will be used for the sole purpose of this project without any deviation whatsoever. The kindness and role that you will play in helping me write the proposal will be highly rated and I would like to acknowledge it in advance.

Yours Faithfully,

Ruth K. Makuthu

Student of Master of International Conflict Management- UON

Nairobi University

APPENDIX II: QUESTIONNAIRE

Section A; Personal details

NAME (optional) _____

AGE; (tick one)

Between 20-30

31-35

36-45

Over 45

GENDER; Male Female

Department of work _____

Position in the Institution;

How long have you worked with IEBC?

Less than one year

between 1-5 years,

Between 5-10 years,

Over 10 years

SECTION B; Main Questions

1. How effective can you rate the current legal framework governing the dispute resolution arising from boundary delimitation?

a. Very high High Average

b. Low Very Low

2. Do you think that justice is effectively achieved through the current legal system?

3. If No, please explain your answer.

4. As an employee of IEBC have you been sensitized or trained on matters relating to resolution of disputes arising from delimitation of boundaries?

Yes

No

5. How would you explain the management of hearings during the forums held by the IEBC to review delimitation?

6. Kenya is currently perceived to have an inadequate legal framework which may not be used during the next review of the electoral units, leaving the whole process prone to conflict. Do you agree?

Yes

Slightly

No

No idea

If yes, please explain

7. What are your comments on ethnicity, culture and how it affects the resolution of disputes during the process of boundary delimitation in Kenya?

8. According to the variables below, which one would you attribute as the biggest cause of conflict during the delimitation of boundaries? Kindly rank in order of importance starting with the one that has the biggest impact.

a) Politics

b) Ethnicity

c) Inaccessibility to judicial and quasi-judicial forums

- d) None of the above
 - e) All of the above
 - f) I don't know
9. In your opinion what are some of the strategies that may be employed to improve access to justice during the disputes arising from the delimitation on electoral units?

APPENDIX III: INTERVIEW GUIDE

NAME (optional) _____

Between 20-30

31-35

36-45

Over 45

GENDER; Male Female

Department of work _____

Position in the firm; _____

How long have you worked with your organization?

Less than one year

Between 1-5 years,

Between 5-10 years,

Over 10 years

1. With the new Constitutional dispensation Kenya had to review its electoral boundaries before the 2013 general election. What do you think are some of the legal issues that arose during the process?
2. In your opinion what are some of the gaps that arose and still exist in the Kenyan legal system to effectively handle disputes arising from the process of delimitation of electoral boundaries?
3. Do you think that the provisions of the Constitution grant sufficient time for respondents, representatives of respondents and the judiciary to hear or present and determine cases?
4. During elections Kenya and other African countries are accused of letting ethnicity to traditionally influence political process especially elections. Do you agree?
5. In your opinion to what extent does ethnicity and politicization of electoral processes impact the process delimitation in Kenya?

6. The current law of delimitation under the IEBC Act is spent. Do you think there is adequate legal and structural framework to guide and control the process of the next process of delimitation of electoral units?
7. Any suggestions on what can be done to improve the legal system before the next review?
8. It is said that ignorance is no defence, however, what do you think should be done to create an society that is aware of the process of delimitation before the next boundary review process to avoid the conflict experienced in 2012?
9. What can the government do in terms of policy to create a balance between accessibility of justice for all?

APPENDIX IV: EXTRACT OF PRINCIPAL REPLYING AFFIDAVIT

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS & JUDICIAL REVIEW DIVISIONS
PETITION NUMBER 91 OF 2012 AND JUDICIAL REVIEW
APPLICATION NO. 94 OF 2012 AND ALL OTHER CONSTITUTIONAL
PETITIONS ,JUDICIAL REVIEW APPLICATIONS AND MISCELLEANOUS
APPLICATIONS RESPECTING THE DELIMITATION OF ELECTORAL UNITS

(As consolidated by the Order of the Hon. The Chief Justice on 30th April, 2012)

**IN THE MATTER OF: DELIMITATION OF BOUNDARIES OF ELECTORAL
UNITS BY THE INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION**

AND

**IN THE MATTER OF: ARTICLE 89 OF THE CONSTITUTION OF KENYA
AND ALL OTHER ENABLING PROVISIONS OF THE CONSTITUTION
BETWEEN**

**MOHAMED IBRAHIM YUSSUF
IBRAHIM AHMED YAKUBU AND OTHERS.....PETITIONERS/
APPLICANTS**

AND

**THE INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION AND
OTHERS.....RESPONDENT**

PRINCIPAL REPLYING AFFIDAVIT

I, PRAXEDES TOROREY of Post Office Box Number 45371–00100 Nairobi, and a resident of Nairobi within the Republic of Kenya, do hereby make oath and state as follows:-

- 1. THAT I am an Advocate of the High Court of Kenya and the Director, Legal and Public Affairs with the Independent Electoral and Boundaries Commission a respondent herein (hereinafter also referred to as “the Commission”). I am seized of the facts herein and duly authorized by the Commission to make this affidavit and thus competent to depone to herein.**
- 2. THAT I have read and understood the Applicants’/Petitioners’ pleadings and affidavits on record and I make this affidavit in response thereto. I have further been advised thereon by the Commission’s Advocates on record and verily believe the same advice to be sound in law.**

3. **THAT** the Independent Electoral and Boundaries Commission is established by Article 88 of the Constitution of Kenya, 2010 (hereinafter “the Constitution”) and is thus a creature of the Constitution and as such, is a constitutional body.
4. **THAT** under Article 88(4)(c) of the Constitution, the Commission is responsible for:
“ the delimitation of constituencies and wards.”
5. **THAT** pursuant to Article 88(4)(c) above and Article 89 of the Constitution of Kenya, the Commission’s mandate includes:
*“89 (2); The Independent Electoral and Boundaries Commission shall review the names and boundaries of constituencies at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.
89 (3); The Commission shall review the number, names and boundaries of wards periodically.
89 (8); If necessary, the Commission shall alter the names and boundaries of constituencies, and the number, names and boundaries of wards.”*
6. **THAT** under Article 82(1)(a) of the Constitution, Parliament is mandated to enact legislation to provide for;
“the delimitation by the Independent Electoral and Boundaries Commission of electoral units for election of members of the National Assembly and county assemblies;”
7. **THAT** pursuant to the aforesaid mandate, Parliament enacted the Independent Electoral and Boundaries Commission Act 2011 (hereinafter “the IEBC Act”) effectively breathing life into the provisions of Article 82(1)(a) as read together with the provision of Article 88 of the Constitution.
8. **THAT** under Sections 2, 4(c), 36 and the Fifth Schedule of the IEBC Act, Parliament mandated the Commission to resolve all issues arising from the first review and complete the first review.
9. **THAT** after having carried out the aforesaid mandate, the Commission was required to publish its final report within a period of four months of the date of its appointment as provided under the IEBC Act.
10. **THAT** pursuant to Clause 2 (1) (a) and (b) of the Fifth Schedule of the IEBC Act 2011, the Commission in addressing the issues arising out of the first review was to;

“(a): use as its primary reference material the report of the former Boundaries Commission on the first review as adopted by the National Assembly; and

(b): use as its secondary reference material, the report of the Parliamentary Committee on the report of the former Boundaries Commission on the first review.”

11. **THAT** in carrying out the exercise, the subject matter of the instant proceedings, the Commission sought to resolve issues arising from the first review which were:

(a): re-distribution of such wards or administrative units in the affected constituencies as may be appropriate;

(b): subject to the Constitution, addressing issues of new constituencies falling outside the population quota as provided for by Article 89(6) of the Constitution...

(c): addressing the issue of progressively advancing towards the population quota in protected constituencies...

(reference is had to Clause 2(2)(a), (b) and C of the Fifth Schedule of the IEBC Act, 2011).

12. **THAT** the Chairperson and members of the Commission were appointed on November 8, 2011 vide Gazette Notices 14091 and 14094 of November 9, 2011 respectively (annexed hereto and marked “**PT.1**” is a copy of the Gazette Notice).

13. **THAT** in fulfilling its mandate under the Constitution and the IEBC Act, the Commission undertook its mandate independently and conducted the following activities;

a) Pursuant to Commission meetings held on diverse dates in the month of December 2011 and January 2012, the Commission resolved how it would discharge its mandate under the Constitution and IEBC Act (annexed hereto and marked “**PT.2**” are extracts of minutes of relevant commission meetings minutes).

b) On January 9, 2012 the Commission published its Preliminary Report on the First Review Relating to the Delimitation of Boundaries of Constituencies and county assembly wards (annexed hereto and marked “**PT.3**” is a copy of the said report).

- c) The Commission invited members of the public through print and electronic media to make their submissions and presentations on the Commission’s Preliminary report (annexed hereto and marked “**PT.4**” are copies of documents verifying the aforestated).
- d) Between the 9th and 30th of January 2012, the Commission received, collated, considered and analysed all views and memoranda received during the public fora in accordance with the Constitution and the IEBC Act.
- e) On February 9, 2012, the Commission published its Revised Preliminary Report relating to the Delimitation of Boundaries of Constituencies and county assembly wards (annexed hereto and marked “**PT.5**” is a copy of the said Revised Preliminary Report).
- f) On February 9, 2012, the Revised Preliminary Report was forwarded to the Parliamentary Committee for deliberation.
- g) On 2nd March,2012 the Commission received the recommendations of Parliament on the Revised Preliminary Report (annexed herein and marked “**PT.6**” are copies of the Report of the Parliamentary Departmental Committee . Further, the Commission received various reports and findings of Parliament on the Revised Preliminary Report annexed herewith and marked “**PT 7 (A)**”-“**PT.7(F)**”)
- h) Upon receipt of the Report of the whole house, the Commission deliberated and considered the recommendations made by parliament and thereafter published the final report which comprised of:
 - i. Volume 1: The Final Report of the Proposed Boundaries of Constituencies and Wards (annexed hereto and marked “**PT.8**” is a copy of the said report).
 - ii. Volume 2: The National Assembly Constituencies and County Assembly Wards Order, 2012 dated 6th March 2012 (annexed hereto and marked “**PT.9**” is a copy of the said Order).
 - iii. Volume 3: Atlas of Maps Proposed Boundaries Constituencies and Wards (annexed hereto and marked “**PT.10**” is a compact disc containing the said Atlas).

14. **THAT** the aforesaid National Assembly Constituencies and County Assembly Order, 2012 dated 6th March, 2012 was published in the Kenya Gazette as Legal Notice No. 14 of 2012.
15. **THAT** the IEBC undertook literature review on internationally accepted standards on delimitation of electoral boundaries and identified five internationally accepted principles for the delimitation namely:
 - a) *community of interest (also known as representativeness);*
 - b) *equality of votes (also known as equality of voting strength);*
 - c) *independent or impartial boundary delimitation authority (such as the IIBRC as established in Kenya's circumstances);*
 - d) *transparency (implying that the delimitation process should be as transparent as possible, with the methodology and guidelines clearly established and publicized in advance); and*
 - e) *non-discrimination (indicating that electoral boundaries should not be drawn in a manner that discriminates against any particular group).*
16. **THAT** throughout the delivery of its mandate, the Commission sought to uphold these international principles as far as possible within Kenya's circumstances especially the Constitutional parameters for delimitation of electoral boundaries.
17. **THAT** the Commission analyzed and interpreted data and information relying on social science methodologies and analytical tools including Information Communication Technologies (ICT) and Geographical Information Systems (GIS) in the delimitation of the electoral units.
18. **THAT** I verily believe that it is important to set out the history of the present delimitation process to this Honourable Court. This process began with the establishment of the Independent Review Commission (Kreigler Commission) after the 2007 General Elections.
19. **THAT** one of the conclusions of the Kreigler Commission was that the then existing electoral units breached fundamental equality principle of democracy and therefore made specific recommendations that a first boundary delimitation be undertaken to correct this anomaly (annexed hereto and marked as "**PT.11**" is a copy of the Kreigler Commission report).

20. **THAT** the Kreigler Commission report was adopted by Parliament where it was resolved that the same be given effect (annexed hereto and marked “PT.12” is a copy of relevant Parliamentary Hansard).
21. **THAT** following the adoption of the Kreigler Report aforesaid, Parliament enacted the Constitution of Kenya (Amendment) Act, 2008, which established the Interim Independent Boundaries Review Commission (IIBRC) also known as Ligale Commission.
22. **THAT** the constitutional mandate of the Ligale Commission set out under Section 41(c) of the former Constitution entailed *inter alia*:
- a) making recommendations to Parliament on the delimitation of constituencies and local authority electoral units and the optimal number of constituencies on the basis of equality of votes taking into account;
 - i. density of population, and in particular the need to ensure adequate representation of urban and sparsely populated rural area;
 - ii. population trends
 - iii. means of communication;
 - iv. community interests;
 - b) making recommendations to Parliament on administrative boundaries, including the fixing, reviewing and variation of boundaries of districts and other units; and
 - c) performance of such other functions as may be prescribed by Parliament.
23. **THAT** the Ligale Commission commenced its mandate however prior to the publication of its report the Current Constitution was promulgated on the 27th August, 2010 whereof the IEBC was established.
24. **THAT** there was a debate at the time on whether the IIBRC could conclude its mandate given the IEBC had been established under the Constitution.
25. **THAT** the debate arose partly due to the fact that the IIEC mandate had been extended under the Sixth Schedule of the Constitution, whilst the IIBRC mandate was to expire 3 months from date of promulgation.
26. **THAT** arising from the aforesaid there was a multiplicity of suits aimed at preventing the Ligale Commission from publishing its report.

27. **THAT** in particular, in High Court Petition Number 72 of 2010, Musinga J, held: a) The IIBRC had exclusive mandate to determine the issues relating to delimitation b) The process undertaken by IIBRC was in accordance with the law and which ruling, to the best of my knowledge has not been appealed against. annexed and marked “**PT 12(A)**” is a copy of the said ruling.
28. **THAT** prior to the lapse of its tenure on November 27, 2010 the Ligale Commission presented its Report on delimitation of constituencies and recommendations on Local Authority Electoral Units and Administrative Boundaries for districts and other units to Parliament and the same was debated and adopted by Parliament (annexed hereto and marked “**PT.13**”, “**PT.14**” “**PT.14(A)**” “**PT.14(B)**” and “**PT.14(C)**” are certified copies of the Parliamentary Hansard, copy of the IIBRC report and other relevant correspondence thereto).
29. **THAT** in adopting the Ligale Report, Parliament noted that there were matters arising, which required further resolution and thus Parliament resolved that the Independent Electoral and Boundaries Commission would resolve the same.
30. **THAT** as Parliament was debating the Ligale report, the Independent Electoral and Boundaries Commission Bill was before Parliament and it was resolved to address the matters arising through the IEBC Bill (annexed hereto and marked **pt15** is a copy of the parliamentary hansard on the iebc bill debate.).
31. **THAT** Parliament in its bid to resolve matters arising hereinabove, introduced Section 36 of the IEBC Act and the Fifth Schedule thereof to address the issues arising from the First review.
32. **THAT** arising from the foregoing, I now set out herein below the manner in which the Commission discharged its constitutional mandate.
33. **THAT** the Commission was guided by the provisions of Article 89 (1) and 97(1)(a) of the Constitution that provide for two hundred and ninety constituencies (290).
34. **THAT** the criteria used by the Commission in resolving the matters arising from the process of delimitation incorporated the following considerations:

- a) the applicable population quota;
- b) geographical features and urban centres;
- c) community of interest, historical and cultural ties and
- d) means of communication

35. **THAT** in applying the criteria in paragraph 36 hereinabove, the Commission employed statistical and geographical information system (GIS) modelling which processes involved the collection and analysis of data from;

- i. The Kenya National Population and Housing Census as published by the Kenya National Bureau of Statistics.
- ii. Geographical details from the Survey of Kenya
- iii. Kenya Forestry Services on National Forest cover
- iv. Kenya Wildlife Service on coverage of national parks and game reserves.
- v. Water Resources Management Authority on coverage and extent of water bodies.
- vi. Kenya Roads Board on extent and coverage of National Road Network.
- vii. Communication Commission of Kenya on the national Communication Network.
- viii. The Report of the Task Force on Devolved Government (TFDG) Report.
- ix. The Report of the parliamentary committee on the report of the former Boundaries Commission.
- x. The Justice and Legal Affairs Committee Report on the revised preliminary report.
- xi. The resolution of Parliament received by the Commission on March 1, 2012.

- xii. Oral Submissions and written memoranda from all interested parties including the general public, various government departments, the political class among others.
- xiii. Annexes of the various reports and documents.

Annexed hereto marked “PT. 14 D” are copies correspondence from the Commission seeking the various reports and data and a copy of a letter seconding staff from Survey of Kenya to the Commission.

- 36. **THAT** the Commission in applying the methodology with respect to the delimitation of electoral units employed a formula based on the provisions of Article 89(12) of the Constitution to derive inter alia, the population quota which is provided for as: Total Population of Kenya divided by total number of constituencies under the Constitution.
- 37. **THAT** Article 89(7)(b) of the Constitution provides for progressive efforts to be made towards achieving population equality and in undertaking the review of electoral units the Commission approached the task with this requirement in mind.
- 38. **THAT** to demonstrate the above, at the beginning of the first review the constituency with the highest population was Embakasi with 925,775 persons and the Constituency with the lowest population was Lamu East Constituency with 18,841 persons.
- 39. **THAT** at the end of the delimitation process Lamu East remained at 18,841 persons as it is protected under Section 27 (4) of the Sixth Schedule to the Constitution, however, the Constituency with the highest population was now Mandera South with a population of 247,619 persons.
- 40. **THAT** in applying the population quota to the constituencies set out in paragraphs 38 and 39 herein above, the percentage deviation from the population quota for Embakasi Constituency at the beginning of the first review was 595% to minus (-) 86% for Lamu East Constituency and to this end I shall refer this Honourable Court to the content of the population census result of the said areas as contained in the 2009 Kenya Population and Housing Census volume 1B pages 18 to 19,
- 41. **THAT** at the end of the delimitation exercise the Constituency with the greatest deviation from the population quota was Mandera South which is at

plus(+) 86% as compared to Lamu which is at minus(-) 86% and to this end I shall refer this Honourable Court to the content of the population census result of the said areas as contained in the 2009 Kenya Population and Housing Census volume 1B pages 18 to 19, The National Assembly Constituency and County Assembly Wards Order, 2012 and The Final Report of The Proposed Boundaries of Constituency and Wards Volume 1(refer to annexures marked “**PT.8**”, “**PT.9**” and “**PT.16**”)

42. **THAT** I also annex here to Marked as “**PT.15 (A)**” and “**PT.15(B)**” correspondence between the Chairperson of the Commission and the Minister of State for Planning National Development and Vision 2030 by which the Minister availed census results to the Commission.
43. **THAT** in determining the applicable population quota under Article 89(12) of the Constitution, the Commission took the total population of Kenya to be 38,610,097 persons as enumerated in The 2009 Kenya National Population and Housing Census (hereinafter, the census results) as published by the Kenya National Bureau of Statistics. (annexed hereto and marked “**PT.16**” is a copy of the said census results).
44. **THAT** therefore taking the enumerated population of 38,610,097 persons as above stated and dividing by 290 constituencies results into a population quota of 133,138 persons per constituency, a result envisaged under Article 89(12) of the Constitution.
45. **THAT** under Clause 2(b)(ii) of the Fifth Schedule of the IEBC Act, the Commission was obligated to use enumerated National Census Figures and not projected figures and as such the Commission was to use the 2009 census results herein above.
46. **THAT** indeed, I am aware and have been advised by the Commission’s Advocates on record which advice I verily believe to be true that the **High Court of Kenya (in Misc. App. No. 309 of 2010 (in the matter of an application for Judicial Review Orders of certiorari and prohibition, R V Minister of State for Planning & Two Others ex-parte Noor Maalim Hussein & 4 Others)** upheld the validity of the 2009 census results (annexed hereto and marked “**PT.17**” is a copy of the Court Order confirming the said).
47. **THAT** Article 89 (6) of the Constitution provides that:

“The number of inhabitants of a constituency or ward may be greater or lesser than the population quota by a margin of not more than- (a) forty per cent for cities and sparsely populated areas; and (b) thirty per cent for the other areas”

48. THAT according to the said Article 89 (6) of the Constitution, the permitted variation from the population quota for the various areas there under are as follows;

VARIATION TO POPULATION QUOTA	CONSTITUTIONAL VARIATION TO POPULATION QUOTA	AREA TO WHICH VARIED QUOTA IS APPLICABLE
+ 40%	186,393	City
- 40%	79,883	Sparse
+ 30%	173,079	Other Areas (Upper limit)
- 30%	93,197	Other Areas (Lower limit)

Population Quota = 133,138

49. THAT applying the foregoing formulae to the specific constituencies the results are as follows:

Table 6: 210 Constituency Populations (2009 National Census) and Classification of Constituencies¹²³

National Population - 38,610,097

Total Surface Area for the country (Sq Km) - 581,313.20

Constituency	Constituency Area	Population Density	Population	Classification
Makadara	20	10,878	218,641	City
Kamukunji	12	22,381	261,855	City
Starehe	11	25,906	274,607	City
Langata	223	1,590	355,188	City
Dagoretti	39	8,516	329,577	City
Westlands	98	2,532	247,102	City
Kasarani	86	6,133	525,624	City
Embakasi	208	4,434	925,775	City

¹²³ Article 89(6) of the Constitution

Constituency	Constituency Area	Population Density	Population	Classification
North Horr	38,953	2	75,196	Sparsely populated
Laisamis	20,266	3	65,669	Sparsely populated
Isiolo South	9,817	4	43,118	Sparsely populated
Samburu East	10,142	6	59,094	Sparsely populated
Fafi	15,974	6	95,212	Sparsely populated
Garsen	16,013	6	96,664	Sparsely populated
Wajir South	21,424	6	130,070	Sparsely populated
Galole	9,657	6	60,866	Sparsely populated
Isiolo North	15,881	6	100,176	Sparsely populated
Bura	12,796	6	82,545	Sparsely populated
Voi	10,348	9	89,458	Sparsely populated
Ijara	9,994	9	92,663	Sparsely populated
Turkana North	35,000	11	374,414	Sparsely populated
Moyale	9,390	11	103,799	Sparsely populated
Lamu East	1,663	11	18,841	Sparsely populated
Turkana South	18,622	12	226,379	Sparsely populated
Kitui South	12,544	13	166,050	Sparsely populated
Wajir West	12,800	13	171,948	Sparsely populated
Wajir North	9,493	14	135,505	Sparsely populated
Samburu West	10,985	15	164,853	Sparsely populated
Taveta	4,205	16	67,665	Sparsely populated
Turkana Central	14,766	17	254,606	Sparsely populated
Wajir East	12,979	17	224,418	Sparsely populated
Lamu West	4,504	18	82,698	Sparsely populated
Lagdera	13,297	18	245,123	Sparsely populated
Kajiado Central	8,142	20	162,278	Sparsely populated
Kajiado South	6,356	22	137,496	Sparsely populated
Saku	2,078	22	46,502	Sparsely populated
Mutito	5,037	25	126,711	Sparsely populated
Baringo East	4,525	29	133,189	Sparsely populated
Narok South	10,444	30	317,844	Sparsely populated
Dujis	5,688	33	190,062	Sparsely populated
Mwingi North	5,773	35	204,932	Sparsely populated

Constituency	Constituency Area	Population Density	Population	Classification
Mandera Central	11,648	36	417,294	Sparsely populated
Mandera West	8,631	37	319,775	Sparsely populated
Mwatate	1,873	38	71,513	Sparsely populated
Laikipia East	4,460	39	174,796	Sparsely populated
Kacheliba	3,856	40	156,011	Sparsely populated
Mwingi South	4,258	42	180,016	Sparsely populated
Mogotio	1,364	45	60,959	Sparsely populated
Ganze	2,902	46	132,688	Sparsely populated
Mandera East	6,195	47	288,687	Sparsely populated
Malindi	5,334	47	249,355	Sparsely populated
Laikipia West	4,769	47	224,431	Sparsely populated
Kinango	4,008	52	209,560	Sparsely populated
Kajiado North	7,405	52	387,538	Sparsely populated
Baringo North	1,695	55	93,789	Sparsely populated
Narok North	4,654	56	258,544	Sparsely populated
Sigor	2,902	61	175,616	Sparsely populated
Magarini	2,417	63	151,159	Sparsely populated
Kibwezi	3,955	63	248,704	Sparsely populated
Baringo Central	2,426	67	162,351	Other areas
Kapenguria	2,306	79	181,063	Other areas
Wundanyi	702	80	56,021	Other areas
Tharaka	1,570	83	130,098	Other areas
Kitui West	1,843	86	159,367	Other areas
Msambweni	3,235	89	288,393	Other areas
Masinga	1,411	89	125,940	Other areas
Kilgoris	2,846	96	274,532	Other areas
Gachoka	1,315	99	130,185	Other areas
Ndaragwa	934	99	92,626	Other areas
Marakwet East	783	101	78,749	Other areas
Eldama Ravine	942	112	105,273	Other areas
Kieni	1,556	113	175,812	Other areas
Siakago	777	115	89,035	Other areas
Makueni	2,011	121	243,219	Other areas
Keiyo South	898	122	109,160	Other areas

Constituency	Constituency Area	Population Density	Population	Classification
Naivasha	2,837	133	376,243	Other areas
Rongai	1,222	134	163,864	Other areas
Marakwet West	805	135	108,374	Other areas
Keiyo North	541	136	73,715	Other areas
Yatta	1,059	139	147,579	Other areas
Kilome	630	139	87,864	Other areas
Matuga	1,052	144	151,978	Other areas
Othaya	600	146	87,374	Other areas
Kuresoi	1,596	150	239,485	Other areas
Mwala	1,015	161	163,032	Other areas
Gwasi	640	161	103,054	Other areas
Igembe South	1,489	170	252,885	Other areas
Igembe North	1,327	173	229,871	Other areas
North Imenti	1,484	174	258,947	Other areas
Kipipiri	544	175	95,338	Other areas
Kitui Central	979	179	175,633	Other areas
Mt. Elgon	944	183	172,377	Other areas
Central Imenti	761	186	141,768	Other areas
Kipkelion	1,103	187	206,590	Other areas
Tetu	418	187	78,320	Other areas
Eldoret East	1,251	193	241,451	Other areas
Mbooni	951	194	184,624	Other areas
Kathiani	1,163	210	243,719	Other areas
Kwanza	1,119	211	236,218	Other areas
Tinderet	938	213	199,514	Other areas
Nyatike	676	214	144,625	Other areas
Nithi	1,093	215	235,232	Other areas
Tigania East	723	217	157,246	Other areas
Muhoroni	666	219	145,764	Other areas
Ol-Kalou	974	222	215,925	Other areas
Mosop	736	223	164,430	Other areas
Kinangop	853	226	192,379	Other areas
Machakos Town	822	242	199,211	Other areas
Ndhiwa	709	243	172,212	Other areas
South Imenti	737	244	179,604	Other areas

Constituency	Constituency Area	Population Density	Population	Classification
Molo	1,198	253	302,618	Other areas
Eldoret South	989	264	261,073	Other areas
Mbita	416	268	111,409	Other areas
Bondo	587	268	157,522	Other areas
Kangundo	813	269	219,103	Other areas
Gatanga	603	271	163,597	Other areas
Kaloleni	909	278	252,924	Other areas
Lari	441	281	123,895	Other areas
Kaiti	418	287	120,116	Other areas
Kangema	260	296	76,988	Other areas
Aldai	524	301	157,967	Other areas
Uriri	380	304	115,751	Other areas
Chepalungu	537	305	163,833	Other areas
Gichugu	405	308	124,672	Other areas
Cherangany	627	311	195,173	Other areas
Alego	599	313	187,243	Other areas
Maragwa	468	326	152,272	Other areas
Emgwen	702	329	231,054	Other areas
Runyenjes	430	331	142,360	Other areas
Bahari	968	334	323,609	Other areas
Konoin	414	336	139,114	Other areas
Mathioya	262	336	88,219	Other areas
Rarieda	400	337	134,558	Other areas
Tigania West	402	338	135,980	Other areas
Nyando	412	342	141,037	Other areas
Mathira	434	343	148,847	Other areas
Gatundu North	289	348	100,611	Other areas
Ainamoi	520	349	181,509	Other areas
Mwea	541	352	190,512	Other areas
Funyula	264	354	93,500	Other areas
Budalang'i	187	358	66,723	Other areas
Eldoret North	1,088	360	391,655	Other areas
Belgut	560	362	202,591	Other areas
Ndia	270	369	99,515	Other areas
Karachuoonyo	438	370	162,045	Other areas
Nyakach	359	371	133,041	Other areas

Constituency	Constituency Area	Population Density	Population	Classification
Subukia	570	371	211,691	Other areas
Shinyalu	410	389	159,475	Other areas
Ugenya	518	390	202,306	Other areas
Migori	481	398	191,248	Other areas
Gem	403	399	160,675	Other areas
Kisumu Rural	361	402	144,907	Other areas
Kigumo	293	422	123,766	Other areas
Rangwe	451	431	194,408	Other areas
Kirinyaga Central	263	432	113,355	Other areas
Kasipul Kabondo	507	435	220,666	Other areas
Lugari	670	436	292,151	Other areas
Kuria	581	441	256,086	Other areas
Kiharu	407	445	181,076	Other areas
Rongo	468	447	209,460	Other areas
Bomet	514	454	233,271	Other areas
Amagoro	559	458	255,871	Other areas
Mukurwe-ini	180	466	83,932	Other areas
Limuru	281	467	131,132	Other areas
Nambale	428	481	205,982	Other areas
Malava	424	484	205,166	Other areas
Butula	245	497	121,870	Other areas
North Mugirango Borabu	464	517	239,443	Other areas
Manyatta	299	518	154,632	Other areas
Bumula	345	519	178,897	Other areas
Saboti	741	523	387,366	Other areas
Buret	320	524	167,649	Other areas
Sirisia	447	545	243,535	Other areas
Matungu	260	564	146,563	Other areas
Webuye	401	574	230,253	Other areas
Kimilili	556	576	320,300	Other areas
Gatundu South	192	594	114,180	Other areas
Juja	747	651	486,121	Other areas
Mumias	326	652	212,818	Other areas

Constituency	Constituency Area	Population Density	Population	Classification
Kandara	237	661	156,663	Other areas
Butere	210	666	139,780	Other areas
Nyeri Town	168	710	119,273	Other areas
Lurambi	417	713	297,394	Other areas
Khwisero	143	716	102,635	Other areas
Kanduyi	319	720	229,701	Other areas
Ikolomani	143	732	104,669	Other areas
Nyaribari Masaba	162	756	122,070	Other areas
Hamisi	189	784	148,259	Other areas
Kitutu Masaba	253	788	199,136	Other areas
Bobasi	239	794	190,074	Other areas
South Mugirango	200	794	159,049	Other areas
Githunguri	175	843	147,763	Other areas
West Mugirango	180	887	159,673	Other areas
Bonchari	126	907	114,615	Other areas
Bomachoge	221	907	200,729	Other areas
Kisumu Town West	144	972	139,933	Other areas
Kitutu Chache	229	977	223,356	Other areas
Vihiga	90	1,018	91,616	Other areas
Emuhaya	173	1,070	185,069	Other areas
Nyaribari Chache	132	1,076	142,389	Other areas
Kabete	236	1,124	265,829	Other areas
Nakuru Town	263	1,179	309,424	Other areas
Sabatia	110	1,179	129,678	Other areas
Kiambaa	191	1,332	253,751	Other areas
Kisumu Town East	146	1,810	264,227	Other areas
Likoni	53	3,304	176,426	Other areas
Kisauni	113	3,602	405,930	Other areas
Sotik	555	4,444	187,968	Other areas
Changamwe	57	4,987	282,279	Other areas
Mvita	7	10,831	74,735	Other areas

A. Cities

Nairobi

B. Sparsely Populated Areas

Those constituencies with a reported population density below the national population density i.e. 66 persons per square kilometer.

C. Other Areas

Areas not being cities or sparsely populated areas and with a population density greater than 67 persons per square kilometre.

APPENDIX V: RESEARCH AUTHORIZATION



NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

Telephone: 020 400 7000,
0713 788787,0735404245
Fax: +254-20-318245,318249
Email: dg@nacosti.go.ke
Website: www.nacosti.go.ke
When replying please quote

NACOSTI, Upper Kabete
Off Waiyaki Way
P.O. Box 30623-00100
NAIROBI-KENYA

Ref. No. **NACOSTI/P/17/97754/19488**

Date: **10th October, 2017**

Ruth Kavuo Makuthu
University of Nairobi
P.O. Box 30197-00100
NAIROBI.

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on "*The nexus between conduct of elections and delimitation of electoral boundaries in Kenya*" I am pleased to inform you that you have been authorized to undertake research in **Nairobi County** for the period ending **9th October, 2018.**

You are advised to report to **the Chief Executive Officer, Independent Electoral and Boundaries Commission, the County Commissioner and the County Director of Education, Nairobi County** before embarking on the research project.

Kindly note that, as an applicant who has been licensed under the Science, Technology and Innovation Act, 2013 to conduct research in Kenya, you shall deposit **a copy** of the final research report to the Commission within **one year** of completion. The soft copy of the same should be submitted through the Online Research Information System.

**GODFREY P. KALERWA MSc., MBA, MKIM
FOR: DIRECTOR-GENERAL/CEO**

Copy to:

The Chief Executive Officer
Independent Electoral and Boundaries Commission.

The County Commissioner
Nairobi County.

APPENDIX VI: RESEARCH PERMIT

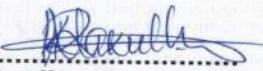
**THIS IS TO CERTIFY THAT:
MISS. RUTH KAVUO MAKUTHU
of UNIVERSITY OF NAIROBI, 56229-200
NAIROBI, has been permitted to conduct
research in Nairobi County**


**Permit No : NACOSTI/P/17/97754/19488
Date Of Issue : 10th October,2017
Fee Recieved :Ksh 1000**

**on the topic: THE NEXUS BETWEEN
CONDUCT OF ELECTIONS AND
DELIMITATION OF ELECTORAL
BOUNDARIES IN KENYA**

**for the period ending:
9th October,2018**




.....
**Applicant's
Signature**


.....
**Director General
National Commission for Science,
Technology & Innovation**

APPENDIX VII: EXTRACT OF PRELIMINARY REPORT

REPUBLIC OF KENYA



**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION**

**PRELIMINARY REPORT ON THE FIRST
REVIEW RELATING TO THE
DELIMITATION OF BOUNDARIES OF
CONSTITUENCIES AND WARDS**

9TH JANUARY 2012

APPENDIX VIII: LEGAL NOTICE NO. 14 OF 2012

[Rev. 2016]

*Independent Electoral and
Boundaries Commission*

No. 9 of 2011

[Subsidiary]

**NATIONAL ASSEMBLY CONSTITUENCIES AND COUNTY
ASSEMBLY WARDS ORDER**

[L.N. 14/2012.]

1. This Order may be cited as the National Assembly Constituencies and County Assembly Wards Order, 2012.
2. The Parliamentary Constituencies Review Order, as appearing in Legal Notice No. 298 of 1996 is hereby revoked.
3. Pursuant to Article 89(1) of the Constitution, there shall be two hundred and ninety constituencies for the purposes of the election of the members of the National Assembly provided for in Article 97(1)(a).
4. This Order determines the number, names and delimitation of boundaries for constituencies and county assembly wards; and the specific geographical and demographical details relating to such delimitation.
5. The attached Schedule outlines the number and the name of the counties, constituencies and county assembly wards, the population based on the 2009 Kenya National Population and Housing Census, the surface area of the constituencies and county assembly wards in square kilometres and the description of the county assembly wards made up of sub-locations based on the 2009 Kenya National Population and Housing Census.
6. Pursuant to Article 89(9) of the Constitution and Paragraph 3(6) of the Fifth Schedule of the Independent Electoral and Boundaries Commission Act; this Order shall have effect from 7th March, 2012.

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[Issue 3]