

THE UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**REFORMING ELECTIONS MANAGEMENT AND
ADMINISTRATION IN KENYA: THE CASE FOR
INDEPENDENT ELECTORAL AND BOUNDARIES
COMMISSION (IEBC)**

BY

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JULY 2016

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DEDICATION

This thesis is dedicated to the people of Kenya who desperately yearn for stronger, more responsive democratic institutions and democratic consolidation. May the progressive and transformative Constitution of Kenya 2010 bring with it the desired change in electoral governance in the Country.

ACKNOWLEDGMENT

This research project would not have been completed without the unyielding support of many for which I shall forever be indebted. I thank my family for the support and understanding and for enduring many days without me. Your sacrifice to enable me undertake this study was crucial. Secondly, I acknowledged the contribution, comments and input of my supervisor Prof. Musili Wambua. Our initial meeting helped to focus my thoughts and perspectives to the topic at hand. I also wish to thank all the respondents who participated in the study and especially your concurrence with the topic as an important step in consolidating electoral democracy in Kenya. Your input and recommendations were invaluable without which the final product would have been an impossibility. It would be remiss of me not to acknowledge the insightful contribution and perspectives of the defence team led by Doctor Florence Jaoko, Professors Edwin Abuya and Musili Wambua. Professor Abuya's correction improved on the flow and ensured the document read as one. Finally, I thank my employer the Electoral Institute for Sustainable Democracy in Africa (EISA). The pre- eminent role EISA plays as a leading governance, democracy and elections in Africa was most valuable. The exposure you accorded me to work on elections both regionally and sub-regionally helped prepare me to engage constructively with the research topic.

LIST OF LAWS

International

African Charter on Democracy, Elections and Governance.

African Charter on Human and People's Rights.

Durban Declaration on the Principles of Governance, Democracy and Elections in Africa.

International Covenant on Civil and Political Rights.

Statute of the International Court of Justice.

Universal Declaration on Human Rights.

Municipal

Constitution of Kenya, 2010.

Constitution of Kenya, 1969 as amended in 1992 (repealed).

Elections Act, 2011.

Electoral Campaign Financing Act, 2013.

Independent Electoral and Boundaries Commission Act, 2011.

National Assembly and Presidential Elections Act, 1992 (repealed).

Political Parties Act, 2012.

Elections (General) Regulations, 2012.

LIST OF CASES

Diana Kethi Kilonzo and another v IEBC and 2 others (High Court Petition No. 359 of 2013)

Edward Okong'o Oyugi v IEBC & 2 others ((HC EP No. 3 of 2013).)

Jose Sivan Pillai and others (1984) AIR 921

Kalembe Ndile v Patrick Musimba & others ((HC EP No. 1 of 2013, Machakos).

New Vision (NVK Mageuzi & others v IEBC and 5 others, (2014 eKLR).

Phillip Mukui Wasike v James Lusweti, IEBC and others (HC EP No. 5 of 2013).

Raila Odinga v IEBC and 3 others (Supreme Court Petition No. 5 of 2013)

Republic v IEBC *ex parte* Eliot Ludubwi & 5 others (HC JR Msc. App. No. 94 of 2012.

Reynolds v Sims (US Supreme Court, 1964).

Thomas Musau v IEBC & another ((HC EP No. 2 of 2013).)

William Odhiambo Oduol v Cornel Rasanga and another ((HC EP No. 1 of 2013, Kisumu).

LIST OF ABBREVIATIONS

AfriCOG	African Centre for Open Governance
AU	African Union
BVR	Biometric Voter Registration
CSO	Community Service Organisation
ECK	Electoral Commission of Kenya
EDR	Electoral Dispute Resolution
EISA	Electoral Institute for Sustainable Democracy in Africa
EVID	Electronic Voter Identification Device
EU	European Union
FPTP	First Past The Post
GCG	Grand Coalition Government
ICCPR	International Covenant on Civil and Political Rights
ICT	Information Communication Technology
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electoral Systems
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IPPG	Inter-Party Parliamentary Group
IREC	Independent Review Committee
MP	Member of Parliament
NGO	Non-Governmental Organisation
OMR	Optical Marker Reader
PIL	Public International Law
PVT	Parallel Vote Tabulation
RDS	Results Display System
RO	Returning Officer
RTS	Results Transmission System
TCC	The Carter Centre
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
USA	United State of America

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CHAPTER ONE

INTRODUCTION: OVERVIEW AND OUTLINE

Abstract

The challenges of designing an effective electoral management system are related to the recurring theme of governance and public administration. Perhaps more so because of the legitimacy issues which inevitably attend to the establishment of a popular government in liberal democracies. Over the last decade, electoral management has emerged as an important aspect of democracy building and consolidation. To cut the inherent agency problems in governance, insulate electoral process from the reach of an interested incumbent, guarantee expression of the will of the people, facilitate fair political competition and the fussy relations between electoral administration and politics present the imminent problems of designing an administrative model for election management. Like in many parts of the continent, the consolidation of electoral democracy in Kenya still poses numerous challenges ranging from the legal and institutional framework for elections, to the resolution of electoral disputes. The promulgation of the Constitution of Kenya 2010, heightened expectation and optimism that the challenges that had characterised the electoral process in the past would be remedied. Paradoxically, the challenges of managing election persisted despite the new constitutional, legal and institutional framework. The foregoing poses a number of interrelated questions. First, is the constitutional and legal framework for elections capable of guaranteeing credible elections? Secondly, does the organisational structure of IEBC enhance or facilitate fair competition in the electoral process? This research project attempts to unpack the correlation between the legal and institutional framework for managing elections and its impact during the 2013 elections. In so doing, the research examines the conduct of IEBC within the context of the 2013 elections in Kenya and

make recommendations for reforming and strengthening the credibility of the electoral process in Kenya.

1.1 Background and Introduction

Over the last decade, electoral democracy in Africa has been subjected to its most severe test. Although majority of the fifty four countries¹ in the continent reverted back to multi-party democracy in the early 1990s, and have, over the intervening period held periodic elections, most of these elections did not meet the democratic test of credible, free, fair and peaceful.² Examples from Nigeria, Kenya, Zimbabwe, Ivory Coast, Uganda, vindicate the foregoing claim.³ On a positive note, however, few countries, among them Ghana, South Africa, Botswana, Zambia and Senegal held elections that were in compliance with the legal and constitutional framework and met the credibility test as was affirmed by both local and international observers.⁴

Comparatively across the continent, weak constitutional, legal and institutional framework was manifestly evident throughout the electoral cycle which also lacked clear mechanism for resolving the electoral disputes. As was witnessed in Kenya, Nigeria, Zimbabwe and Ivory Coast, the electoral process was accompanied by unprecedented violence that led a number of scholars to conclude that electoral violence had become a new manifestation of conflict in post-cold war Africa.⁵ Fundamentally, a major feature across the failed election was weak election management and administration, with Elections Management Bodies (EMBs)

¹ Gilbert Khadiagala, 'Reflections on the Causes, Courses and Consequences of Election Violence in Africa' in Khabele Matlosa, Gilbert Khadiagala and Victor Shale (eds), *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa* (EISA 2010) 3.

² The Carter Center, 'Elections Obligations and Standards; A Carter Center Assessment Manual' (2014) 2 < <https://www.cartercenter.org/resources/pdfs/peace/democracy/cc-OES-handbook-10172014.pdf>> accessed 02 April 2015.

³ Felix Owuor, 'Electoral Dispute Resolution in Kenya' (Law Society Annual Conference, Mombasa, 2012) 1.

⁴ *ibid.*

⁵ John Oucho, 'The Political Economy of Violence in Kenya' in Karuti Kanyinga and Duncan Okello (eds), *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections* (Society for International Development and Institute for Development Studies University of Nairobi 2010) cap 5.

exhibiting open bias, incompetence and structural inadequacies that compromised the entire process.

Since the reintroduction of multi-party elections in Kenya in 1991, the country has held five elections. The first election was held in 1992 and thereafter every five years in accordance with the constitution and election laws, with the exception of the 2013 elections which exceeded the five year period owing to the constitutional implementation agenda.⁶ While considerable progress has been made in the democratic landscape, the five elections held in Kenya exhibited weaknesses and challenges in the legal and institutional framework.⁷ Using Kenya as a case study, this research analysed the interaction of fundamental prerequisites for democratic consolidation including constitutional and institutional framework, and election management in Kenya. To this end the conduct of the Independent Electoral and Boundaries Commission (IEBC) and its constitutional and statutory functions, and the conduct of the 2013 elections were examined.

Thematically, an assessment of election management in Kenya is divided into five parts: constitutional and legal framework underpinning election management and administration; organisational structure, composition and function of the IEBC; the role of the IEBC in the preparatory stages of the elections and whether the preparatory work is designed to facilitate credible elections; role of the IEBC on election day activities (counting, tabulation, and transmission of results; and finally the jurisdiction of IEBC on pre-election dispute resolution. The study took cognisance of the fact that Kenya promulgated a new constitution in 2010 and enacted the election sector laws as part of compliance with the new constitutional framework. The study examined the impact of the new legal framework on the performance

⁶ See the transitional sections (Schedule 5 and 6) of the Constitution of Kenya, 2010 on the timelines for the implementation and the enactment of the requisite legal framework.

⁷ Karuti Kanyinga, Duncan Okello and Akoko Akech, 'Contradictions of Transition to Democracy in Fragmented Societies: The Kenya 2007 General Elections in Perspective' in Karuti Kanyinga and Duncan Okello (eds), *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections* (Society for International Development and Institute for Development Studies University of Nairobi 2010) 3.

of the IEBC and interrogated the same within the context of 2013 election. A critical aspect of the research involved an assessment of the implementation of recommendations contained in the Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007.

1.2 Statement of the Problem

The Kriegler Commission appointed in 2008 to inquire the conduct of the disputed 2007 elections made radical recommendations for strengthening the electoral process and election management in Kenya. Recommendations contained in the Kriegler report led to the disbandment of the Electoral Commission of Kenya (ECK), and informed provisions on Representation of the People in the 2010 Constitution⁸. Despite the transformative and progressive nature of the Constitution, complete with new legal and institutional framework for elections, the 2013 elections experienced numerous challenges and shortcomings that fell below the public expectations. The period after the enactment of the Constitution and the run up to the 2013 elections saw increased public confidence on the legal and institutional framework for elections. However, the new framework did not translate into a credible electoral process which has remained a mystery and a puzzle for many. Accordingly, the research endeavoured to address the problem of why the new constitutional, legal and administrative framework for elections management and administration enacted in post 2010 did not enhance the credibility and transparency of the 2013 elections in Kenya

1.3 Objectives of the Study

The objectives of the research were to-

- examine the constitutional and legal framework for elections management and administration in Kenya;

⁸ Constitution of Kenya, 2010, Chapter 7

- assess the organisational and functional structure of the IEBC and whether the structure as designed can enhance free, fair and credible elections;
- examine the role of election management in facilitating credible elections within the context of 2013 general elections; and
- make recommendations for strengthening electoral management and administration in Kenya as a prerequisite to consolidating electoral democracy.

1.4 Research Questions

The study sought to answer the following questions:

- a) Is the constitutional and legal framework for election management and administration in Kenya sufficient to guarantee credible, free and fair elections?
- b) What is the organisational structure of IEBC and does the structure enhance election management and administration?
- c) What are the gaps inhibiting effective performance of IEBC?
- d) What measures can be taken to enhance the performance of the IEBC and improve its efficiency in managing elections?

1.5 Hypothesis

Essentially, the study proceeded from the hypothesis that sound constitutional, legal and institutional framework for election management and administration will enhance the credibility of elections in Kenya. A related hypothesis flowing from the foregoing was that weak and poor election management and administration leads to disputed results which if not well managed may spiral into full blown election violence. It is conceded that while reforming election management and administration will go a long way in strengthening the electoral process in Kenya, sustainable reforms should extend to other critical players in the electoral process. To this end, a multi sectoral and participatory approach is key to enhancing

the credibility of the electoral process. The correlation between sound legal and administrative framework and election management is consistent with experimental research hypothesis, which establishes the linkage between variables. In this regard, the researcher posited that “comprehensive review of the legal and administrative framework has an impact on the credibility of election management and administration”.

1.6 Theoretical Framework

The theories of electoral governance essentially emanate from Western democracies and are premised on participatory governance and the use of law and institutions to enhance and facilitate inclusive participation. The study examined two theories namely Liberal Democracy as a legal theory and the New Institutionalism theory.

1.6.1 Liberal Democracy as a Legal Theory

Democracy as conceptual and theoretical framework has lent itself to complex and multifaceted definition. Despite the many definitions, the consensus has been established across various disciplines that the origin and meaning of democracy can be traced from ancient Greek word ‘demos’ meaning the people and ‘kratein’ to rule⁹. Democracy thus denotes the power and participation of the people over their own affairs. Comparatively around the world different forms of democracy exist. These include social democracy, representative democracy, liberal democracy, monarchies, among others.

While different types of democracies proceed from the conceptual framework of citizens’ participation, it is the liberal democracy theory and its various underpinnings that aptly captured the objectives of this research. The relevance of liberal democracy theory is underscored by the fact that it is the most predominant practice in most established

⁹ Kenneth Bollen, ‘Liberal Democracy: Validity and Method Factors in Cross National Measures’ (1993) 37(4) American Journal of Political Science 1207, 1208.

democracies.¹⁰ Secondly, following the end of the cold war, other forms of democracies have been on a declining trend.¹¹ The prominent role occupied by the people in the democratic participation was aptly captured by President Abraham Lincoln of the United States of America during the Gettysburg Address in the middle of American Civil War in 1864, ‘... the nation, shall have a new birth of freedom, and that government of the people, by the people and for the people shall not perish from the earth.’¹²

Kenneth Bollen defines liberal democracy as the extent to which political system allows political liberties and democratic rule.¹³ Democratic rule and citizens participation in the democratic process is further amplified by Schumpeter who defined liberal democracy as ‘an institutional arrangement for arriving at political decisions in which the individuals acquire the power to decide by means of competitive struggle for the peoples vote’.¹⁴ While a general acceptance has emerged on the multi- disciplinary nature of liberal democracy theory, it is the definition advanced by Fareed Zakaria that establishes liberal democracy as a legal theory. Fareed Zakaria, defines liberal democracy as, ‘A political system marked not only by free and fair elections, but also by the rule of law, separation of powers and the protection of basic liberties of speech, assembly, religion and property’.¹⁵ According to Zakaria, besides free and fair elections, the other aspects of liberal democracy fall under ‘Constitutional Liberalism’. Liberal democracy as a legal theory marries two closely connected ideas. It is liberal because it draws on the philosophical strain, beginning with the Greeks, that emphasizes individual

¹⁰ See Mamadou Gazibo, ‘The Forging of Institutional Autonomy: A Comparative Study of Electoral Management Commissions in Africa’ (2006) 39(3) Canadian Journal of Political Science Publication 611.

¹¹ Kenneth Bollen, ‘Liberal Democracy: Validity and Method Factors in Cross National Measures’ (1993) 37(4) American Journal of Political Science 1207, 1208.

¹² President Abraham Lincoln’s Gettysburg Address (19 November 1863) <<http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>> accessed 20 July 2015.

¹³ *ibid.*

¹⁴ Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge 2003) 250.

¹⁵ Fareed Zakaria, ‘The Rise of Illiberal Democracy’ (1997) 76(6) Foreign Affairs 22, 22.

liberty. It is constitutional because it rests on the tradition, beginning with the Romans, of the rule of law.¹⁶

The various definitions of liberal democracy have led to the development of global indicators for measuring liberal democracy¹⁷. These indicators isolate the salient features that must be present in a democracy namely; universal suffrage, vibrant media, political pluralism (vibrant political parties), freedom of speech and assembly, and prudent management of the country resources.¹⁸

A critical analysis of liberal democracy theory encompasses four elements: citizens' participation; democratic rule, civil rights and liberties; and the rule of law. The four elements constitute pillars upon which most constitutions are premised.¹⁹ While the foregoing represent key pillars of liberal democracy theory, it is noteworthy to mention that individual or collective theories have emerged to explain the theories further. The government of the people, by the people and for the people as defined by Abraham Lincoln best illustrates the concept of citizens' participation. The meaning of this definition is that the inclusion of citizens in the formation and affairs of government and the responsiveness of the government to the needs of the people are key.²⁰ The right to citizen participation is also underpinned by the theory of *Popular Sovereignty*²¹. The Universal Declaration of Human Rights (UDHR) expressly elaborates both the substance of the right in article 21 which states that, "The will of the people shall be the basis of authority of government, this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be

¹⁶ *ibid* 2.

¹⁷ *See for example* Freedom House Global Indicator on Political Rights and Civil Liberties; The Mo Ibrahim Index, among others.

¹⁸ Robert Fatton, 'Liberal Democracy in Africa' (1990) 105(3) *Political Science Quarterly* 455, 471.

¹⁹ Majority of countries now have Chapters on the Bill of Rights and Fundamental Freedoms.

²⁰ National Democratic Institute, 'Increasing Citizen Participation through Advocacy Efforts: A Guidebook for Program Development' (200) 5-8 <https://www.ndi.org/files/1170_citpart_advocacy122000.pdf> accessed 02 June 2015.

²¹ The notion that no law is legitimate unless it rest on the consent of the people- Thomas Hobbes, John Locke, Jean- Jacques Rousseau.

held by secret vote or by equivalent free voting procedures.”²² Article 21 of the UDHR clearly establishes the nexus between citizens’ participation and the legitimacy to govern.²³

The relationship between the governed and the governors is the essence of what John Locke defined as the Social Contract Theory.²⁴ Citizens’ participation in the democratic process is the hallmark of sovereignty, which is expressed collectively through periodic free and fair elections. Accordingly, political rights and the right to vote are now recognized across many jurisdictions as a fundamental right, which anchors and secures the enjoyment of all other rights. A critical element of the liberal democracy theory is the protection guaranteed in civil rights, fundamental freedoms and liberties. Increasingly, fundamental rights and freedoms are guaranteed in most Constitutions under the Bill of Rights Chapter, and are underpinned by the Natural Law Theory²⁵. Within the context of elections, freedoms of assembly, freedom of speech, freedom of the media, right to form political parties, and political rights are meant to play facilitative role in enabling citizens to participate in the governance process²⁶. Although the doctrine of the Rule of Law exists both as a legal and political theory, conceptually, the Rule of Law represents an important ingredient in the liberal democracy theory. Hillarie Barnett defines the rule of law as either a philosophy or political theory which lays down fundamental requirements of law, or as a procedural device by which those with power rule under the law. The requirement that governmental power and authority should be constrained by law and the individual protection of rights establish the linkage between liberal democracy and the rule of law.²⁷

²² Universal Declaration of Human Rights, Art. 21 (3), GA Res. 217 A (III), U.N. GAOR, 3rd Session, U.N. DOC. A/810, at 71 (1948).

²³ See also International Covenant on Civil and Political rights, Art 19, GA Res 2200, (1966)

²⁴ See also writings of Jean-Jacques Rousseau and Thomas Paine on the Social Contract Theory and Natural Law.

²⁵ Proponents of Natural Law Theory include scholars like Thomas Aquinas, John Austin and Thomas Finnis.

²⁶ Elkilt J and Reynolds A, ‘The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda’ (September 2000) Kellog Institute Working Paper No. 281, 33

²⁷ Hillarie Barnett, *Constitutional and Administrative Law* (5th edn, Routledge 2005) 70.

The clearest exposition of the rule of law was advanced by Albert Venn Dicey who brought out three critical elements of the doctrine namely: lack of arbitrariness and retrospectivity; supremacy of the legally promulgated laws and legal principles that everybody is subjected to; equality before the law. The Rule of Law anticipates the existence of legally binding laws and subject both the individuals and institutions to these laws. In most jurisdictions, electoral process, elective offices and elections administration are established under the constitution and statutory provisions. Non-compliance with the legal framework especially by the electoral management bodies has resulted in elections that fail the legitimacy test. Administrative action of state institutions are remedied by Judicial Review that ensures that acts that are both *intra vires* and *ultra vires* are dealt with within the confines of relief provided for under Judicial Review.²⁸

1.6.2 New Institutionalism Theory

The study of elections administration and management bodies is also underpinned by the theory of New Institutionalism. The theory gained prominence in the 1980s following the resurgence of, and the important role that institutions played in social, political and economic reconstruction²⁹. The proponents of the New Institutionalism Theory, James March and Johan Olsen defined the theory as ‘connoting a general approach to the study of political institutions, a set of theoretical ideas and hypothesis concerning the relations between institutional characteristics and political agency, performance and change’.³⁰ Alistair Cole defines New Institutionalism as focusing on the way in which Institutions embody values and power relationship.³¹

²⁸ *ibid* 75.

²⁹ Bell S, Institutionalism: Old and New (2006), 40

³⁰ James March and Johan Olsen, ‘Elaborating the “New Institutionalism”’ (2005) Centre for European Studies working Paper No. 11, 1 <<http://www.unesco.amu.edu.pl/pdf/olsen2.pdf>> accessed 01 May 2015.

³¹ Alistair Cole, ‘Institutions and Institutionalism’ (2015) 2 <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAAahUKEwjvpZ>>

In a bid to incorporate the earlier conception of New Institutionalism and to draw a parallel between Old and New Institutionalism, Vivien Lowndes defined the theory thus-

“The New Institutionalists concern themselves with informal conventions as well as formal rules and structures. They pay attention to the way in which institutions embody values and power relationships, and they study not just the impact of institutions upon behaviour, but interactions between individuals and institutions”.³²

The theory of New Institutionalism builds upon and expounds on the Old Institutionalism.³³

The central feature distinguishing Old and New Institutionalism is the focus on formal rules and structures as opposed to informal structures.³⁴ Preoccupation with the official structures of government and not the wider institutional context that facilitates or constrains the exercise of power within the formal structures such as government or the legislature is also a point of departure between the Old and the New Institutionalism.³⁵ New Institutionalist theorist such as March and Olsen acknowledged that institutional design encompass both formal and informal structures.³⁶ Caren Cook and Margaret Levi captured the interface between formal and informal institutions more succinctly thus, “The most effective institutional arrangements incorporate a normative system of informal and internalized rules.”³⁷

In its various elements, the theory of New Institutionalism recognizes sound institutional framework as well as the interdependent nature of institutions. While the theory lends itself to different definition, and has relevant application in social, economic and political sectors, the

[rJ7K3IAhWLPPhQKHfBbAOM&url=http%3A%2F%2Fwww.univ-paris1.fr%2Fuploads%2Fmedia%2F2_-Institutions_and_institutionalism-2.ppt&usg=AFQjCNHM_MKLxM4ORa9sSUBbM3VKkWWUtQ&sig2=ExCAKW6slfaziIoTyJTELQ&cad=rja](http://www.univ-paris1.fr/uploads/media/2F2_-Institutions_and_institutionalism-2.ppt&usg=AFQjCNHM_MKLxM4ORa9sSUBbM3VKkWWUtQ&sig2=ExCAKW6slfaziIoTyJTELQ&cad=rja)> accessed 20 June 2015.

³² Vivien Lowndes, ‘Rescuing Aunt Sally: Taking Institutional Theory Seriously in Urban Politics’ (2001) 38(11) *Urban Studies* 1953, 1953.

³³ Stephen Bell, ‘Institutionalism: Old and New’ (2006) 1, <<https://espace.library.uq.edu.au/view/UQ:9699/Institutionalism.pdf>> accessed 20 July 2015.

³⁴ *ibid.*

³⁵ Grubović Ljiljana, ‘New Institutionalism as A new Theoretical Framework for Urban Political Analysis’ (2004) *Spatium* 41, 42.

³⁶ James March and Johan Olsen, ‘The New Institutionalism: Organisational Factors in Political Life’ (1984) 78(3) *The American Political Science Review* 734, 734.

³⁷ Karen Schweers Cook and Margaret Levi (eds), *The Limits of Rationality* (The University of Chicago Press 1990) 409.

key elements that underpin New Institutionalism theory include the Normative Institutionalism; Rational Choice theory; Historical Institutionalism; and Empirical Institutionalism.³⁸ Normative Institutionalism theory argues that individual behaviour are influenced by rules, norms and value system that characterize sound institutional framework and governs the operations of the institutions.³⁹ Accordingly, individual behaviours are fashioned along the normative framework and value system that impact on the choices and decisions individuals make in an institution.

March and Olsen formulated the 'logic of appropriateness' as a tool for shaping the behaviour of individuals within an institution. By contrast the Rationale Choice Theory is premised on the assumption of rationality of individual actors.⁴⁰ The central feature of this approach is the critical role individuals play in an institution. Rationale choice theorists posit that in a given institutional setting, individual utility maximization is the overriding objective.⁴¹ March and Olsen defines Rationale Choice Theory as involving actors who are calculating and motivated by the pursuit of maximization of individual gains.⁴² In legal jurisprudence, the theory of *Utilitarianism*⁴³ that lays emphasis on maximization of individual benefits underlies the Rational Choice Theory. Historical Institutionalism combines elements of rationale choice and normative institutionalism. The theory advocates for the entrenchment of institutions which transcends individual choices and desires.

The central thesis of historical institutionalism is sound rules (normative framework) and individuals' desires and goals are aimed not at maximization of benefits (rationale choice) but

³⁸ James March and Johan Olsen, 'Elaborating the "New Institutionalism"' (2005) Centre for European Studies working Paper No. 11, 5 <<http://www.unesco.amu.edu.pl/pdf/olsen2.pdf>> accessed 01 May 2015.

³⁹ *ibid*, 6.

⁴⁰ Stephen Bell, 'Institutionalism: Old and New' (2006) 6, <<https://espace.library.uq.edu.au/view/UQ:9699/Institutionalism.pdf>> accessed 20 July 2015.

⁴¹ Grubović Ljiljana, 'New Institutionalism as A new Theoretical Framework for Urban Political Analysis' (2004) *Spatium* 41, 43.

⁴² James March and Johan Olsen, 'Elaborating the "New Institutionalism"' (2005) Centre for European Studies working Paper No. 11, 18 <<http://www.unesco.amu.edu.pl/pdf/olsen2.pdf>> accessed 01 May 2015.

⁴³ Propagated by Jeremy Bentham, theory involves utility and utilitarian calculus.

are directed towards the wellbeing of the institution⁴⁴. The concept of *Path Dependence* amplifies the important role that institutions play in historical institutionalism. Proponents of path dependence theory argue that at formation institutions are cast along a predictive path that determines the progress and trajectory of institutions.⁴⁵ Institutional policies are path dependent and once launched on that path, they continue along the path until some sufficiently strong political force deflects them from it.⁴⁶ Critics of path dependence, opine that this approach cast institutions as static entities that are not transformative to the dynamic nature of societies.⁴⁷

The mushrooming and development of institutions over the last few decades underlie the relevance and appropriateness of the theory of New Institutionalism. Comparatively across the world, modern democratic dispensation is predicated upon strong and vibrant institutions. As mentioned in the preceding section, one of the hallmarks of liberal democracy that has gained acceptance is the concept of separation of powers characterized by distinct and functional state institutions. Strong institutions are also important in controlling and constraining arbitrary use or abuse of power among state officers. For the rule of law to flourish, sound institutional mechanism is required that can guarantee the enforcement of equality before the law complete with remedial measures such as Judicial Review to check on administrative actions.

⁴⁴ Ibid, 8

⁴⁵ Alistair Cole, 'Institutions and Institutionalism' (2015) 6 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAAahUKEwjvpZrJ7K3IAhWLPPhQKHfBbAOM&url=http%3A%2F%2Fwww.univ-paris1.fr%2Fuploads%2Fmedia%2F2_-_Institutions_and_institutionalism-2.ppt&usg=AFQjCNHM_MKLxM4ORa9sSUBbM3VKkWWUtQ&sig2=ExCAKW6slfaziIoTyJTELQ&cad=rja> accessed 20 June 2015.

⁴⁶ Stephen Bell, 'Institutionalism: Old and New' (2006) 1, <<https://espace.library.uq.edu.au/view/UQ:9699/Institutionalism.pdf>> accessed 20 July 2015.

⁴⁷ See also James March and Johan Olsen, 'Elaborating the "New Institutionalism"' (2005) Centre for European Studies working Paper No. 11, 18 <<http://www.unesco.amu.edu.pl/pdf/olsen2.pdf>> accessed 01 May 2015.

The application of the theory of New Institutionalism is relevant to the composition and operations of Election Management Bodies (EMBs).⁴⁸ In the various analysis elaborating the scope and application of New Institutionalism, a general acceptance has emerged that sound institutional framework must of essence encompass institutional formation, institutional design institutional reaction and institutional change.⁴⁹ To guarantee effectiveness, sound institutional framework must embody a sufficient degree of autonomy, institutional rules, norms and standard operating procedures that can impact on political behaviour;⁵⁰ institutional dynamism and ability to embrace changing environments; and institutional impact on political actors and outcomes including the ability to mediate political disputes.⁵¹ By their very nature, elections are highly emotive and involve contestations between and among political players⁵².

The significant role that elections play in a democracy demand a credible, professional and efficient election management body, not only to procure a credible and transparent process, but also to ensure that the electorate and political contestants have total confidence in the electoral body. With few exceptions,⁵³ the conduct of EMBs in Africa has inspired very little confidence on their ability to preside over highly contested and polarized elections. In Kenya in particular, the ECK and its successor the IEBC exhibited serious institutional weaknesses in 2007 and 2013 that impacted on both the electoral process and the outcome thereof. New

⁴⁸ Mamadou Gazibo, 'The Forging of Institutional Autonomy: A Comparative Study of Electoral Management Commissions in Africa' (2006) 39(3) Canadian Journal of Political Science Publication 611, 632.

⁴⁹ 'A Return to State-Centered Political Analysis: New Institutionalism' 40 <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0CB0QFjAAahUKEwjg9aOU8a3IAhWGVhQKHUNoCDw&url=https%3A%2F%2Fperswww.kuleuven.be%2F~u0035056%2FPhD%2Finspiratie.doc&usq=AFQjCNE8O6AnO9hG11TusNgv5o1SUxtMRO&sig2=ganR0wH0XqzKuVuspDvVug>> accessed 20 July 2015.

⁵⁰ James March and Johan Olsen, 'Elaborating the "New Institutionalism"' (2005) Centre for European Studies working Paper No. 11, 8 <<http://www.unesco.amu.edu.pl/pdf/olsen2.pdf>> accessed 01 May 2015.

⁵¹ Grubović Ljiljana, 'New Institutionalism as A new Theoretical Framework for Urban Political Analysis' (2004) *Spatium* 41, 45.

⁵² Lopez Pinto R, 'Election Management Bodies as Institutions of Governance' 12

⁵³ Independent Electoral Commission of South Africa, of South Africa, Electoral Commission of Ghana and the Independent National Electoral Commission of Nigeria in 2015 (*See* the African Union, the Commonwealth and the European Union Election Observation Reports for South Africa; Ghana and Nigerian 2015 Elections.

Institutionalism can provide a framework upon which EMBs in Africa can be transformed into credible and professional institutions.

The theory of Liberal Democracy and New Institutionalism are not without limitations particularly in the African context. As mentioned, both theories originated from mature Western democracies that have entrenched strong democratic cultures and functional institutions spanning over decades.⁵⁴ Most Western countries, notably France and the United States of America (USA) promulgated liberal constitutions that have provided the foundation upon which socio, political and economic progress are modelled spanning centuries. By contrast democratic consolidation in most African countries is still work in progress.⁵⁵ The *political incumbency theory*⁵⁶ that is widespread in most African countries also present limitations to both Liberal Democracy and New Institutionalism. A major characteristic of the political incumbency theory is the centralization of power in the executive and the dominance of imperial presidency and in some cases founding leaders of political parties. The foregoing has resulted in the emasculation of other state organs and for most EMBs, lack of independence and autonomy. According to Martha Mutisi, elections in Africa favour incumbents.⁵⁷

Nic Cheeseman, argues that incumbents enjoy a considerable amount of power and control over the electoral process that extends to the appointment of electoral commissions. In addition, a sitting president retains control over the state coercive capacity until the election results are announced.⁵⁸ Individuals perform certain actions not because they fear punishment

⁵⁴ See Denis Kadima, 'Understanding the Causes and Consequences of Political Party Alliances and Coalitions in Socially-Divided Africa' (2014) 13(1) EISA Journal of African Elections 1, 3.

⁵⁵ Khabele Matlosa, Gilbert Khadiagala and Victor Shale (eds), *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa* (EISA 2010) 39.

⁵⁶ Nic Cheeseman, 'African Elections as Vehicles for Change' (2010) 21(4). Journal of Democracy 139, 147.

⁵⁷ Martha Mutisi, 'Navigating Post-Peace Agreement Plebiscites: Zimbabwe and Kenya' (2013) ACCORD Policy and Practice Briefs, 14 <http://www.accord.org.za/images/downloads/brief/ACCORD-policy-practice-brief-22.pdf> accessed 20 July 2015.

⁵⁸ Nic Cheeseman, 'African Elections as Vehicles for Change' (2010) 21(4). Journal of Democracy 139, 147.

or consequences of non-compliance but because they don't see any alternative. The open bias demonstrated by both the ECK and the IEBC and a host of EMBs in Africa towards incumbents is a case in point. Political Incumbency Theory presents ample justification for reforming the electoral governance in Africa.

1.7 Literature Review

1.7.1 Revisiting the Nexus Between Democracy and Elections

The nexus between elections and democracy in Africa has been a subject of considerable scholarly writings and analysis. While the definition of democracy in the liberal western sense lend itself to a straight forward answer, the experience with governance in Africa and the self-serving definition advanced by the leadership has often brought with it more confusion than clarity.⁵⁹ Despite the various definitions, African scholars among them Archie Mafeje, Claude Ake, Ali Mazrui, Thandika Mkhawire, opine that democracy is not merely a Western concept but must also be defined from an Afrocentric point of view, and that it is a fallacy to suggest that democracy is foreign to Africa.⁶⁰ The central feature distinguishing democracy from authoritarian system is that democracies are responsive to the will of the people and that the people express their collective sovereignty through periodic free and fair elections⁶¹.

Given the foregoing, the central role that elections play in a democracy cannot be overemphasized. However, debate about whether election is synonymous to democracy abounds in Africa and has elicited various reactions.⁶² While elections and democracy are so

⁵⁹ Robert Fatton, 'Liberal Democracy in Africa' (1990) 105(3) *Political Science Quarterly* 455, 471.

⁶⁰ Gilbert Khadiagala, 'Reflections on the Causes, Courses and Consequences of Election Violence in Africa' in Khabele Matlosa, Gilbert Khadiagala and Victor Shale (eds), *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa* (EISA 2010) 3.

⁶¹ *Ibid*, 5

⁶² Richard Sandbrook, *Democracy and Pluralism in Africa* (Lynne Rienner Publishers 2004) 32.

inextricably intertwined, the causal relationship between the two is not straightforward.⁶³ Election is one of the most important elements of democracy,⁶⁴ but a country's democratic credentials cannot be measured simply by the frequency or regularity of elections. This is the paradox of democratisation that continues to confound many scholars especially when looked at within the context and experience in Africa. As pointed out in the preceding section, the last decade has witnessed multi-party elections held in different parts of Africa. Gilbert Khadiagala puts it more succinctly in what he calls democratic experiments in Africa. Between 1989 and 1994, 38 African countries held competitive elections, while another 11 states followed suit and held founding elections between 1995 and 1997. In the same period 16 countries held second elections.⁶⁵ The central question that has persisted is why sustainable democracy is still largely elusive in Africa despite these elections?

While the foregoing question is restricted to election and democracy, a broader approach would be the question posed by Larry Diamond in trying to explain Africa's dilemma. "Why does Africa remain, a half a century after the onset of decolonization, mired in poverty, stagnation, misery, violence and disruption?"⁶⁶ The response to Diamond's dilemma is partly answered by Chinua Achebe in his seminal work 'The Trouble with Nigeria', where he states that the trouble with Nigeria is one of governance. Achebe's assertion on Nigeria is relevant to describe the situation in most Africa countries.

⁶³ Gilbert Khadiagala, 'Reflections on the Causes, Courses and Consequences of Election Violence in Africa' in Khabele Matlosa, Gilbert Khadiagala and Victor Shale (eds), *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa* (EISA 2010) 12.

⁶⁴ Denis Kadima and Felix Owuor, 'The National Rainbow Coalition: Achievements and Challenges of Building and Sustaining a Broad-Based Political Party Coalition in Kenya' in Denis Kadima (ed), *The Politics of Party Coalitions in Africa* (2nd edn, EISA and Konrad-Adenauer-Stiftung 2006) 197.

⁶⁵ Gilbert Khadiagala, 'Reflections on the Causes, Courses and Consequences of Election Violence in Africa' in Khabele Matlosa, Gilbert Khadiagala and Victor Shale (eds), *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa* (EISA 2010) 14.

⁶⁶ Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (Henry Holt and Company 2008) 247.

An in depth analysis on the predicament and challenges of governance in Africa and why democracy is still elusive emanates from what Max Weber called neopatrimonialism culture.⁶⁷ The institutional hallmark of authoritarianism regimes in post-colonial Africa was neopatrimonialism,⁶⁸ a system of governance based on the monopoly of state and resources. Accordingly, the colonial legacy of centralized power and institutional legacies distinguished African states and were retained and utilized to maximize political advantage. Neopatrimonialism created informal reality of personalized, unaccountable power and pervasive patron-client ties⁶⁹ and this eventually led to a dominant characteristic of Presidentialism which was associated with extreme concentration of power and the emergence of the 'Big Man' syndrome.⁷⁰

1.7.2 The Legal Framework and Electoral Process

The starting point for unpacking the correlation between elections, democracy and constitutionalism is by reference to the now acclaimed article by Fareed Zakaria, 'The Rise of Illiberal Democracy.'⁷¹ The illiberal democracy theory emerged partly in response to the imperfections of liberal democracy. To draw a distinction between liberal and illiberal democracy, Zakaria defined liberal democracy as a political system marked not only by free and fair elections, the rule of law, separation of powers, and the protection of basic liberties of speech, assembly, religion, and property.⁷² By definitions, illiberal democracy denotes a governing system in which although fairly free elections take place, citizens are cut off from real power due to the lack of civil liberties. This may be because a constitution limiting

⁶⁷ See Migai Akech, 'Constraining Government Power in Africa' (2011) 22(1) *Journal of Democracy* 96, 97.

⁶⁸ Larry Diamond observes that in Africa Politics, 'the informal trumps the formal' (Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (Henry Holt and Company 2008) 247).

⁶⁹ Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (Henry Holt and Company 2008) 249.

⁷⁰ Migai Akech, 'Constraining Government Power in Africa' (2011) 22(1) *Journal of Democracy* 96, 97.

⁷¹ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) *Foreign Affairs* 22.

⁷² *Ibid*

government power exists but its liberties are ignored, or to the simple absence of an adequate legal and constitutional framework of liberties.⁷³

While elections is synonymous with democracy, the fundamental rights and freedoms that form the cornerstone of sound democratic dispensation fall under what Zakaria call Constitutional Liberalism⁷⁴. Democracy and constitutional liberalism are inextricably linked and are mutually reinforcing, illiberal democracy theorists contend that the two concepts do not necessarily go hand in hand. The point of departure between democracy and constitutional liberalism was succinctly captured by Zakaria, thus, ‘Today the two strands of liberal democracy, interwoven in the western political fabric, are coming apart in the rest of the world. Democracy is flourishing; constitutional liberalism is not.’⁷⁵ To illustrate the foregoing, Zakaria drew a comparison of countries that had embraced multi-party politics, and regularly held periodic elections but had not entrenched constitutional liberalism. Comparatively across the world, elections remain the best way to select governments and is the most important manifestation of democracy. However, institutionalization of democracy should go beyond mere periodic elections and should be premised on sound legal and constitutional framework. Zakaria borrows from the words of Samuel Huntington thus,

“Elections, open, free and fair, are the essence of democracy, the inescapable sine qua non. Governments produced by elections may be inefficient, corrupt, short-sighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. These qualities make such governments undesirable but they do not make them undemocratic.”⁷⁶

⁷³ < <http://illiberalism.askdefine.com/> >

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

In practical parlance a number of countries across the world fit in this spectrum. In Africa in particular, virtually all countries with only few exceptions fall under this category⁷⁷. At the extreme end, tyrannies like Zimbabwe, Burundi, Uganda, Cameroon, Benin, Guinea top the list, while at the rear end countries like, South Africa and Botswana while the rest of the countries fall in between. Constitutional liberalism as expounded by Zakaria is not about elections and how governments come into place. In Western political sense, the term denotes protection of individual autonomy, and dignity against coercion. Conceptually, the term integrates the philosophy of individual liberty, underpinned by the constitutional tradition of the rule of law⁷⁸.

Over the last 50 years and fuelled by the politics of the cold war, many countries have been swinging between liberal democracy or liberal autocracy. According to Zakaria, most of the regimes in Africa, East Asia, Eastern Europe and Latin America remained semi democratic, with patriarchs or one party that made their elections a ratification of power rather than genuine contest⁷⁹. Zakaria sums up his analysis that by concluding that, while constitutional liberalism has led to democracy, democracy does not seem to bring constitutional liberalism⁸⁰.

From the foregoing, it is clear that consolidation of democracy mirrors a pendulum with countries swinging between liberal democracy, semi democracy, and liberal autocracy⁸¹. To illustrate the above point, Zakaria, quoted with approval a study commissioned by Scholar Larry Diamond in 1993. In Latin America 10 out of 22 countries have human rights abuses incompatible with the consolidation of liberal democracy. In some African countries,

⁷⁷ Khadiagala G, 'Reflections on the Causes and Consequences of Election Violence in Africa' in *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa* (EISA 2010) 12.

⁷⁸ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) *Foreign Affairs* 22-24.

⁷⁹ *Ibid*, 4

⁸⁰ *Ibid*

⁸¹ See also Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World* (Henry Holt and Company 2008) 249-250

democracy is understood to mean elections and whereas many countries have held periodic multi- party elections since 1990 consolidation of liberal democratic ideals remain a pipe dream⁸².

Fareed Zakaria makes two additional distinctions; absolute sovereignty and ethnic conflict and war. Absolute sovereignty concern itself with centralisation and accumulation of power. The central difference between the two concepts with regard to handling of power is that constitutional liberalism is about the limitation of power, while democracy is about its accumulation and use. This obsession with power accumulation, referred to by Tocqueville as ‘Tyranny of the Majority’ which implies centralization of power by employing extraconstitutional means which often lead to disaster.

Within the context of elections, centralization of power manifests itself through the desire to control Electoral Management Bodies as a prerequisite to accessing and accumulating power. In Africa, this has been the trend over the last two decades. In the absence of constitutional liberalism, democracy or elections foment ethnic tensions, division and violence⁸³. A cursory glance at African experience confirms the foregoing contention. Zakaria concludes by recommending a fusion between consolidation of democracy and the presence of constitutional culture to anchor constitutional liberalism as the requisite fusion required in liberal democracy.

While Fareed Zakaria’s exposition on illiberal democracy remain an important contribution to the whole concept of democracy, elections, and constitutionalism, democratic governance over the last few decades reveal certain gaps. To begin with, Zakaria’s article was premised exclusively on liberal constitutions which has its roots in most established Western

⁸² Migai Akech, ‘Constraining Government Power in Africa’ (2011) 22(1) *Journal of Democracy* 96.

⁸³ Stephen Ndegwa, ‘*Citizenship and Ethnicity: An Examination of Two Transition Movements in Kenyan Politics*’. 91 *American Political Science Review* 559 (1997)

democracies. Although useful comparison was given with Asia, Africa and Latin America, the author did not envision Neo Liberal Constitutions that have been regarded as transformative and progressive documents. Examples of Transformative Constitutions, notably the South African Constitution, 1996 and the Kenyan Constitution, 2010, made elaborate provisions that combined both the elements of democracy (elaborate chapters on representation of the people) and principles of constitutional liberalism provided for in the expansive and transformative chapters of the Bill of rights. Chapters on Devolution of Power and Equitable Resource allocation and provisions on Socio, Economic Rights also went beyond the liberal democracy doctrine.

Despite elaborate fusion of liberal democracy and constitutional liberalism in the Kenyan constitution for example, the goal of securing a credible and transparent elections in 2013 was largely unmet and compliance with the constitutional liberalism anchored in the Bill of Rights Chapter is still a pipe dream. Zakaria made useful reference to periodic multi-party elections as a means of selecting governments. Regrettably, the role of Election Management Bodies in procuring quality elections was not examined. Admittedly, while elections remain an important element of democracy, the obsession with the numbers (quantitative) as opposed to the quality of those elections was not addressed.⁸⁴ Given the significance of elections to democracy, it is this author's contention that the process of electing leaders and the body charged with that responsibility must comply with certain qualitative requirements that will eventually confer legitimacy to the outcome.

⁸⁴ See Gregory Fox, 'Election Monitoring: The International Legal Setting' (2001) 19 Wisconsin International Law Journal 295, 302.

1.7.3 Organizational Structure and Operations of Elections Management Bodies

Shaheen Mozaffar in his article 'Patterns of Electoral Governance in Africa's Emerging Democracies,'⁸⁵ elaborately analyses the patterns of electoral governance in Africa through an examination of Election Management Bodies (EMBS) as the formal units principally responsible for organisation and conduct of elections. Mozaffar's central thesis is that the effectiveness of EMBS as institutional linchpins of electoral governance depends largely, but not exclusively on their autonomy from government. Comparatively across Africa, composition of EMBS has taken three main patterns namely; non autonomous, autonomous and semi-autonomous EMBS⁸⁶. However, the combined effects of the institutional legacies of colonial governance, post-colonial neopatrimonial regimes, ethno political fragmentation, and political negotiations over new democratic institutions had an impact on the EMBS. Given the dynamics of contemporary multi party politics it is incumbent for institutions especially the EMBS to democratize, which is defined by Mozaffar as the need to craft and reform institutions to achieve their aims.

Reforms on electoral governance and the EMBS should essentially take a two-pronged format: the first set defines, among other things the electoral formula, constituency boundaries, electoral system and electoral seats. These rules endogenously structure electoral competition by encouraging strategic coordination among voters, parties and candidates over votes and seats⁸⁷. The other set defines and configures the broad institutional framework of electoral governance, and consist of procedures that exogenously structure electoral

⁸⁵ Shaheen Mozaffar, 'Patterns of Electoral Governance in Africa's Emerging Democracies' (2002) 3(1) *International Political Science Review* 85.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, 86.

competition by regulating voter registration, candidate registration, election observation, voting, counting and tabulation of votes and results transmission.

This article on electoral governance by Mozaffar is consistent with the overall objective of this research and gives a clear exposition of the issues the researcher intends to interrogate and present a justification on the need to reform the various electoral institution and in particular the IEBC in Kenya which is the electoral body. As pointed out, the colonial legacy, post-colonial authoritarian regimes and the emergence of social cleavages during the multi-party era (1990 to date) requires a relook at electoral governance and in particular electoral management and administration.

Mozaffar's article, however, falls short of appreciating the phenomenon of politics in Africa that involves other players notably the Executive and political parties and their impact on the functioning of the EMBS⁸⁸. While the article appreciates the role that EMBS play on managing elections, sufficient attention and reforms is also not well argued to locate electoral administration and sound legal framework. Given the dynamics of neopatrimonial regimes, a serious case should be made to institute constitutional, legal and institutional reforms to recast the EMBS to reflect the multi- party political dispensation.

While the need for independence and autonomy of electoral commissions is well argued, the author explains autonomy to mean the process of appointing and constituting the electoral commission and not autonomy and independence in the operational aspects of the commission work. The situation obtaining in Kenya where an elaborate process of appointment was grounded in law as well as guarantees for independence in the operation of the Commission seems to be out of the scope of Mozaffar's article. To this end, this research

⁸⁸ See Kadima Denis (ed), *The Politics of Party Coalition in Africa* 2nd edn, EISA and Konrad- Adenaur- Stiftung 2006.

interrogates the link between autonomy, organisational structure and the attitude or individual interest⁸⁹ of the Commissioners.

The article by Edwin Abuya, ‘Can African States Conduct Free and Fair Presidential Elections?’⁹⁰ also address the structure, tenure, and composition of the EMBs and is relevant to this study. The paper proceeds by acknowledging the significance of elections in a democracy and interrogates the extent to which elections held in Africa in the past have advanced democracy and comply with the International Legal Standards. Contextualising the research within the experience of Kenya (2007 elections) and Zimbabwe (2008) elections, the paper examines the dynamics of the two elections that focused on the crucial aspects of the electoral process. Additionally, the paper explored the conduct of the two elections and the role of EMBs in managing and handling the said elections.

Recognizing the fact that elections is a process and not event, Abuya urged vigilance in safeguarding electoral rights and suggests possible reforms as a strategy for ‘striking a reasonable balance between democratic participation on one hand and governability on the other hand’.⁹¹ Specifically, the paper focused on composition and role of election management bodies (EMBs), procedures for electing the President in Kenya and Zimbabwe, political violence, and the role of the Judiciary in election dispute resolution⁹².

With regard to the EMB, which is the subject of this review, Abuya assessed crucial aspects of effective EMBs which included mandate and independence, appointment of officials, qualification of officials and the size of the EMBs. The central argument on the efficacy of the EMB rests on their mandate and independence⁹³. Abuya argues for a transparent and all

⁸⁹ *Rationale Choice Theory and Utilitarianism.*

⁹⁰ Edwin Odhiambo Abuya, ‘Can African States Conduct Free and Fair Presidential Elections?’ (2010) 8(2) *Northwestern Journal of International Human Rights* 122.

⁹¹ *ibid* 124.

⁹² *ibid*

⁹³ *Ibid*

independent process of appointments as a means of enhancing confidence on the EMB and in particular the crucial work of management the elections. Abuya acknowledges that while there are various modes of appointing commissioners, the two most acceptable modes include a political process and a mixed process.

Generally, the political process usually involves unilateral presidential appointments, parliament and appointments by political parties. Essentially, the mixed model involves participation by parliament in the appointment process, through constituting of the various agencies to participate in the process. Given the fact that election involves different processes, Abuya advocates for a permanent commission that can spearhead the work expected of the EMBs. The writer also examined the qualification of the EMBs and acknowledged the existence of both enabling and disabling criteria in the appointments of the Commissions. Among the qualification listed is the requirement of a Judge for the position of Chair, integrity, and the skills and competencies⁹⁴. With regard to the role of the EMBs, the paper examined the size of the EMB and drew a comparison between a number of countries. The author rightly conclude that in line with international trends, a smaller size (EMB) is recommended but ultimately, the test lies with the ability of the EMB to be independent, efficient, fair, and accurate.

While on the whole, Abuya brought out salient issues with regard to the efficient management of elections, experiences of the 2007 and 2013 elections in Kenya and the 2008 and 2013 elections in Zimbabwe contradicts some assertion. The permanency of the EMB in both Kenya and Zimbabwe has not necessarily translated into professional and efficient bodies. While granted, elections is a process and not an event, crucial aspects of the electoral process do not require the commissioners but an efficient secretariat to carry out the tasks. International best practices calls for a clear demarcation between the commission and the

⁹⁴ Ibid

secretariat and delineates their roles as involving policy formulation and implementation of policy and electoral programmes respectively⁹⁵.

The experience of Kenya in 2013 elections in fact calls for a reintroduction of the debate between a permanent and a part time commission. Regarding the independence of the commission, the author argued for certain tests to be applied in ascertaining the independence of the EMB, which include; the mode of appointment, integrity of the EMB, security of tenure and sound legal framework. While the foregoing constitute operational and functional autonomy, a critical omission was the financial and fiscal independence of the commission which has a direct and collateral impact on the operations of the commissions. In Kenya for example, the Constitution and the IEBC Act provides for the expenses of the Commission to be charged to the consolidated funds.⁹⁶ While this was intended to guarantee financial autonomy, the fact that both treasury and Parliament must vote for the allocation of the Commission has seen a reduction of the Commission budget rendering incapable of discharging its constitutional mandate effectively. In the 2013 elections in Zimbabwe, the Electoral Commission faced numerous financial hurdles that impacted on the overall credibility of elections.

The International Institute for Democracy and Electoral Assistance's publication *Electoral System Design: The New International IDEA Handbook*⁹⁷ provides a holistic analysis on the nexus between electoral system, organisational structure, legal framework, and elections management and administration. The publication argues that the choice of electoral system and the design of the Electoral Commission, ultimately impact on the governance and political process and election management and administration. In arguing for reforming

⁹⁵ See International Institute for Democracy and Electoral Assistance, *Electoral System Design: The New International IDEA Handbook* (International IDEA 2005).

⁹⁶ Constitution of Kenya, 2010, art 88 and *IEBC Act*, 2011, s 19.

⁹⁷ International Institute for Democracy and Electoral Assistance, *Electoral System Design: The New International IDEA Handbook* (International IDEA 2005).

election management and administration in Kenya, the literature on electoral system design will be relevant in exploring the interface between electoral system, organisational structure of the EMB, and election management. However, this publication does not demonstrate how the various typologies of electoral bodies can strengthen electoral administration and management.

The Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007 ('Kriegler Report')⁹⁸ is also worth considering. Following the disputed 2007 elections and the post-election violence that occurred in 2008, the panel of Eminent African Personalities recommended the establishment of a commission to investigate the conduct of 2007 general elections in Kenya⁹⁹. The Commission in its report, indicted the ECK in the manner in which they conducted the 2007 elections. Specifically, the Kriegler Report stated that the ECK lacked the necessary independence, capacity and functionality because of weaknesses in its organizational structure, composition and management system. Further, the report stated that the institutional legitimacy of the ECK and public confidence in the professional credibility of its Commissioners and Staff had been gravely and arguably irreversibly impaired¹⁰⁰.

As part of its recommendation, the report called for a radical reform of the ECK, or in the alternative, the establishment of an Electoral body that could uphold the commitment of credible and democratic elections that could be reflective of the aspirations of Kenya. Kriegler also recommended a demarcation of roles between the Commissioners and the Secretariat and a transparent method of appointment of

⁹⁸ The Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007 (17 September 2008).

⁹⁹ Ibid

¹⁰⁰ Ibid

Commissioners. The report made detailed recommendation in reforming the electoral process, the legal and constitutional framework for elections, and the introduction of technology to enhance the transparency and accountability in the electoral process in Kenya including counting, tabulation, and announcement of results.

The Kriegler Report provided a useful benchmark for the enactment of Electoral Sector Laws and the establishment of the new electoral commission. Accordingly, Kriegler Report constitutes a useful background against which this research will be based. In this regard, the extent to which recommendations made in the Kriegler Report were implemented and its efficacy in enhancing the 2013 elections will be examined.

The Kriegler Report made a number of assumptions which based on the experience of the 2013 requires further interrogation. Some of the assumptions included that a new legal framework was all that was required to restore sanity in the Kenya's electoral process. Secondly, the introduction of ICT in election will inevitably enhance the credibility of elections, and finally, an inclusive mode of appointing the election body will insulate it from political interference¹⁰¹. The massive failures of technology during the election day in 2013, division within the electoral commission and allegations of manipulation by the political elites and the inadequacies posed by the election sector laws clearly challenged Kriegler Commission's assertions and constitute a useful critique on the report.

1.7.4 Boundaries Delimitation

IFES comparative work, *Challenging the Norms and Standards of Election Administration* (IFES, 2007) provides great insight on the conceptual and practical considerations in boundaries delimitation. Lisa Handley's article in that publication *Challenging the Norms and*

¹⁰¹ AfriCOG, 'Election Day 2013 and its aftermath' (2013) AfriCOG/KPTJ Election Series.

Standards of Election Administration provides a comprehensive comparative analysis.¹⁰² That publication, 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 work by IFES is largely corroborated by another comprehensive work by the International IDEA, *Electoral System Design*.¹⁰³ The publications gives useful insights on the connection between electoral system and representation. These two works are in tandem with the expressions contained in the international norms including Universal Declaration of Human Rights.¹⁰⁴ 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.

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, that discharged the boundaries delimitation mandate prior to establishment of the IEBC. The Constitution of Kenya 2010¹⁰⁵ provided the mechanism to complete the process of the first review and entrenched the function as part of the IEBC mandate. Article 89 of the Constitution of Kenya 2010 outlines the criteria and process for boundaries delimitation while Transitional Provisions provide the interim stipulations relating to the first review. The criteria underscores the principles expressed in the UN Charter on Political and Civil Rights.

¹⁰² International Foundations for Election Systems *Challenging the Norms and Standards for Election Administration: Boundaries Delimitation* (IFES, 2007) see the analysis by Lisa Handley on page 59.

¹⁰³ Andrew Reynolds et al *Electoral System Design* International IDEA Handbook, pg 35

¹⁰⁴ Universal Declaration of Human Rights, 1948

¹⁰⁵ See Article 89, Constitution of Kenya 2010 and the relevant Transitional Provisions.

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. To this end, an analysis has been made on the Report of the Interim Independent Boundaries Delimitation Commission, the Report of the Departmental Committee on Justice and Legal Affairs (10th Parliament Fourth Session);¹⁰⁶ the ruling in *John Kimathi Maingi vs Andrew Ligale and 4 others* (2010),¹⁰⁷ 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*.¹⁰⁸

The research appreciated the comparative and emerging lessons in other jurisdiction by considering the Delimitation Equity Project, IFES – Center for Transitional and Post Conflict Governance; *Challenging the Norms and Standards of Election Administration: Boundary Delimitation Standards*, Lisa Handley (IFES); and *Electoral System Design* published by International IDEA. The foregoing publications are both comprehensive and holistic and the gaps identified in Kenya with regard to boundaries delimitation, was the failure to comply with broad principles espoused in these publications.

1.7.5 Technology and the Electoral Process

The International Institute for Democracy and Electoral Assistance's policy paper 'Introducing Electronic Voting: Essential Considerations'¹⁰⁹ provides insightful analysis of the considerations for introducing technology in election management. Comparatively across

¹⁰⁶ Report of the Justice and Legal Affairs Committee, 10th Parliament 4th Session, 2008.

¹⁰⁷ *John Kimathi Maingi vs Andrew Ligale and 4 Others* (2010) eKLR.

¹⁰⁸ [2012] eKLR.

¹⁰⁹ International IDEA, 'Introducing Electronic Voting: Essential Considerations' (2011) Policy Paper <<http://www.eods.eu/library/IDEA.Introducing-Electronic-Voting-Essential-Considerations.pdf>> accessed 29 July 2015.

the world, an emerging trend in electoral democracy is the use of technology in the electoral process. In response to this global development, a number of organisations and scholars have published widely on technology and the electoral process intended to simplify and offer clarity on the use of technology in advancing electoral democracy.

The paper aptly captures the international justification for introducing technology in elections, which is to make the electoral process more efficient and for increasing trust in the management of elections. If properly implemented, technology can increase the security of the ballot, speed up the processing of results and make voting easier. Despite its many advantages, the publication acknowledges that the challenges and shortcomings associated with technology are considerable and if not well planned and designed, can undermine the entire electoral process.

The paper lists different types of e-voting technology which includes; Direct Recording Electronic (DRE) Voting Machines, which is designed to come with or without paper trail evidence; Optical Marker Reader (OMR) systems which are based on scanners that can recognize the voters choice on special machines-readable ballot papers; Electronic Ballot Printers (EBPs) which work almost in the same way as the DRE machines in terms of reading the ballot paper and producing paper trail but go further to act as a counting device for all the votes cast; and the Internet Voting Systems which involves voting and counting of ballots using internet systems which is usually located at a central precinct.

A further publication on technology and elections edited by Michael Yard, *Direct Democracy: Progress and Pitfalls of Election Technology*¹¹⁰ is an essential guideline for the EMBs for maximising the chance of successful implementation of new technologies to the

¹¹⁰ Michael Yard, *Direct Democracy: Progress and Pitfalls of Election Technology* (International Foundations for Electoral Systems 2010).

election processes. Different countries have adopted different technologies to aid the various phases of elections.

Biometric Voter Registration (BVR) systems are increasingly deployed to capture the salient biometric features of voters which include photos and finger prints among others¹¹¹. On election day, technologies that are commonly used include, Electronic Voter Identification Devices (EVIDs), Electronic Calculators for Counting Votes, Results Transmission Systems, Results Display Technology and Advanced Computers Servers for data storage. The publication outlines certain considerations that should inform the use of technology in any country. These include a careful needs assessment to determine technology; appropriate timing for the introduction of technology; training of personnel on how to use the technology; and planning for the technology life circle¹¹².

The critique on technology and elections emanates from the obsession, especially in transitional democracy countries, that technology is the ‘rule of the thump’ that will cure poor electoral management and administration. Although both International IDEA and IFES publication issue caution in approaching the subject of technology, clear shortcomings are not argued. Secondly, and looked at within the African context, technology presupposes advancement and development in other areas. Technology relies on electricity to function, and technical expertise including prevalence of internet services all over the country¹¹³.

While the foregoing factors are present in advance democracy, most African countries are poor without the requisite infrastructure for the well-functioning of technology. Having observed elections in Nigeria, Ghana, and Kenya, the conclusions drawn by the African Union Missions and other Observers pointed to lack of conducive environment for the

¹¹¹ Ibid

¹¹² Ibid, 3

¹¹³ Report of the African Union Elections Observation Mission to Ghana General Elections held on 7th December 2012.

functioning of technology which contributed to failures.¹¹⁴ As the situation in Kenya demonstrated during the 2013 elections, technology can be prone to hacking which might then interfere with crucial processes of elections. The technology used by IEBC in handling of results on election day massively failed forcing the IEBC to resort to the manual results tallying and transmission which tainted the integrity of the process.¹¹⁵ Despite the shortcomings of technology in 2013 elections in Kenya, it is the researcher's considered view that if the appropriate technology is deployed, the electoral malpractices can be cured and electoral integrity protected.

1.7.6 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*,¹¹⁶ 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. 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 laments that while some of the logistical problems experienced by the 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

¹¹⁴ See Report of the African Union Elections Observation Mission to the 7 December 2012 General Elections in the Republic of Ghana (2012); Report of the African Union Elections Observation Mission to the 4 March 2013 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).

¹¹⁵ See Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4 March 2013 General Election (October 2014); Report of the African Union Elections Observation Mission to the 4 March 2013 General Elections in Kenya (2013); Report of the European Union Election Observation Mission to Kenya General Elections 2013; Report of the Commonwealth Observer Group: Kenya General Elections 4 March 2013.

¹¹⁶ Kenya Human Rights Commission, *The Democratic Paradox: A Report on Kenya's 2013 General Elections* (KHRC 2014).

election day. Other failures identified by KHRC include incomplete and inaccurate voter register; the conduct of IEBC personnel and staff on election day; problems with counting, tabulation and transmission of results and resolution of election disputes by the IEBC.

Admittedly, the KHRC exposes institutional and structural weaknesses of the IEBC that contributed to weak electoral administration in 2013 elections. 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. This research will demonstrate the linkage and provide recommendations for addressing the two dimensions.

1.7.7 Election Observation and Electoral Process

The challenges posed by managing elections in transition democracy countries, brought with it domestic and international interest in observing and monitoring elections. In its publication the National Democratic Institute (NDI) *handbook on how Organisations Observe Elections an A to Z Guide*, NDI documented a comparative study on 75 countries the Institute had conducted and observed elections. The publication also benefitted from analysis of other election observer reports in different parts of the world¹¹⁷. According to NDI, the rationale for conducting election observation mission is premised on International Obligation that affirms fundamental rights and freedoms. The basis of the handbook is traceable to the Universal Declaration on Human Rights (UDHR)¹¹⁸ and the recognition that participation in the electoral process is an actualisation of fundamental rights and freedoms.

¹¹⁷ See for example Fox G, 'Election Monitoring': *The International Legal Setting*, (2001) 19 Wisconsin International Law Journal 295

¹¹⁸ Universal Declaration of Human Rights, Art. 21 (3), GA Res. 217 A (III), U.N. GAOR, 3rd Session, U.N. DOC. A/810, at 71 (1948).

The NDI publication provides a comprehensive analysis and guide on how domestic and international organisations can mount effective observation throughout the electoral process. According to NDI, election observation enhances the conduct of the electoral process by among other things; boost public confidence in the elections, provides deterrence on election fraud, contribute to democracy consolidation and mitigate electoral disputes.

While admittedly, the concept of election observation has gained prominence around the world, a comparative look at elections held in the continent include Kenya does not clearly bring out the advantages espoused by NDI. The critique on election observation is largely based on the organisations of election observer missions. To begin with, International Election Missions are usually deployed a few days to the actual elections¹¹⁹, this essentially denies them sufficient understanding and familiarity with the political and electoral context against which the elections are held. Deployment of election missions are done on very restrictive samples and as such do not have large geographical coverage. Most Missions are only interested on the election day activities and do not understand the processes preceding the elections and the immediate post- election period. An analysis of some of the observer Mission who monitored the 2013 general elections in Kenya demonstrate the inadequacies of election observation mission especially on important themes set out in this study namely; the constitutional and legal framework, organisational structure of the EMB, technology and elections, boundaries delimitation, results management and election dispute resolution. A sample of the two Election Mission Reports to the March 4th General Elections in Kenya is illustrative of the above.

In 2013 the African Union (AU) deployed an election observation mission in Kenya from 24 February to 9 March 2013. The Mission comprised 69 observers drawn from 29 Countries

¹¹⁹ Nahomi Ichindo and Mathias Schunden, '*Deterring or Displacing Electoral Irregularities? The Spillover Effects of Observers in a Randomised Field Experiment*', (15 July 2011), 3.

across Africa. The AU observed the Kenyan elections in accordance with AU Instruments namely; Durban Declaration on the Principles Governing Democratic Elections in Africa; The African Charter on Democracy, Elections and Governance, which came to force on 15 February 2012; and the African Union Guidelines for Elections Observation and Monitoring. The AU also relied on the Constitutional and Legal Framework governing elections in Kenya. The African Union report assessed various aspects of the electoral process focusing on pre-voting day and the immediate post-election period.¹²⁰ Specifically, The Mission assessed the political context for the 2013 elections, the legal framework governing elections in Kenya, election management in Kenya (IEBC), political parties, voter registration, civic and voter education, representation of women and minorities among others. Overall, the AU expressed satisfaction with the conduct of 2013 elections in Kenya and concluded that the elections were a reflection of the will and aspirations of the Kenyan voters. The AU assessment of the Kenyan 2013 elections was not without shortcomings. While acknowledging improvements on the legal framework, the AU failed to critically examine the law in relation to credible election and constitutional liberalism.

The AU's conclusion that the Kenyan electoral system was a solution to ethnic tensions and polarization¹²¹ also contradicted the obvious ethnic vote mobilization that had preceded the elections and the electoral outcome that demonstrated voting a long ethnic line. With regard to electoral administration, its conclusion that the IEBC was largely prepared to conduct successful elections¹²² was not in tandem with logistical challenges that the IEBC experienced on voting day particularly with technological failures.

¹²⁰ Report of the African Union Elections Observation Mission to the 4 March 2013 General Elections in Kenya (2013).

¹²¹ Report of the African Union Elections Observation Mission to the 4 March 2013 General Elections in Kenya (2013) 9.

¹²² *ibid* 14.

The European Union (EU) Elections Mission to Kenya was deployed weeks to the March 4 general elections.¹²³ Indeed over the last decade, the EU has distinguished itself as an objective and impartial observer of elections throughout the world. During the disputed 2007 general elections for example, the EU Mission Election Observation Report for the 2007 general elections was extensively relied on by the Panel of Eminent African Personalities, and both the Kriegler and the Commission of Inquiry into Post-Election Violence. The EU Mission comprised of 65 Observers from the EU Member States and were deployed between 19 January to 4 April 2013. The Mission observed the critical election phases and noted improvement and shortcomings in the various stages of electoral process in Kenya.

For the purposes of this research, the EU report is relevant on three main areas; the legal and constitutional framework for elections; the conduct of IEBC and election management and the Electoral Dispute Resolution (EDR). The EU noted the enactment of the new Constitutional, legal and institutional framework between 2011 and 2012. The Mission also noted the transformative nature of the new laws and the potential for securing credible elections.

The EU however pointed out that the statutory amendments by parliament enacted shortly before the elections had substantial impact on the overall conduct of the elections. The Mission further noted the ambitious nature of the new legal framework especially with regard to holding six elections at the same time. The EU conceded that although the overall conduct of the IEBC was good on voting day, the Commission decision making abilities, division within the Commission, and corruption allegations undoubtedly compromised the credibility of the process.

¹²³ Report of the European Union Election Observation Mission to Kenya General Elections 2013.

The EU Mission also assessed the use of technology during the 2013 elections in Kenya. While the Mission appreciated the relevance of technology in enhancing the transparency of the electoral process, the Mission decried massive failures of the Biometric Voter Registers (BVR), Electronic Voter Identification Devices (EVIDs) among others. The Mission recommended that appropriate technology should be considered and deployed well in advance.

Finally on Election Dispute Resolution (EDR), the Mission acknowledged the efforts used to reform the Judiciary and expressed satisfaction with dispute resolution mechanisms in Kenya. However, the Mission observed that the legislative framework for pre- election dispute in Kenya is extensive but complex and involves multiple channels for complaints and appeals on electoral issues¹²⁴. On the whole, the EU report was very detailed. However, the Mission while noting problems with the IEBC, failed to make recommendations of structural and institutional nature that could enhance election administration in Kenya.

1.8 Research Methodology

The study on reforming Election Management and administration in Kenya was inclined towards qualitative research design. Owing to its descriptive and narrative approach, the qualitative design enables the researcher to understand the topic in detail and to interact with the respondents in their natural setting.¹²⁵ A combination of both fieldwork (primary data) and secondary data methodology was used for the study. The study relied heavily on secondary data owing to the literature and publication developed on the topic.

The study population comprised of target respondents who included key electoral stakeholders, among them IEBC, Political Parties, Judiciary, CSOs, Political Parties Dispute

¹²⁴ Report of the European Union Election Observation Mission to Kenya General Elections 2013, 14.

¹²⁵ Donald Kombo and Delno Tromp, *Proposal and Thesis Writing: An Introduction* (Pauline's Publications Africa 2006) 94.

Tribunal (PPDT), Registrar of Political Parties, among others. Purposive sampling¹²⁶ was used to identify individuals and organisations with considerable knowledge and expertise on election and governance in Kenya. Among the respondents interviewed included the presidential candidates who contested the 2013 elections, and who gave useful insights and perspectives on election administration from a practical perspective. Reaching out to these respondents was made easier due to the fact that the researcher works for a governance organisation that conducts programmes for political parties and other governance institutions. However, given the fact that political leaders are usually busy, confirmation of meetings proved difficult owing to the unavailability of the respondents. However, the long working relationship with most of the respondents made it easier for the researcher to reach out to the respondents and confirm the meetings.

To this end, the researcher did not require any formal letter introducing him to the respondents and instead outlined the purpose, objective and scope of the research in the introductory sections of the questionnaire. Appointments for interviews were sought directly by the researcher through phone calls. All former presidential candidates were interviewed directly by the researcher, with the exception of Mary who responded electronically. Presidential candidate Jack was interviewed in his home. Most representatives of Civil Society Organisations also filled their questionnaires electronically and submitted to the researcher. A total of 20 respondents were interviewed drawn from a sample size of 30 interviewees. Respondents in this research have been given pseudonyms for purposes of confidentiality.

Semi structured questionnaires was used to conduct the interviews. Semi structured questionnaires are a mix of unstructured and structured questionnaires where some of the

¹²⁶ See Donald Kombo and Delno Trop, *Proposal and Thesis Writing: An Introduction* (Pauline's Publications Africa 2006): Purposive sampling targets a particular group of people because they possess a quality that the researcher is interested in.

questions and their sequence are determined in advance, while others evolve as the interview proceeded¹²⁷. The questionnaire was developed along thematic areas pertinent to the electoral process, which provided useful information on key aspect of electoral cycle in Kenya including election management. Prior to the actual field work, the questionnaire was pretested to ascertain whether the questions and themes were relevant to the topic. The pre testing exercise was done on 18th February 2015 amongst a group 5 respondents representing political parties and CSOs. It was observed that the tool used was long and complex and the respondents recommended that the tool be structured along thematic areas. The researcher then revised the tool to incorporate the suggestions and the recommendations. Once it was confirmed that the questionnaires were understandable, they were distributed.

To supplement the interviews and secondary data, direct observation was made during the various workshops, conferences and seminars which the researcher participated in, on the various topics on electoral process in Kenya. There was for example a workshop with the Judiciary to conduct a post- election evaluation of 2013 elections and make recommendations that would aid in improving the electoral dispute resolution mechanism in Kenya. Other forums involved the IEBC, political parties among others. Thematic analysis of data was employed for the purposes of the research. This entailed an analysis of key and cross cutting themes that had emerged during the interviews. The themes included; constitutional and legal framework for elections; Institutional framework; boundaries delimitation; voter registration; voting and results management; technology and elections; and electoral dispute resolution. In addition, an analysis of the major decisions of the Judiciary on the election petitions that examined the conduct of IEBC was done.

¹²⁷ Sociological Methods & Research, Vol. 10 No. 2, November 1981

1.9 Limitations

Obtaining information and data on the 2013 elections from IEBC was difficult. During the presidential election petitions (Raila Odinga and 2 others v IEBC and 3 others),¹²⁸ the petitioner could not obtain information from the IEBC and had to seek the High Court's intervention to compel the IEBC to release the information. The IEBC was guarded on releasing information on the polling station returns and voter registration and the functioning of the ICT. The researcher circumvented this through accessing some information that was filed in the courts during the various petitions.

The research aimed at conducting target interviews with key stakeholders to gain their experiences on the 2013 elections and perspectives on enhancing election administration and management in Kenya. It was expected that getting an appointment with HE Uhuru Kenyatta, the President of Kenya who was also the candidate for Jubilee Alliance would be difficult. In the alternative, the researcher interviewed top officials of both the National Alliance Party (TNA) and the United Republican Party (URP), the main coalition parties under the ruling Jubilee coalition.

¹²⁸ Supreme Court Petitions 5, 4 & 3 (Consolidated) of 2013.

1.10 Chapter Breakdown

Chapter 1- Introduction and Outline

This chapter provides the overall scope of the study and an introduction to election management and administration as well as governance. Through a detailed literature review, the chapter examines the nexus between elections and democracy and zero down on key aspect of electoral process. Research objectives, questions, hypothesis are discussed in this chapter.

Chapter 2- Elections Management and Administration in Kenya

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.

Chapter 3- 2013 Elections in Perspective: Experiences and Challenges in Election Management and Administration

Against the backdrop of 2013 elections, this chapter examines the conduct of 2013 elections and the role of IEBC during the first elections under the 2010 Constitution.

Chapter 4- Strengthening Election Management and administration in Kenya: Proposal for Reforms.

Based on the interviews conducted and secondary data, this chapter makes detailed proposals for reforming and strengthening the electoral process in Kenya.

Chapter 5- Summary, Conclusion and Recommendations

This Chapter isolates lessons learnt from the 2013 elections and makes recommendations to key stakeholders for strengthening the credibility of elections in Kenya.

CHAPTER TWO

ELECTIONS MANAGEMENT AND ADMINISTRATION IN KENYA: CONTEXT, CONSTITUTIONAL, LEGAL AND ADMINISTRATIVE FRAMEWORK

2.1 Introduction

Kenya has had a chequered elections history since gaining independence. The credibility of the electoral process and election management has dominated debate in every election¹²⁹. The shortcomings of election administration and effective management of elections is not unique to Kenya. In many countries in Africa, the interface between the imperial neopatrimonial presidents, the overwhelming hold of ruling parties on election administration, and ethnicity presents imminent problems to effective functioning of EMBs and designing an administrative model for elections.¹³⁰

As demonstrated in the preceding Chapter, literature and scholarly writings on electoral governance have established the nexus between democracy, governance, constitutional framework and effective election administration and management. The inescapable question that continue to confound many however remains. What kind of election management model should a country embrace to insulate it from political interference and achieve credible elections?¹³¹ In many jurisdictions, a specific electoral management body is constituted with the mandate to manage and supervise elections and related processes. In some countries however, the disparate elements of the electoral process are undertaken by different agencies.¹³²

¹²⁹ Problems compounded during elections held in the multi- party era, 1992, 1997, 2002, 2007, and 2013.

¹³⁰ Rafael López-Pintor, 'Election Management Bodies as Institutions of Governance' (UNDP) <<http://www.eods.eu/library/UNDP.Electoral%20Management%20Bodies%20as%20Institutions%20of%20Governance.pdf>> accessed 05 August 2015.

¹³¹ Kenneth Meyer, 'Comparative Electoral Administration: Can we learn anything from the Australian Electoral Commission' <<http://users.polisci.wisc.edu/apw/archives/mayer2.pdf>> accessed 05 August 2015.

¹³² For example in Senegal where elections management is split between the Commission and Ministry of Interior.

The triumph of democracy in the last quarter of the 20th Century spawned closer scrutiny of the systems and quality of democratic elections.¹³³ More academics, civil society organizations, international organizations paid even more attention on the tendency of the political elite minded on perpetual control of the state through elections which were largely seen as facades. Correlative attention necessarily focused on the legal framework, institutional design, conduct of persons mandated to supervise elections, management of political parties and related security or dispute resolution institutions. Developments elsewhere and internal agitation for greater recognition of political rights¹³⁴ and credibility in electoral management are recurring issues in constitutional, legal and institutional reforms.

Over twenty years of resistance and sometimes incremental reforms culminated into the enactment of the Constitution of Kenya 2010 thereby setting the stage for comprehensive reforms. The political and constitutional crisis that followed the disputed elections in 2007 gave the impetus for comprehensive reform of the governance and electoral framework.¹³⁵

Kenya has moved in step with the international developments with mixed fortunes.¹³⁶ The country has experimented with various designs of the electoral management bodies, tinkered with the law, adjusted regulations and changed personnel. Kenya has also witnessed hopeful moments of peaceful democratic transition like in 2002 and unfortunate moments of near total collapse of the state in 2007. Since independence, Kenya has moved from legal

¹³³ See generally Jørgen Elklit and Andrew Reynolds, 'The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda' (September 2000) Kellogg Institute Working Paper No. 281 < <https://kellogg.nd.edu/publications/workingpapers/WPS/281.pdf> > accessed 04 August 2015.

¹³⁴ 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.

¹³⁵ 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 August 2015.

¹³⁶ See generally, the Okech Owiti (ed), *The Electoral Environment in Kenya: A Research Project Report* (Institute for Education in Democracy 1997).

subversion of the will of the people in the colonial and one party era, and expanded political rights in its Constitution 2010 which is generally acclaimed for its progressiveness.¹³⁷

2.2 International Trends and Standards in Electoral Administration

Greater analysis has been made on electoral administration trends in the last twenty years. This has led to categorisations based on the recurring features in electoral management design. Many academics and NGO's involved in electoral administration or policy activism have set out to discern the main features in electoral administration. The United Nation Development Programme (UNDP), the International Institute for Democracy and Electoral Assistance (International IDEA), International Foundation for Electoral Systems (IFES), Electoral Institute for Sustainable Democracy in Africa (EISA), among others, have made in-depth studies on the emerging standards in electoral administration. Professionals, regional bodies and research institutions have put increased time in the study of electoral management systems.

Johan Elklit and Andrew Reynolds propose a framework for assessing the quality of electoral administration.¹³⁸ In respect to the optimal effectiveness of the electoral management, they propose an assessment based on the perceived degree of legitimacy or acceptance of the electoral management body by parties and voters; the perceived degree of independence of the EMB; the perceived quality of service delivery by the EMB; and the degree of transparency of the EMB. These factors for internal institutional study are reinforced by assessment of other essential parameters in electoral management including: the legal framework, boundaries delimitation, voter education, voter registration, the role of political

¹³⁷ Walter Oyugi, 'The Politics of Transition in Kenya 1992-2003: Democratic Consolidation or Deconsolidation?' in Walter Oyugi, Peter Wanyande and Crispin Odhiambo-Mbai, *Politics of Transition in Kenya: From KANU to NARC* (Heinrich Böll Foundation 2003) 345.

¹³⁸ Jørgen Elklit and Andrew Reynolds, 'The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda' (September 2000) Kellogg Institute Working Paper No. 281 <<https://kellogg.nd.edu/publications/workingpapers/WPS/281.pdf>> accessed 04 August 2015.

parties, regulation of election campaigns, polling procedures, counting and tabulation of results, electoral dispute resolution and management of post-election procedures. Beyond the factors proposed by the Elklit and Reynolds, the extent of regulation of political finance and election security has emerged as an increasingly important factor. The former remaining a critical factor in emerging as well as advanced democracies, while the latter is a prominent factor in transitional democracies.

The common thread of the impetus for more in-depth study of the quality of electoral administration have tended to lift the veil on the minimalist view of electoral democracy and invoke analysis based on higher grounds of the extent to which the elections enforce the requirement of political competition in liberal democracy. Authors and academics have denounced the ‘fallacy of electoralism’¹³⁹ and advanced the need for deeper understanding of the connection between elections and democratization.

In liberal democracy, elections must bear out some standards of fair competition and guarantee certain political freedoms. As a key element in democratization process, elections go far beyond the ritual of frequent events advanced by a minimalist view of the Universal Declaration of Human Rights. Such a minimalist view, focused disproportionate attention on the frequency of elections even where the results were predictable and do not engender fairness or inherent uncertainty in any arena of competition.

Certain standards are observable in the movement toward better management of election processes.¹⁴⁰ The quality of elections administered by an impartial management body that lends itself to scrutiny by local and international observers, embodies the confidence of the electorate, and is acceptable to the participants has become increasingly central. The political

¹³⁹ Caroline van Ham, ‘Beyond Electoralism, Electoral Fraud in Third Wave Regimes 1974-2009’ (Ph.D Thesis, European University Institute) 11.

¹⁴⁰ Jørgen Elklit and Andrew Reynolds, ‘The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda’ (September 2000) Kellogg Institute Working Paper No. 281 <<https://kellogg.nd.edu/publications/workingpapers/WPS/281.pdf>> accessed 04 August 2015.

choices must be expressed by knowledgeable voters within an environment free of violence or official intimidation. Also important is effective management of political parties which respect internal democracy. A credible and efficient process of determination of disputes is an important link between election administration and the observance of the rule of law. And finally, the latest frontier of election reform relates to increased attention on campaign or political finance in order to foreclose the influence of interested money, enhance fairness and contribute to anti-corruption agenda. These standards, by no means are exclusive, but are nevertheless essential to understanding the performance of election management bodies and other institutions with roles in election administration.

In achieving these mutually reinforcing elements, different countries have designed their systems differently responding to local circumstances or in some instances through the accident of colonial legacy. The three most studied categorisations are the government based model; the independent model and the hybrid model.¹⁴¹ Some electoral management bodies are also categorized based on the extent of decentralization particularly in federal or semi federal systems. Exceptionally, elections conducted by international bodies with specific mandate in transitional elections like the UN in East Timor¹⁴² or mixed international and national officials.

The government based model is common in advanced democracy or emerging democracies which have not reformed the electoral legacies left by the colonial administrations.¹⁴³ Under the model, all or substantial elements of the electoral administration are undertaken by a department under the executive, for instance, the Ministry of Interior in many French

¹⁴¹ International Institute for Democracy and Electoral Assistance, *Electoral System Design: The New International IDEA Handbook* (International IDEA 2005).

¹⁴² United Nations, 'Electoral Assistance' <<http://www.un.org/en/peacekeeping/issues/electoralassistance.shtml>> accessed 01 August 2015.

¹⁴³ International Institute for Democracy and Electoral Assistance, *Electoral System Design: The New International IDEA Handbook* (International IDEA 2005) 7.

colonies. The success of such a system requires concurrence of at least three factors: mature, independent and impartial civil service that is not vulnerable to manipulation particularly by an interested incumbent; a long tradition of the rule of law where powerful political leaders are subject to the legal limits; and full acceptance by the electorate and the political parties respecting the efficacy of the civil service.¹⁴⁴ It is not surprising therefore that while this model has worked without much objection in advanced democracies, it has largely failed in emerging or transitional democracies. Kenya's elections administered by the Supervisor of Elections under the Attorney General's Office was an example of a government-based model.

The Independent Model is where elections or the critical aspects thereof are managed by an institution that is independent and autonomous from the executive branch.¹⁴⁵ The members are recruited through a process that secures their independence, they have security of tenure, operational and financial autonomy for their operations. They may be accountable to the legislature, the judiciary or the head of state for their reporting by neither of the organs may direct their operations.¹⁴⁶ Many transitional and emerging democracies have resorted to the independent model particularly to minimize the historical consequences control by an overbearing executive.¹⁴⁷ The degree of constitutional or legal independence varies from country to country. In practice, the degree of autonomy also varies based on potential bias owing to corruption, ethnicity or other social dynamics. The constitution of Kenya 2010 establishes an EMB with significant marks of the independent model.

¹⁴⁴On democracy, institutional governance and the rule of law, *see* Rafael López-Pintor, 'Election Management Bodies as Institutions of Governance' (UNDP) <<http://www.eods.eu/library/UNDP.Electoral%20Management%20Bodies%20as%20Institutions%20of%20Governance.pdf>> accessed 05 August 2015.

¹⁴⁵ International Institute for Democracy and Electoral Assistance, *Electoral System Design: The New International IDEA Handbook* (International IDEA 2005).

¹⁴⁶ See Report of the African Union Elections Observation Mission to the 4 March 2013 General Elections in Kenya (2013).

¹⁴⁷ Rafael López-Pintor, 'Election Management Bodies as Institutions of Governance' (UNDP) 138 <<http://www.eods.eu/library/UNDP.Electoral%20Management%20Bodies%20as%20Institutions%20of%20Governance.pdf>> accessed 05 August 2015 (In the concluding remarks the author discusses his findings that independent permanent model has tended to result in professionalism, efficiency and cost effectiveness).

The mixed model of electoral management is a dual structure where two bodies, one an independent oversight electoral management body responsible for policy development, supervision and monitoring the critical aspects of the process, and an implementation agency within the executive department responsible for organization and conduct of the election process.¹⁴⁸ Under this model the actual organization of the election is conducted by a government department under the policy direction and supervision by an independent EMB. This model is used in France, Japan, Spain and most French Colonies.¹⁴⁹ Presumably, post-colonial Kenya that had an Electoral Commission established under the Constitution and the Supervisor of Elections under the Attorney General's Office should have functioned in practice as a mixed model. It was however closer to the government based model, except for the delimitation of boundaries.

2.3 Kenya's Electoral Legacy: Historical Antecedents

There is scarce literature or analysis relating to the system for election management and administration in the colonial period. Greater focus in this period had tended to disproportionately analyses the restriction of franchise, limits on political rights including controls of political parties or outright discrimination of the electoral system. Elections were administered by the supervisor of elections, an office under the executive branch of government.¹⁵⁰ The Supervisor of Elections was responsible for the administration of elections. The supervisor of elections was a civil servant supported by other public officials mainly drawn from the provincial administration.

¹⁴⁸ International Institute for Democracy and Electoral Assistance, *Electoral System Design: The New International IDEA Handbook* (International IDEA 2005) 7.

¹⁴⁹ *ibid* 8.

¹⁵⁰ Christopher Mulei, 'Historical Perspectives of Elections in Kenya' in Institute for Education in Democracy, *The Electoral Environment in Kenya: A Research Project Report* (IED 1998) 24-38.

2.4 Post- Colonial (1963 – 1991)

The 1963 Constitution established the Electoral Commission of Kenya as an autonomous body mandated to administer and supervise the elections. The Constitution was however not operationalised effectively leaving the Supervisor of Elections, a unit under the Office of the Attorney General with the powers to conduct elections.¹⁵¹ In this period, the electoral body was so disused that it had been relegated to only one of its constitutional mandates: the determination of constituency boundaries. The National Assembly and Presidential Elections Act enacted in 1969 consolidated the Ordinances and Regulations relating to elections. In this period, Kenya conducted frequent elections including by elections, popularly referred to as the little general elections of 1966, General Elections in 1969, 1974, 1979, 1983 and 1988.

The 1966 little General elections was a culmination of post-colonial events which shaped the political fate of the new nation. Following the 1963 Elections African Peoples Party dissolved itself to join KANU. In 1964, KADU disbanded to merge with KANU effectively turning Kenya's evolving by-party system to a one party state.¹⁵² However internal tensions within KANU developed between persons considered to be left wing and those generally perceived as right wing. At the KANU Delegate's conference held at Limuru in March 1966, the party abolished the position of vice president and replace it with eight provincial party vice-presidents, a move seen as purposed at punishing Oginga Odinga and restructuring KANU leadership under a prominent presidency.¹⁵³

In April 1966, Oginga Odinga supported by twenty eight parliamentary colleagues announced the formation of the Kenya People's Union (KPU). KANU with an unassailable majority in Parliament pushed through a constitutional amendment, popularly referred to as the "turn-

¹⁵¹ *ibid* 34.

¹⁵² Christopher Mulei, 'Historical Perspectives of Elections in Kenya' in Institute for Education in Democracy, *The Electoral Environment in Kenya: A Research Project Report* (IED 1998) 32-33.

¹⁵³ *ibid*.

coat rule”¹⁵⁴ requiring that all MPs who crossed to another party following an elections must vacate their seats and a by election ensue. At the by election held in 29 constituencies KANU used all the powers and resources available to an overreaching incumbent.¹⁵⁵ It openly used public officials and public resources to campaign including wide use of the state owned media, and promise of local development. This coupled with the wide use of civil servants as electoral administrators established the post-colonial political environment. Despite the restricted political environment, KPU won a considerable number of seats. KPU was disbanded by the government before the 1969 General Elections and many of its leaders subjected to arrests of harassment.

1974, 1979, 1983 and 1988 Elections had similar features. Following disbandment of KPU, Kenya was effectively a one party state. This scenario was constitutionalised through the enactment of Article 2A of the Constitution.¹⁵⁶ The presidential elections were not competitive since the incumbent benefited from sole nomination. Parliamentary elections was a field to checkmate persons who were not thought of as sufficiently loyal to the presidency either through denial of nomination or manipulation of the election process. In 1973 a constitutional amendment lowered the age of majority from 21 to 18 years.¹⁵⁷ Because of lack of identity cards many young people, the incumbent could use its power to manipulate the method of identification of voters. The elections were also marked by low turnout because of general apathy with the system.

¹⁵⁴ *ibid* 33.

¹⁵⁵ *ibid* 33; *See also* 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) 51-95.

¹⁵⁶ Enactment of Section 2A in 1982; *See* Francis Away, *Constitutional and Legal Context for Elections in Kenya* (IED 1997).

¹⁵⁷ Christopher Mulei, ‘Historical Perspectives of Elections in Kenya’ in Institute for Education in Democracy, *The Electoral Environment in Kenya: A Research Project Report* (IED 1998) 33-35.

The incumbent could use all cards including unilaterally changing election date.¹⁵⁸ For instance, the 1983 elections were held one and half years before they were due, ostensibly to dislodge dissidents after the 1982 attempted coup. The 1988 elections, considered to be the most fraudulent in Kenya's history demonstrated the façade of Kenya's elections. First the KANU introduced an apparently unconstitutional internal party rule that candidates who garnered at least 70% votes at the primaries stood elected unopposed. Then it introduced queue voting at the primaries stage. At the primaries largely administered by provincial administration, those whose queues looks shorter were announced outright winners. These elections which demonstrably shattered for space for political dissent heightened agitation for re-introduction of multiparty.

2.5 Multi Party Era: The Electoral Commission of Kenya (ECK)

The ECK had been in existence vide Article 41 of the Independence Constitution. However its functions and powers were earnestly undertaken by the Office of the Supervisor of Elections under the Office of the Attorney General and the provincial administration. The Electoral Commission of Kenya appointed in 1991 recast Kenya's electoral management model to the independent after years of a largely government driven model. Until 1997, the Commission comprised 11 members. Successive commissions were ineffective except in respect to delimitation of boundaries function.

Under Article 41 of the former Constitution,¹⁵⁹ the President was empowered to appoint the Chairperson and at least four Commissioners. The Commission contained no qualification for appointment as a Commissioner. It however disqualified sitting MPs, holders of public office and members of the Armed Forces. The Chairperson and Vice Chairperson had to be persons qualified for appointment as judges of the High Court or the Court of Appeal. Upon

¹⁵⁸ *ibid* 34.

¹⁵⁹ Constitution of Kenya (1969), as amended in 1992.

appointment, Commissioners were subjected to an oath and thereafter to the Code of Conduct, a schedule in the National Assembly and Presidential Elections Act, Cap 7 of the Laws of Kenya.

In 1997, following agreement by the Inter-Party Parliamentary Group, convened to assuage activism for complete overhaul of the electoral management, agreed to increase the membership of the Commission by additional 10 persons nominated by parliamentary political parties. This saw political parties appoint members of the Commission to top up the initial 11 appointed by the incumbent president. The result of this process was perceived to be subjective or yielding Commissioners who had affiliation with the incumbent executive or appointing parties. The chance and subjectiveness is evident in Kivuitu's comments in a speech in 2001 while addressing the Constitution Review Commission in Mombasa. He noted that-

“ The ECK as constituted since October 1997 has worked very well. The authorities that nominated them brought together mature people who have served the public in the past in one way or another. Generally they are fairly educated. But most of all they have very high sense of responsibility and their integrity cannot be faulted. The result of this has been that this group has worked harmoniously”¹⁶⁰

In spite of the internal weaknesses of the ECK, the presence of political parties' appointees introduced a sense of balance and acceptance, at least among the elite. When the vacancies of Commissioners fell for second renewal in 2006 and 2007, the then incumbent opted to overlook the IPPG settlement and unilaterally appointed the Commissioners thereby nourishing discontent and lack of confidence in the Commission. The Chairman and the members served for a renewable term of five (5) years. The constitution also protected Commissioners from removal; they could only be removed upon a recommendation of a

¹⁶⁰ Samuel Kivuitu, 'The Electoral Process in Kenya' (Constitution of Kenya Review Commission Workshop on the Interpretation of the CKRC's Mandate, Mombasa, 19 September 2001) <<http://www.commonlii.org/ke/other/KECKRC/2001/27.html>> accessed 01 July 2015.

special tribunal. The members' salaries were determined in accordance with the Constitutional Offices Remuneration Act and paid from the consolidated fund. The budget of the Commission was subject to review and adoption by parliament. The Commission had powers to appoint its own staff and create regional offices.

2.6 Post 2007: The Interim Period- Interim Independent Electoral Commission (IIEC) and Interim Independent Boundaries Review Commission (IIBRC)

The circumstances which followed the 2007 General Elections prompted a rethink of electoral management in Kenya. With very strong justification, the electoral framework attracted significant reforms in the new Constitution. The credibility questions in the 2007 General Elections tipped the balance of necessity for fundamental constitutional reform after long period of resistance and indifference. Following the violence that shadowed the disputed presidential elections in 2007, the Kenya National Dialogue and Reconciliation process and the two principals agreed inter alia to establish an Independent Review Committee (IREC) to investigate all aspects of the 2007 presidential election and make findings and recommendations to improve the electoral process in future.

The Committee chaired by Justice Johann Kriegler submitted its report,¹⁶¹ which contained the most authoritative legal, policy and institutional recommendations on electoral reform. The Kreigler Commission Report found fundamental weaknesses in the Kenyan political culture, institutional breakdown electoral management framework and made strong recommendations respecting review of the legal and constitutional framework on electoral procedures, the Electoral Management Body, the composition and appointment of

¹⁶¹ Report of the Independent Review Commission (Kriegler Report) on the General Elections held in Kenya on 27 December, 2007 (17 September 2008).

commissioners, the operational procedures, funding modalities, functional efficiency amongst others.¹⁶²

The report recommended a total overhaul of the ECK, its replacement by a lean policy commission interacting with a professional secretariat. In the interim period, through Constitutional Amendment Act No. 10 of 2008, the ECK was replaced by the Interim Independent Electoral Commission (IIEC) and Interim Independent Boundaries Review Commission (IIBRC) charged with electoral management and boundary delimitation mandates respectively. The IIEC made considerable incremental administrative reforms and generally contributed to increased confidence of Kenyans in the electoral process. The report of the IIBRC was not published and therefore did not take effect in accordance with art 89 of the Constitution.

2.7 Independent Electoral and Boundaries Commission (IEBC)

The Constitution of Kenya 2010 contains far reaching reforms of electoral democracy in Kenya. First the Constitution is normative and inherently post-liberal in its architecture¹⁶³. It declares Kenya's republic based on sovereignty of the people exercised in accordance with the Constitution. It sets out the values and principles of governance and a progressive Bill of Rights. Governance and exercise of public authority is tied to a rights based agenda. Article 81 reinforces the normative agenda by setting out the general principles that governs the electoral system and representation. The legal and legislative framework of elections and election management in Kenya can be found principally in five laws; The Constitution of Kenya (2010), the Independent Electoral and Boundaries Commission Act (2011), the

¹⁶² *ibid* 42.

¹⁶³ 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.

Elections Act (2011), the Political Parties Act (2011) and the recently enacted Elections Campaign Finance Act (2013)¹⁶⁴.

As the Supreme Law of the land, the Constitution of Kenya 2010, is the most important law that governs electoral process and election management in Kenya. The Constitution devotes substantial chapters to deal with elections and establishes elective offices and institutions that have a direct role in the electoral process. The transformative aspect of elections with regard to electoral process emanates from two salient features. The first is the conferment of the sovereign power to Kenyans, and the explicit provision that sovereignty can be exercised directly or through freely chosen representatives¹⁶⁵ and secondly constitutionalisation of fundamental rights and freedoms that form an integral part of the democratic process including political rights.¹⁶⁶

The foregoing are augmented by provisions on Constitutional Values and Principles,¹⁶⁷ as well as a Chapter on Leadership and Integrity.¹⁶⁸ The Constitutional basis for election in Kenya must of essence take into consideration the provisions in Article 1 (5-6) with regard to the incorporation of the general rules of international laws (Article 5) and the application of treaties and conventions that Kenya has ratified (Article 6).

The Constitution of Kenya 2010 provides the legal basis for the IEBC. Article 88 provides for the establishment and functions of the IEBC. Article 89 outlines the process and criteria for boundaries delimitation. Articles 248-254 provide common provisions designed to protect the independence of independent commissions. Under Article 248 Commissions are not expected to act under the direction of any person or authority. IEBC Commissioners are appointed for

¹⁶⁴ Ibid, 47

¹⁶⁵ Constitution of Kenya 2010, art 1.

¹⁶⁶ ibid art 38.

¹⁶⁷ ibid art 10.

¹⁶⁸ ibid cap 6.

a fixed single term of 6 years. The IEBC¹⁶⁹ Act provides for the manner of appointment, the establishment of the offices, financial provisions and the conduct of commissioners and officials. The Commissioners are full time Commissioners inevitably bringing into question whether they are policy oversight organ or executive. Commissioners are organized into committees which oversee various aspects of the operational and technical aspects of election planning and management. Commissioners are also assigned regions which they oversee. This arrangement is comparable to the organizational culture established by the ECK.

The Secretariat and regional structure established by the IIEC was sustained under the IEBC. The Secretariat is comprised of a Chief Executive Officer and 9 Directorates headed by Directors in the top management level. Each Directorate has managers, officers and assistants in accordance with the functions assigned to the Directorate. The structure is designed as a functional model where by Directorates and Departments complement each other to achieve common objectives but are jointly accountable under the Chief Executive Officer. The IEBC Act, contemplated a clear demarcation of roles between the Commission and the Secretariat. Essentially, the Commission was to give policy directives to the IEBC, while the Secretariat was to be in charge of the day to day operations of the Commission.

In respect to financial autonomy IEBC is a victim of fate, imprudence by its predecessors and itself.¹⁷⁰ Prior to the Kreigler Commission it had been argued by many policy activists and observers that the full budget of the Commission should be a charge on the consolidated fund and not subject to review by the Treasury or Parliament. The objective was to insulate elections budgeting from partisan debate in parliament or cabinet as a means to reinforce the

¹⁶⁹ *Independent Electoral and Boundaries Commission Act, 2011.*

¹⁷⁰ The Kreigler Commission Report made far reaching conclusions on the management capacity of the ECK. The IEBC has also been subject to critical observations on its financial management and allegations of impropriety in procurement of electoral materials. See Office of the Auditor General, Special Audit Report On the Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (06 June 2014) < http://www.kenao.go.ke/index.php/reports/doc_download/148-iebc-special-audit-report-on-procurement-of-evds> accessed 30 August 2015.

independence of the Commission. The Kreigler Commission however made findings of significant unaccountable management of funds by the ECK and reserved an unequivocal recommendation in this for full financial autonomy. Instead, the IREC made telling comments relating to financial mismanagement in the ECK and suggested the needs for further checks and accountability.

The legal framework therefore reflects particular indifference in according the IEBC full financial autonomy. Section 17 of the IEBC Act provides for funds of the Commission to consist of: monies allocated by Parliament for purposes of the Commission; any grants, gifts, donations or other endowments given to the Commission; Such funds as may vest in or accrue to the Commission in the performance of its functions under this Act or under any other written law¹⁷¹. Section 18 of the Act establishes the Independent Electoral and Boundaries Commission Fund which shall be administered by the Commission Secretary. The funds to be paid into the fund include salaries, allowances and other remuneration of employees of the Commission, and any other operational and “other expenses incurred by the Commission in the performance of its functions.”

Section 19 of the IEBC Act provides that, ‘The administrative and other expenses of the Commission, including the salaries, allowances, gratuities and pensions of the members and employees of the Commission shall be a charge on the Consolidated Fund.’ Section 20 provides that the members and employees of the Commission shall be paid such remuneration or allowances as the Salaries and Remuneration Commission shall determine. Under Section 21 the annual estimates of the Commission are prepared by the Secretary subject to the approval of the Commission. The Cabinet Secretary responsible for finance is mandated to ‘present the estimates approved by the Commission for consideration and

¹⁷¹ Independent Electoral and Boundaries Commission Act, 2011, Section 26

approval by the National Assembly¹⁷².’ The policy intention was clearly to insulate IEBC budget from debate but this is largely undermined by past and present unaccountable management of resources.

The functions of the IEBC are set out under Article 88(4) of the Constitution¹⁷³. These include: the voter registration and revision of the voters roll; delimitation of electoral boundaries; regulation of party nomination; settlement of electoral disputes except election petitions; registration of candidates for election; voter education; facilitation of election observation, monitoring and evaluation; regulation of campaign expenditures; developing party codes of conduct; and monitoring compliance with election law.¹⁷⁴ This function expands and clarifies the functions contained under Articles 41 and 42 of the former Constitution. The Independent Electoral and Boundaries Commission Act, 2011 restates and expounds on the functions of the IEBC.

The Elections Act¹⁷⁵ is the main operational legislation on the electoral process. It consolidates the former legislative provisions and provide in an elaborate fashion the procedure and processes associated with voter registration; nominations, elections, referendum, election offences and election dispute resolutions. The Elections Act vests the powers to manage the elections on the IEBC. The Act provides for registration of voters and the determination of questions relating to registration of voters; the nomination and election of the president, members of parliament, the governors and county assembly representatives; nomination of party lists members envisaged under Article 90 of the Constitution, recall of elected members of parliament; conduct of referendum; election offences; and resolution of election disputes. In a bid to give more powers to the Commission, the Elections Act

¹⁷² Ibid.

¹⁷³ Constitution of Kenya 2010, Article 88.

¹⁷⁴ Constitution of Kenya 2010, art 88(4)(a)-(k).

¹⁷⁵ *Elections Act*, 2011

introduced two more provisions that is a departure from the previous dispensation. These are the prosecutorial powers of the IEBC with respect to Election Offences and the enforcement of the Election Code of Conduct.¹⁷⁶ In enforcing the Code, the Commission can issue a formal warning, disqualify a candidate or a political party from contesting the elections and may ban a candidate or a political party from contesting subsequent elections. Political Parties Act, 2011 is also a major law governing elections in Kenya. The Act deals mainly with the regulations and funding of political and is therefore not important for the purposes of this research.

The Campaign Finance Act, 2013 implements Article 88(4)(i) of the Constitution by providing a framework for the regulation of amount of money that may be used by candidates in an election. The Act provides for the powers of the IEBC, obligations of political parties and candidates, regulation of contributions and expenditures, disclosure and resolution of disputes. While this legislation was not enacted in time for the 2013 General Elections, it is expected to provide a new dimension of electoral reform in the run up to the 2017 General Elections. The passage of the Elections Campaign Finance Act, and the vesting of jurisdiction on the IEBC to manage election campaign finances inevitably increases responsibility on the IEBC over and above the management of six elections as well as dealing with disputes arising from party nominations.

2.8 Conclusion

Every multi -party elections in Kenya since 1992 has experienced serious challenges and contestations. A study on the evolution of election management bodies (EMBs) in all these elections and elections held before then demonstrated gaps in the organisational structure of the EMBs, constitutional and legal framework, as well as their conduct of EMB personnel in the actual management of the elections. While failures and challenges have been noted in

¹⁷⁶ *Elections Act*, 2011, part VIII, cl 10.

each election, the conduct of the ECK for example in the 2007 elections triggered unprecedented violence never witnessed. As noted by Kriegler, the conduct of the ECK provided a trigger for deeply entrenched division and marginalisation that escalated into serious violence. Regrettably, 20 years since the restoration of multi party politics, Kenya still grapples with the design and structure of Electoral Commission to manage its elections.

CHAPTER THREE

THE 2013 ELECTIONS IN PERSPECTIVE: EXPERIENCES AND CHALLENGES IN ELECTION MANAGEMENT AND ADMINISTRATION

3.1 Introduction and Context

“In every election since 1992, the debate about electoral laws and election management body has featured prominently. The conduct of the former ECK, to the IPPG and finally the era of the new constitution and IEBC, the country is still embroiled in the discussion on electoral laws and management of elections over two decades since the country reverted back to multi-party democracy”¹⁷⁷

The promulgation of the 2010 Constitution of Kenya comprehensively overhauled the Kenyan electoral framework and introduced new legal and institutional framework for elections management and administration. While the elections were generally peaceful and hailed by both local and international observers as ‘free and fair’, the elections witnessed numerous shortcomings and challenges that brought into question the credibility and integrity of results. Post election audit carried by different stakeholders including the IEBC Task Force on elections exposed evidence of malpractices, failure of technology and wilful complicity by electoral officials in the overall conduct of the elections.¹⁷⁸ As Jack, a former Presidential candidate opined, “IEBC did not demonstrate that it had the capacity or understood the stakes of mismanaging elections and it is by God’s grace that the country did not witness violence in 2013 elections”¹⁷⁹.

In assessing electoral administration, analysis has been drawn from the field work undertaken in the study as well as literature on electoral governance examined in Chapter one. Based on thematic issues identified on sound electoral administration¹⁸⁰, and analysis of the evolution of election management and administration in Kenya discussed in chapter two, it is argued

¹⁷⁷ Interview with Moses, CSO election expert, on 3rd June 2015

¹⁷⁸ See AfriCOG, ‘Election Day 2013 and Its Aftermath’ (2013) AfriCOG/KPTJ Election Series, 5 <<http://nisisikenya.com/wp-content/uploads/2014/03/March-2014-Election-Day-Election-Series-AfriCOG-KPTJ.pdf>> accessed 24 August 2015.

¹⁷⁹ Interview with Jack, in Nairobi Kenya 3rd May 2015

¹⁸⁰ See the literature review section

that as presently constituted, the legal and institutional framework governing elections management and administration cannot guarantee credible elections in line with the new constitutional dispensation introduced as part of the 2010 constitutional framework.

3.2 Conceptualizing Election Administration, Electoral Cycle and Electoral Governance

Although used interchangeably, election administration, electoral cycle and electoral governance lend themselves to different meanings. Electoral system is generally divided into two broad categories- the electoral system and electoral management. The electoral system refers to the broad overarching design and legislations of elections including the process by which votes are translated into seats, while electoral management encompass the practical and administrative aspects of elections including the composition of the electoral management bodies.¹⁸¹

Electoral cycle is the complimentary and interwoven phases that collectively make up the electoral process. As described by the International Institute for Democracy Assistance (IDEA), the electoral cycle is the step by step process that begins with the promulgation of electoral laws and includes processes such as the delimitation of constituencies, voter registration, procurement of electoral materials, party nominations, campaigns, election day activities and the resolution of election disputes.¹⁸² Shaheen Mozaffar defines Electoral Governance as the wider set of activities that creates and maintains the broad institutional framework in which voting and electoral competition takes place, which operates at three levels; rule making, rule application, and rule adjudication.¹⁸³

¹⁸¹ Michael Bratton and Nicholas van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (Cambridge University Press 1997) 43.

¹⁸² International Institute for Democracy and Electoral Assistance, *Electoral System Design: The New International IDEA Handbook* (International IDEA 2005).

¹⁸³ Shaheen Mozaffar and Andreas Schedler, 'The Comparative study of Electoral Governance-Introduction' (2002) 23(1) *International Political Science Review* 5, 7.

Essentially, rule making, rule application and rule adjudication are at the centre of the electoral cycle which the election management bodies exercise the ultimate jurisdiction over. A major finding of the study was the lack of fusion between election administration, electoral cycle and electoral governance in the overall design and conceptualisation of electoral management in Kenya. 14 out of the 20 interviewees were unanimous that Kenya's electoral design and management failed to appreciate the interface between the electoral cycle, administration and governance and hence the treatment of election as an event and not a process. As observed by Mary during the interviews " Kenya seems to treat elections as a one off event that does not require planning and institutional development"¹⁸⁴

3.3 The Organizational Structure and Operations of IEBC

The organisational structure of the ECK, was at the centre of the inquiry conducted by the Kriegler Commission with the conclusion that the structure and composition of the ECK was not conducive to guarantee a credible elections and partly contributed to the failures of the 2007 elections. In its findings the Commission stated that-

"Kenya's electoral commission does not seem to conform to any clearly defined appointment principles. Inevitably, its credibility suffers, since key stakeholders cannot feel a sense of ownership of the structure, nor can they place much faith in its inherent professional competence."¹⁸⁵

The research sought to establish the extent to which the new constitutional and legal framework governing the IEBC had complied with the recommendations of the Kriegler Commission Report on the organisational structure and operations of the IEBC. Most importantly was the inquiry as to whether the new structure could be relied upon to guarantee credible and transparent elections? The institutional design and organisational structure of the IEBC is premised on four broad parameters, namely; demarcation of roles and

¹⁸⁴ See the response by Mary filled electronically, 4th September 2015

¹⁸⁵ Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2010 (17 September 2008) 31.

responsibilities between the Commission and the Secretariat; fixed tenure (six years non renewable term), operational and financial independence, and devolution of the operation of the Commission. From the interviews conducted, most of the Presidential candidates, Jack, Mary, and Andrew¹⁸⁶ strongly felt that the new constitution had not achieved the parameters argued above while representatives of CSOs namely, Michael and Moses felt that, the new legal framework had demarcated the above structures and what was lacking was compliance to the law by IEBC.

As argued in Chapter 2 of this thesis, the legal framework establishing the IEBC is contained in the Constitution of Kenya 2010 at Article 88. The Constitution lays in elaborate fashion the functions of Commission, which include; registration of voters and the maintenance of voter register, delimitation of constituencies and wards, regulation of party nominations, voter education, dispute resolution and evaluation of election among others.¹⁸⁷ Article 89 details the procedure and criteria for delimiting constituencies and vests that responsibility to the IEBC.¹⁸⁸

The IEBC Act provides for appointment of Commissioners and governance of the Commission.¹⁸⁹ The Act provides for the framework and procedure for appointment of Commissioners. The detailed provisions for appointing the Commissioners under the first review are provided in Schedule 1 of the IEBC Act, 2011. In a bid to inject independence and cure the uncertainties that were caused by failure to entrench the IPPG reforms package in the appointment of the Commission, the Constitution and the IEBC Act, introduced multiple

¹⁸⁶ Interview with Andrew, in Nairobi 12th March 2015. From the interviews conducted, perspectives of Political party leaders and CSOs demonstrated remarkable differences of opinion.

¹⁸⁷ Constitution of Kenya 2010, arts 88 (1-5).

¹⁸⁸ *ibid*, arts 89 (1-12).

¹⁸⁹ *IEBC Act*, 2011, ss 5 and 6.

appointment process to the Commission similar to the Independent Electoral Commission (IEC) of South Africa.¹⁹⁰

The appointment process involved a Selection Panel nominated by key stakeholders, whose role was to receive application, interview and shortlist candidates.¹⁹¹ At the second stage were interviews by the Parliamentary Committee on Justice and Legal Affairs. The third stage involved Plenary of Parliament to debate the names, and finally the President to appoint from the list recommended by Parliament.¹⁹² As a strategy for accommodating the politics of the Grand Coalition Government, the two Principals (President Kibaki and Prime Minister Raila Odinga) were allowed to nominate two people each in the 7 member Panel.

The independent model of appointing the Commissioners was intended to inject autonomy and professionalism in the management of elections in Kenya. Indeed, the argument by Abuya that the efficacy of the EMB rests on their mandate and independence¹⁹³ would then be proved as a legitimate observation to the extent that the transparent and independent process of appointments would ultimately enhance confidence on the EMB and in particular the crucial work of management of the elections¹⁹⁴. In the run up to the 2013 elections however, clear splits and fissures emerged in the Commission that undermined its neutrality and independence. ‘The alignment of the Commission with the political factions brought into question their neutrality and independence. A debate to revert back to the IPPG model where political parties nominated the Commissioners has also featured in the post 2013 election’.¹⁹⁵

¹⁹⁰ South Africa, *Independent Electoral Commission Act, 1998*

¹⁹¹ *IEBC Act, 2011*, sch 1 (Bodies nominating the Selection Panel included; The President, Prime Minister, Judicial Service Commission, Kenya Anti -Corruption Advisory Board and the Association of Professional Societies of East Africa).

¹⁹² *ibid.*

¹⁹³ *Ibid* see note 88 above

¹⁹⁴ *ibid*

¹⁹⁵ Interview with Jack, Nairobi 3rd May 2015. Jack voiced a strong opinion on the need for political parties to nominate electoral Commissioners.

One of the challenges that undermined the operations of the IEBC was the manifest overlap, duplication and conflictual relationship between the Commission and the Secretariat¹⁹⁶. Arising from the recommendations of the Kriegler Commission, the IEBC Act attempted to draw a clear demarcation of the role of the Commission and the Secretariat. Section 10 of the IEBC Act, states that the Commissions Secretary is the head of the Chief Executive and Head of the Secretariat, whose primary responsibility is to facilitate, coordinate and ensure execution of the Commissions mandate.¹⁹⁷

While the spirit and the mischief that was intended to be cured by this provision is clear, ambiguous drafting of this provision lent itself to challenges. The Act is silent on whether the commissioners are executive or non-executive, and this has led to ambiguity with the commissioners resorting to the past practice of being executive commissioners. The initial drafts of the Bills expressly provided for Commissioners as non-executive, this may be reasonably inferred from the context of the Constitution and the Act. Section 10(6) provides for the Commission's Secretary shall, in the performance of the functions and duties of office, be responsible, answerable and report to the Commission. This section is presumably based on the fact that the position of a Chief Executive hosts delegated authority of the Commission. However further clarity on the framework for reporting would have been helpful¹⁹⁸. Despite the lack of clarity in law on the demarcation of roles between the Commission and the Secretariat, George¹⁹⁹ and Victor, representing the Constitutional Commissions, felt that the provisions in the IEBC Act was sufficient to allow the CEO exert enough powers to run the Commission²⁰⁰.

¹⁹⁶ 12 out of the 20 respondents interviewed

¹⁹⁷ IEBC Act, 2011, s 10 (7)(e-iii).

¹⁹⁸ See European Union Elections Observation Mission Report to the General Elections Held in Kenya on 4th March 2013.

¹⁹⁹ Interview with George, held in Nairobi on 5th August, 2015.

²⁰⁰ See also interview with Victor, held in Nairobi 5th October 2015.

At the Commission level, the commissioners exercise collegiate authority through the plenary. The Commission also establish Committees to oversee different functions. Individual commissioners are assigned regions which they supervise. This arrangement facilitates effective day to day control by the commissioners. It is particularly useful for a new Commission that has not established effective systems and attained structural maturity²⁰¹. The downside is that full time commissioners are likely to get involved in executive roles, direct supervision of the operational level thereby blurring the line between the strategic and operational levels and the accountability framework²⁰².

The IEBC attempted to surmount this challenge by having Management Committee comprised of all Directors and led by the CEO to facilitate collective accountability of the operational level to the governing level with the plenary sitting weekly and Committees meeting frequently. While the Committee arrangement was intended to enhance efficiency, it slowed decision making on key electoral matters.

The Constitution and the IEBC Act guarantee operational and financial autonomy and independence to the IEBC in the discharge of its functions. Section 26 of the IEBC Act is explicit that, ‘In the discharge of its functions, the Commission shall not be subject to the direction or control of any person or authority.’ Section 18 of the Act establishes the Independent Electoral and Boundaries Commission Fund which shall be administered by the Commission Secretary, while section 19 directs that the Commission expenses to be charged to the Consolidated Fund. With regard to Independence and Financial Autonomy, the IEBC is a victim of fate, imprudence by its predecessors and itself²⁰³. By acceding to the Grand

²⁰¹ Report of the Independent review Commission on the General Elections Held in Kenya on 27th December 2007(17 September 2008), p 4.

²⁰² The Report of the Independent Review Commission on the General Elections Held on 27th December 2007 (17th September 2008), 23.

²⁰³ See also the Report of the African Union Panel of Eminent African Personalities, ‘*Bank From the Brink: The 2008 Mediation Process and the Reforms in Kenya*’ (2014) 56

Coalition Government to procure the BVR kits, for example, the IEBC inadvertently conceded its autonomy to the government in flagrant violation of Section 26 of the IEBC Act. “The requirements in Section 21 of the IEBC Act that obligates the IEBC to present estimates approved by the Commission for consideration and approval by the National Assembly’ inevitably makes IEBC beholden to Parliament”²⁰⁴. The foregoing is better illustrated by the budgetary process in 2015 whereby the IEBC presented a budget of Kshs 7.8 Billion, and Parliament unilaterally reduced the IEBC budget to Kshs 3.8 Billion.²⁰⁵

The organisational structure of the IEBC is incomplete without an assessment of the interface between the National Secretariat based in Nairobi and the County and Constituency structures. In a bid to devolve its functions, the IEBC established 17 Regional Offices and 290 Constituency Offices presided over by the Regional Coordinators and the Constituency Coordinators. The IEBC also employed part time staff during the 2013 elections. The Constituency Coordinators were retained as Returning Officers (ROs) for purposes of constituency elections.

IEBC necessarily relies on temporary workers to provide operational support during electoral activities. Adequate training and preparedness is therefore indispensable to efficient electoral administration. From the interviews conducted, 10 respondents²⁰⁶ acknowledged that the IEBC tried its best in training the staff and facilitated cascaded training in the constituencies and polling stations. IEBC also developed the necessary trainings materials that were used during the training sessions²⁰⁷. The question of the impact of these trainings however could not be ascertained in light of the multiple mistakes realised on election day and the high number of spoilt ballots that accompanied the process. 15 of the respondents interviewed felt

²⁰⁴ Interview with Succiline, held in Nairobi, on 2nd October 2015

²⁰⁵ Independent Electoral and Boundaries Commission Strategic Plan (2015-2018) 3.

²⁰⁶ Comprising 50% of the respondents.

²⁰⁷ Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4 March 2013 General Election (October 2014) 35.

that the trainings were held to close to the elections and that some IEBC staff were influenced by political parties and candidates to favour them.

3.4 Boundaries Delimitation

*“Boundaries delimitation is one of the most emotive issues in the First-Past-the Post Electoral System (FPTP)”.*²⁰⁸

The Kriegler Commission Report noted the complex nexus between the Electoral System in Kenya and the boundaries delimitation process over the years and observed that, ‘The First-Past-The Post Electoral System carried over from the colonial days, with its potential for distortion, real or perceived, compounded the problems caused by the originally gerrymandered, outdated and grossly skewed constituency delimitation pattern.’²⁰⁹

The report proceeded to argue against the electoral system in Kenya (FPTP) and suggested five options for reforms. One of the options recommended by the Commission was the continuation of the FPTP system, but with a redistribution of constituencies, (delimitation in the traditional way, but using GPS-based system, or by employing a combination of principle).²¹⁰ The IEBC concluded the review of Constituencies commenced by the Interim Independent Boundaries Review Commission (IIBRC) (the first review of constituencies under the Constitution of Kenya 2010. IIBRC had been established in 2008 as an interim measure to succeed the ECK and mandated to undertake fresh boundaries delimitation. The Kreigler Commission had made critical findings regarding successive boundaries delimitation process prior to the 2007 General Elections. The Commission found that there was evidence of gerrymandering leading to imbalanced representation. There was lack of clear procedure and criteria for boundaries delimitation²¹¹. The IIBRC was mandated to undertake a

²⁰⁸ Interview with Christopher, held in Nairobi on 23rd August 2015

²⁰⁹ The Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007 (17 September 2008) 3.

²¹⁰ *ibid.*

²¹¹ Report of the Justice and Legal Affairs Committee, 10th Parliament 4th Session, 2008.

comprehensive boundaries delimitation process and correct historical imbalance in representation.

Upon the completion of the delimitation process, a number of court cases were filed challenging the manner and procedure used by the IEBC in the delimitation process. In the case of *Republic v IEBC exparte Eliot Ludubwi & 5 others*,²¹² the issues for determination were two fold; firstly the jurisdiction under the powers of the High Court to review a decision on the delimitation of electoral units under Article 89(1), and secondly, the constitutionality and legality of the criteria for delimitation applied by the Commission. The fulcrum of the litigation was therefore the interpretation of and application of the criteria for delimitation set out in Article 89 as read together with Section 27 of the sixth schedule to the Constitution and Section 36 of the IEBC Act as read with the 5th Schedule to the Act.

Acknowledging that equality of vote and fair representation are related concepts, the Court addressed itself to the mandate imposed upon the Commission to strike this balance. The Court ruled that the IEBC complied with the constitutional and legal provisions governing boundaries delimitation and that reliance on other reports and materials did not render the exercise a nullity. The High Court also affirmed its jurisdiction of judicial review as provided for in the Constitution. The Court however faulted the IEBC for not conducting adequate Public Participation.

The challenges of the first review included the fact that the process straddled two constitutions and two institutions²¹³. The mandate of the IIBRC prior to the enactment of the current Constitution was limited to making recommendations to parliament which had final authority to approve the Constitution.

²¹² HC Judicial Review Division Miscellaneous Application 94 of 2012.

²¹³ Parliamentary Committee on Justice and Legal Affairs, 10th Parliament 4th Session. The Committee considered the challenges relating to the IBBRC Mandate before completion of its work thereby leaving outstanding issues to be resolved by the in -coming IEBC.

The current Constitution changed the approval process by empowering the Boundaries Commission full authority to publish the revised electoral boundaries. Schedule Five of the Independent Electoral and Boundaries Commission Act, 2011 effectively circumvented the constitutional provision by providing for parliamentary consideration of proposed boundaries. The transitional provisions in the Constitution also limited the operation of the formula and criteria set out under Article 89. It is also unclear whether the exercise of appellate jurisdiction by the Court of Appeal in respect to the judicial review mandate of the High Court is mandated under Article 89(11).

3.5 Registration of Voters and the Maintenance of Voter Register

Voter registration exercise is the process by which eligible persons are listed as voters. Voter registration exercise remains a crucial and indispensable process in the electoral cycle because in most countries only those who are registered to vote ultimately participate in the election day. For compelling reasons, voter Registration attracted substantial investments in the lead up to the 2013 General Elections. “The legal framework, the new boundaries delimitation concluded in 2012, and the recommendations of the Kreigler Commission Report necessitated a fresh voter registration. Presumably, not for the sake of getting a new voters’ register but so as to premise voter registration on the higher principles of accuracy, verifiability and the principles articulated in the Constitution”.²¹⁴

The pilot project which preceded the 2010 Constitutional referendum raised the public expectation that these ideals could only be guaranteed by a Biometric Voter Registration system. Integrity of the voters register is predicated on two mutually re-enforcing elements of accuracy and completeness of the suffrage. These elements found the expression in the principles stipulated under Article 81 of the Constitution, political rights under Article 38 of the Constitution, the Elections Act and Regulations.

²¹⁴ Interview with Silas, held in Nairobi on 23rd October 2015

Criticisms of the old framework in the Kreigler Commission Report and other observer reports focused heavily on enhancing suffrage of women and youth. While the report noted issues relating to accuracy it was explicit on the mechanisms necessary to remedy the gaps. Internationally, the development on voter registration has isolated three criteria as constituting the test for effective voter register; the first test is whether the voter register is comprehensive with acceptable geographical spread across the country; the second question is whether the register is an authoritative role; and finally whether the register is accurate and verifiable.²¹⁵ Peter, who is a party leader opined that the voter register, as compiled by the IEBC did not meet the three tests argued above²¹⁶, especially on the geographical representativeness. However, Robert, who worked for the Commission felt that the three tests were largely met given the constrained of time the IEBC operated under during the voter registration process.

The Constitution of Kenya 2010 provides the legal foundation for voter registration in Kenya. Article 38 guarantees political rights and entrenches participation in election and voter registration as a fundamental right.²¹⁷ Operationally, the effectiveness of all rights contained in Article 38, namely; the right to form, participate and campaign for a political party, the right to free, fair and regular elections, and the right to vote in an election or referendum, is firmly anchored on voter registration. Article 83 deals with the criteria or qualification of voters and sets out enabling and disabling criteria to be registered as voter. Curiously, the Article retained the citizenship requirement and abolished the residency criterion that was contained in the former National Assembly and Presidential Elections Act (now repealed).

²¹⁵ Elisabeth Carter and David Farrell, Electoral Systems and Election Management' 2 <https://www.ucd.ie/t4cms/Farrell_Carter_Election_Management.pdf> accessed 02 August 2015.

²¹⁶ Interview with Peter, held in Nairobi on 4th November 2015

²¹⁷ Constitution of Kenya 2010, art 38 (3 -a) (Every citizen has a right without unreasonable restriction, to be registered as a voter).

The Elections Act, 2011, is the principle statute which consolidates provisions relating to the several elements of elections operations.

Undoubtedly, the Constitution of Kenya and the Elections Act, provides a sufficient foundation for the registration of voters. The legal framework makes voter registration rights based, and integrally connected to the freedom of political choice articulated under Article 38, 83 and 88 (2)²¹⁸ which are straight forward and written in plain terms. Paradoxically, while the law appeared to be straight forward, the actual exercise of voter registration in Kenya faced many operational challenges and misinterpretation of the law. As aptly captured by Mary,²¹⁹ “it was clear that the voter registration exercise and the register compiled did not meet the tests of comprehensiveness, authoritativeness, accuracy and verifiability, which are the acceptable benchmarks governing voter registration processes”.

The problem of voter registration in the run up to 2013 elections was complicated by a number of factors, some of which were outside the purview of the IEBC. The numerous court challenges on various aspects of the electoral cycle ensured significant delays in the voter registration process that needed to be resolved. Throughout 2012, the conduct of the 10th parliament of engineering amendments to the Elections Act, interfered with crucial timelines for election preparations, which in turn interfered with the preparatory stages of the elections. Perhaps the greatest challenge was the procurement challenges faced by IEBC that effectively stalled the process.²²⁰

Remarkably, the Kriegler Commission noted material defects with the 2007 voter register. In a bid to remedy problems noted by the Kriegler Commission, the IEBC resolved to use

²¹⁸ Constitution of Kenya 2010.

²¹⁹ This view was widely shared by especially opposition parties, csos and the presidential candidates during the interviews.

²²⁰ AfriCOG, ‘Election Day 2013 and Its Aftermath’ (2013) AfriCOG/KPTJ Election Series, 3 <<http://nisisikenya.com/wp-content/uploads/2014/03/March-2014-Election-Day-Election-Series-AfriCOG-KPTJ.pdf>> accessed 24 August 2015.

Biometric Voter Registration (BVR), which involved the capturing of personal biographic information which included fingerprints and photo identification, which would then be transmitted to the IEBC central biometric database. The use of technology in voter registration exercise was represented as a departure from the previous Optical Marker Reader (OMR), which had been blamed for the problems noted by the Kriegler Commission. BVR process was further represented by the IEBC as the best way to guarantee geographical coverage, accuracy and verifiability of the voter registration exercise.²²¹

While a national consensus had been built on the need to introduce technology on voter registration exercise, the IEBC failed in conducting a transparent process for the procurement of the BVR. Vested business interests coupled by division, resulted into IEBC abandoning the process and announcing its intentions to revert back to the OMR, process. The Grand Coalition Government (GCG) hurriedly met and announced its decision to procure the BVR through Government to Government tender. The decision to cede the responsibility for procuring BVR by the IEBC to the government amounted to abdication of responsibility by the Commission which was at the core of its independence and autonomy as guaranteed by the Constitution and the IEBC Act.²²²

Following protracted court battles and delays, IEBC commenced voter registration process on 19 November 2012. Against a projection of 18 million voters, IEBC managed to register slightly over 14 million voters, in 25,000 polling centres, using 15,000 BVR kits, within a period of one month.²²³ Subsequently the register was opened for inspection where the registered voters were allowed to verify whether their particulars had been accurately

²²¹ See Ahmed Issack, 'Biometric Voter Registration (BVR) to Enhance Credibility of Elections' <<http://jamhuri magazine.com/index.php/kenya/3719-biometric-voter-registration-bvr-to-enhance-credibility-of-elections.html>> accessed 20 August 2015.

²²² Constitution of Kenya 2010, art 88; *IEBC Act*, ss 26.

²²³ See Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4 March 2013 General Election (October 2014) 35.

captured.²²⁴ The question as to how comprehensive the voters roll was can be answered with reference to available data prepared by the Commission. To begin with, IEBC only managed to register 70% of the total voting population which translated to 14 million against a projection of 18 million voters.

While the foregoing was not a major problem, the final tally of registered voters in the 47 Counties in Kenya revealed glaring discrepancy and disproportionality. In Mandera County for example, with an estimated population of 1,025,756 and an estimated voting population of 478,207, IEBC only managed to register 25.3% which was a paltry 121,005.²²⁵ The situation in Mandera County compares poorly with Kirinyaga County which had an estimated population of 528,054, with approximately 262,148 voting population, registered 262,715 which translated into 106.7%²²⁶. The second most populous County in Kenya, Kakamega County, with an estimated population of 1,660,651 and an estimated voting population of 774,194 managed to register 568,813 voters (73.5), while the third largest County in Kenya, Kiambu County, with a population of 1,623,282 and an estimated voting population of 756,773 managed to register 860,716 which was an overshoot of 113.7%.²²⁷

Different constituencies also showed significant variation in the total number of registered voters against the voting population. In Mbita Constituency for example, IEBC was able to register a total of 37,809 voters, against an estimated population of 111,409, which comprised of a voting population of 51,939.²²⁸ In Othaya Constituency, IEBC was able to register 46,793 voters against an estimated population of 87,384, with an estimated voting population

²²⁴ Given the delays in the process, the inspection period was opened for a period of two weeks.

²²⁵ IEBC Principle Voter Register Gazetted on 18th December 2012. *See also* Silas Jakakimba, 'It's Time to Reform Our Poll Infrastructure Ahead of 2017 Elections' *Daily Nation* <<http://www.nation.co.ke/oped/opinion/Silas-Jakakimba-time-to-reform-KENya-poll-infrastructure-is-now/440808/tmwwaz/index-html>> accessed 22 August 2014.

²²⁶ *Ibid*

²²⁷ *Ibid*.

²²⁸ *Ibid*.

of 40,734 (114.9).²²⁹ Extrapolation of all the total registered voters in Kenya, clearly demonstrate the fact that the voters roll was not comprehensive and did not adequately cover the geographical spread.

The publication of different registration figures and the qualification of the Principle register with other registration materials such as the Green Book confirmed the fact that the voter register, as prepared by the IEBC, was not an authoritative roll. According to the analysis conducted by AfriCOG and the Institute for Education in Democracy (IED), the IEBC gave the total number of registered voters as 14,340, 036 on 18 December 2012 upon the completion of the voter registration exercise. On 18 February 2013, the IEBC gazetted the total number of registered voters as 14,352, 036, which represented an increment of 12,000 voters. On election day, IEBC indicated that the total number of registered voters stood at 14,352,542, which was a further increment of some 36,000 voters.²³⁰

From the foregoing, it is clear that the voter registration exercise continued beyond the statutory deadline which according to the elections Act ought to have been January 2013. The definition of the Principle Register was among the highly contested issues during the Supreme Court Presidential Petition.²³¹ In Particular, the Petitioners argued that the IEBC failed to establish and maintain an accurate voter register that was publicly available, verifiable and credible as required by Articles 38(3), 81(d), 83 (2), 86 and 88 (4) of the Constitution, and the relevant sections of the Elections Act 2011. Curiously and despite clear provision of the Elections Act, Section 4. The Supreme Court, while castigating the voter registration exercise, proceeded to accept the Register as what the Commission said it was.

²²⁹ *ibid.*

²³⁰ AfriCOG, 'Election Day 2013 and Its Aftermath' (2013) AfriCOG/KPTJ Election Series, 7 <<http://nisisikenya.com/wp-content/uploads/2014/03/March-2014-Election-Day-Election-Series-AfriCOG-KPTJ.pdf>> accessed 24 August 2015.

²³¹ *Raila Odinga v IEBC and 3 others*, Supreme Court Petition No. 5 of 2013 (Coram: W.M Mutunga, Chief Justice and President of the Supreme Court; P.K Tunoi; M.K Ibrahim; J.B Ojwang'; S.C Wanjala; N.S Ndungu').

The ruling of the Supreme Court on the voters register inadvertently took the Country back to the ECK days, where multiple registers existed to deal with weaknesses inherent in the manual and OMR system.²³² “The danger with this approach is that all the investment that went on procuring technology to enhance the voter register went into waste and the voter register will forever be a contested issue because of lack of authoritativeness and verifiability.”²³³

3.6 Results Management System: Tallying, Transmission and Declarations of Results

*“Perhaps the greatest failure of the 2013 general elections was the manner in which the IEBC handled the whole aspect of results management system. From counting, tabulation, declaration and transmission of results, manifest failures were noted that if not remedy will present serious dangers to future elections in Kenya”*²³⁴

After the 2007 General Elections, tallying, transmission and publication of results attracted substantial debate. The failures of 2007 General Elections necessitated the enactment of specific provisions in the Constitution, the Elections Act and the Regulations. IEBC made substantial investments to integrate technology to guarantee assurance of speed, efficiency, transparency and verifiability of results through a scheme of electronic transmission of provisional results²³⁵. All these factors were considered indispensable to the credibility of a highly contested election in a potentially volatile transitional political environment²³⁶. Public expectations hinged on substantial reform to the result management framework. However, the massive failure of results transmission on election day and other technological failures came

²³² *National Assembly and Presidential Elections Act*, 1992 (repealed), s 4(1).

²³³ Interview with Andrew, held in Nairobi 4th September 2015

²³⁴ Interview with Jack, Nairobi 3rd May 2015

²³⁵ AfriCOG, ‘Election Day 2013 and Its Aftermath’ (2013) AfriCOG/KPTJ Election Series, 7

<http://nisisikenya.com/wp-content/uploads/2014/03/March-2014_Election-Day_Election-Series_AfriCOG-KPTJ.pdf> accessed 24 August 2015.

²³⁶ See AU, EU, The Carter Center and the Commonwealth Election Mission to Reports to the March 4th General Elections in Kenya.

as a shock to many. As observed by Lucas, “it was clear that the system was designed to fail as a justification to reversal to the manual system of transmitting results.”²³⁷

Article 138(10) of the Constitution of Kenya 2010 provides for a cut off period of seven days for the declaration of presidential elections. The Elections (General) Regulations enacted under the Elections Act, 2012 provides for the procedure and sequence of tallying transmission and publication of results. The administrative structure provided under the law is based on counting and declaration of results at polling stations; tallying sequentially at the constituency levels, county level and at the national level. The chain of decision making and accountability by the election officials are assigned at the various levels²³⁸. For the purposes of the 2013 General Elections, IEBC made an administrative variation in respect to the presidential elections. Rather than insist on the tallying and publication of presidential results at the constituency level, the Constituency ROs invariably brought presidential results directly to the national tallying centre. As observed by Paul, “while this conveniently served the purposes of speed and efficiency, it probably brought into question the required strict compliance with the chain of accountability contemplated in the regulations”.²³⁹

The major problems regarding transmission and publication of results were the manifest failure of technology for electronic transmission of provisional results and the lack of clarity in the management and tabulation of hard copy results. Specific systems were developed for both the two aspects of tallying. Investments were also made on necessary hardware including servers. However, due to training and logistics issues, officials were generally unprepared and therefore failed to transmit results. This was coupled with crashing of servers at the national level. In respect to tabulation of official results, officials invariably resorted to

²³⁷ Interview with Lucas, held in Nairobi on 18th August 2015

²³⁸ Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4th March 2013 General Elections (October 2013).

²³⁹ Interview with Paul held in Nairobi on 7th August 2015

the use of excel spreadsheets in place of the database systems. There were numerous errors, rectifications and in some cases printing of parallel forms for the same electoral area.

Many criticisms by observers and politicians were founded on the general management of electoral results. In many cases, including the comments by the Supreme Court ruling on the presidential petition, the value of technology and the reform in the law did not profoundly increase transparency or verifiability. On the issues related to electronic support for the electoral process, the central claim revolves around the transmission of results, where the Petitioners claimed that Section 39 of the Elections Act 2011²⁴⁰ created a mandatory obligation for the electronic transmission of results. Counsel for the 2nd Petitioner relying on *A.C. Jose V Sivan Pillai and others*,²⁴¹ to support the contention that, where certain requirements are prescribed by an Act, and its Rules, IEBC was not at liberty to derogate from such Rules, or exercise discretion.²⁴² The net finding of the Supreme Court was that the value of the reforms and technology were to increase speed of results publication rather than guarantee accountability. Thus technology is virtually unconnected to the official results submitted through the hard copy forms and therefore its value is significantly diminished. This conclusion is comparable to the scenario in 2007 that engenders risks to election credibility.

In numerous other cases filed with respect to other elective offices, the Conduct of the IEBC staff on election day especially the way the results were managed were brought to the fore. In *Phillip Mukui Wasike v James Lusweti, IEBC and Others*,²⁴³ grounds of massive irregularities and malpractices resulting in a lack of transparency and accountability of the electoral process was the basis of the petition against election of Member of Parliament for Webuye

²⁴⁰ *Elections Act 2011* as read with *Elections (General) Regulations 2012*, reg 82.

²⁴¹ 1984 AIR 921.

²⁴² Petition No. 5 of 2013.

²⁴³ HC EP No. 5 of 2013.

East Constituency. The Court noted the errors and omissions by IEBC personnel and found that, if the Commission was diligent in reconciling the results, and gave the information, the petitioner would probably not have filed the petition. IEBC was ordered to meet the cost of the petition. In *Edward Okong'o Oyugi v IEBC & 2 others*,²⁴⁴ allegations were raised on the discrepancies in the statutory Forms 35s and 36s specifically that party agents did not sign the relevant forms and that there were massive discrepancies raising uncertainty as to the votes cast, valid votes tallied and the rejected votes tallied at the constituency and county level. The Court acknowledged that the errors were admitted by the Commission and was convinced that the same were occasioned by the negligence and casual manner of the officers of the Commission. The Commission was ordered to pay costs not exceeding Kenya Shillings 1 million for each party.

In *Thomas Musau v IEBC & another*,²⁴⁵ the petition against election of the Member of Parliament for Matungulu Constituency was allowed on the grounds that there were missing counterfoils from some of the ballot boxes. The Judge found that the authenticity of the ballot papers found therein could not be vouched for hence nullified the election. In a similar case in Kibwezi West Constituency, *Kalembe Ndile v Patrick Musimba & others*²⁴⁶ the Petition was allowed on the basis that some ballot papers were found missing in ballot box hence a nullification of the election.²⁴⁷ The gubernatorial petition for Siaya County that pitted *William Odhiambo Oduol v Cornel Rasanga and another*²⁴⁸ also raised issues of malfeasance and complicity of the IEBC personnel. In this petition, the petitioner succeeded on the grounds that the credibility of the results was severely and materially tainted by the recount. The court further held that the results as declared by the 1st and 2nd Respondents were neither accurate

²⁴⁴ HC EP No. 3 of 2013.

²⁴⁵ HC EP No. 2 of 2013.

²⁴⁶ Richard N. Kalembe Ndile v Patrick Musimba Mweu and 2 others (2013)eKLR.

²⁴⁷ HC EP No. 1 of 2013 (Machakos).

²⁴⁸ HC EP No. 1 of 2013 (Kisumu).

nor verifiable. The recount results showed that the wide margin of 9,001 votes in favour of the 3rd respondent that had been declared were reduced to 897 votes only. Robert, who handled some of the petitions after the 2013 general elections summed up the failures of results transmission and the responsibility of IEBC as follows;

‘The 2013 elections confirmed the fact that Results Management System constituted one of the weakest links in the consolidation of electoral democracy in Kenya. It is instructive to note that out of the 188 petitions filed in the various courts, almost all cases indicted the IEBC personnel in the manner in which they handled the electoral process and especially the Results Management and Transmission System.’²⁴⁹

3.7 Election Dispute Resolution

While the legal framework for election dispute resolution is seen as an aspect where substantial reform was achieved, 2013 elections showed elements of complexity which created confusion among stakeholders. The legislative framework for election disputes resolution in Kenya is primarily set out in the Constitution,²⁵⁰ the Elections Act,²⁵¹ the Independent Electoral and Boundaries Commission Act, and the Political Parties Act.²⁵² The new legislation on dispute resolution is complex and involves multiple resolution bodies.

Jurisdiction to determine electoral disputes is shared between the IEBC, which has the responsibility for the settlement of electoral disputes before the announcement of results including disputes related to or arising from nominations of candidates but excluding election petitions;²⁵³ the Political Parties Dispute Tribunal (PPDT) which is empowered to determine disputes under the Political Parties Act, and the Courts, whose authority is primarily the

²⁴⁹ Interview with Robert held in Nairobi on 10th September 2016

²⁵⁰ Constitution of Kenya 2010, arts 88, 140, 165.

²⁵¹ *Elections Act*, 2011, s 74.

²⁵² *Political Parties Act*, 2011, s 39.

²⁵³ Constitution of Kenya 2010, art 88 (4); *Elections Act*, s 74.

determination of election petitions²⁵⁴. The Judiciary is however seen by most Kenyans and political contestants, as the traditional dispute resolution body in relation to elections²⁵⁵. Despite the fact that this role is now shared with other institutions such as the IEBC and the Political Parties Disputes Tribunal, the public is not fully aware of the categories of disputes that are best referred to which body. As noted by Mary²⁵⁶, the by- elections in Kangema, Kajiado North and Ndhiwa Constituencies held in 2012 where disputes were lodged in various institutions provided evidence of public confusion on the jurisdiction of the various bodies.

The Political Parties Act confers power to settle political party disputes on the Political Parties Disputes Tribunal while the Constitution and the IEBC Act confer on the IEBC, particularly, the Dispute Resolution Committee, the power to settle electoral disputes, excluding election petitions and disputes subsequent to the declaration of election results. All disputes filed at the PPDT must be determined within a period of three months. The decisions of the Tribunal are not final and parties have the option of appeal to the High Court. Although the law requires first the exhaustion of internal mechanisms of resolving disputes within parties, and in the case of dissatisfaction, that questions go to the Political Parties' Tribunal, followed by the IEBC, many candidates who were dissatisfied with internal party mechanisms defected to other parties in order to stay in the campaign.

The jurisdiction of the IEBC and the PPDT was complicated by the constrained timeframes owing to late amendments to electoral law. Party nominations were held too close to the elections, leaving little time for nomination disputes. As a result, some parties failed to submit their list of nominees for various elective offices, and most parties forfeited the seven-

²⁵⁴ David Majanja, *Judiciary's Quest for A Speedy and Just Electoral Dispute Resolution mechanism: Lessons from Kenya's 2013 Elections* in *Balancing The Scales of Electoral Justice* (2016), 18.

²⁵⁵ See the interviews by especially the CSOs and representatives of State Commissions.

²⁵⁶ Interview held in Nairobi, on 4th September 2015

day possibility to resolve nomination disputes by opting to pick candidates on 17 January, just 24 hours before the deadline.

From the interviews conducted²⁵⁷ and the analysis of publications on electoral dispute resolutions post 2013,²⁵⁸ the Judiciary received much compliment in its work to resolve electoral disputes. The jurisdiction of the High Court is regulated under Article 165(3) and (5) of the Constitution, including the jurisdiction to hear pre-election disputes and to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.²⁵⁹ The Elections Act was amended to provide appeal process for election petitions. 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 petitions²⁶⁰. The courts also dealt with election offenses either as part of election petitions, breaches of the code of conduct or as criminal offenses.

The main problem witnessed with electoral dispute resolution in 2013 elections was the clear overlap in jurisdiction of the Political Parties Tribunal, the high court's jurisdiction for enforcement of fundamental rights and freedoms and the jurisdiction of the independent electoral and boundaries commission in resolution of certain electoral disputes. The exercise of concurrent jurisdiction by the three bodies led to the multiplicity of suits lodged to challenge the elections especially at the pre -election stage. This was witnessed in the by-

²⁵⁷ See the interview with Koech, former Presidential candidate, held on 3rd August 2015.

²⁵⁸ See Generally Justice David Maraga, '*Scrutiny in Electoral Disputes*', in *Balancing the Scales of Justice: IDLO and Judiciary Training Institute Publication* (2016), 243

²⁵⁹ Constitution of Kenya 2010, ART 165 (The powers of the High Court extend to Judicial Review on the administrative powers of Institutions).

²⁶⁰ David Majanja, '*Judiciary's Quest for A Speedy and Just Electoral Dispute Resolution mechanism: Lessons from Kenya's 2013 Elections*' in *Balancing The Scales of Electoral Justice* (2016), 18.

elections in Ndhiwa, and Kajiado North constituencies and gained prominence in the run up to 2013 elections. Inevitably, challenges of concurrent jurisdiction will continue to manifest in the electoral process and especially the 2017 elections.

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. A total of 400 disputes were filed with the IEBC Committee and determined within the seven days period provided for in law.²⁶¹ The research established weak electoral law jurisprudence that emanated from the decision of the IEBC Dispute Committee.²⁶² The IEBC Committee attributed the weak jurisprudence on the time constraints the Commission worked under. The complex nature of the exercise of the IEBC mandate on dispute resolution arose during the *Kethi Kilonzo* case.²⁶³ 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, 2011.²⁶⁴

The preliminary objection was however dismissed on grounds that the Committee had jurisdiction within the meaning and reading of Article 88(4)(e). The *Kilonzo* case highlighted

²⁶¹ IEBC, *Case Digest: Decisions of the IEBC Dispute Resolution Committee* (IEBC 2014) 3.

²⁶² Interview with political party representative held in Nairobi, 24 August 2015.

²⁶³ *Diana Kethi Kilonzo and another v IEBC and 2 others*, High Court in Petition No. 359 of 2013.

²⁶⁴ IEBC, *Case Digest: Decisions of the IEBC Dispute Resolution Committee* (IEBC 2014) 83.

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.²⁶⁵ Proposal to review the IEBC jurisdiction with regard to nomination disputes and the role of the PPDT in such disputes is considered in the next Chapter.

3.8 Integration of Technology in the Electoral Process

The relevance of ICT in enhancing the credibility and transparency of the electoral process during the 2013 elections was aptly captured by the IEBC in the post- election taskforce report.²⁶⁶ Integration of ICT in the electoral process is not a stand- alone activity, it is an integral part of the electoral process, it ranges from the delimitation of constituencies to the results management system. Recognising the fusion of ICT in the various cycle of elections, this research project examined the use of technology in the 2013 elections especially the BVR and the Results Transmission System. To the extent that the IEBC put a high premium on technology in the 2013 elections, and considering the fact that there were widespread technological failures, it is necessary to devote this section to examine the role of technology during the 2013 elections.

Michael, an election technology expert, observed during the interviews that, technology commonly used in the electoral process include telephone lines, wireless signals, computers, servers, storage and audio visual systems and calculators for results transmission.²⁶⁷ As mentioned, the 2013 elections was billed and indeed conducted on the basis of improved

²⁶⁵ *ibid* 84.

²⁶⁶ Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4 March 2013 General Election (October 2014) 104.

²⁶⁷ Interview with Michael held in Nairobi on 5th March 2015

technology. The technology used was not only intended to enhance the credibility of the process but also to cure the problems that had been identified as part of the failures of 2007 elections. Paradoxically, failure of technology contributed substantially to the shortcomings of the 2013 elections. All the Election Observer Mission reports for the 2013 elections as well as the IEBC Post Election Task Force Report confirmed the failure of technology.

The Commission introduced BVR kits to conduct voter registration exercise in the run up to 2013 elections. The BVR was an improvement of the previous OMR system because of its two unique features namely the automated finger print identification system (AFIS) and the facial features recognition system.²⁶⁸ Although the BVR registration enabled the registration of 14,388, 781 voters within a record one month period, the process was not without shortcomings. A number of challenges were noted with regard to the voter registration exercise. The first challenge was the procurement process that led to serious delays and ceding of responsibility of procuring the BVR to the Grand Coalition Government. In a hurry to procure, IEBC omitted to negotiate ownership of the software licence, which remained the property of the manufacturers with the intended consequence that IEBC must apply for its use anytime it wants to use the kits.²⁶⁹

The BVR also experienced technical hitches and malfunctions occasioned by overheating due to exposure to extreme temperatures and pre- installed passwords. Lack of synchronisation of the BVR and the EVID data also posed challenges to the Commission with the result that some voters information were missing from the polling stations or could not be recognised by the identification devices on election day leading to disenfranchisement of potential voters.²⁷⁰

²⁶⁸ *ibid* 107.

²⁶⁹ *ibid* 109.

²⁷⁰ *ibid* 109; *See also* George Kegoro, 'Technological and Administrative Doubt: Kenya's 2013 Elections in Perspective' (2013) < <http://jurist.org/hotline/2013/03/george-kegoro-kenya-election.php>> accessed 03 August 2015; AfriCOG, 'Election Day 2013 and Its Aftermath' (2013) AfriCOG/KPTJ Election Series, 17 <http://nisisikenya.com/wp-content/uploads/2014/03/March-2014_Election-Day_Election-Series_AfriCOG-KPTJ.pdf> accessed 24 August 2015.

Finally lack of training of the IEBC staff on the functioning of the BVR kits and how to use the kits also presented challenges to the Commission given the delay in their supply and delivery²⁷¹.

The Electronic Voter Identification Devices (EVIDs) were intended to enhance the integrity, transparency, efficiency as well as to cure the perennial problem identified by the Kriegler Commission of multiple voting especially in the strongholds of the leading parties.²⁷² Like the BVR kits, late deployment occasioned by delays in procurement, poor training of IEBC official on the use of the EVIDs, technical hitches including battery malfunction, and inconsistencies between the data in the BVR kits, manual register and the EVIDs. So widespread was the failure of EVIDs that the IEBC decided on election day to revert back to the manual system. Considering the fact that similar devices worked in Ghana in 2012²⁷³ and South Africa in 2014,²⁷⁴ it is unclear whether the failures of EVIDs was occasioned by human error or was deliberate and planned.

The Results Transmission System (RTS) and the upgraded servers, were the other technologies that were introduced by IEBC as part of improving efficiency in the electoral process. IEBC procured the RTS for the purposes of transmitting provisional results in all the 31, 981 Polling Stations which included secure phone lines and SIM cards from Safaricom mobile company. Upon completion of the counting process, the POs were to simultaneously transmit the results to the national, county and constituency tallying centres. Results transmission system failed forcing the IEBC to revert back to the manual tallying which involved the Returning Officers physically bringing the results to the national tallying

²⁷¹ Interview with Michael, ICT and elections expert held in Nairobi on 3rd March 2015

²⁷² Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December, 2007 (17 September 2008) 4.

²⁷³ See Report of the African Union Elections Observation Mission to the 7 December 2012 General Elections in the Republic of Ghana (2012) 12 (The functionality of EVIDS in Ghana was at 94%).

²⁷⁴ See the African Union Election Observation Mission to the 7 May 2014 National and Provincial Elections in the Republic of South Africa (August 2014) 9 (The functionality of ZAP ZAP machines for voter identification was at 99%).

centres. Subjecting the results management system to multiple layers of reconciliation and accountability led to numerous errors as was evidenced by the various Petitions. Poor configuration of the RTS server also led to the collapse of the Servers as confusion arose between the BVR, EVID and RTS data.²⁷⁵

At the National Tallying Centre established at the Bomas of Kenya, for the purposes of handling the Presidential results, the IEBC installed a technology from *Google* called the Results Display System (RDS) that was to project the presidential results on giant screen that could be followed by all the stakeholders. Because all the other technology deployed on election day had failed, inevitably, the RDS system also failed. The failure of technology especially transitional democracy countries, is one of the precaution given by technology expert Mike Yard on embracing technology without conducting context based analysis.²⁷⁶

3.9 Conclusion

Against the backdrop of the 2013 elections, the research revealed gaps in both the legal framework for elections and the institutional framework necessary for the conduct of credible, free fair and transparent elections. While the 2013 elections witnessed remarkable improvement in the laws and the conduct of the elections, the shortcomings noted if not remedied will pose significant challenges in the conduct of future elections in Kenya. As evidenced from the above findings, challenges were noted through the entire electoral cycle from the promulgation of the laws, the organisational structure of IEBC, voter registration, results transmission, failure of technology and resolution of electoral disputes, with the conclusion that as presently constituted, the electoral management and administration cannot be relied upon to procure a credible process.

²⁷⁵ Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4 March 2013 General Election (October 2014) 113.

²⁷⁶ Michael Yard, *Direct Democracy: Progress and Pitfalls of Election Technology* (International Foundations for Electoral Systems 2010).

CHAPTER FOUR

STRENGTHENING ELECTION MANAGEMENT AND ADMINISTRATION IN KENYA: PROPOSAL FOR REFORMS

4.1 Introduction

“It would be pointless to participate in the next general elections if substantial reforms are not enacted to level the playing field. At the very minimum, IEBC cannot be entrusted to manage the next elections due to the open bias, and partisanship exhibited by the Commission”²⁷⁷

The Research made some quick observations in relation to evolution of electoral reforms in Kenya, focusing primarily on electoral management and administration as a prerequisite to strengthening electoral democracy. The research demonstrated that despite 50 years of independence, and over two decades of multi-party democracy, Kenya still exhibits weaknesses of constitutional, legal, institutional and attitudinal nature necessary for democratic transformation. Since 1991, Kenya has been in almost a permanent crossroad of electoral reforms process.²⁷⁸ The theories discussed in this research, the literature review and the interrogation of the conduct of the 2013 elections discussed in the preceding chapter, presents the justification for strengthening election management and administration in Kenya. This research 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. The process has been one of somewhat sluggish evolution as opposed to radical transformation. It emerged from general acceptance that re-introduction of multi-party system without corresponding transformation

²⁷⁷ Interview with Jack held in Nairobi on 3rd May 2015

²⁷⁸ Michael Chege, ‘The Case for Electoral System Reform in Kenya’ in African Research and Resource Forum and Hanns Seidel Foundation, *Electoral System and Multiparty in Kenya* (ARRF and Hanns Seidel Foundation 2007) 6 (Chege traces Kenya’s half century history in electoral politics).

of the electoral system²⁷⁹ resulted in a fundamental deficit which could easily be exploited by power holders.²⁸⁰

The debate 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. 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 2002.²⁸¹ 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.

4.2 REFORMS

There are much needed reforms with regards to the manner in which elections are managed and administered in Kenya. The reforms would perhaps go a long way in positively contributing to the legitimacy of the electoral process and affirm the sovereignty of the people. The reforms proposal were made following the analysis of data collected, reports of the various stakeholders forums as well as the literature review. For the purposes of the study minimum reforms have been proposed defined as those reforms that are absolutely necessary to strengthen the credibility of the electoral process in the medium term. Mary, however noted that after the enactment of minimum reforms, the country would have to embark on

²⁷⁹ Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December, 2007 (17 September 2008) 23 [The report makes the assertion that 'Nearly two decades after nominal disavowal of one-party rule (in fact one-man rule), the day-to-day running of the country was until recently left essentially undisturbed.']

²⁸⁰ See Gabriele Mukele, 'The Kenyan Electoral System' in African Research and Resource Forum and Hanns Seidel Foundation, *Electoral System and Multiparty in Kenya* (ARRF and Hanns Seidel Foundation 2007) 36.

²⁸¹ *National Assembly and Presidential Elections Act, 2002* (Introduced among others: counting of ballots at polling stations; and introduced rules on assisted voters).

comprehensive electoral reforms post 2017 elections to secure and consolidate electoral democracy in Kenya.²⁸²

4.2.1 Using Public International Law and Human Rights Law to Strengthen the Electoral Process and Management

Over the last decade, an international debate has emerged on the role of Human Rights Law and Public International Law (PIL) in strengthening the electoral process. In his article ‘Consequences of a Flawed Presidential Elections’ Edwin Abuya argued that there is a link between free and fair elections and the enjoyment of human rights.²⁸³ The article further argue that consolidation of democracy in Africa require compliance with internationally recognised standards embodied in international law.²⁸⁴ The most authoritative examination of the dichotomy between elections, human rights and public international law was advanced by Avery Davis-Roberts and David Carroll in their widely acclaimed publication ‘Using International Law to Assess Elections.’²⁸⁵

The greatest justification for invoking PIL in assessing the conduct of elections is premised on the standard setting nature and obligations inherent in the application of international law. The primary sources of International Law remain treaties and instruments that States voluntary commit themselves too, as well as Customary International Law²⁸⁶ attributable to state practice over the years. According to TCC, states have obligated themselves to standards of behaviour and respect for human rights through the ratification of treaties and in some cases through membership of community of states.²⁸⁷ The obligations inherent in PIL as

²⁸² Interview with Mary held in Nairobi on 4th September 2015

²⁸³ Edwin Abuya, ‘Consequences of a Flawed Presidential Election’ (2009) 29(1) *Legal Studies* 127, 127.

²⁸⁴ *Ibid.*

²⁸⁵ Avery Davis-Roberts and David Carroll, ‘Using International Law to Assess Elections’ (2010) 17(3) *Democratization* 416, 418.

²⁸⁶ Statute of International Court of Justice, art 38 (1); *See also* Malcolm Shaw, *International Law* (6th edn, Cambridge University Press 2008) 72.

²⁸⁷ Avery Davis-Roberts and David Carroll, ‘Using International Law to Assess Elections’ (2010) 17(3) *Democratization* 416, 418.

well as membership in international, regional and sub-regional entities can provide and set the standards for assessing the quality of elections as well as elections management and administration.

At the international level, the Universal Declaration of Human Rights (UHDR) and the International Covenant on Civil and Political Rights (ICCPR), establishes obligation on States to hold credible and genuine elections as well as anchoring that obligation on human rights. Article 21 of the UHDR and Article 25 of ICCPR are illustrative in this regard. Article 25 of the ICCPR closely mirrors the provisions of Article 21 of the UDHR and upholds citizens' participation in genuine and periodic elections.

While the foregoing provisions present a standard for assessing the credibility and conduct of elections, their construction are in general terms which often lead to lack of uniformity and consistency. In a bid to bring clarity and application of PIL in electoral process, TCC formulated benchmarks that can be used to interpret and construct the meaning of the UHDR and ICCPR as it relates to elections²⁸⁸. Specifically, the TCC identified three main areas namely fundamental rights and freedoms including civil liberties, constitutionalism and the rule of law; obligations of the State and state institutions to ensure credible elections; and finally rights and responsibilities of citizens in the electoral process. These benchmarks offer the normative framework and standards upon which the implication of International Instruments can be used to assess the conduct of elections²⁸⁹.

Relevant regional Instruments that govern the conduct of democratic elections include the African Charter on Democracy, Elections and Governance (AU Charter), The Durban Declarations on the Principles Governing Democratic Elections in Africa. The African

²⁸⁸ Davis- Roberts A and Carrol D, 'Using Public International Law to Assess Elections' The Carter Center Publication, (2010) 21(4). Journal of Democracy 139.

²⁸⁹ Ibid, 56

Charter on Human and Peoples Rights that basically customised the progressive human rights obligations contained in the UHDR to the African continent. While all the above continental as well as sub-regional instruments are critical in securing credible elections, the boldest attempt by African leaders to enhance the credibility and transparency of the electoral process was made through the AU Charter on Democracy, Elections and Governance. The AU Charter came into force on 15 February 2012 upon the ratification by Cameroon which became the 15th Member State to adopt the Charter.

As a consequence of that ratification, African States are expected to hold elections in conformity with the provisions of the Charter. The relevance of the AU Charter with regard to elections management and administration is contained in Article 17 on Democratic Elections which states among other things that commitments by the State Parties to regularly hold transparent, free and fair elections in accordance with the Principles Governing Democratic Elections in Africa. In actualising that commitment, States should 'establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.'²⁹⁰

As pointed out by Robert and Musau during the interviews, the relevance of international and regional Instruments in strengthening the electoral process and Election Management in Kenya is traceable to the progressive Constitution that Kenya adopted that gives the framework upon which these instruments are applicable in the Kenyan Context²⁹¹. The Constitution of Kenya 2010 provides in Article 2(5) and (6) that, the general rules of international law shall form part of the law of Kenya,²⁹² and that any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

²⁹⁰ African Charter on Democracy, Elections and Governance, art 17 (1).

²⁹¹ Views of Michael and Musau also supported by George Kegoro, 'Technological and Administrative Doubt: Kenya's 2013 Elections in perspective.

²⁹² Constitution of Kenya 2010, art 2(5).

The import of the above provisions is to guarantee the application of both treaties and conventions that Kenya is a signatory to. (Article 2(6). Article 2 (5) seems to widen the scope to include Customary International Law as also being applicable in Kenya. Progressive interpretation and application of Articles 2 (5-6) within the context of elections in Kenya will no doubt ensure a high threshold in the conduct of election and election management in Kenya. In this regard, relevant International and Regional Instruments among them the UDHR, ICCPR, and the AU Charter will be invoked to complement the constitutional and legal framework for elections in Kenya and cure the deficit arising as a result.

4.2.2 Remodeling the Legal and Organisational Structure of IEBC

The interviews revealed a stark difference of opinion between the ruling and opposition party leaders, and CSOs on the precise reforms on the organisational structure of the IEBC. The number of Commissioners, tenure, and terms of office featured prominently in this discussion. Jack, Mary and Peter were of the opinion that the IEBC should be disbanded and a new structure created²⁹³, while Bernard, Moses and Musau felt that disbandment of the Commission was not feasible and instead argued for reforms. Jack, proposed a new mode of appointing the successor commission after the disbandment by allowing political parties to nominate commissioners.²⁹⁴

Election organization is hinged on constitutional, legal and institutional framework. The Constitution of Kenya 2010 went far in recreating the normative architecture of elections management. It affirmed the sovereignty of the people and fundamentally reformed the human rights basis of Kenya's civil and political life. The Bill of Rights in the Kenya's constitution is progressive in its re-statement of fundamental rights and freedoms. The binding obligation of the Bill of Rights as evidenced by its vertical and horizontal

²⁹³ See specific interviews with Jack, Mary and Peter and contrast with the views of Benard, Moses and Musau.

²⁹⁴ Jack reached this conclusion having observed the elections in Mozambique where FRELIMO and RENAMO nominated Commissioners to serve in the electoral Commission.

applications, as well as providing the framework for governmental policy, affirms the supremacy of the Bill of Rights.²⁹⁵ Chapter Six of the Constitution establishes a framework for leadership, ethics and accountability.

Chapter Seven of the Constitution is dedicated to representation of the people. Importantly the organization of election is based on particular fundamental principle articulated under Article 81 of the Constitution²⁹⁶. Article 88 established the Independent Electoral and Boundaries Commission and sets out the broad functions intended to comprehensively secure its functional independence. Article 89 focuses on the process of Boundaries Delimitation, insulates the process from political considerations and establishes a framework for judicial review. Article 90 opens the window for mixed member proportional representation system. However this window is arguably shut or contradicted by Articles 90(2) due to the apparent disharmony with provisions of Article 97 and 98. Article 100 provides for legislative framework for affirmative action aimed at improving representation of specific groups.

Chapter Fifteen on Commissions and Independent Offices enjoins the Commission in the protection of the Constitution and the sovereignty of the Kenyan people. Article 250 sets out the composition while Article 251 provides for a six years secured tenure for members of Constitutional Commissions. Article 252 provides for powers of investigations and Alternative Dispute Resolution (ADR) and provides further operational independence to Independent Commissions to recruit their own staff.

The key legislation enacted to govern the electoral framework include the Elections Act, 2011; the Independent Electoral and Boundaries Commission Act 2011; the Political Parties Act, 2012; and the Electoral Campaign Financing Act 2013. These legislations operationalise

²⁹⁵ See Japhet Biegon and Geoffrey Musila (eds), *Judicial Enforcement of the Socio-Economic Rights under the New Constitution* (International Commission of Jurists-Kenya 2011).

²⁹⁶ The AU Panel of Eminent African Personalities Report, '*Back from the Brink: The 2008 Mediation Process and the Reform in Kenya*' (2014)

the Constitutional provisions in respect to the organization, technical operations, participation and regulation of campaign financing.²⁹⁷

The statutory framework received considerable attention to implement the provisions of the Constitution. However, the reform process seemed to have overlooked the consolidation objectives²⁹⁸ and yielded disparate legislations which could perhaps be merged to facilitate accessibility and implementation of mutually reinforcing elements. Consequently, the IEBC Act²⁹⁹ contains provisions relating to boundaries delimitation process which is essentially a technical function therefore may aptly be addressed under the Elections Act. The Political Parties Act, and the IEBC Act makes provisions for a liaison Committee and both, perhaps, miss the point in the position of the liaison Committee in the electoral process. In addition, the Political Parties Act, and the Electoral Campaign Financing Act, provides for funding of political process raising the opportunity for a disjointed approach to campaign financing reforms.

As noted by Victor during the interview, “the consolidation agenda is therefore largely unachieved despite the unprecedented opportunity presented by the enactment of a new Constitution”³⁰⁰. As an overarching consideration, the Kreigler Commission Report noted that-

“The review needs to take into account the need to consolidate the electoral provisions scattered among various statutes, the importance of independent but interrelated activities such as political party election-related activities and the need to have effective enforcement mechanisms for any laws put in place”.³⁰¹

²⁹⁷ See generally Elisha Ongoya and Willis Otieno, *Handbook on Kenya's Electoral Laws and System* (Institute for Sustainable Elections in Africa 2012).

²⁹⁸ See Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December, 2007 (17 September 2008).

²⁹⁹ *IEBC Act*, sch 5.

³⁰⁰ Interview with Victor, held in Nairobi on 15th August 2015

³⁰¹ Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December, 2007 (17 September 2008) 21.

Lack of consolidation may also be increased through the current proposals for separate Article 100 of the Constitution provides for legislation to promote representation of marginalised groups in parliament including: women, youth, ethnic and other minority groups, marginalized communities, and persons with disabilities. This will no doubt miss the point noted above regarding the connection between these elements.

4.2.3 Strengthening Electoral Management and Oversight

“To disband or not to disband the IEBC featured prominently throughout the interviews with different stakeholders expressing divergent opinion on whether to retain or reconstitute the current IEBC”³⁰²

The electoral management framework received considerable attention in the report of the Kreigler Commission.³⁰³ In assessing the management framework of the ECK, the Kreigler Commission noted that-

“The ECK has professional staff in many of its departments – all departmental heads at least are professionals. Given the Commission’s committee system, however, they will continue to be nothing more than ‘senior assistants’ to the commissioners if they are not given room to apply their professional minds to the issues”.³⁰⁴

This finding attracted a recommendation by the Commission for a more policy oriented Commission interacting with a professional secretariat with efficient delegation and accountability framework.³⁰⁵ The Interim Independent Electoral Commission (IIEC) established to succeed the ECK in the interim period before the enactment of the Constitution

³⁰² See generally the interviews conducted with political party leaders and CSO representatives.

³⁰³ See generally Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December, 2007 (17 September 2008) cap 3 (The Organizational Structure of the Kenya’s Electoral Management System).

³⁰⁴ See also Gabriele Mukele, ‘The Kenyan Electoral System’ in African Research and Resource Forum and Hanns Seidel Foundation, *Electoral System and Multiparty in Kenya* (ARRF and Hanns Seidel Foundation 2007) 36.

³⁰⁵ Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December, 2007 (17 September 2008) 29.

was charged with establishing a new professional Secretariat that would presumably give effect to a new governance and operational arrangement.

The IEBC Act purposed to enforce the new arrangement through clear stipulations on the non-executive roles of Commissioners, more prominent role of the Secretariat and clearer devolution of functions. However, the proposals in earlier versions of the Bill were removed leading to a result which essentially reflects the ECK organisation. It is important to re-visit the organisational framework of the IEBC with a view to demarcating the responsibilities with regard to institutional governance, decision making, operations and accountability.

“The IEBC needs to restructure its governance framework”³⁰⁶. This involves a determination of whether the Commission is a policy oriented leadership organ or is an essential part of the management and operational level.³⁰⁷ Given that the Commissioners are appointed to act on a permanent basis, and work through committees, while also maintaining direct supervision roles for regions assigned to each Commissioner, it is impossible to assume that the Commissioners can maintain a detached policy posture while letting the Secretariat to fully drive operations. The solution to the governance challenges therefore impinges on the recognition that the Commissioners have operational roles. This is a first aspect to designing the organisation model to address the required policy making, standards, quality control, oversight and accountability.³⁰⁸

³⁰⁶ See the interview conducted with Robert, a representative of Constitutional Commission

³⁰⁷ Jørgen Elklit and Andrew Reynolds, ‘The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda’ (September 2000) Kellogg Institute Working Paper No. 28, 4 <<https://kellogg.nd.edu/publications/workingpapers/WPS/281.pdf>> accessed 04 August 2015; See also International Institute for Democracy and Electoral Assistance, *Electoral System Design: The New International IDEA Handbook* (International IDEA 2005) 42.

³⁰⁸ See generally the recommendations of the Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December, 2007 (17 September 2008) 29-34 (Organisational structure of the IEBC).

The second aspect of the organisational re-modelling depends on details of the functional framework³⁰⁹ of the Secretariat and the scope of devolving the operations of the IEBC to regional structures. Currently, the Secretariat has a management level Directors, supported by managers, officers and assistants. The Regional Elections Coordinators and Constituency Elections Coordinators facilitate the operations of the Secretariat at the regional levels.³¹⁰ IEBC currently operates in seventeen regions demarcated for the purpose of facilitating efficient operations of the Commission. During Elections, the Constituency Elections Coordinators double up as the Returning Officers at the Constituency level while temporary officials are appointed and designated as the County Returning Officers.

There is nothing fundamentally wrong with the Secretariat Organization described above. However, its operation in practice depends on the comments made in respect to the governance arrangements with the Commission level. Since Commissioners are intimately involved in operational work, the opportunities and detachment necessary for policy making, oversight and accountability are arguably compromised. There is also likelihood of indecision, prolonged meetings, and buck-passing which are common in top heavy organizational structures. At the functional level, there is the likelihood of silos developing which undermines efficient delivery of projects.

This thesis recommends remodelling the structure of the IEBC. It proceeds from the fact that despite the appearance as belonging to the family of independent EMBs described above, IEBC is a hybrid combining prominent elements of the independent model and some elements of government based model.³¹¹ For instance the funding is, in practice, subjected to

³⁰⁹ See Lorenzo Casini, 'Models of Public Administration: Comparative Analysis of Administration Organisation' (2007) 3 International Comparisons 19.

³¹⁰ IEBC Structure <<http://www.iebc.or.ke/index.php/about-iebc/regional-offices>> accessed 07 July 2015.

³¹¹ Jørgen Elklit and Andrew Reynolds, 'The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda' (September 2000) Kellogg Institute Working Paper No. 28, 9 <<https://kellogg.nd.edu/publications/workingpapers/WPS/281.pdf>> accessed 04 August 2015 (The paper alludes to "more or less" independent bodies generally referred to as Electoral Commissions).

renegotiation by the national treasury, and subsequent consideration and approval by the National Assembly. While substantially the government has provided funding to the electoral process, it has not been in the absence of haggling and public pressure. Koech captured financial dependence on parliament and the executive as follows “As long as the IEBC depends on other organs for its funding and remuneration, then it shall forever be held captive by other organs thereby compromising on its political and functional autonomy”.³¹²

A policy oriented commission working with a streamlined and professional secretariat is also proposed. The secretariat shall have decentralised structure at the County and Constituency with adequate capacity for operational support and aspects of decision making. The designation of County officials should be County Elections Assistant while at the Constituency level the designation should be Constituency Election Managers.³¹³ If the regional officers double up as returning officers, they should serve for a fixed term. Or in the alternative be shuffled within 6 months prior to every General Election. There is also need to recast the IEBC Act to reinforce budgetary and funding independence and a strict accountability framework proposed in this thesis.

At the oversight level, this thesis proposes a double check to the Secretariat. The Commission will provide the intrinsic oversight required for accountability, supervise delivery of quality services and develop policies. At parliamentary oversight level, an inter-party and bi-cameral standing committee on elections should be constituted. Elections have uniqueness that warrants bi-party and bicameral consideration of plans, reports and accountability mechanisms as opposed to the current sectoral committees.

³¹² Interview conducted with Koech in Nairobi on 3rd August 2015

³¹³ The change of designation and job descriptions should lean toward giving prominence to the roles of regional officers in managing the election process rather than coordinating instructions of the Headquarters.

Greater financial autonomy if supported by adequate controls and accountability mechanism is good in the longer term. Effective accountability of the Commission must be counterbalanced by the need for total financial autonomy by the Commission. The research found that opportunities for pre-budget controls should be limited³¹⁴ while a strict regime of post budget accountability enhanced. Additionally, the opportunities for accountability set out in the IEBC Act are inadequate and requires specific reinforcements. It is important to recast the provisions on budget processes to provide the mechanism for Budget Making by IEBC by providing for among others, details on comprehensive planning, consultations with key stakeholders and publication of plans. Once the budget is approved by the Commission it should be submitted to the Treasury and Parliament for adoption without variations.

4.2.4 Boundaries Delimitation

“Legislators represent people not trees or acres of land. Legislators are elected by voters, not farms or cities or economic interest”³¹⁵.

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 to³¹⁶. 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 vote³¹⁷. This is an ideal that is not

³¹⁴ A structured deference to the IEBC to make its budget should be counterbalanced with a strict accountability mechanism.

³¹⁵ Chief Justice Warren announcing the decision of the US Supreme Court in the case of *Reynolds v Sims 1964*.

³¹⁶ Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007' (17 September 2008)

³¹⁷ 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.

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 interests³¹⁸. 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 population equality is the starting point but tempered using various criteria including geographical features and urban centres; community of interest, historical, economic and cultural ties; and means of communication. The progressive tone of Article 89 was superseded through the transitional provisions intended to anchor the First Review³¹⁹ conducted by the Interim Independent Boundaries Commission (IIBRC) and completed by the IEBC. The transitional provisions suspended the strict application of the criteria 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.

Schedule Five of the IEBC Act elapsed upon conclusion of the first boundaries delimitation under the current Constitution.³²⁰ Therefore, there is no statutory framework to implement Article 89 of the Constitution. Since Article 89 is comprehensive in respect to criteria and

³¹⁸ Ibid, 83.

³¹⁹ *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).

³²⁰ *IEBC Act* s 36(2) (Provides that the Fifth Schedule shall elapse upon publication of the Report on the First Review).

process. There is need for a proper legislation to anchor the process of boundaries delimitation in the Elections Act being the operational legislation as opposed to the IEBC Act which serves as the institutional legislation.

Specifically, the intervention of parliament³²¹ 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 delimitation³²². Given the political and social controversy regarding boundaries delimitation, this thesis proposes an oversight through a temporary Bicameral Committee³²³. Such a Committee should be chaired by the Speaker of the Senate and incorporate equal members of each house. 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. 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.

³²¹ *IEBC Act*, sch 5 para 3 (Provides for consideration of the review report by parliament).

³²² Views echoed by Koech during the interview on 3rd August 2015 (held in Nairobi)

³²³ See interviews conducted with Mary and Andrew former Presidential Candidates

4.2.5 Towards Transparent and Accountable Voter Registration Exercise

“2013 elections in Kenya demonstrated that elections can be won or lost at the voter registration stage”³²⁴.

Given the competitive nature of elections in Kenya, this reality will continue to dominate the political landscape with considerable impact on future elections. 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. The probable lurking constitutional question is whether pre-condition to have an identification card or a passport can be sustained³²⁵. 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. 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 have asserted IEBC position that Article 38(3) is not absolute and can be subject to reasonable limitations. The courts have guided the IEBC as follows: that considering that the right to vote is to be enjoyed without distinction Kenyan citizens in the Diaspora who are dual citizens are eligible

³²⁴ Concept of the ‘Tyranny of Numbers’ Propagated by Mutahi Ngunyi to explain Jubilee Coalition Victory during the 2013 elections. The phrase was used to justify Jubilees Victory on the basis of IEBC voter registration exercise. *See generally the interview with Jack, held in Nairobi on 3rd May 2015*

³²⁵ See the Report of the African European Union Elections Observation Mission to the March 4 2013 General Elections.

to be registered as voters. That the IEBC should progressively set up more registration centres in the Diaspora.³²⁶

Clarity on the principle register is required. It is proposed that section 2 of the Elections Act, should be amended by deleting the definition of the ‘principal register of voters’ since that phrase is substantively provided under section 9 of the Act. In the alternative, recast the sections by deleting the words ‘and includes a register that is compiled electronically.’ This definition was meant to be very straightforward but with hindsight repudiated the intention of the Act through inelegant drafting or conservative interpretation. It has however appealed to quite imaginative interpretation by the IEBC and the Supreme Court.³²⁷ The inclusion of these words were meant to represent the progress expected from the IEBC in development of the register by legitimizing the principal register of voters that is compiled electronically rather than founding a way back to the old order of unaccountable multiple reference materials. If the IEBC and the Supreme Court choose to take this unimaginative interpretation in relation to the words ‘ballot paper’ as used in section 2 of the Elections Act.

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.³²⁸ 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 Kreigler Commission concluded, ‘A permanent solution will necessarily involve moving to an alternative system, based on other population

³²⁶ *New Vision (NVK Mageuzi & others v Independent Electoral and Boundaries Commission and 5 others*, (2014 eKLR per R. Nambuye JJ.A).

³²⁷ See Supreme Court Decision in Petition No. 5 of 2013, on Voter Registration.

³²⁸ Mary strongly felt that the present voter register should be discarded and a new voter registration exercise conducted.

databases, particularly that related to the national Identity Card and, when implemented, to the proposed Integrated Population Registration Systems (IPRS).³²⁹

The voter register is based on polling station as the smallest unit in accordance with section 3 of the Elections Act. However, in practice, the Commission uses registration centres and subsequently divides the centre registers into streams. This practice poses two challenges. First, in centres where there are multiple streams, there is no polling station register as such but rather a polling centre register³³⁰. Thus during elections, there is not only multiple material in respect to each polling centre, but there is also comparable names across polling stations. Secondly during reconciliation of ballots, materials and results, it is difficult to determine absolutely the number of registered persons in each station without reference to the entire centre. A related challenge is that during polling there are inordinately long queues creating problems in managing polling process, delays and causing unnecessary anxiety. The convenient opportunity of curing these challenges is during the occasion of fresh registrations when the operational infrastructure is redesigned.

It is unfortunate that since 2007 Kenya has had two occasions of fresh voter registration but no proactive steps has been taken to align the register with polling stations. Accordingly, IEBC has maintained the legacy of determining registration centres at during voter registration periods while gazetting polling stations closer to election periods³³¹. This inevitably leads to some misalignment of polling stations and registration centres. Thus, during elections, there are always complaints of voters unable to find their stations or allegations of arbitrary creation of new polling stations. Technically, this is problematic.

³²⁹ Report of the Independent Review Commission on the General Elections held in Kenya on the 27 December 2007 (17 September 2008) 79.

³³⁰ Ibid, 23

³³¹ AfriCOG, 'Election Day and Its Aftermath' (2013), AfriCOG/KPTJ Election Series.

Provisions of the Elections Act and the relevant regulations should be aligned to voter registration with election operations.

Finally, with respect to voter registration technology should address the objectives of the integrity of the voters register. This objective has two aims-on the one hand, comprehensiveness or completeness of eligible franchise, and accuracy and verifiability on the other hand. The required integrity and completeness are achieved through, simplicity, complete enfranchisement, and verifiability.³³² These elements were compromised in the 2013 General Elections since the published BVR voters register was subject to additional reference materials which were not published and therefore not verifiable. In respect to franchise, enhanced inclusion of women, youth and regional registration drives should be enhanced. This should be supported through an arrangement that interfaces the regime of registration of persons with voter registration.³³³ The choice of technology for BVR should be amenable to changes and in-built security features. The licence arrangements for the software chosen should not make the IEBC hostage to a supplier thus increasing operational costs and risking integrity of the process.

³³² See generally Vladimir Pran and Patrick Merloe, *Monitoring Electronic Technologies in Electoral Processes: An NDI Guide for Political Parties and Civic Organizations* (National Democracy Institute 2007); See also Rafael López-Pintor and Maria Gratschew, 'Registration and Inclusive Democracy: Analysing Practices Worldwide' 5-9 < <http://www.idea.int/publications/vt/upload/Voter%20registration.pdf>> accessed 20 July 2015.

³³³ Current practice in Rwanda, South Africa, and Ghana among other countries in Africa.

4.2.6 Integration of Technology, Voter Registration, and Result Transmission.

IEBC is commended to have sustained the progress by the IIEC in respect to integration of electoral technology.³³⁴ 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. 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 no clear policy other than 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.³³⁵ 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. This was in itself not controversial since it is almost impossible to achieve full electronic based voting, registration, identification and result transmission systems. Virtually no country has attained that level of electronic modernisation in electoral

³³⁴ See generally European Commission and UNDP, 'Information Technology and Elections Management: Informed Decisions for Sustainable Outcomes' (2012) <<http://www.undp.org/content/dam/brussels/docs/Other/EC%20UNDP%20Joint%20Task%20Force%20The%20matic%20Workshop%20on%20ICT%20and%20Elections%20Management.%205%20to%209%20March.%202012.pdf>> accessed 21 July 2015.

³³⁵ Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4 March 2013 General Election (October 2014) 104.

administration.³³⁶ This is particularly because the standards of transparency and accountability required in election necessitate significant elements of human scrutiny.

During the interviews, Michael stressed that, ultimately, success in integration of election technology impinges on a clear policy and strategy that recognises the key objectives to enhance transparency and accountability³³⁷. The primary purpose of electoral technology should be to enhance the integrity of the electoral process and strengthen the efficiency of human intervention. Thus efficiency and transparency must be seen as two mutually reinforcing elements as opposed to exclusive objectives.

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. Attention should also be made to security and substantial voter education. In addition, the legal framework should have sufficient clarity on the integration of technology and verifiability by electoral officials and stakeholders.

Lack of a clear policy and strategy³³⁸ 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. This inevitably leads to unnecessary suspicion and lack of acceptance thus impacting on the integrity of the electoral process. Going forward, it is therefore necessary to comprehensively evaluate the successes and failures of technology in

³³⁶ Sean Dunne, 'Elections and Technology' <http://www.idea.int/publications/emd/upload/EMD_CS_Information_Technology.pdf> accessed 03 July 2015.

³³⁷ Michael, CSO representative and ICT and Election expert.

³³⁸ See Independent Electoral and Boundaries Commission Post Election Evaluation Report on the 4 March 2013 General Election (October 2014) 118.

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.³³⁹ 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 implemented³⁴⁰. IEBC was therefore exposed to unconscionable demands by the chosen supplier. The late delivery of the equipment curtailed testing, training and deployment of equipment. 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 transmission of result system is important. This will allow segregation of polling station data, management of cues, reconciliation of ballots, and management of election results data thereby engendering verifiability and election integrity.³⁴¹

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. The process seemed to have been undertaken through great assumptions based solely on the reputation of the IIEC

³³⁹ *ibid.*

³⁴⁰ See the interviews by Mary and Koech, Party leaders

³⁴¹ Rafael López-Pintor and Maria Gratschew, 'Registration and Inclusive Democracy: Analysing Practices Worldwide' 5-8 <<http://www.idea.int/publications/vt/upload/Voter%20registration.pdf>> accessed 20 July 2015.

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. 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 disregarded regulations which provided 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.³⁴² The regulations should provide this and remove any opportunities for inconsistent practice.

The Chairperson is recognised as the national Returning Officer in respect to Presidential Elections. However, the architecture of elections are still based on the practice that returns are made at the Constituency levels and are not subject to review³⁴³. The process is indeterminate at the national level especially when allegations of arithmetic changes or rectification of constituency returns are made at the national level. Amend regulations to provide for the tallying of presidential results at the polling station.

³⁴² See *Elections General Regulations* 2012, regs 81-87.

³⁴³ Kenya Human Rights Commission, *The Democratic Paradox: A Report of Kenya's 2013 General Elections* (KHRC 2014).

The regulations should be clear and specify the integration of technology in the transmission and tallying.³⁴⁴ The handling of presidential elections results in both 2007 and 2013 general elections calls for sweeping reforms in the management of the presidential results. Other than the foregoing recommendations, presidential results declared at the polling stations should not be subjected to multiple stages of tallying. The current practice where the presidential results are channelled from the polling stations, to the constituency tallying centre is amenable to abuse. Additionally, it is recommended that statutory forms 34 and 35 should be standardised. One form should be available to the Presiding Officers which should be countersigned by all the agents, who should obtain copies of the same. This will cure the problems witnessed during the election petitions where one polling station produced different forms 34 and 35.

Finally, the media should be involved in transmitting and tallying declaring provisional presidential results. It should be recalled that during the 2002 general elections and the 2005 constitutional referendum, declaration of winners were made on the basis of provisional results released by the media. This will compel the IEBC to be transparent in the results handling and management. In the final analysis, investment in technology is meaningless if it cannot act as a countercheck to the recognised prevalent human error. The aims of efficiency and speed in publication of election data must purpose to reinforce, and not be removed from, the element of transparency and integrity of the elections.

4.2.7 Streamlining Election Dispute Resolution Regime in Kenya

The major problem with Electoral Dispute Resolution in Kenya (EDR) in the run up to 2013 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

³⁴⁴ *ibid.*

resolution of electoral disputes. A cardinal principle of EDR is the speedy and expeditious resolution of disputes.³⁴⁵ Given the foregoing principle, a fundamental question is whether the jurisdiction vested in the IEBC to determine disputes arising from party nominations is misplaced.³⁴⁶

Considering the fact that IEBC 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 concurrent jurisdiction is necessary. To strengthen EDR in Kenya, Article 88 (4) of the Constitution and Sections 74 of the Elections Act, and Section 40 of the Political Parties Act, 2011 needs to be streamlined. The Political Parties Dispute Tribunal should be empowered to deal with the larger chunk of party nomination disputes, while IEBC can retain the jurisdiction to determine disputes arising after the clearance by the Returning Officers. This approach is consistent with the preamble of the Elections Act 2011 that defines nominations to mean clearance by the Returning Officers (RO).

4.3 CONCLUSION

Despite significant reforms on electoral democracy in Kenya following the promulgation of the 2010 Constitutional, legal and institutional shortcomings were noted. 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 proposals were informed by a detailed review of literature on electoral governance as well as the analysis of the interviews conducted. Of crucial importance was the information

³⁴⁵ International Foundations for Electoral System, 'Principles of Electoral Disputes Resolution' 3 <<http://www.ifes.org/issues/election-dispute-resolution-and-complaints-adjudication>> accessed 07 July 2015.

³⁴⁶ Felix Owuor, 'Elections Dispute Resolution in Kenya' (Law Society Annual Conference, Mombasa, August 2012).

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. 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 Overall Summary of the Study

The main aim of the study was to examine the legal and institutional framework for managing elections in Kenya. Undoubtedly, the 2010 Constitution and the Election Sector Laws enacted as part of constitutional implementation agenda heralded a paradigm shift in the socio economic and political governance in Kenya. 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 Government³⁴⁷.

The study embraced a qualitative approach using semi structured interviews to gauge the perspectives of the target respondents. Through the study, a comprehensive audit of the performance of the IEBC in the discharge of its constitutional and statutory mandate within the context of 2013 elections was done. The legal and constitutional framework governing elections in Kenya including election management and administration was also assessed.

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.

³⁴⁷ See Constitution of Kenya 2010, Chapters 4, 7, 8, 10 and 11.

5.2 Conclusion

A number of important lessons were generated from the study that will contribute meaningfully to democratic consolidation in Kenya and strengthening of the electoral process. The conclusion and lessons learnt can be summarized as follows:

5.2.1 Election Reforms key to Strengthening Election Management and Administration

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.³⁴⁸ Elections management and administration in Kenya must of essence comply to the progressive provisions enshrined in the Constitution and other statutes³⁴⁹. 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.

5.2.2 Adopting Electoral Cycle Approach as a Strategy for Consolidation of Election Management and Administration

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. Given the challenges noted in the past elections, Kenya should shift to an electoral cycle approach³⁵⁰ in dealing with election management issues.

³⁴⁸ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) Foreign Affairs 22.

³⁴⁹ Constitution of Kenya, 2010, Articles 1, 38, 81, 83, 88. See also Elections Act and the IEBC Act, 2011.

³⁵⁰ International Institute for Democracy and Electoral Assistance, *Electoral System Design: The New International IDEA Handbook (International IDEA 2005)*12-14

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 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.

The Carter Centre outlines the various cycle of elections to include; the legal framework, the electoral system and boundary delimitation, election management, voter registration, parties candidates and campaigns, voting operations, vote counting and electoral dispute resolution.³⁵¹ Electoral cycle approach envisages a strategy of dealing with the electoral process as a whole and treating each phase a complementary and interrelated aspect of the entire process. Consolidation of electoral democracy in Kenya requires the adoption of electoral cycle approach strategy.

5.2.3 Multi-Sectoral and Collaborative Approach in Strengthening Electoral Process in Kenya

The research established that although IEBC is the main player in election administration in Kenya, other stakeholders equally play an important role and their actions impact on the electoral process and election administration. Strengthening and reforming IEBC must of necessity take into consideration the roles played by the other stakeholders that have a collateral impact on election administration. To this end, the Executive, Parliament, Judiciary, political parties, RPP, PPDT, CSOs, the media, and even the voters. The conduct of the 10th parliament of engineering amendments in the run up to the 2013³⁵² elections illustrate this interrelationship. The adoption of the electoral cycle approach envisages the participation of other players. Parliament law making powers including enacting electoral reforms, the

³⁵¹ Avery Davis-Roberts and David Carroll, 'Using International Law to Assess Elections' (2010) 17(3) Democratization 416, 424.

³⁵² AfriCOG, 'Election Day and Its Aftermath' (2013) AfriCog/KPTJ Election Series, 2-4.

conduct of political parties in the electoral process including party nominations, the role of voters exercising their sovereign right and the resolution of electoral disputes by the Judiciary, all contribute to credible election management and consolidating electoral democracy.

5.2.4 Potential for the Recurrence of Electoral Violence in 2017

A related hypothesis of the study was the nexus between poor election management and election violence. As mentioned, the trigger for the 2008 violence in Kenya was the disputed 2007 elections that drove the country into unprecedented violence. While the Agenda Item 4 negotiated by the Panel of Eminent Africa Personalities was intended to introduce comprehensive reforms geared towards redressing past imbalance and inequalities, some of the reforms that were contemplated as part of Agenda 4 are yet to be fully implemented.³⁵³

Despite the new constitution and a raft of legislative framework, the research established waning public confidence especially on the IEBC and the Judiciary. As one of the respondents put it, 'If the 2017 elections are bugled by IEBC, we shall not seek recourse in the Supreme Court.'³⁵⁴ The foregoing statement is a reflection of the mood characterising the political and electoral environment in Kenya currently. 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 intransigence political statements, lack of national healing and reconciliation owing to the fact that the divide created in 2013 has not been bridged. If left unresolved, the potential for

³⁵³ This include security sector reforms among others.

³⁵⁴ Interview with James, party leader, on 22nd August 2015.

electoral violence will be real in 2017 elections. The possibility of violence in the electoral process presents further justification to reforming election management in Kenya.

5.2.5 Strong and Effective IEBC as a Conflict Prevention Mechanism

The study reveals the correlation of strengthening election administration in Kenya as a conflict prevention mechanism. As mentioned, the violent conflict that preceded a number of elections in Africa including Kenya has reignited a discussion about the interface between elections and conflict especially in highly divided and polarized societies.³⁵⁵ Weak electoral processes accompanied by electoral conflicts are not only an indictment on African democratic consolidation, but a frontal focus on institutions that may stifle political competition which include electoral commissions.³⁵⁶ 18 out of the 20 respondents interviewed expressed doubts as to the ability of the IEBC to manage the 2017 elections credibly. To avert the impending crisis, it is imperative for the IEBC to realise that the consolidation of democracy requires that the institution that manages the electoral process be independent, competent, and perceived as completely fair by all the candidates and parties participating in the electoral process.³⁵⁷

³⁵⁵ Gilbert Khadiagala, 'Reflections on the Causes, Courses and Consequences of Election Violence in Africa' in Khabele Matlosa, Gilbert Khadiagala and Victor Shale (eds), *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa* (EISA 2010) 13.

³⁵⁶ *ibid.*

³⁵⁷ Report of the European Commission for Democracy Through Law, 'Transparency and Impartiality of the Electoral Administration on Election Day: The Importance of the Management of the Elections and the Role of the Electoral Administrator' (24-25 June 2005).

5.2.6 Divisive Nature of Electoral Reforms Agenda

An important objective of the study was to examine the context for the constitutional and legal framework for elections in Kenya. Since the reintroduction of multi party politics in Kenya, reforms agenda have been both divisive and polarising³⁵⁸. The 2013 elections left a highly divided and polarized nation split in the middle in terms of the votes the two leading candidates garnered.³⁵⁹ Since 2013 elections, very little has been done to promote national healing and reconciliation. Accordingly, debate on reforming the electoral process and the electoral administration has been mired in suspicion, tension and mistrust. Both the ruling Jubilee Coalition and CORD coalition interpret election reforms as a ploy to take power from them, and a means of acquiring political power respectively.

Disagreement over election reforms has also extended to reforming IEBC. While CORD and its affiliate parties insist that disbandment of the current IEBC is an important first step towards electoral reforms, Jubilee Coalition and its affiliate insist that the retention of the current IEBC Commissioners is an important pre-condition towards discussing any electoral reforms agenda in Kenya. Suspicion inherent in the electoral reforms agenda is not unique to post 2013 elections in Kenya.

5.2.7 Addressing Behaviour and Attitudinal Change through Constitutionalism and the Rule of Law

A cross cutting theme throughout the study was behaviour, attitudinal change, constitutionalism and the rule of law. While the study hypothesised the nexus between constitutional and sound election management, the researcher contention was that the same must be accompanied by behaviour and attitudinal change on especially the people charged

³⁵⁸ See generally the report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007 (Kriegler Report 17 September 2008)

³⁵⁹ In 2013 elections in Kenya, both President Uhuru Kenyatta and Raila Odinga polled over 5 Million votes.

with the responsibility of managing elections. A key pillar of liberal democracy theory is constitutional liberalism that espouses constitutionalism, civil liberties and the rule of law.³⁶⁰

The inter play between constitutions and adherence to constitutional culture is what Professor Okoth Ogendo described as the “Constitutions without Constitutionalism”³⁶¹. Montesquieu and Madison who were the earlier proponents of constitutionalism defined it as a complicated system of checks and balances designed to prevent the accumulation of power and abuse of office³⁶².

The theory of New Institutionalism also examine the relationship between sound institutional framework, values and the impact of institutions upon behaviour.³⁶³ Normative Institutionalism argues for predicating individual behaviour and attitudes to rules, norms and value system to curb maximisation of individual desires (rationale choice and utilitarianism). 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 constitutionalism and the rule of law as a strategy to addressing behavioural and attitudinal change, as an important part of the constitutional implementation and agenda.

³⁶⁰ Fareed Zakaria, ‘The Rise of Illiberal Democracy’ (1997) 76(6) Foreign Affairs 22, 31.

³⁶¹ H.W.O Okoth- Ogendo, *Constitutions without Constitutionalism: “Reflections on an African Political Paradox”* In State and Constitutionalism, (ed Shivji) 8-9.

³⁶² Barnett H, *Constitutional and Administrative Law* (5th edn, Routledge 2005), p 38.

³⁶³ March J and Olsen J, ‘The New Institutionalism: Organisational Factors in Political Life’ (1984) 78 (3) The American Political Science Review 735.

5.3 Recommendations

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, CSOs and the Judiciary.

5.3.1 Recommendation for the Government of Kenya

Strengthening and institutionalizing sustainable democracy in Kenya and 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. The research established the fact that Kenya enacted a progressive and transformative constitution that among other things guaranteed fundamental rights and freedoms including constitutionalisation of political rights. Additionally, the constitution makes elaborate provisions on values and principles which are binding on the state.

The constitution also establishes institutional framework for credible elections which include the Judiciary and the IEBC among others. 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 it³⁶⁴. Consolidating electoral democracy in Kenya will require implementation of the constitution as well as instituting electoral reforms proposals suggested in the study.³⁶⁵ Responsibility of establishing an enabling peaceful environment for elections

³⁶⁴ Constitution of Kenya 2010, Article 19.

³⁶⁵ See cap 4 on electoral reforms proposals.

rests with the Government. This responsibility was effectively exercised by the Government of Ghana in 2008 and recently the Government of Nigeria during the 2015 elections.

As mentioned, elections in democratizing countries are a high stake affair, where the winner takes it all. In Kenya, the only time the country has moved closer to civil war was during the disputed 2007 elections. The prevailing political environment in Kenya points to a very volatile election in 2017 if the government does not put in place an amicable, peaceful and conducive environment in place. Finally, the government of Kenya should ensure that the Ministry of Education incorporates the electoral process in its curriculum for the upper primary and secondary schools. This will ensure the inculcation of a democratic culture early in life which might in turn contribute to the strengthening of democracy in Kenya.

5.3.2 Recommendation to Parliament

The study established gaps in the legal and statutory framework for elections in Kenya and made recommendations for strengthening elections management in Kenya. Ultimately, the responsibility for effecting electoral law reforms rests with parliament. Accordingly, parliament should review the legislative framework for elections and ensure that meaningful reforms are introduced that can strengthen the electoral administration and management. Legislative processes for reforming election process should embrace multi sectoral approach involving other key stakeholders. While it is acknowledged that the legislative jurisdiction of Parliament is limitless, Parliament should refrain from instituting amendments to the election sector laws in the run up to 2017 elections as this will complicate the electoral process especially from election management perspectives.³⁶⁶

³⁶⁶ See Research Findings in cap 3 (Amendments instituted by the 10th parliament had a collateral impact on election administration and management).

5.3.3 Recommendations to the IEBC

The important role that IEBC plays in elections has been established in the research. Admittedly, credible and democratic elections will require the participation of other players but as successful elections in the continent demonstrate, there is no substitute for professional election management body in the overall credibility of the results³⁶⁷. Bearing the foregoing in mind, and based on the findings of the study, the IEBC should consider doing the following; IEBC should launch elections preparations early enough to mitigate the shortcomings and challenges that were noted in election administration in 2013. Enhanced planning and management capacity of IEBC is consistent with the election cycle approach that requires a holistic approach to the entire electoral process in a timely and well sequenced manner. A context based determination on suitable election technology should be done by IEBC.

This should entail an evaluation of the technology used in 2013 elections as well as a comparative analysis of technology which were used and worked well in Nigeria (2015), South Africa (2014) and Ghana (2012). IEBC should initiate the procurement of essential election materials well in advance and conclude the process by February 2017. This will insulate the process from vested business interests. Additionally, an effective and transparent procurement plan must be put in place. IEBC should also develop a comprehensive mechanism for voter registration and the maintenance of voter register. This should include a mechanism for the registration of Kenyans in the diaspora. Finally, IEBC should strengthen voter education mechanisms. IEBC should prepare realistic election operational and strategic plan to guide in the preparation of 2017 elections.

³⁶⁷ Mozaffar S, 'Patterns of Electoral Governance in Africa's Emerging Democracies' (2002) 3(1) International Political Science Review 85.

5.3.4 Recommendations to the Civil Society Organisations (CSOs)

In the collaborative spirit, CSOs should complement IEBC work in conducting comprehensive voter education. To enhance transparency, domestic CSOs should strengthen domestic election observation work including Parallel Vote Tabulation (PVT).

5.3.5 Recommendation to the Judiciary

The research established the overlapping mandates of the various bodies charged with election dispute resolution. The judiciary should collaborate with the IEBC and the PPDT to harmonise jurisdictions arising from elections dispute resolution.

5.3.6 Recommendation to Political Parties

Institutionalisation of political parties is key to strengthening election management in Kenya and the electoral process. As such political parties should ensure that they have credible and democratic processes geared towards enhancing internal party democracy.³⁶⁸ Parties should embark on credible nomination processes that should be conducted early to ensure minimal disputes lodged with the IEBC Dispute Committee. On election day, parties should deploy trained agents who can file polling stations returns to complement the work of the IEBC personnel. Parties should also ensure peaceful campaigns so as to ensure that the IEBC does not invoke enforcement of the Electoral Code of Conduct. Enforcement of the Code will require a sitting by the Committee in charge of the Code and this will result into stretching the IEBC and distracting the Commission from attending to its core mandate of election management.

³⁶⁸ See EISA, *Setting Benchmarks for Enhanced Political Party Performance for Democratic Governance in Africa* (EISA 2011).

5.4 Areas for Further Research

Completion of this study will hopefully motivate interests on further research on the electoral process and election management in particular. As observed by Mosaffar Jaffer, this is an area which is under researched and hence lack of clarity on the dynamics of election management. To further this discourse, it would be important to conduct research on a number of areas that has relevance to the implementation of the Constitution of Kenya 2010. This research has examined the election management and administration, a connected study should be commissioned to assess the consolidation of democracy in Kenya through the new constitutional and legal framework. This will examine whether the progressive constitution enacted in 2010 and the statutory framework has enhanced democratic elections in Kenya.

Institutionalisation of Political Parties through the law can also provide a good basis for conducting research. The question is why do political parties in Kenya exhibit institutional weaknesses despite Kenya being a multi- party state for over two decades. Another area for research should be Political Parties and Campaign Financing in Kenya owing to the enactment of both the Political Parties Act, 2011 and the Election Campaign Finance Act, 2012 which provided funding for parties and candidates in elections. Finally, Concurrent and Overlapping Jurisdictions on Election Dispute Resolution in Kenya should be researched on.

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APPENDIX 1: LIST OF RESPONDENTS

A. Party Leaders and Former Presidential Candidates

1. Jack
2. Mary
3. Joseph
4. Peter
5. Andrew
6. Koech

B. Constitutional and State Agencies

1. George
2. Victor
3. Silas
4. Phoebe
5. Robert
6. Succiline

C. Other Officials of the Main Parties

1. Lucas
2. Paul

D. Civil Society Organizations (CSOs)

1. Bernard
2. Michael
3. Dickson
4. Christopher
5. Moses
6. Musau

APPENDIX 2: RESEARCH QUESTIONNAIRE

I request your acceptance to participate in my research as a respondent. I (Felix Odhiambo Owuor) a Masters of Law student at the University of Nairobi undertaking Masters studies in Law. My research topic is, **Reforming Elections Management and Administration in Kenya: The Case for Independent Electoral and Boundaries Commission (IEBC)**. All information shall be strictly used for study purposes and shall remain confidential to extent of the respondents wishes.

I Bio Data *(Tick whichever is applicable)*

Name:.....(Optional)

Organization of Work:..... Designation:.....

Choose Organization Type:

Security Agency Electoral Body Non- State Actor Other

If Other (Specify);.....

Level of Education Attained:

Up to Diploma Undergraduate Masters and Above

II Preliminary Questions: Historical overview of Elections in Kenya

- Have you ever participated in any multi-party Elections in Kenya?

Yes No

- How would you rate the conduct of multi-party elections in Kenya?

.....

III Constitutional and legal framework of Elections in Kenya:

- What are the main laws governing Elections in Kenya?
.....
.....
.....
- How, if at all, do you think the laws contributed to credible elections in 2013?
 - Electoral process?
.....
.....
 - Election administration and management?
.....
.....
 - Conduct of political parties in Elections?
.....
.....
 - Elections Dispute Resolution?
.....
.....
- Are there shortcomings or weaknesses in the legal framework for Elections in Kenya?
.....
.....
- What reforms, if at all, can you suggest to improve the laws governing Elections administration and management in Kenya?
.....
.....
.....
.....

VI Institutional framework for Elections Management in Kenya

- Please state the body charged with the responsibility of managing elections in Kenya?
.....
- Are there other bodies / institutions that have a direct role in the Elections process in Kenya?
.....
- What are the functions of IEBC?
.....
.....
.....
.....
- Please assess the performance of IEBC in discharging the functions below during the 2013 Elections?

Boundaries Delimitation:

In your assessment did the boundaries delimitation process meet the criteria and methodology provided in the Constitution and the IEBC Act?

.....
.....

What are of your observations in respect to independence and capacity of the IEBC to conduct boundaries delimitation?

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What is your assessment of the role of parliament in boundaries delimitation?

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What are any additional observations and recommendations on the boundaries delimitation process?

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Voter Registration

Was the legal and institutional framework effective in facilitating voter registration process

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Were there adequate logistical and administrative support for voter registration process?

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Was there adequate strategies put in place to ensure voter registration and mobilization during the voter registration process?

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Was the voter register used in 2013 adequately accurate?

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Was the voter register a complete representation of eligible franchise?

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Was the voter register a fair representation of women and other marginalized groups?

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Polling Operations

What is your assessment on the demarcation of polling stations and managing of queues during polling?

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Were there effective logistics support to ensure that polling stations opened and closed on time?

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In your assessment are the is the law on assisted voters adequate and consistently applied?

Was the counting process conducted in a manner consistent with the laws and regulations?

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Was the process of counting transparent and consistent with the laws and regulations?

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Assess the performance of the election officials in managing polling operations?

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Were there any material challenges including violence and malpractices experienced during the voting day?

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Transmission, Tallying, and Publication of Results

Assess whether the process of tallying and relaying of results from polling stations; constituencies; county level and National Levels was consistent in practice and with the regulations?

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Assess the conduct of the IEBC and its officials in managing a transparent and efficient process of result transmission and declaration?

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Was there adequate participation of parties, candidates agents and observers in overseeing the results management process?

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Were any complaints and objections during counting, transmission, tallying and publication of results

effectively dealt with?

What are the improvements required to ensure transparent, effective and efficient results management?

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Integration of ICT in Election Process:

Was there a clear legal and administrative framework for integration of ICT in the electoral process?

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In your assessment did the ICT integration improve both transparency and efficiency in managing elections?

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Was there adequate inclusion of political parties and other stakeholders in the process of integrating technology?

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In your assessment, were there adequate precaution in respect to the process of technology integration?

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Were the noted failures in electronic voter identification or voter register material in respect to a free and fair elections?

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Were the noted failures in respect to result transmission and publication material in respect to ensuring free and fair elections?

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What improvements are required to improve election technology?

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Dispute Resolution

Was the legal and institutional framework for dispute resolution adequate to ensure electoral justice?

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Was there adequate certainty regarding the laws, rules, and institutional framework?

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What is your observation regarding resolution of pre-election disputes?

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What is your assessment and observations regarding the resolution of post-election disputes and petitions?

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In your observation, is the appellate structure of dispute resolution facilitative of the electoral framework and the principles under Article 81 of the Constitution?

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Are there any lessons and recommendations regarding the management of the 2013 electoral disputes?

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V Recommendations for reforms

- Please suggest constitutional and legal reforms for enhancing election management and administration in Kenya?

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- Please suggest institutional and administrative reforms that can strengthen the operations of IEBC

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