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# HANDBOOK ON KENYA'S ELECTORAL LAWS AND SYSTEM

ONGOYA, Z. ELISHA
&
WILLIS E. OTIENO






# A HANDBOOK ON KENYA'S ELECTORAL LAWS AND SYSTEM

## HIGHLIGHTS OF THE ELECTORAL LAWS AND SYSTEM ESTABLISHED BY AND UNDER THE CONSTITUTION OF KENYA 2010 AND OTHER STATUTES.

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**&**
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# About the Electoral Institute for Sustainable Democracy in Africa (EISA)

EISA is a not for profit organisation established in 1996 and headquartered in Johannesburg (South Africa) with field offices in Kinshasa (DRC), N'Djamena (Chad), Antananarivo (Madagascar), Maputo (Mozambique), Nairobi (Kenya), Harare (Zimbabwe) and Cairo (Egypt).

EISA's vision is for an African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment.
EISA strives for excellence in the promotion of credible elections, citizen participation, and the strengthening of political institutions for sustainable democracy in Africa.

- To achieve its objectives, EISA works in a number of programme areas including;
- Democracy, conflict management and electoral education
- Elections and political processes
- Balloting and electoral services
- Governance (political parties, APRM, institutions of governance and local governance)
- Online Democracy Encyclopedia

Research and information (including a specialized library and in house publications)
Program activities are supported by a number of programme officers in special focus areas that cover:

- Research
- Library
- Publications
- ICTs (Information and Communication Technologies)
- Finance and Administration

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# LIST OF ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| **CEDAW** | Convention on the Elimination of All Forms of Discrimination against Women |
| **ICERD** | Convention on the Elimination of All Forms of Racial Discrimination |
| **IIEC** | Interim Independent Electoral Commission |
| **IEBC** | Independent Electoral and Boundaries Commission |
| **MP** | Member of Parliament |
| **PPDT** | Political Parties Dispute Tribunal |
| **RPP** | Registrar of Political Parties |
| **UDHR** | Universal Declaration on Human and People's Rights |

# FOREWORD

For a long time, laws governing elections in Kenya were scattered in various Acts; a scenario, which presented a huge challenge to voters, political parties and candidates, and those, tasked with the implementation of the law.

With the coming into force of the Constitution of Kenya, 2010, these scattered laws have since been revised and consolidated giving rise to two key pieces of legislations; the Elections Act and the Political Parties Act. A new addition is the Independent Electoral and Boundaries Commission Act, which provides for the appointment of members of the Commission and management of the Commission.

The Handbook on Kenya's Electoral Laws and System provides timely and invaluable one-stop reference to the electoral reforms recently undertaken in Kenya. By relating to international best practices, Conventions and special interest groups in elections, the Handbook is expected to broaden the reader's understanding of election management and the institutionalization of democracy in Kenya and beyond. It goes further to demystify the new form of representation in Kenya by elaborating the six elective positions and the minimum requirements for nomination or election of candidates, the pre-polling processes including the nomination process, the actual election day and post-polling activities such as election petitions. The Handbook further gives an insight into the new requirements of political parties under the new constitutional dispensation and outlines the myriad of offences in the two Acts.

I have no doubt that voters, potential candidates, journalists and the political constituency will find this publication useful for their day-to-day work. I congratulate the authors for the tremendous effort to ably document works that have just come out of the mould. I equally commend the Electoral Institute for Sustainable Democracy in Africa (EISA) for supporting the initiative, which undoubtedly is a realization of its vision of "an African continent where democratic governance, human rights and citizen participation are upheld in a peaceful environment".

AHMED ISSACK HASSAN, EBS

**CHAIRMAN, INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION**

# Word from the Kenya Country Director of the Electoral Institute for Sustainable Democracy in Africa

It is widely understood that the effectiveness with which a country manages its electoral system and the viability of its electoral laws are the ultimate indicators of the strength of a democratic society. Elections give voice to the people. At the same time, political power is pursued or maintained through electoral processes. For this reason, if not properly structured and managed, elections can generate conflict and violence.

There has been an ongoing pursuit to reform and consolidate electoral laws in Kenya over the last few decades. This is for the simple reason that our elections have often been characterized by controversy and utter disregard for the rule of law. However, the inception of a new constitutional order has meant drastic changes for this country in most spheres, the electoral arena not excluded.

This handbook provides an overview of the electoral law regime in Kenya. It comprehensively covers the electoral system in Kenya and the structure and functions of the key organ responsible for electoral management in the country. Further, it gives an insight on political and related rights as envisaged in our current electoral law.

It is our hope that this Handbook will provide an easy and holistic read on matters elections for legal practitioners, electoral practitioners, politicians, those in academia as well as ordinary citizens.

The Electoral Institute for Sustainable Democracy in Africa acknowledges the efforts and extends its gratitude to the many individuals who contributed to the publication of the "Handbook on Kenya's Electoral Laws and System."

EISA is particularly grateful to those individuals who researched and compiled the Handbook. Specifically, we thank Mr. Elisha Ongoya who led in the development of the first draft of the Handbook, for his meticulous and thoroughness in that quest. We are grateful for the efforts of Mr. Willis Otieno who conceptualized, researched, and designed the overall flaw of the Handbook and ensuring that it is a reality.

We wish to express our sincere gratitude to Mr. O.J.H Oswago, the Chief Electoral Officer of Kenya and Ms. Nur Awadh both of the Independent Electoral and Boundaries Commission for their insights and perspectives on the content and structure of the Handbook.

EISA is greatly indebted to the Department of Foreign International Development **(DFID)** and **(SIDA)** Sweden for their continued financial support that guaranteed

the successful completion of this publication. The views expressed herein do not necessarily reflect those of our funding partners.

Last but not least, EISA appreciates the support of its Board, Executive Director, Mr. Dennis Kadima and Secretariat staff and the Kenyan Staff in particular for ensuring the continued successful implementation of its objectives and the publication of this Handbook.

FELIX ODHIAMBO OWUOR

**COUNTRY DIRECTOR**

# INTRODUCTION

Among the factors that informed the push for constitutional and legal reforms in Kenya through history was the desire to have an electoral system that accords to the fundamentals of democracy. Free and fair elections are a result of a sound electoral management system that is itself founded upon a sound legal and administrative framework. The legitimacy of any government, which is foundational to proper governance, is dependent on the confidence that people have in the electoral system. An electoral system founded on a weak legal framework is less than likely to inspire people's confidence in the resultant government.

Following the resounding adoption of the new Constitution of Kenya 2010 on August 4th 2010 and the subsequent promulgation of the same constitution on August 27th 2010, a number of institutional and legal reforms were ushered in. The Constitution itself made provisions that altered the institutional and legal underpinnings of governance in the country as hitherto understood. With the new Constitution, a number of other legislative and administrative reforms were inevitable. These reforms were either expressly required under the Constitution within prescribed time-frames or implicitly required to make the legal regime in the relevant sectors compliant with the new constitutional order. One of the sectors that was inevitably affected by the promulgation of the new constitution of Kenya was the electoral sector.

There are a number of laws that the Constitution of Kenya 2010 demanded to be enacted to govern the electoral system and process in the country. A number of these laws have since been enacted by the National Assembly and have been brought into force. Whether or not these laws will eventually transform the electoral sector in Kenya to a better system remains to be seen. As acknowledged by constitutionalists the world over, it is one thing to have a good or flowery constitution and quite another to realize the promises that the Constitution promises its intended beneficiaries – the people.

This handbook on electoral laws in Kenya is intended to provide a one-stop simplified rendition of the provisions of the laws governing the electoral sector in Kenya. It does not offer a detailed interrogation of the efficacy of the said

laws. It is simply an expository account of the electoral laws in Kenya's electoral system. It is hoped to afford reference material for civic education providers, researchers, the general citizenry and active participants in the electoral process to basically understand what the laws in the electoral sector provide.

To satisfy the information and intellectual thirst and hunger of those who may wish to have an in-depth analytical engagement with Kenya's electoral laws, it is hoped that a sequel to this handbook will come from the wood work in the foreseeable future.

As at the time of preparation of this handbook, only a few aspects in a few of the electoral laws that form the subject matter of the book have been tested by practical application in their current formulation. It will, therefore, be necessary to generate sequels to this handbook once the laws have been applied and tested to reflect the efficacy or otherwise of the said laws and their respective contribution to Kenya's electoral democracy.

## The Laws Governing Elections in Kenya

There are laws that directly govern the electoral process in Kenya. They are the ones that form the substance of this handbook. The said laws are the following.

a) The Constitution of Kenya 2010.
b) The Elections Act, 2011.
c) The Political Parties Act, 2011.
d) The Independent Electoral and Boundaries Commission Act, 2011.

In addition to the foregoing, there are also the general principles of international law and treaties ratified by Kenya that have a bearing on the electoral process and which, too, impact the electoral process. The same have the force of law in Kenya by virtue of article 2(5) and (6) of the Constitution of the Republic of Kenya which recognize them as part and parcel of Kenya's law. They have also been discussed in this handbook.

There are other laws that are not necessarily legislated for purposes of governing elections in Kenya but which inevitably have a bearing on the electoral sector in Kenya. These have not been discussed in the substance of this handbook but

a student of Kenya's electoral processes is better advised to procure them as an integral part of the raw materials of his study. These include:

a. The Kenya Broadcasting Cooperation Act.
b. The Public Order Act.

## Various subjects regulated by the various laws governing elections in Kenya.

For ease of rendition of this handbook, the following themes have been identified as governed by the various laws having a bearing on the electoral system in Kenya:

a) International Law and its Application to the Electoral Process in Kenya
b) Political and Related Rights of Citizens and the Electoral System in Kenya
c) Guiding Principles for the Electoral System in Kenya
d) Independent Electoral and Boundaries Commission
e) Delimitation of Electoral Boundaries in Kenya's Electoral System
f) Nomination of Candidates for Elections and Eligibility of Candidature for Elections and the Question of Independent Candidature
g) Registration of Citizens as Voters
h) The Conduct of Elections and Referenda and the Regulation and Supervision of Elections and Referenda.
i) Electoral Code of Conduct
j) Resolution of Electoral Disputes
k) Nomination of Nominated Members of Parliament and County Assemblies (Party List system)
l) Political parties
m) The Marginalized and the Electoral System
n) Recall of Members of Parliament
o) Election Offences and illegal practices and offences and illegal practices relating to referenda.

# CHAPTER 1

# INTERNATIONAL LAW AND ITS APPLICATION TO THE ELECTORAL PROCESS IN KENYA

The constitution has radically changed the electoral laws landscape and introduced into the ambit of election laws, instruments that hitherto never formed part of the laws of Kenya. It provides that the general rules of international law shall form part of the laws of Kenya[1] and further that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the constitution.[2] The net effect of these provisions is that, there are non traditional sources of law affecting the electoral process and participation of the people in that process. In this regard, any discussion of the laws of Kenya on elections cannot be complete without an enumeration of international instruments that Kenya has ratified and those that form part of the general rules of international law.

## 1.1 The General Rules of International Law

What then are the general rules of international law that impact on the electoral process in Kenya and participation of the people in the electoral process?

### 1.1.1 The Universal Declaration on Human Rights (UDHR)

Though not a treaty per se, this 1948 Declaration has been argued to have acquired the status of customary international law owing to the fact that most countries have consistently applied it for over fifty years and it has had a profound influence on the development of international human rights law[3]. The provisions of this instrument have informed the development of numerous international legally binding conventions.[4]

The UDHR acts as an expression of the fundamental values shared by all members of the international community. It openly recognizes the right of the people to participate in government either directly or through their democratically elected representatives.[5]

1 Section 2 (5) constitution
2 Section 2(6) constitution
3 Customary Law as an Instrument for the protection of human rights by the Instituto per gliStudi di PoliticaInternazionale. Accessed at www.ispionline.it/it/documents/wp_7_2006.pdf on the 21st February 2011
4 Examples include the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights
5 Article 21 of the Universal Declaration of Human Rights

The Declaration provides that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers[6]. This right is essential in the realization of a political choice and campaign for the adoption of that choice within the confines of the law.

There is the right to freedom of peaceful assembly and association which also outlaws a person from being compelled to join an association[7]. A fair electoral process provides for the opportunity of citizens to engage freely in political activities including association with persons of like mind and recruitment of other persons into the same political association within the confines of the law.

Touching directly on electoral processes, the Declaration provides that everyone has the right to take part in the government of his country, directly or through freely chosen representatives[8].It goes further to provide that the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or equivalent free voting procedures[9].

The Declaration in essence requires the participation of the people to legitimize any exercise or claim to exercise state authority. It underscores the centrality of the people in the establishment of their government and exercise of state authority. The participation of the people should not be a one off event but a periodic event through which leaders seek further legitimacy from the people. The Declaration reserves to the people the right to change their minds and reconsider their choice of leaders at periodic elections that are prescribed. Equally important is the provisions that the elections shall be by secret ballot or equivalent voting procedures. The sanctity of a vote cannot be gainsaid and it is therefore essential that the vote should not be revealed to another party. This may influence the choice of the elector thereby undermining the exercise of the right to vote. Mechanisms should however be put in place that will enable assisted voters to cast their ballot with the aid of trusted relatives or friends or prescribed officials.

6 Article 19
7 Article 20
8 Article 21 (1)
9 Article 21 (3)

The Kenyan electoral system meets the provisions of this Article. The constitution provides for periodic general elections to be held after every five (5) years and the same shall be by universal suffrage[10]. Article 1 of the constitution vests all sovereign power to the people of Kenya and provides that it shall only be exercised in accordance with the constitution. We must observe further that the constitution provides that the sovereign power can be exercised only in two ways by the people; directly or through democratically elected representatives.[11]

## 1.2 International Conventions ratified by Kenya relevant in the Electoral Process

On the other end of the legal spectrum we have those international instruments that have been ratified by Kenya and as such are binding on the state by dint of Article 2 (6) of the constitution. These instruments are considered to form part of the legal regime of the state of Kenya and are enforceable before its courts.

The relevant international legal instruments are; the International Covenant on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPWD).

The International Covenant on Civil and Political Rights[12] provides[13] that every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
b) To vote and to be elected at genuine periodic elections, this shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
c) To have access, on general terms of equality, to public service in his country.

10 Article 81 of the constitution
11 Article 1 (2)a constitution
12 Kenya Ascended to this treaty on the 23rd March 1976
13 Article 25

This instrument affords every citizen the right to vote and be elected at periodic genuine elections. The emphasis on the need for a genuine electoral process has been informed by past instances where states have adopted a mockery of electoral processes aimed at window dressing the quest for democracy.

Notably there are other international instruments that deal specifically with particular target groups in the society and their representation in public affairs and activities. The development of these instruments was done on the understanding and background that there exists challenges facing such persons thereby necessitating the need to enact laws that grant and secure their rights to full participation in public affairs. Such groups include women, persons with disabilities, and minorities.

### 1.2.1 The Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965

This convention was developed principally to protect racial minorities and eliminate any forms of discrimination on the basis of one's race. Article 5 of the convention provides that state parties to the convention have undertaken to prohibit and eliminate racial discrimination in all its forms and to guarantee the rights of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of amongst others the political rights as captured in paragraph (c) of the article.

Paragraph (c) of Article 5 grants the Political rights, in particular the right to participate in elections, to vote and to stand for election, on the basis of universal and equal suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service.

Significantly captured in the convention are the principles of participation in elections, universal suffrage, equal suffrage, the right to vie for elections and the right to vote. Though this convention primarily targets elimination of racial discrimination, it has incidentally prohibited discrimination on the basis of ethnic origin and as such ethnicity should not be a basis for disenfranchising the electorate who may constitute a minority in an electoral process.

### 1.2.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)

The convention was passed in 1979. It seeks to integrate women at the center of decision—making processes and eradicate impediments women face in the course of effective participation in societal affairs. Of relevance in the present discourse is article 7 of the Convention which provides that state parties shall take appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.

Article 7 of the convention in essence avails women the opportunity to participate in the electoral and political processes of their respective countries through voting and being voted for and further calls for the equal treatment of both men and women in the mentioned processes. Gender cannot be the reason for discrimination in involvement in political and electoral undertakings of a country.

From the above discussion on international instruments that relate to elections,, we can discern certain principles that are central to the exercise of the right to vote which an electoral system must aspire to comply with. These are;

i. Periodic elections. Elections should be conducted within a given interval on a continuous basis
ii Genuine elections. For a realization of the wishes of voters, the elections ought to be genuine and not a sham exercise marred by irregularities and only pursued under the guise of going through the motions.
iii Right to stand for election. The people must be accorded the right to contest in an election without undue limitations and hindrances.
iv Universal suffrage. This connotes allowing every person who has attained the age of majority to exercise the right to vote at elections. Universal suffrage can only be restricted in known instances so identified by law and such restrictions must be reasonable in the circumstances e.g. restrictions prohibiting undischarged bankrupts from voting.

v. Voting in elections on the basis of the right to vote
vi Equality of the vote. This principle is to the effect that the votes cast in an election should be equal and that some votes should not carry more weight than others in the electoral process.
vii Secret ballot. The principle requires that the sanctity of the vote be respected by ensuring that the voter exercises his franchise without fear or favour and that no one should be in a position to influence the voter's choice of candidate. Specific exceptions may be given in certain circumstances in respect to assisted voters.
viii Free expression of the will of the voter. This requires that the voter should be afforded an opportunity to exercise his franchise without fear or intimidation. The electoral process should be free from violence or intimidation of the voter.

## 1.3 Regional Instruments

There are regional instruments touching on political participation which have been adopted by the African Union and state parties have ratified the same. These include;

### 1.3.1 The African Charter on Human and People's Rights

This Charter was adopted in 1981. Article 13 of the Charter speaks to participation of the people. The charter requires Member States of the Organization of African Unity parties to the present Charter to recognize the rights, duties and freedoms enshrined in this Charter and undertake to adopt legislative or other measures to give effect to them[14]. It further provides that every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law[15].

The right to participate has been argued to exclude military interventions in the

14 Article 1 of the Charter
15 Article 13

takeover of a government[16]. Any exercise of state power should be as a result of a people's exercise of their rights independent of any threats or coercion. Military intervention in the governance of a country is an infringement of the right of a people to freely participate in the governmental affairs of their country. The right to free participation is realized when people who are otherwise not disqualified, are allowed to contest for electoral positions and to vote freely in democratically organized elections.

The African Commission on Human and People's Rights in its Sixteenth session passed a resolution on the military takeover of Gambia in 1994[17]. In that resolution, the Commission reiterated that military takeovers work against principles envisioned in the Charter and that the coup was a flagrant and grave violation of the right of the people of Gambia to freely choose their government. It called upon the military leaders to transfer power to democratically elected representatives by the people of Gambia.

Of equal consideration is the right granted in article 20 which sets out the rights to unquestionable and inalienable right to self- determination. This encompasses the right of the electorate to freely determine their political status and pursue their economic and social development according to the policy they have freely chosen.

This provision introduces an important element in political development which is the right to self determination and the requirement that persons shall choose the policy by which they will be governed. Free choice must respect the importance of the individual in making his decision. Such a choice must be made free from intimidation, violence or undue pressure or influence.

The African Charter also provides for non restricted rights which are rights that are applicable to all. It provides for the right to non discrimination whether based on, race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status[18].

16 The African Charter on Human and People's Rights by U. Oji Umorizike at page 36. The author in the book goes on to argue that due to the forays of the military in administration through coups, national armies should be abolished and the work of maintaining law and order be accorded to paramilitary forces or the police. He gives the example of Costa Rica which was previously plagued by military coups and has since enjoyed long periods of stability and development ever since it opted to abolish the military.

17 ACHPR/Res.13(XVI)94: Resolution on the Gambia

18 Article 2

# CHAPTER 2

# POLITICAL AND RELATED RIGHTS OF CITIZENS AND THE ELECTORAL SYSTEM IN KENYA

Among the many provisions in the laws governing elections in Kenya, and in particular the Constitution of Kenya 2010, are provisions on the political rights of citizens. These are over-arching rights that play a definitive role in the manner in which the other laws governing elections have to be crafted.

These rights are to be found majorly at articles 34, 35, 36 and 38 of the Constitution of Kenya, 2010. In addition to the rights expressed described as "political", there are other rights that are instrumental to the realization of political rights. The rights that are instrumental to the realization of political rights are:

a) The freedom of the media as guaranteed by Article 34 of the Constitution.
b) The right to access to information as guaranteed by Article 35 of the Constitution.
c) The freedom of association as guaranteed by Article 36 of the Constitution.
d) The right to assembly as guaranteed by Article 37 of the Constitution.

The express political rights in the Constitution include the following:

i. Every citizen's right to form or participate in forming a political party;
ii. Every citizen's right to participate in the activities of, or recruitment of members for a political party;
iii. Every citizen's right to campaign for a political party or cause;
iv Every citizen's right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the constitution;
v. Every citizen's right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any office of any political party of which the citizen is a member;
vi. The right of every adult citizen, without unreasonable restrictions, to be registered as a voter;
vii. The right of every adult citizen, without unreasonable restrictions to vote by secret ballot in any election or referendum;
viii. The right of every adult citizen, without unreasonable restrictions to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

# CHAPTER 3

# GUIDING PRINCIPLES FOR THE ELECTORAL SYSTEM IN KENYA

The constitutional and legal order in Kenya requires that the electoral system be subject to certain cross cutting principles. The function of such principles is to provide general and objective guidelines as the players in the electoral system make laws, rules, regulation and administrative decisions or guidelines. The said principles are as follows[19]:

a) The electoral system must comply with principle of freedom of citizens to exercise their political rights spelt out in article 38 and discussed above.
b) The electoral system must comply with the principle that not more than two-thirds of members of elective public bodies shall be of the same gender.
c) The electoral system must comply with the principle of fair representation of persons with disabilities.
d) The electoral system must comply with the principle of universal suffrage based on the aspiration for fair representation and equality to vote.

The electoral system must comply with the principle of free and fair elections that bear the following characteristics:

i. By secret ballot;
ii. Free from violence, intimidation, improper influence or corruption;
iii. Conducted by an independent body;
iv. Transparent; and
v. Administered in an impartial, neutral, efficient, accurate and accountable manner.

19 See Article 81 of the Constitution as well as Section 25 of the Independent Electoral and Boundaries Commission Act, No. 9 of 2011.

# CHAPTER 4

# INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

This is the Election Management Body in Kenya's electoral system. It is established by the Constitution.[20] It is also recognized by and subject to the provisions of the Constitution that apply to Constitutional Commissions and Independent Offices.[21]

The finer details regarding the appointment and effective operation of the Commission are set out in the Independent Electoral and Boundaries Commission Act, 2011.

## 4.1 General Objectives and Independence of the Commission

In conjunction with other Constitutional Commissions, it is expected to contribute to the following objectives:

a) Protect the sovereignty of the people;
b) Secure the observance by all state organs of democratic values and principle;
c) Promote constitutionalism.

In the performance of its functions, like any other Constitutional Commission it is expected to be subject only to the Constitution and the law and to be independent and hence not subject to the direction or control by any person or authority[22].

## 4.2 Funding of the Commission

Like any other Constitutional Commission, the Commission's budget is a separate vote (as opposed to a line item under any Ministry's vote). Parliament is under a duty to allocate adequate funds to enable the commission to perform its functions.

20 Article 88 of the Constitution established the Independent Electoral and Boundaries Commission.
21 Chapter 15 of the Constitution of Kenya .
22 Articles 88(5) and 249(2) of the Constitution.

## 4.3 Membership of the Commission

Being a constitutional commission within the meaning of Article 248 of the Constitution, the Independent Electoral and Boundaries Commission is expected to be composed of at least three and at most nine members. The Independent Electoral and Boundaries Commission Act 2011 in section 5(1) provide that the Commission shall consist of a chairperson and eight (8) other members.
A member of the Independent Electoral and Boundaries Commission is prohibited from holding another public office by dint of section 7(2) of the providing that they shall serve as full time Commissioners as read together with article 250 (6) (b) of the constitution prohibiting full time members of constitutional commissions from holding any other office or employment for profit whether private or public.

The statute that makes provision for the appointment and effective operation of the Independent Electoral and Boundaries Commission provides for the Commission to be composed of a chairperson and eight other members.

The following categories of people are not eligible for membership to the Independent Electoral and Boundaries Commission, namely;

a) A person who has at any time within the preceding five years held office or stood for election as a Member of Parliament or of a county assembly;
b) A person who has at any time within the preceding five years held office or stood for election as a member of the governing body of a political party;
c) A person who hold any state office.

To qualify to serve as a chairperson of the Commission, one should meet the qualifications for holding the office of judge of the Supreme Court as spelt out under the Constitution, that is that the person must;

i. Hold a law degree from a recognized university or be an advocate of the High Court of Kenya or possess a qualification equivalent to a holder of a law degree or advocate of the High Court of Kenya in a common-law jurisdiction.
ii. Have a high moral character, integrity and impartiality;
iii. Posses the following experience:

a) Have at least fifteen years experience as a superior court judge whether that experience was gained in Kenya or in other Common Law jurisdiction; or
b) Have at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
c) Have the experience in (a) and (b) above for an aggregate period of at least fifteen years.

It is implicit that such person must be less than seventy years of age which is the retirement age of judges of the Supreme Court.

Since the chairperson of the Commission is by virtue of that position within the membership of the Commission, then he must be a citizen of Kenya.

As for the other members of the Commission, the qualifications to be a member as set out in statute are that one must:

a) Be a citizen of Kenya;
b) Hold a degree from a recognized university;
c) Have proven relevant experience in, electoral matters, management, finance, governance, public administration or law.
d) Meet the requirements of leadership and integrity as set out in the constitution.

## 4.4 Functions of the Commission

The Constitutional and statutory functions of the Independent Electoral and Boundaries Commission are to take responsibility for the following[23]:

a) Conducting or supervising referenda.
b) Conducting and supervising elections to any elective body established by the Constitution.
c) Conducting and supervising any other elections as may be prescribed by an Act of Parliament.
d) Continuous registration of citizens as voters.
e) Regular revision of the voters' register.

23 These functions are spelt out at Article 88 of the Constitution and Section 4 of the Independent Electoral and Boundaries Commission Act, Act No. 9 of 2011.

f) Delimitation of constituencies and wards;
g) Regulation of the process by which parties nominate candidates for elections;
h) Settlement of electoral disputes including disputes relating to or arising from nominations. This responsibility excludes election petitions and disputes arising after declaration of election results;
i) Registration of candidates for election;
j) Voter education;
k) Facilitation of observation, monitoring and evaluation of elections;
l) Regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
m) Development of a code of conduct for candidates and parties contesting elections;
n) Monitoring compliance with the legislation relating to nomination of candidates by parties[24].
o) Investigation and prosecution of electoral offences by candidates, political parties of their agents.
p) Use of appropriate technology and approaches in the performance of its functions;

There is, of course, the residual omnibus power of the Commission to perform such other functions as are provided for in the Constitution or any other written law.

24 At the moment, the said legislation is the Elections Act, Act No. 24 of 2011.

# CHAPTER 5

# DELIMITATION OF ELECTORAL BOUNDARIES IN KENYA'S ELECTORAL SYSTEM

The question of delimitation of electoral boundaries is core to the principles of universal suffrage as well as effective representation. It is also at the core of the electoral democratic principle of equality of the vote. It is, further, a prerequisite to equitable distribution of national resources. To address itself to this issue, the electoral laws have made a number of material provisions.

Foundationally, Parliament is constitutionally authorized and duty bound to enact legislation that provides for the delimitation by the Independent Electoral and Boundaries Commission – the Election Management Body created by the Constitution – of electoral units for election of Members of the National Assembly and County Assemblies.[25]

In delimitation of electoral units as required of the law anticipated above, certain constitutional guidelines are provided, the same are[26]:

a) There are to be two hundred and ninety (290) constituencies for purposes of single member constituencies of the National Assembly.
b) Review of names and boundaries of the National Assembly single member constituencies is the obligation of the Independent Electoral and Boundaries Commission.
c) The review of names and boundaries of the National Assembly single member constituencies is to be undertaken at intervals of between eight and twelve years.
d) Any review of the names and boundaries of the National Assembly single member constituencies should be completed at least twelve months before a general election of members of parliament.
e) Any new boundaries created as a result of a review of the boundaries of the National Assembly single member constituencies within twelve months to the date of the general election are not effective for purposes of that election.
f) The primary indicator of review of constituency boundaries is the population quota. However, there are other factors that must be borne in mind in addition to the population quota, namely;
    i. Geographical features and urban centers
    ii. Community of interest, historical, economic and cultural ties, and,

25 Article 82(1)(a) of the Constitution.
26 See Article 89 of the Constitution.

iii. Means of communication.

g) The term, population quota as used in relation to delimitation of constituency boundaries means the number obtained by dividing the number of inhabitants of Kenya by the number of constituencies or wards, as the case may be, into which Kenya is divided.

h) The margin of error permitted from the population quota for every constituency or ward is prescribed by the Constitution as follows:
   - Greater than or less that the population quota by forty percent (40%) for cities and sparsely populated areas; and
   - Greater than or less that the population quota by thirty percent (30%) for all other areas.

i) In reviewing constituency and ward boundaries, the Independent Electoral and Boundaries Commission is required by the Constitution to consult all interested parties, and, to progressively work towards ensuring that the number of inhabitants in each constituency and ward is as nearly as possible, equal to the population quota.

j) The Commission is duty bound to publish in the official government Gazette the names and details of the boundaries of constituencies and wards determined as a consequence of the review and the same only come into effect upon dissolution of Parliament first following the publication.

k) In case any person is dissatisfied with a decision of the Commission in the exercise of its mandate to review names and boundaries of Constituencies and wards, such person has a remedy by way of application for review to the High Court. Whereas there is no procedure provided for such application for review, it is arguable that the age old jurisprudence will hold, that is, that such a person will apply to the High Court by any procedure known to law.

l) The limitation period for making an application for review to the High Court above is thirty days of the publication of the decision in the Gazette. Such claim must also be determined by the Court within a fixed time frame, namely, three months from the date of filing. It will be necessary for the court to evolve guidelines governing such actions since they, on the face of it, are of a public interest character.

In exercise of its mandate to legislate on delimitation of boundaries of electoral units for election of Members of the National Assembly and County Assemblies

by the Independent Electoral and Boundaries Commission, Parliament has so far enacted provisions relating to the First Review relating to delimitation of boundaries of constituencies and wards[27].

By First Review is meant the review that had hitherto been conducted by the Interim Independent Boundaries Review Commission that was established under the former constitution of Kenya[28]. The said First Review was confronted by controversies leading to a number of court cases that led to non-implementation of its final recommendations. The Independent Electoral and Boundaries Commission is expected to resolve the issues that arose out of the said First Review within a period of four months of the date of its appointment under the Independent Electoral and Boundaries Commission Act, 2011[29].

The issues identified for resolution out of the first review have been set out as follows:

a) Re-distribution of such wards or administrative units in the affected constituencies as may be appropriate;
b) Addressing issues of new constituencies falling outside the population quota as provided under the constitution taking into account with special attention to:
    i. Taking into account the constitutional provisions requiring progressive efforts and not instant demographic equality of all towards attaining the population quota in each constituency and ward for the purposes of the first review.
    ii. Not being subject to new definitions of cities, urban areas and sparsely populated areas or to new population figures.
    iii. Being subject to the use of enumerated national census figures and not projected figures.
c) Addressing the issue of progressively advancing towards the population quota in protected constituencies in relation to neighboring constituencies where appropriate.

Within the period of four months from its establishment as highlighted above,

27 See the Fifth Schedule to the Independent Electoral and Boundaries Commission Act, No. 9 of 2011.

28 Popularly known as the Ligale Commission owing to its chairmanship by the Former Member of Parliament for Vihiga Constituency Hon. Andrew Ligale

29 The Commissioners were appointed on the 8th November 2011 and gazetted the following day.

the Independent Electoral and Boundaries Commission is expected to prepare and publish a preliminary report outlining to broad aspects of the review, namely;

a) The proposed delimitation of boundaries for constituencies and wards; and
b) The specific geographical and demographical details relating to such limitation.

The preliminary report shall be made available to the public for a period of twenty one days during which time representations shall be sought from the public on the proposals contained in the report.[30] At the end of the twenty-one day period, the Commission has fourteen days to review its proposals in the preliminary report taking into consideration the views received from the public before submitting the revised preliminary report to the parliamentary committee[31]. The Parliamentary Committee has fourteen days to table the revised report as well as its own recommendations to the National Assembly. The National Assembly, on its part, has seven days from the date of tabling the report of the Committee to consider the revised preliminary report and forward its resolutions to the Independent Electoral and Boundaries Commission. On its part, the Commission has fourteen days to consider the resolution of the National Assembly and prepare and submit its final report outlining the two broad issues highlighted above for publication in the official government Gazette. In the event that the National Assembly fails to make a resolution within the time specified above, the Commission shall proceed to make and publish its final report. It is an offence for any person who has the responsibility to publish in the Gazette of the final report submitted by the Commission and fails to do so punishable by imprisonment for a term of one year.

In any event, if the report is not published by the official government Gazette, after submission by the Commission, the Commission has the option to cause the report to be published in at least two dailies of national circulation which publication shall have the same effect as if it were done in the official government Gazette.

30 At the time of completing this chapter, the Independent Electoral and Boundaries Commission had published and circulated through print media the Preliminary Report anticipated by this legal provision.

31 The term Parliamentary Committee by definition at Section 2 of the Act refers to the relevant Departmental Committee of the National Assembly responsible for matters relating to the Independent Electoral and Boundaries Commission.

Any decision of the Commission in the conduct of the review of constituency and ward boundaries is subject to supervision by an appropriate application to the High Court[32]. Such matter in the High Court must be lodged within thirty days of the publication of the report in the Gazette and must be heard and determined within three months of the date on which it was filed[33].

The public must be sensitized on the boundaries published by the Commission for a period of thirty days which process must be facilitated by the Commission.

The Commission is also under a statutory duty to maintain all documents, materials, publications, reports and recommendations arising from the delimitation process in a form that is accessible and usable by the general public.

32 Article 89 (10) of the constitution
33 Article 89 (11)

# CHAPTER 6

# NOMINATION OF CANDIDATES FOR ELECTIONS AND ELIGIBILITY OF CANDIDATURE FOR ELECTIONS AND THE QUESTION OF INDEPENDENT CANDIDATURE

## 6.1 General Provisions on Nomination of Candidates

The Constitution of Kenya at Article 82(1)(b)reposes in Parliament the responsibility to enact legislation to make provision for nomination of candidates for elections.
In execution of the above responsibility, Parliament has enacted the Elections Act, 2011.[34]

Candidates in a General Election under the Elections Act, 2011 are to be nominated by political parties at least forty five days before a general election.[35] Political parties are prohibited from changing the candidate nominated after that nomination has been received by the Independent Electoral and Boundaries Commission.

However, before presentation of nomination papers to the Independent Electoral and Boundaries Commission, a political party may substitute its candidate on any of the following grounds;

i. Death of the nominated candidate
ii. Resignation of the nominated candidate
iii. Incapacity of the nominated candidate
iv. Violation of the Electoral Code of Conduct by the nominated candidate

Such substitution of the nominated candidate should be preceded, where applicable, with a notification by the political party to the candidate sought to be substituted.

For elections other than a General Election, the Independent Electoral and Boundaries Commission is under a duty to issue a notice in the prescribed form specifying the day or days upon which political parties should nominate candidates to contest in the elections in accordance with the party constitution and the party rules. In any event, however, such nomination should be conducted not later than twenty one (21) days following the publication of such notice.

34 Act No. 24 of 2011.
35 Section 13(1) of the Elections Act, 2011.

At least six months before a political party nominates its candidates for elections, it should submit its nomination rules to the Independent Electoral and Boundaries Commission.[36]

Three months before a political party nominates its candidates for any election under the Elections Act 2011, it should submit its party membership list.[37]
Only registered members of a candidate's political party have authority to nominate a presidential, parliamentary, county governor and county assembly candidates for that political party.[38]

## 6.2 Independent Candidates

The constitution makes it possible for persons to contest all public elective offices as independent candidates. Independent candidates are those persons contesting an election without being associated with a political party or running on a political party's ticket. Article 85 of the constitution provides that any person is eligible to stand as an independent candidate for election if they meet the following stipulations;

i. The first requirement is that the person should not be a member of a registered political party;
ii. The person should not have been a member of a political party in the last three (3) months preceding the date of the election; and
iii. The person must satisfy the requirements set out in Articles 99(1) (c ) or (ii) and 193(1) (c ) (ii) with specific regards to independent candidates. These provisions set out the minimum number of registered voters who should support the quest for the independent candidate to contest the elections.

Independent candidates running for the position of Member of the National Assembly should be supported by at least one thousand (1000) registered voters in the constituency while those running for Senate seat must be supported by at least two thousand (2,000) registered voters in the county. Article 193 (1) (c) (ii) on its part require that independent candidates running for the position of county assembly representatives must be supported by at least five hundred (500) registered voters in the ward concerned.

36 Section 27 of the Elections Act
37 Section 28 of the Elections Act
38 Section 29(1) of the Elections Act

The Elections Act on the other hand in section 29 (2) require that only persons who are not registered members of a political party may nominate an independent candidate for presidential, parliamentary, county governor, and county assembly elections.

This provision of the Act will have to be tested against the constitution through the court process. It attempts to modify the provisions of the constitution in regard to those who can support the candidacy of an independent candidate. The constitution only makes reference to *registered voters* while the Act introduces a further qualification that those registered voters *should not be members of a political party* which the constitution is silent on.

## 6.3 Qualifications for a Presidential candidate

To qualify for election as President, a person must meet the following criteria:

- Be a citizen of Kenya by birth;
- Be qualified to stand for election as a Member of Parliament;
- Be nominated by a political party or be an independent candidate;
- Be nominated by not fewer than two thousand voters from each of a majority of the counties.
- Should hold a post-secondary school qualification recognized in Kenya[39]
- The person should not owe allegiance to a foreign state
- The person should not be a public officer, or be acting in any state office or other public officer except for persons serving in the offices of president, deputy president or Member of Parliament.

## 6.4 Qualifications for a Parliamentary Candidate

The criteria to be met for eligibility to be a Member of Parliament are that a person:

- Must be a registered voter;
- Must satisfy the educational, moral and ethical requirements prescribed by the Constitution and by an Act of Parliament.

39 Section 22(1)(b) of the Elections Act.

The ethical criteria set by the Constitution is to be found in Chapter six of the Constitution, that is the principles of leadership and integrity of the Constitution The educational requirement under the Elections Act is that the person must hold a post secondary school qualification recognized in Kenya.[40]

- Should be nominated by a political party, or be an independent candidate who has following support:
    a) In the case of election to the National Assembly, at least one thousand registered voters in the constituency;
    b) In the case of election to the senate, at least two thousand registered voters in the county.
- The person should not be a state officer or other public officer other than a member of parliament;
- The person should not have held officer as a member of the Independent Electoral and Boundaries Commission within five years immediately preceding the date of election.
- The person should have been a citizen of Kenya for at least ten years immediately preceding the date of elections.
- The person should not be a member of a county assembly.
- The person should not be of unsound mind.
- The person should not be an undischarged bankrupt.
- The person should not be subject to a sentence of imprisonment of at least six months as at the date of registration as a candidate or at the date of election. This disqualification only operates where all possibility of appeal or review of the relevant sentence or decision has been exhausted.
- The person should not be found, in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened the provisions of the Constitution on leadership and integrity. This disqualification also only operates where all possibility of appeal or review of the decision has been exhausted.

40 Section 22(1)(b) of the Elections Act.

## 6.5 Qualifications for a member of the County Assembly

To be eligible for election as a member of the county assembly a person must meet the following criteria:

a) Be a registered voter;
b) Satisfy the educational, moral and ethical requirements prescribed by the Constitution or an Act of Parliament. The ethical requirements under the Constitution are the provisions on leadership and integrity spelt out in Chapter six of the Constitution. The educational requirements prescribed under the Elections Act, 2011, are that the person must have a post secondary school qualification recognized in Kenya.
c) The person must either be nominated by a political party or be an independent candidate and in either case must be supported by at least five hundred registered voters in the ward concerned.
d) The person should not be a state officer or other public officer other than a member of the county assembly;
e) The person should not have held office as a member of the Independent Electoral and Boundaries Commission within five years immediately preceding the date of election.
f) The person should have been a citizen of Kenya for at least ten years immediately preceding the date of elections.
g) The person should not be a member of a county assembly.
h) The person should not be of unsound mind.
i) The person should not be an undischarged bankrupt.
j) The person should not be subject to a sentence of imprisonment of at least six months as at the date of registration as a candidate or at the date of election. This disqualification only operates where all possibility of appeal or review of the relevant sentence or decision has been exhausted.
h) The person should not be found, in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened the provisions of the Constitution on leadership and integrity. This disqualification also only operates where all possibility of appeal or review of the decision has been exhausted.

## 6.6 Qualifications for a County Governor Candidate

The Constitution requires that a person be eligible for election as a member of the County Assembly for such person to be eligible for election as a county governor.[41] From the foregoing, the qualifications for election as county governor are the same as the ones set out in relation to the qualifications for a county assembly representative candidate above.

41 Article 180(2) of the Constitution.

# CHAPTER 7

# REGISTRATION OF CITIZENS AS VOTERS

The Constitution of Kenya 2010 obligates Parliament to enact legislation to make two important provisions that relate to registration of citizens as voters, that is,

a) Provision for the continuous registration of citizens as voters.[42]
b) The progressive registration of citizens residing outside Kenya and the progressive realization of their right to vote.[43]

In fulfillment of the above obligation Parliament has enacted the Elections Act which provides for a Principal register of voters, to be compiled and maintained by the Independent Electoral and Boundaries Commission that comprises of the following sub-registers[44]:

a) A poll register in respect of every polling station
b) A ward register in respect of every ward
c) A constituency register in respect of ever constituency
d) A county register in respect of every county and
e) A register of voters residing outside Kenya.

The Elections Act also requires the registration of voters and the revision of the register of voters to be carried out at all times with only three exceptions, that is;

i. In case of a general election or a repeat presidential election where no clear winner emerged out of the first round of the general election, the registration of voters and revision of the register of voters shall not be carried out between the date of commencement of the ninety days period immediately before the election and the date of such election.
ii. In the case of a by-election, the registration of voters and revision of the register of voters shall not be carried out between the date of the declaration of the vacancy of the seat concerned and the date of such by-election.
iii. In any other case, the registration of voters and the revision of the register of voters shall not take place between the date of the declaration of the vacancy of the seat concerned and the date of such election.

42 Article 82(1)(c) of the Constitution.
43 Article 82(1)(e) of the Constitution.
44 See Section 4 of the Elections Act.

To be registered as a voter at elections or referenda a person must meet certan qualifications namely;

a) Be an adult citizen[45]
b) Should not have been declared to be of unsound mind
c) Should not have been convicted of an election offence during the preceding five years

The law requires a person to make an application in the prescribed manner for registration as a voter to the registration officer or any other officer authorized by the Commission. The information relating to the registration of a voter is then transmitted at the Commission's direction, to the Commission for inclusion in the Principal Register of voters.

Where a person has duly applied to be registered and his/her name is not included in the register of voters, such person may submit a claim to the registration officer in the prescribed form and manner and within the prescribed time for his name to be included in the register. Such claim shall be determined by the registration officer with a right of appeal to the Principal Magistrate's Court where it raises matters of fact and law, and, to the High Court where it raises matters of law.

45 The Elections Act extrapolates this requirement by specifying that such citizen must have attained the age of eighteen years as evidenced either by a national identity card or a Kenyan passport.

# CHAPTER 8

# THE CONDUCT OF ELECTIONS AND REFERENDA AND THE REGULATION AND SUPERVISION OF ELECTIONS AND REFERENDA.

## 8.1 Conduct of Elections

The Constitution of Kenya puts Parliament under a duty to enact legislation to provide for the conduct of elections and referenda and the regulation and efficient supervision of elections and referenda including the nomination of candidates for elections.

The legislation in respect of the above subject is also constitutionally required to pass some criteria, which is, to ensure that voting at every election is;

a) Simple;
b) Transparent and
c) Takes into account the special needs of –
    i. Persons with disabilities
    ii. Other persons or groups with special needs.

This subject of legislation has been captured by Parliament in the Elections Act. In terms of eligibility to vote, only a person whose name is entered in the register of voters in a particular polling station and who produces an identification document is eligible to vote in that polling station. The identification document in question should be the same identification document that was used at the time of registration as a voter.

The actual conduct of elections is preceded by nomination of eligible candidates for elections as discussed earlier in this handbook.

A presidential election is initiated by the Commission publishing a notice in the Gazette as well as in the electronic and print media of national circulation. Such publication is made at least sixty days before the date of the election in the case of a general election, and, at least twenty one days before the date of an election in case of a repeat presidential election following lack of a clear winner at a general election, and, upon the office of the president becoming vacant in any other case.

A parliamentary election is initiated by the publishing of a notice of the holding of the election in the Gazette as well as in the print and electronic media of national circulation. Such publication is made at least sixty days before the date

of the election in the case of a general election, and, in any other case, upon the office of a member of parliament becoming vacant and on receipt of a notice issued by the respective speaker.

County governor elections on their part are initiated by the Commission publishing a notice of the holding of the election in the Gazette and in the electronic and print media of national circulation. Such publication is made at least sixty days before the date of the election in the case of a general election, and, in any other case, upon the office of the county governor becoming vacant.

County assembly elections on their part are initiated by the Commission publishing a notice of the holding of the election in the Gazette and in the electronic and print media of national circulation. Such publication is made at least sixty days before the date of the election in the case of a general election, and, in any other case, upon the office of a member of the county assembly becoming vacant.

Each of the notices prescribed above must be in a prescribed form and must specify the following things:

- In the case of all the elections, the nomination date for the candidates as well as the day or days on which the poll shall be taken which shall not be less than twenty-one days after the day specified for nomination.
- In the case of parliamentary and county assembly elections, in addition to the foregoing contents, the notice must also specify the day upon which political parties shall submit party lists for purposes of facilitating the nomination of nominated members of the two representative bodies as required under the Constitution.

## 8.2 The Election Date

For the avoidance of doubt, the constitution of Kenya 2010 has prescribed a precise general election date, that is, the second Tuesday in August of every fifth year of Parliament.[46]

46 See Articles 101, 136(2)(a), 177(1)(a) and 180(1) of the Constitution.

In spite of the foregoing clarity, controversy raged over when precisely the first general election under the constitution of Kenya 2010 should be held in light of the transition provisions of the said constitution.

Precisely, the controversy arose out of the foregoing provisions of the Constitution of Kenya, 2010:

- Article 101 under Chapter 8 of the Constitution of Kenya, 2010, which provides that a general election of members of parliament shall be held on the second Tuesday in August every fifth year.
- Article 136(2)(a) under Chapter 9 of the Constitution of Kenya 2010 which provides that an election for the president shall be held on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year
- Article 177(1) under Chapter 11 of the Constitution which provides that an election of members of the county assembly shall be on the same day as a general election of Members of Parliament, being the second Tuesday in August in every fifth year; and
- Article 180 under Chapter 11 of the constitution which provides for election of the county governor on the same day as a general election of Members of Parliament, being the second Tuesday in August in every fifth year.

These substantive provisions were to be interpreted and counterbalanced against a number of transitional provisions of the Constitution that are spelt out in the Sixth Schedule of the same Constitution, namely;

- Section 2(b) and (c) of the Sixth Schedule which materially provides that the provisions of Chapter 8 and Articles 129 to 155 of Chapter 9 of the Constitution of Kenya 2010 are suspended until the final announcement of all the results of the first elections for parliament under the Constitution of Kenya, 2010 except that the provisions of Chapter 8 relating to the election of the National Assembly and the Senate and the provisions of Chapter 9 relating to the election of the President shall apply to the first general election under the Constitution.
- Section 2(2) of the Sixth schedule which suspends the provisions of the Constitution relating to devolved government until the date of the first elections for county assemblies and governors under the

constitution and section 2(3) which provides that "despite subsection (2)", elections for county assemblies and governors shall be held in accordance with articles 177 and 180 of the Constitution.

- Section 9 of the sixth schedule which provides that:
    i. The first elections for the President, the National Assembly, the senate, county assemblies and county governors under the constitution shall be held at the same time, within sixty days after dissolution of the National Assembly at the end of its term.
    ii. Despite (i) above, if the coalition established under the National Accord is dissolved and general elections are held before 2012, elections for the first county assemblies and governors shall be held during 2012.
- Section 10 of the sixth schedule which provides that the National Assembly existing immediately before the effective date shall continue as the National Assembly for the purposes of the constitution for its unexpired term.

The foregoing were the provisions of the Constitution that brought forth conflicting interpretations in the academic, professional and political cycles leading to a number of court cases; *Supreme Court of Kenya, Constitutional Application Number 2 of 2011 (Re In the Matter of the Interim Independent Electoral Commission as Applicant); High Court Constitutional Petition No. 65 of 2011(Milton Mugambi Imanyara, Professor Lawrence Gumbe, Martin Muthomi Gitonga v The Attorney General, Commission for Implementation of the Constitution and Independent Electoral and Boundaries Commission); High Court Constitutional Petition No. 123 of 2011 (John Harun Mwau v The Attorney General); and, High Court Constitutional Petition No, 185 of 2011 (Milton Mugambi Imanyara v The Attorney General).*

With the Supreme Court having declined to exercise jurisdiction in respect of the question in order to give the High Court an opportunity to deal with the same in the first instance, the matters before the High Court were consolidated and heard together. The High Court considered the issues arising out of the rival petition and responses as the following:

i. A determination of the question as to when the next general election should be lawfully held.

ii. A determination as to whether an amendment to the Constitution affecting the term of the President could be proposed, enacted or effected into law without a referendum being held under the Constitution.
iii. A determination whether the unexpired term of the existing members of Parliament included terms and conditions of service.
iv. A determination whether the President had power or authority to dissolve Parliament under the current Constitution.
v. Whether the court had jurisdiction to determine the matter.
vi. Which body under the Constitution had the Constitutional responsibility to fix the election date?

The foregoing court cases culminated into the understandably controversial decision of the three judge bench of the High Court delivered on 13th January 2012 which established the date of the first general election under the Constitution as determinable by a formula and made the findings on the framed issues as follows:

(i) We have jurisdiction to determine this matter and it is founded on two grounds. First, failure to hold the first elections on a date fixed in accordance with the provisions Constitution would be a threat to the Constitution and therefore any party is entitled to move the court under **Article 258(1)** for appropriate relief. Secondly, the Supreme Court in **Constitutional Application No. 2 of 2011** directed this court to determine the petitions before it having been satisfied that we have jurisdiction.

(ii) The date of the first elections under the Constitution is determined by reference to **section 9** and **10 of the Sixth Schedule** as follows;

(a) In the year 2012, within sixty days from the date on which **the National Coalition is dissolved by written agreement between the President and Prime Minister** in accordance with **section 6(b)** of the **National Accord and Reconciliation Act, 2008; or**

(b) Upon the expiry of the term of the 10th Parliament on the 5th Anniversary of the day it first sat which is designated by **Legal Notice No. 1 of 2008** as 15th January 2008. The term therefore expires on 14th January 2013. The elections shall be held within **sixty days** of **15th January 2013.**

(iii) Following the repeal of the former Constitution and together with it section 59 thereof and in the absence of a specific provision entitling the President to dissolve Parliament, the President has no power under the Constitution to dissolve Parliament.

(iv) The body entitled under the Constitution to fix the date of the first elections within sixty of the expiry of the term of the National Assembly or upon dissolution of the National Coalition by written agreement between the President and the Prime Minister in accordance with **section 6(b)** of the ***National Accord and Reconciliation Act, 2008*** is the Independent Electoral and Boundaries Commission.

(v) In accordance with **Article 255** of the Constitution, an amendment to the Constitution affecting the term of the President cannot be effected into law without a referendum.

(vi) The terms and conditions of service of Members of Parliament are governed by the **National Assembly Remuneration Act (Chapter 5 of the Laws of Kenya) and Parliamentary Pensions Act (Chapter 196 of the Laws of Kenya)** which are saved by virtue of the provisions of **section 6** and **7** of the **Sixth Schedule** upto the end of the term of the National Assembly or upon dissolution of the National Coalition.

## 8.3 The Voting Process

Except for the guiding principles governing the electoral process prescribed in the Constitution of Kenya, 2010, the Elections Act does not provide the nitty gritty details regarding the voting process has been left to be prescribed by regulations to be made by the Independent Electoral and Boundaries Commission. Section 109 of the Elections Act empowers the Commission to make regulations to govern a wide gamut of areas relating to the electoral process. Among the areas to be covered by the regulations are to;

(a) Prescribe the place and manner in which votes may be cast and the construction and scaling of ballot boxes and provide for the issue of ballot papers to voters;

(b) Provide for the manner in which, and the person by whom any question as to the identity of any person claiming the right to vote shall be determined;

(c) Provide for the manner in which a voter who is not able to read or write may vote or be assisted in voting;
(d) Provide for the manner in which a voter with special needs including a person with disability may vote or be assisted in voting;
(e) Prescribe the procedure to be followed in the counting of votes and the circumstances in which votes may be rejected by a returning officer as being invalid;
(f) Prescribe the facilities to be provided during the electoral process and in particular, for voting by electronic machines and the persons entitled so to vote and the circumstances in which persons may so vote;
(g) Prescribe the procedure for advance voting for special categories including patients admitted in hospital, pastoralists, members of the armed forces, elections officers and other citizens of Kenya providing essential services;
(h) Prescribe the procedure for voting for citizens residing outside Kenya;
(i) Provide for the mode of declaration of election results.

Such power to make regulations by the Commission is subject to a number of conditions, namely;

- It is exercisable for the purpose and objective of giving effect to the Constitution and the Elections Act;
- It is limited to the nature and scope specifically stipulated in the Constitution and the Elections Act;
- It is based on the general principles and standards contained in the Constitution and the Elections Act;
- It is exercisable only after a draft of the proposed regulations has been approved by the National Assembly, at least six months preceding a general election.

At the time of developing this Handbook, no such regulations had been promulgated under the Elections Act, 2011. By instrumentality of the Interpretations and General Provisions Act (Chapter 2 Laws of Kenya), the regulations governing each of the foregoing themes and promulgated under the National Assembly and Presidential Elections Act Cap 7 (now repealed) remain in force until such time as the new regulations shall be promulgated.

## 8.4 Conduct of Referenda

Within the framework of the Elections Act, 2011, Kenya now has a standing referendum law. This is as contradistinguished from the two previous occasions that the country has held referenda when it had to rely on *adhoc* referendum laws.[47]

Under the law, the President initiates the referendum process "whenever it is necessary to hold a referendum on any issue". Such initiation of a referendum is by issuance of a notice to the Independent Electoral and Boundaries Commission for purposes of conducting the referendum. The statutory steps in the conduct of referenda are as follows:

**Step one –** the president issues a notice referring the issue to the Independent Electoral and Boundaries Commission for purposes of conducting a referendum.

**Step two -** the Commission upon presidential reference of the issue frames the question or questions for determination at the referendum.

**Step three –** the Commission in consultation with the speaker of *the relevant* house, lays the question or questions framed before the House for approval by resolution. It is not apparent how the Commission determines the relevant House, between the National Assembly and the Senate, for purposes of laying the question as required in this step.

**Step four –** this step is rather confusing as prescribed in statute since it then vests discretion in the National Assembly to approve one or more questions for a referendum. Whether this implies that by "relevant house' in step three above it was meant the National Assembly is not very clear.

**Step five –** The Commission publishes the question(s) approved by the National Assembly in the official government Gazette as well as in the electronic and print media of national circulation.

**Step six –** the Commission conducts the referendum within ninety days of publication of the question.

The foregoing steps are intertwined with a number of administrative powers and steps necessary for the smooth conduct of the referendum. These are:

- The commission has the discretion to assign such symbol for each answer to the referendum question or questions as it may consider

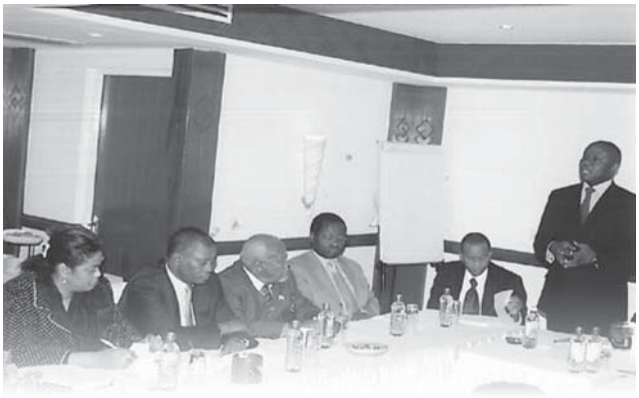
47 Kenya had its first ever referendum on 21.11.2005 when a proposal to adopt the then proposed new constitution was rejected and 04.08.2011 when the new constitution for Kenya was overwhelmingly approved.

necessary. Such symbol should be distinguishable from symbols of political parties and independent candidates.

- Upon publishing of the referendum question as indicated above, the Commission must, within a period of fourteen (14) days, publish a notice of holding the referendum in the official government Gazette as well as in the print and electronic media of national circulation with the following details:
  (a) The referendum question or questions and the option for the answer or answers;
  (b) The symbols assigned for the answers to the referendum question;
  (c) The day on which the referendum is to be held which should be not less than twenty one days following the publication of the notice;
  (d) The polling time of the referendum;
  (e) The day by which the referendum committees should have registered with the Commission;
  (f) The day and time by which campaigns in support of or opposition to the referendum question should start and cease.
- In cases where the referendum question requires a "yes" or "no" answer, persons intending to campaign for or against the referendum question are duty bound to form the necessary national referendum committees as well as constituency committees.
- In cases where there is more than one referendum question, persons intending to campaign for or against each referendum question will make applications to the Independent Electoral and Boundaries Commission to form one national referendum committee for each question and one national referendum committee against each question and one committee in every constituency for each question and one committee in every constituency against each question.
- A referendum committee should apply for registration to the Independent Electoral and Boundaries Commission in a form that should be prescribed. Such application must be accompanied by information showing that the applicant adequately represents persons campaigning for or against the referendum question.
- Members of the referendum committee should subscribe to and

abide by the Electoral Code of Conduct discussed elsewhere in this handbook.

- The procedure for the conduct of a referendum is the same, subject to necessary modifications, to the procedure for the conduct of an election.
- Except for referenda on the amendment of the Constitution, every other referendum question should be decided by a simple majority of citizens voting in the referendum.



*Consultative Forum (Parliament, Independent State Actors, Civil Society Organizations), 12th August 2010, Panafric Hotel, Nairobi*




*EISA Country Director, Mr. Felix Odhiambo at an EISA/ IIEC convened stakeholder consultative forum on the IEBC Bill 2011 held in Naivasha*



*Chairman of the IEBC Mr. Ahmed Isaack giving his opening address at the IEBC Bill development forum in Naivasha*



*Mr. OJH Oswago, Commission Secretary, Ms.Lillian Mahiri, Vice Chairperson of the IEBC and Ms. Praxedes Tororey, Director Legal,IEBC attending the IEBC Bill development workshop*



*Some of the participants at the IEBC Bill development forum*



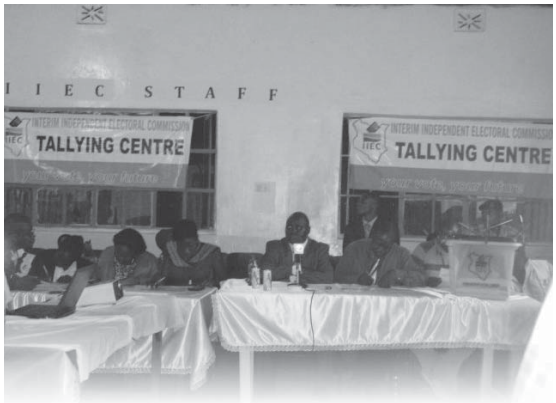
*Hon. Farah Maalim, TheDeputy Speaker at the IEBC Bill development forum in Naivasha*



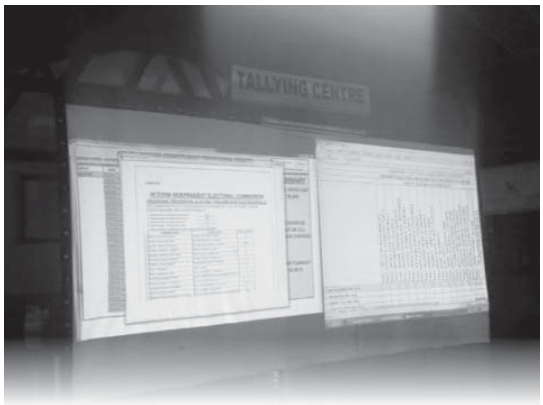
*Prisoners being registered to vote*



*Citizens at a polling station*




*Election officials at work*




*Electronic transmission of election results*



*A campaign rally in progress*






*EISA observers on an Election observation mission*

# CHAPTER 9

# ELECTORAL CODE OF CONDUCT

## 9.1 The Dos and Don'ts Under the Electoral Code of Conduct

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

The intended Code of Conduct has been enacted as part of the Elections Act 2011.[48] The Code as enacted is prescribed not only to apply to elections but also to referenda.[49]

The act of subscription to the Electoral Code of Conduct create further obligations to political parties, referendum committees, officials of political parties and referendum committees and candidates. The obligations are to:
Adhere to the values and principles of the Constitution;

(a) Give wide publicity to the Code;
(b) Promote voter education campaigns
(c) Condemn, avoid and take steps to prevent violence and intimidation;
(d) Instruct candidates, office bearers, agents, members and persons who support the political parties of their obligations under the Code;
(e) Promote gender equality;
(f) Promote ethnic tolerance;
(g) Promote cultural diversity;
(h) Promote the fair representation of special interest groups;
(i) Generally affirm the rights of all participants in an election to:-
    i. Express divergent political opinions;
    ii. Debate and contest the policies and programmes of other parties;
    iii. Canvass freely for membership and support from voters;
    iv. Subject to the Public Order Act hold public meetings;
    v. Attend public meetings convened by others;
    vi. Distribute non-offensive electoral literature and campaign material;

48 The Code is at the Second Schedule to the Act
49 Sections 51(6) and 110(1) of the Elections Act 2011

vii. Publish and distribute non-offensive notices and advertisements;
viii. Erect non-offensive banners, placards and posters;
ix. Remove all banners, placards and posters erected during the election period;
x. Promote free electoral campaigns by all lawful means; and
xi. Co-operate with the Commission and the relevant Government agencies and other authorities in the investigation of issues and allegations arising during the election period.

In addition to the foregoing obligations incidental to the very act of subscribing to the Code, the Code further requires of those bound by it to do the following:

(a) Publicly and repeatedly condemn violence and intimidation and avoid the use of hate speech, language or any kind of action which may lead to violence or intimidation whether to demonstrate party strength, gain any kind of advantage or for any other reason;
(b) Refrain from any action involving violence or intimidation;
(c) Ensure that no arms or weapons of any kind are carried or displayed at political meetings or any march, demonstration or other event of a political nature;
(d) Refrain from campaigning in places of worship or during burial ceremonies;
(e) Co-operate and liaise in good faith with other parties to avoid organizing public meetings, demonstrations, rallies or marches to take place at the same time and venue as similar political events organized by other parties;
(f) Do nothing to impede the right of any party, through its candidates, canvassers and representatives to have reasonable access to voters for the purpose of conducting voter education, fund raising, canvassing membership and soliciting support;
(g) Avoid plagiarizing the symbols, colours or acronyms of other parties and to discourage and, if possible, prevent the removal disfigurement or destruction of political campaign material of any party;
(h) Refrain from offering any document or reward to any person in consideration of such person either joining or not joining any party; attending or not attending any political event; voting or not voting (either

at all, or in a particular manner); or accepting, refusing or withdrawing such person's nomination as a candidate in the election;

(i) Refrain from any attempt to abuse a position of power, privilege or influence, including parental, partrachial, state or traditional authority for political purposes including any offer of reward or threat of penalty;

(j) Avoid any discrimination based on race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth in connection with the election and political activity;

(k) In relation to the Commission :-

i. Acknowledge the authority of the Commission in the conduct of the election or referendum;

ii. Ensure the attendance and participation of representatives at meetings of any party liaison committee and other forums convened by or on behalf of the Commission;

iii. Implement the orders and directions of the Commission;

iv. Facilitate the Commission's right of access through official observers and other representatives to all public political meetings or other electoral activities;

v. Co-operate in the investigation of issues and allegations arising during an election period;

vi. Take all reasonable steps to ensure the safety of observers and other representatives of the Commission from exposure to insult, hazard or threat in the course of their official duties;

vii. To establish and maintain effective lines of communication with the Commission; and

viii. To abide by the provisions of this Code.

(l) Reassure voters with regard to the impartiality of the Commission and the secrecy and integrity of the ballot, and to reaffirm that no one how any other person voted;

(m) Take reasonable steps to discipline and restrain their party office bearers, employees, candidates, members and persons who support the political party who:-

i. Infringe the Code;

ii. Engage in activities of commission or omission which constitute offences under the electoral laws or otherwise fail to observe the

Code; and

iii. Contravene or fail to comply with any provision of the electoral laws;

(n) Agree for party office bearers, employees, candidates, members and persons who support the political party to submit to the disciplinary procedures of the Commission for any violation of the Code; and

(o) Without prejudice to the right to present a petition to an election court, accept the final outcome of the election and the Commission's declaration and certification of the results of the election.

## 9.2 Sanctions for Breach of the Code

There are two sets of sanctions for breach of the Electoral Code of Conduct. There are those sanctions that are issuable by the Commission and sanctions that are issuable by the High Court at the instance of the Commission.

Where the Independent Electoral and Boundaries Commission forms an opinion that any political party or referendum committee participating in any election or referendum or the leader, office bearer or member of a political party or person who supports the political party of referendum committee or any candidate at any election, in any way infringes the provisions of the Code, the Commission may impose the following sanctions:

(a) In the case of a political party, the leader, any office bearer or member or person who supports the political party, referendum committee or candidate, one or more of the following penalties:

i. A formal warning
ii. A fine determined by the Commission
iii. An order prohibiting the political party either permanently or for a specified period from utilizing any public media time as may be allocated to the political party for electoral purposes
iv. An order prohibiting the political party, referendum committee or candidate from:

- Holding particular public meetings, demonstration or marches or any kind of meeting, demonstration or march;
- Entering any specified electoral area for purposes of canvassing for membership, or for any other electoral purpose;

- Erecting placards or banners or from publishing and distributing campaign literature;
- Publishing or distributing campaign literature and electoral advertising or limiting the rights of the political party to do so, which prohibition or limitation should be notified to the relevant regulating officers under the Public Order Act in the affected places or electoral areas for purposes of the Act.[50]
- In the case of the leader, candidate, office bearer or member of a political party or referendum committee impose either or both a formal warning and a fine determinable by the Commission.

In the event that a political party, referendum committee, leader or any office bearer, member or person who supports the political party, referendum committee or any candidate at an election fails, neglects or refuses to comply with any of the above orders of the Commission, the Commission has power to impose upon the defaulting party any of the following sanctions (and the sanctions may be suspended on specific conditions):

(a) In case of fine imposed, prohibit the defaulting party from participating in ongoing and future elections as candidates in case of a defaulting candidate until such fine is paid;
(b) In case of a fine imposed prohibit the political party or referendum committee official from participating in ongoing elections and referendum, and future elections and referendum and future elections or referendum or any activity facilitated by the Commission until such fine has been paid;
(c) In case of failure to comply with any other sanctions imposed, cancel the right of such political party or candidate to participate in the next election.
(d) File execution proceedings in the High Court to enforce the recovery of the fine.

It is a requirement of the Code that a fine imposed by the Commission under the Code be registered in the High Court.

Sanctions issuable by the High Court at the instance of the Commission are subject to the following conditions:

50 It is curious that the notification to relevant regulating officers under the Public Order Act is expressed under the Code in relation to the prohibition on publishing and distributing campaign literature which is a process not necessarily regulated by the Public Order Act and yet the prohibition on holding public meetings, demonstrations and marches or any kind of meeting, demonstration or march, a process wholly regulated by the Public Order Act is not subjected to such notification to the relevant regulating officers under the Public Order Act.

i. The proceedings are to be instituted by the Commission either on its own motion or as a consequence of any report made to it;
ii. The allegation of infringement of the Code must be as against a political party, leader office bearer or member of a political party or person who supports the political party or any candidate.
ii The infringement must involve violence, intimidation or gross or systematic violation of the rights of any political party, candidate or voter.

If the foregoing pre-conditions are satisfied, then the court has discretion to do the following:

(a) In the case of a political party, make an order cancelling the right of such party to participate in the election concerned either in addition to or in substitution of any sanction that issued by the Commission among the sanctions issuable by the Commission and specified above.
(b) In case of the leader, any office bearer or member of a political party or person who supports the political party or of any candidate, make an order disqualifying in the case of a person who is a candidate, that person from being a candidate or deleting the name of that candidate from the list or lists of candidates concerned.

# CHAPTER 10

# ELECTORAL DISPUTE RESOLUTION

The electoral process, by its very nature as a contest, is bound to be riddled with disputes. The credibility of the electoral process, as well as the determination of how free and fair the electoral process has been is very well determinable by reference to the mechanisms of dispute resolution that the process puts in place. Electoral disputes in Kenya are categorized into two; that is, disputes before the declaration of election results and disputes after the declaration of electoral results.

Article 88(4)(e) of the Constitution of Kenya vests in the Independent Electoral and Boundaries Commission the responsibility for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. Such disputes within the resolution mandate of the Commission are to be resolved within seven days of the lodging of the dispute with the Commission.[51] The foregoing notwithstanding, where the dispute relates to a prospective nomination or election, the dispute should be determined before the date of the nomination or election, whichever is applicable.[52]

Section 109 of the Elections Act vests the power to make certain specified regulations governing different aspects of the electoral process in the Independent Electoral and Boundaries Commission, subject to approval by the National Assembly in the manner and within the period prescribed by the Elections Act, 2011. Among areas regulations are expected to cover is the area of provision for complaints resolution mechanisms and for the manner of settlement of electoral disputes.

These regulations are yet to be promulgated. By virtue of the Interpretations and General Provisions Act, it follows that the relevant regulations under the now repealed National Assembly and Presidential Elections Act remain in force for the purpose until such time as the new regulations shall be brought into force.

Be that as it may, there are certain aspects of the electoral dispute resolution mechanisms that have been provided for by the Constitution and the statutes governing the electoral process in Kenya.

51 Section 74(2) of the Elections Act, 2011.
52 Section 74(3) of the Elections Act, 2011.

## 10.1 Legislation for resolution of election disputes

The Constitution demands of parliament to enact legislation to establish mechanisms for timely settling of electoral disputes.[53] To meet this constitutional dictate, parliament has enacted the Elections Act, 2011, that has various provisions touching on election disputes resolution.[54]

## 10.2 Court with jurisdiction to hear and determine electoral disputes

A petition to challenge the election of a President-elect is to be lodged in the Supreme Court for determination.[55]

Petitions to determine the questions whether a person has been validly elected as a member of Parliament or a seat of a member of parliament has become vacant are determinable by the High Court.[56]

A question regarding the validity of a county election is to be determined by the High Court within the county or nearest to the county.[57]

## 10.3 Time for lodging election petitions

With the exception of petitions concerning a presidential election, all other petitions challenging election results must be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.[58]

A petition to challenge the election of a President-elect is to be filed within seven days after the date of declaration of the results of the Presidential election.[59]

53 Article 87(1) of the Constitution of Kenya 2010
54 The entire part VII of the Elections Act, 2011 covering sections 74 to 104 of the Elections Act deals with election disputes resolution.
55 Article 140(1) of the Constitution of Kenya 2010
56 Article 105 of the Constitution of Kenya 2010
57 Section 75(1) of the Elections Act 2011
58 Article 87(2) of the Constitution of Kenya 2010 as read with Section 76(1)(a) of the Elections Act 2011.
59 Article 140(1) of the Constitution of Kenya 2010

A petition seeking a declaration that a seat in Parliament or a County Assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of vacancy by the relevant speaker.[60]

A petition to seek a declaration that a seat in Parliament has become vacant may be presented at any time.[61]

## 10.4 Service of election petitions

To deal with the injustices occasioned by the hitherto jurisprudence of the courts that had risen the requirement of personal service of election petitions to the level of fetish, the Constitution permits either personal service of election petitions or service of petitions by advertisement in a newspaper with national circulation.[62]

## 10.5 Period within which election petitions must be resolved

A petition to challenge the election of a president-elect is to be constitutionally heard and determined within fourteen days after the filing of the Petition.[63]

A petition to determine the questions whether a person has been validly elected as a member of Parliament or a seat of a member of parliament has become vacant is determinable within six months of the date of lodging the Petition.[64]

A question as to the validity of a county election should be heard and determined within six months of the date of lodging the Petition.[65]

60 Section 76(1)(b) of the Elections Act, 2011.
61 Section 76(1)(c)
62 Article 87(3) of the Constitution of Kenya 2010
63 Article 140 of the Constitution of Kenya 2010
64 Article 105(2) of the Constitution of Kenya 2010
65 Section 75(2) of the Elections Act

## 10.6 Determination of Disputes arising from the first round presidential election results

The constitution and the Elections Act are silent on the mode of resolving disputes arising from the first round of presidential elections. It is reasonable to expect disputes and challenges to arise from the first round presidential elections where a candidate may dispute the results as announced by the Independent Electoral and Boundaries Commission. The constitution in Article 140 only envisages disputes relating to challenges to the election of a president- elect and provides that they have to be heard by the Supreme Court. That jurisdiction conferred on the Supreme Court is restricted to challenges to the election of a president elect.

In the absence of clear mechanisms of resolving first round presidential election results disputes, parties may resort to one of the following ways of challenging the first round presidential election results;

(a) File judicial review proceedings in the High Court against the IEBC challenging its decision and calling for the results as announced by the Commission to be quashed;
(b) File a constitutional petition in the High Court grounded on amongst others issues, an infringement of the right to free and fair elections as granted in article 38, the right to fair administrative action as granted in article 47 and other fundamental rights that the action may find were infringed in the course of the elections.
(c) Parties may also invoke the unlimited original jurisdiction of the High Court as conferred in article 165 (3) of the constitution to challenge the results before the High Court.

We must point out at this point that the dispute will be subject to the usual court process prone to delays and the case will have to compete for precious judicial time with other disputes courts ordinarily try. The competition for space must be considered against the pressure of time imposed by the constitution which stipulates the time frame within which the runoff elections are to be held. Article 138(5) of the constitution provides that a runoff election has to be held **within 30 days** from the date of the first election.

# CHAPTER 11

# ELECTION OF PARTY LIST (NOMINATED) MEMBERS OF PARLIAMENT AND COUNTY ASSEMBLIES

The Kenyan electoral system makes provision for a membership to the National Assembly, the Senate and the County Assemblies known as nominated members. Such nominated members are meant to represent special interests including the youth, persons with disabilities and workers.

Article 90 (1) of the Constitution of Kenya requires that elections for the additional seats under Articles 97(1)(c), 98(1)(b)(c) and (d) and 177(1)(b) and (c) be on the basis of proportional representation by use of party lists. The seats referred to in these articles are; the twelve (12) nominated members of the National Assembly, the twenty (20) nominated members of the Senate representing the disabled and youth and the requisite nominated members of the county assemblies required to make them respect the principle that not more than two thirds of members of elective public offices shall be of the same gender and the number required to accommodate marginalized groups and the disabled in the county assemblies.

The Elections Act makes elaborate provision on the mode of submission of party lists by the parties and the handling of the same by the Commission.[66]

Section 34 of the Elections Act requires political parties to submit their party lists to the IEBC before the elections. The party lists submitted are to be valid for the entire term of parliament.[67] They cannot be amended during the entire term of parliament. Persons to be nominated in a political party's list must have been members of the political party for at least three months prior to the date of submission of the list to the Commission.[68]

Parties will be required to submit the following number of candidates in their party lists; 12 names in respect to the list to National Assembly elections; 16 names in respect to the women seats in the senate; 4 names in respect to the disabled members of the Senate and 4 names in respect to the youth representatives to the senate.[69]

The lists submitted must respect the *Zebra principle,* which is to effect that they must alternate between male and female candidates on the list[70].

66 Sections 34, 35, 36, and 37 of the Elections Act
67 Section 34 (7)
68 Section 34 (8)
69 Section 36 (1)
70 Section 36 (2)

The Act provides that the Commission has to designate the allocation of seats to political parties within thirty (30) days from the date of declaration of results on the basis of proportional representation. The Act provides that the Commission is to share the party list seats on the basis of the number of seats that political parties win in the respective election.

This provision is a departure from international practice on proportional representation which uses the number of votes parties get in an election in distributing seats as opposed to the number of seats won in the election.

Section 37 envisages the filling of a party list seat in the event the person, who was elected dies, resigns from the party or the representative body, changes parties, is expelled from the party during the term of parliament. It requires that the Commission should allocate the seat to the next ranking person on the particular political party's list as submitted to the Commission at the time of the elections. In the event that there is no person to pick from the list, the Act provides that the Commission shall require the political party concerned to nominate another representative within twenty (21) days from the date of the notification. Vacancies in a seat in a political party list cannot be filled within three months immediately before a general election.[71]

71 Section 37 (3)

# CHAPTER 12

# POLITICAL PARTIES

In his enduring analysis of political parties as players in the constitutional process, Professor J.B Ojwang took the view that "so important, is the political party at a general level that a constitutional analysis which fails to acknowledge it is unlikely to bear a full relation to reality".[72]

Kenya's constitutional order, as anchored on the Constitution of Kenya, 2010, has placed greater significance to the formation, management and organization of political parties as institutions of governance.

The legal regime governing political parties is two-fold, to wit; the Constitution of Kenya 2010 and the Political Parties Act, 2011.

The constitutional expectations of every political party are as spelt out in article 91 of the Constitution. These expectations are the positive and the negative expectations.

The positive expectations of political parties in Kenya by the Constitution are as follows:

(a) Every political party must have a national character as prescribed by an Act of Parliament.
(b) Every political party must have a democratically elected governing body.
(c) Every political party must promote and uphold national unity.
(d) Every political party must abide by the democratic principles of good governance, promote and practice democracy through regular, fair and free elections within the party.
(e) Every political party must respect the right of all persons to participate in the political process, including minorities and marginalized groups.
(f) Every political party must respect and promote human rights and fundamental freedoms and gender equality and equity.
(g) Every political party must promote the objects and principles of the Constitution and the rule of law; and
(h) Every political party must subscribe to and observe the code of conduct for political parties.

72 J.B Ojwang' Constitutional Development in Kenya: Institutional Adaptation and Social Change, Acts Press, Nairobi, Kenya, 1990.

From the negative front the following prohibitions are fashioned by the constitution against political parties, namely;

(a) A political party should not be founded on a religious, linguistic, racial, ethnic, gender or regional basis or seek to engage in advocacy of hatred on any such basis.
(b) A political party should not engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person;
(c) A political party should not establish or maintain a paramilitary force, militia or similar organization;
(d) A political party should not engage in bribery or other forms of corruption;
(e) A political party should not accept or use public resources to promote its interests or its candidates in elections except as are provided for under Chapter Seven of the Constitution or by an Act of Parliament.

In addition to the foregoing prescriptions on the character of political parties in Kenya, the Constitution demands of Parliament to enact legislation to make certain provisions regarding political parties.[73] The constitutional concerns for the said legislation are the following;

(a) The reasonable and equitable allocation of airtime, by state-owned and other specified categories of broadcasting media, to political parties either generally or during election campaigns;
(b) The regulation of freedom to broadcast in order to ensure fair election campaigning;
(c) The regulation of political parties;
(d) The role and functions of political parties;
(e) The registration and supervision of political parties;
(f) The establishment and management of a political parties fund;
(g) The accounts and audit of political parties;
(h) Restrictions on the use of public resources to promote the interests of political parties;
(i) Any other matters necessary for the management of political parties.

In line with the foregoing constitutional demand of parliament, the Political Parties Act 2011 has been enacted.

73 Article 92 of the Constitution.

The Act makes provision for a number of issues, including the following;

- Registration and regulation of political parties.
- Funding and accounts of political parties.
- The office of the Registrar of Political parties.
- The political parties disputes tribunal.
- The Code of Conduct for political parties.
- Contents of the constitutions or rules of a political party.
- Basic requirements for a coalition agreement

The Political Parties Act 2011 on the other hand aims at providing a regulatory framework through which the general constitutional provisions on political parties are to be applied. The Act sets out detailed provisions on party management and regulation of political parties in the spirit that the constitutional provisions envisage party management and regulation to be pursued.

The Act sets out minimum requirements political parties seeking full registration must achieve before they can be granted full registration.[74] Amongst the identified requirements are;

i. The party must have at least one thousand members who are registered voters in at least 24 counties;
ii. The membership of the party should reflect regional and ethnic diversity, gender balance and representation of minorities and marginalized groups;
iii. The composition of the party's governing body must reflect the regional, ethnic diversity, gender balance and representation of minorities and marginalized groups;
iv. Not more than two thirds of members of the party's governing body should be of the same gender;
v. The party has to demonstrate that the members of its governing body meet the requirements of chapter six of the constitution on leadership and integrity and the laws relating to ethics and integrity;
vi. The party has to submit a list of the names, addresses and identification particulars of all its members, the location and address of its head office, the location and address of its branch offices.

74 Section 7 Political Parties Act 2011

## 12.1 Coalitions

Section 10 of the Act provides for formation of coalition by two or more political parties. This can be done either before or after elections. The Act requires parties forming a coalition to develop a written coalition instrument to be deposited with the Registrar of Political Parties[75]. The instrument is meant to regulate the conduct of the respective parties in the coalition and assist in resolving disputes that may arise thereafter.

## 12.2 Mergers

The Act allows for mergers by two or more political parties[76]. When parties desire to merger, they must be guided by the rules, procedures and constitution of the two parties and the decision to merge must be in writing and executed by the duly registered officials of the parties empowered to execute documents.

## 12.3 Membership in a political party

The Act prohibits persons from being members of more than one political party at any given time[77]. Parties are expected to keep a register of their members and to also deposit the same with the Registrar of Political Parties at least three months before their nominations are done. The Act provides that a member ceases belonging to a political party by resignation, expulsion or when he is deemed to have resigned from the political party. A member of a party is deemed to have resigned from the political party if while being a member of a political party he;

i. forms another political party;
ii. joins in the formation of another political party;
iii. joins another political party;
iv. in any way or manner, publicly advocates for the formation of another political party; or
v. promotes the ideology, interests or policies of another political party

75 Section 10
76 Section 11 Political Parties Act
77 Section 14

## 12.4 Independent Office of Registrar of Political Parties

Section 33 of the Act establishes the Office of the RPP as an independent state office to be headed by a Registrar of Political Parties assisted by three deputies. The RPP is tasked with the responsibility of administering the Act and regulating political parties to ensure they comply with the Act.

## 12.5 Political Parties Liaison Committee

The Act establishes the Political Parties Liaison Committee[78] which will be comprised of representatives of all registered political parties. The principal function of the Committee is to provide a platform for dialogue between the Registrar of Political Parties, the IEBC and political parties.

## 12.6 Political Parties Fund

The Act establishes the Political Parties Fund[79] and pegs the amount to constitute the fund to be at least 0.3% of the total national revenue, contributions and donations from any other lawful source. The Fund is to be administered by the Registrar. 95 % of the Fund is to be shared amongst political parties who meet the minimum requirements set out in the Act while the remaining 5 % is to be used for purposes of administering the Fund.

For a political party to qualify for funding under the Act, it must have attained at least 5% of the total national votes cast in the preceding general elections. Further, the Act provides that not more than two thirds of the registered office bearers of the political party should be of the same gender for the party to qualify for funding. The fund is distributed proportionately to parties that attain the minimum funding criteria alluded to above.

78 Section 39
79 Section 23 Political Parties Act

## 12.7 Political Parties Dispute Tribunal

Section 39 of the Act establishes the Political Parties Act. The composition of the tribunal is pegged at four (4) members and a chairman who must hold the qualifications of a judge of the High Court of Kenya. The jurisdiction of the Tribunal is to hear[80];

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

Political parties are expected to utilize their own internal dispute resolution mechanisms before they refer the same to the Tribunal for adjudication[81].

80 Section 40 (1)
81 Section 40 (2)

# CHAPTER 13

# THE MARGINALIZED AND THE ELECTORAL SYSTEM

One of the pillars of democracy is its recognition of, and protection for the historically marginalized groups. One area where the marginalized need integration is in the electoral process.

Article 260 of the Constitution of the Republic of Kenya defines a marginalized group to mean a group of people who, because of laws or practices before, on or after the effective date[82] were or are disadvantaged by discrimination on one or more of the following grounds; race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

The same article defines a marginalized community in the following terms;

"(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;

(b) a traditional community that, out of need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

(c) An indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or

(d) Pastoral persons and communities, whether they are –

i.Nomadic; or

ii.A settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and enocomic life of Kenya as a whole."

A number of provisions in the Constitution have been fashioned to promote the representation of the marginalized in governance institutions.

Article 27(8) of the Constitution requires of the state to take legislative and other measures to implement the principle that not more than two-thirds of the members of elective and appointive bodies shall be of the same gender.

As one of the principles of Kenya's electoral system, article 81(b) of the Constitution prescribes that 'not more than two-thirds of the members of elective

82 The date on which the Constitution of Kenya 2010 came into force

public bodies shall be of the same gender.'

The foregoing provisions are meant to cure the history of gender marginalization in elective and appointive public bodies in Kenya's governance infrastructure.

Article 81(c) of the Constitution pronounces one of the principles of the electoral system as 'fair representation of persons with disabilities'. Likewise, Article 54(2) of the Constitution demands of the state to 'ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities'.

The Constitution of Kenya demands that every political party in Kenya must respect the right of all persons to participate in the political process, "including minorities and marginalized groups."[83]

Article 100 of the Constitution requires Parliament to enact legislation to promote representation in Parliament of the following groups:

(a) Women;
(b) Persons with disabilities;
(c) Youth;
(d) Ethnic and other minorities; and
(e) Marginalized communities.

At the County level of government, it is a constitutional requirement that not more than two-thirds of the members of any county assembly or county executive committee shall be of the same gender.[84]

It is also the constitutional obligation of parliament to enact legislation to meet two broad objectives, namely;

(a) To ensure that the community and cultural diversity of a county is reflected in its county assembly and county executive committee; and
(b) To prescribe mechanisms for protection of minorities within counties.[85]

83 Article 91(1)(e) of the Constitution of Kenya, 2010.
84 Article 197(1) of the Constitution
85 Article 197(2) of athe Constitution

The architecture and design of the constitution of Kenya 2010 has, with reference to the question of marginalized groups and communities, made various provisions as highlighted above. The real challenge lies with implementation of these flowery provisions which will only be tested by time itself.

# CHAPTER 14

# RECALL OF MEMBERS OF PARLIAMENT

The right of the electorate to recall their representative applies only in respect of elected members of the National Assembly and the Senate[86]. The Constitution requires that the basis for and procedure to be followed in such recall of elected members of the National Assembly and the Senate be provided for in an Act of Parliament to be enacted within two years of the promulgation of the Constitution.[87]

Parliament, in execution of the said mandate and duty has enacted sections 45 to 48 of the Elections Act. The grounds upon which a Member of Parliament may be recalled by the electorate in a constituency (for an elected Member of the National Assembly) or the County (for an elected member of the Senate) are where the member:

i. Is found, *after due process of the law,* to have violated the provisions of the Constitution relating to leadership and integrity.
ii. Is found, *after due process of the law,* to have mismanaged public resources.
iii. Is convicted of an offence under the Elections Act.

Procedurally, and in terms of timing, a recall of an elected Member of Parliament can only be initiated following a judgment or finding of the High Court confirming the grounds specified above. Such recall can only be initiated after the lapse of at least twenty four months following the election of the Member of Parliament and at least twelve months before the next general election. Whereas the logical underpinnings of these timelines are understandable, it creates an impression that Members of the National Assembly and senate who are aware of the unlikelihood of their election at the subsequent election can engage in the wrongs that form the subject of recall without the fear of such eventuality during the last twelve months to the next election.

In times of frequency, a petition for recall can only be filed against a Member of Parliament once during the term of that Member of Parliament.

A rather disenfranchising provision is that a contestant who was unsuccessful in *any* election under the Elections Act is not eligible *directly or indirectly* to initiate

86 See Article 104(1) of the Constitution.

87 See Article 104(2) of the Constitution as read with the fifth schedule to the Constitution. The Constitution was promulgated and became effective as from the 27th August 2010.

a Petition under this Act[88].

- A petition for recall of a Member of Parliament must meet a certain criteria, that is;
- It must be in writing;
- It must be signed by the Petitioner
- It must be accompanied by an order of the High Court confirming the grounds recognized in the Act for recall of members of parliament.
- It must specify the grounds for recall.
- It must be supported by at least thirty percent of the registered voters in the constituency (in case of a Petition for recall of Members of the National Assembly) or in the county (in case of a petition for recall of members of the senate)[89]. The voters supporting the petition must represent "the diversity of the people in the county or constituency as appropriate. The list of supporters of the petition must be collected and submitted to the Independent Electoral and Boundaries Commission within thirty days after filing the Petition. The Commission is under a statutory duty to verify this list of names within thirty days of receipt of the same.
- It must be accompanied by the same amount of fee as is prescribed in case of an election Petition. This requirement would appear to be confusing since it is not clear whether by fee it means the filing fees for an election petition or the security for costs that must accompany an election petition.

Once the commission is satisfied that the Petition has met the statutory criteria, it must issue a notice of recall to the speaker of the relevant House of parliament.

The Commission then frames the question to be determined at the election for recall. Such question should be framed in a manner that requires the answer "yes" or the answer "no" and a symbol must be assigned for each answer to the recall question. The timeframe within which such question is to be framed

88 It is hard to conceptualize how the law will catch up with election losers who initiate recall petitions through proxy since the proxy may not disclose that he is doing so on behalf of another person. It is also difficult to rationalize the prohibition against election losers initiating recall petitions since the merits or otherwise of the basis of the recall petition is a matter for determination by a court of competent jurisdiction with sufficient judicial checks which far outweighs the risk of losers lodging such proceedings out of vengeance or ill will. Once a court of competent jurisdiction has determined the basis for a recall by its order, it does not appear very rational to prohibit a parliamentary loser from giving effect to that order through the exercise of the power of recall.

89 This list comprises of the names, address, voter card number, national identity card or passport number and signature of the voters supporting the Petition and must as well contain at least 15% of the voters in more than half of the wards in the county or constituency.

following notification of the speaker of the relevant house is not clear from the statute.

Following the framing of the question, the Independent Electoral and Boundaries Commission must conduct a recall election in the relevant constituency or county within ninety days of the publication of the question at which election voting must be by secret ballot.

A recall election is determinable by a simple majority of the voters voting in the recall election. If the recall election results in the removal of a member of parliament, the Commission must conduct a by-election in the affected constituency. A recalled member is at liberty to run in the by-election.

There is a curious provision, which is equally susceptible to many interpretations, that a recall election is valid "if the number of voters who concur in the recall election is at least fifty percent of the total number of registered voters in the affected county or constituency".[90] If the term concur as used in the provision connotes a voter for the answer "yes", this would appear to contradict the preceding provision that a recall election "shall be decided by a simple majority of the voters voting in the recall election".

90 Section 48 of the Elections Act

# CHAPTER 15

# ELECTION OFFENCES AND ILLEGAL PRACTICES AND OFFENCES AND ILLEGAL PRACTICES RELATING TO REFERENDA.

## 15.1 Categories of Offences and Illegal Practices

Election offences in Kenya are now provided for in the Elections Act. They are categorized into the various categories discussed below. Each offences prescribed under the Act is an offence relating to an election also operates as an offence during a referendum subject to the necessary modifications. In addition to the specific penal sanctions for commission of any election offence under the Act, a person convicted of an offence under the Elections Act loses eligibility for election or nomination in an election under the Act for five years following the date of conviction.[91]

### (a) Offences relating to register of voters and voter's cards[92];

Offences defined under this category include the following:

- A person without lawful authority making, preparing, printing or being in possession of a document or paper purporting to be a register of voters;
- A person without lawful authority making, preparing, or printing a document or paper purporting to be a voter's card;
- A person who is not authorized being in possession of a voter's card bearing the name of another person or which has not be written in the name of any person, having possession of such a voter's card.
- A person without lawful authority supplying a voter's card to any person;
- A person without lawful authority destroying, damaging, defacing or making any alteration on a voter's card;
- A person selling or offering for sale a voter's card to any person or purchasing or offering to purchase a voter's card from any person
- A person aiding, abetting, counseling or procuring the commission of or attempts to commit any of the above offences.
- A person knowingly making false statement on or in connection with any application to be registered in any register of voters
- A person who commits any offence relating to the register of voters

91 Section 106(3) of the Elections Act

92 Section 56 of the Elections Act

and voters cards is liable on conviction to a fine not exceeding one million shillings or imprisonment for a term not exceeding six years or to both such fine and imprisonment.

## (b) Offences relating to multiple registration as a voter[93];

Under this category, the following acts constitute offences:

- A person who, being registered as voter applies to be registered as a voter in any other register of voters where such other registration is not in substitution for his existing registration.
- A person who, being registered as a voter applies to be registered as a voter in the same register of voters.

A person who commits any of the above offences is liable, on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding one year or to both such fine and imprisonment. In addition to the above penalties, such person will not be eligible to vote in that election and in the next election.

In addition to the above, the other offences relating to multiple registrations as a voter are where:

- A person who has applied to be registered in a register of voters and when that application is still pending applies to be registered in the same register of voters or in another register of voters.
- A person makes two or more simultaneous applications to be registered as a voter.
- A person having been disqualified by an election court applies to be registered as a voter.

A person who commits any of the above three offences is liable, on conviction, to a fine not exceeding one hundred thousand shillings or to imprisonment of a term not exceeding one year or to both such fine and imprisonment.

93 Section 57 of the Elections Act

It is also an offence for a member or officer of the Commission or any other person to aid another person to register as a voter more than once. Such aider is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment of a term not exceeding one year or to both such fine and imprisonment.

Where the aiding for multiple registration as a voter is done by a candidate, such candidate is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment of a term not exceeding one year or to both such fine and imprisonment. In addition to the penalty, the candidate is not eligible to contest in the ongoing general election.

## (c) Offences relating to voting[94];

Any offence under this category on conviction attracts a fine not exceeding one million shillings or imprisonment to a term not exceeding six years or both such fine and prison term. Offences under this category occur when a person does any of the following acts or omissions:

- Forges, counterfeits, defaces or destroys any ballot paper or the official perforation, stamp or mark on any ballot paper;
- Without lawful authority supplies any ballot paper to any person;
- Sells or offers for sale any ballot paper to any person, or, purchases of offers to purchase any ballot paper from any person;
- Has in his possession any ballot paper which has not been marked with any official perforation, stamp or mark when he not entitled to be in possession of any such marked ballot paper.
- Puts into any ballot box anything other than the ballot paper which he is authorized in law to put in.
- Takes out of a polling station any ballot paper without authority or is found in possession of any ballot paper outside a polling station without authority.
- Removes election material from a polling station before, during or after an election when such person is not an election official and is not authorized to do so.
- Destroys, takes, opens, disposes of or in any other manner interferes

94 Section 58 of the Elections Act

with any election material in use or intended to be used for the purpose of an election without authority.

- Prints any ballot paper or what purports to be or is capable of being used as a ballot paper at an election without authority.
- Manufacturers, constructs, imports, has in possession, supplies or uses or causes to be manufactured, constructed, imported, supplied or used, any appliance, device or mechanism by which a ballot paper may be extracted, affected or manipulated after having been deposited in a ballot box during the polling at any election for purposes of an election.
- Makes any mark on any ballot paper issued to any person other than himself without authority.
- Votes at any election when they are not entitled to vote.
- Votes more than once in any election.
- Interferes with a voter in the casting of his vote in secret.
- Pretends to be unable to read or write so as to be assisted in voting.
- Pretends to be visually impaired or suffering from any other disability so as to be assisted in voting.

## (d) Offences by members and staff of the Independent Electoral and BoundariesCommission[95];

When one is convicted on any offence under this rubric, he/she is liable to a fine not exceeding one million shillings or imprisonment for a term not exceeding three years or to both such fine and term of prison. The offences under this rubric occur when a person who is a member of the commission, a staff of the commission or having a duty to perform pursuant to any written law relating to any election does or omits to do any of the following:

- Makes an entry which they know or have reasonable cause to believe to be false or which they do not believe to be true in any record, return or other document which they are required to keep or make under a written law relating to elections.
- Permits any person whom they know or have reasonable cause to believe to be able to read or write to vote in a manner provided for

95 Section 59 of the Elections Act

persons unable to read or write.

- Permits any person whom they know or have reasonable cause to believe not to be visually impaired or a person with disability to vote in the manner provided for persons who are visually impaired or persons with disability.
- Willfully prevents any person from voting at the polling station at which they know or have reasonable cause to believe such person is entitled to vote.
- Willfully rejects or refuses to count any ballot paper which they know or have reasonable cause to believe is validly cast for any candidate in accordance with the provisions of a written law relating to elections
- Willfully counts any ballot paper as being cast for any candidate which they know or have reasonable cause to believe was not validly cast for that candidate.
- Interferes with a voter in the casting of his vote in secret.
- Fails to declare the results of an election where he/she is required under any law relating to election to declare the result of an election.
- Purports to make a formal declaration or formal announcement of an election result when he is not a member, officer or person authorized to do so.
- Does or omits to do anything in breach of official duty without reasonable cause.
- Colludes with any political party or candidate for purposes of giving an undue advantage to the political party or candidate.
- Willfully contravenes the law to give undue advantage to a candidate or a political party on partisan, ethnic, religious, gender or other unlawful considerations.
- Fails to prevent or report to the Independent Electoral and Boundaries Commission and any other relevant authority, the commission of an electoral malpractice or offence committed under the Elections Act.

## (e) Maintenance of secrecy at elections[96];

The law requires that every elections officer, candidate or agent authorized to take part in any proceedings relating to the issue or receipt of ballot papers or to attend a polling station or at the counting of votes to make an oath of secrecy. The oath of secrecy is prescribed in the Third Schedule to the Elections Act.

The law requires every officer, candidate or agent in attendance at a polling station to maintain and aid in maintaining the secrecy of the ballot. Further such officer, candidate or agent should not communicate except for a purpose authorized by law before the poll is closed, any information as to the name or number on the register of voters, of any voter who has or has not applied for a ballot paper or voted at that station or as to the official mark.

A presiding officer is, however, authorized to divulge, on request, to a candidate or the agent of a candidate the total number of voters who have voted in the station any time before the poll is closed[97].

The law prohibits an election officer, candidate agent or other person from either;

- Obtaining or attempting to obtain, in a polling station, information as to the candidate for whom any voter is about to vote or has voted, without authority; or
- Communicating at any time to any person, any information obtained in a polling station as to the candidate for whom any voter in the station is about to vote or has voted; or
- Disclosing the serial number of the ballot paper issued to any voter at the station.

No person other than the Presiding Officer or a person authorized by the presiding officer is allowed to communicate with any voter after the voter has received a ballot paper and before the voter has placed the ballot paper in the ballot box.

96 Section 60 of the Elections Act.
97 Section 60(3) of the Elections Act.

At the counting of votes, every election officer, candidate or agent in attendance is required to maintain and aid in the maintenance of the secrecy of the ballot. At such counting, an election officer, candidate or agent in attendance should not attempt to ascertain the number of any ballot paper or to communicate any information obtained at the counting as to the candidate for whom any vote is given by any particular ballot paper.

Every person attending any proceedings relating to an election is required to maintain and aid in maintaining the secrecy of the ballot. In particular, such person is prohibited from any of the following acts or omissions without lawful excuse:

- Communicating, before the poll is closed to any person any information obtained at those proceedings as to any official perforation, stamp or mark to be used in connection with any paper.
- Communicating to any person at any time any information obtained in those proceedings as to the number of ballot papers issued to any person.
- Attempting to ascertain at the proceedings in connection with the receipt of ballot papers, the number on any ballot paper.
- Attempting to ascertain at the proceedings in connection with the receipt of the ballot papers the candidate for whom any vote is given in any particular ballot paper or communicate any information with respect thereto obtained at those proceedings.
- Capture an image of any marked ballot for purposes of financial gain or for showing allegiance.

Any person who violates any of the foregoing provisions relating to maintenance of secrecy at elections is liable on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years of to both such fine and term of imprisonment.

## (f) Personation[98]

For purposes of this class of offence, it is a cognizable criminal wrong that is punishable to do any of the following:

- Apply for a ballot paper in the name of another person, or a fictitious person.
- Vote of apply for a ballot paper in his own name at an election at which he has already voted once.
- Vote with the knowledge that he is not entitled to vote in that election.
- Present himself as an election official knowing that he is not an election official.

These wrongful acts of personation, once proved to be committed, makes one liable to the general penalty prescribed under the Act, namely, a fine not exceeding one million shillings or imprisonment for a term not exceeding three years or both such fine and imprisonment.[99]

## (g) Treating[100];

This category of offences is prescribed for candidates and voters in the electoral process.

- It entails a candidate doing any of the following acts for purposes of influencing a voter to vote or to refrain from voting for a particular candidate or for any political part at an election, namely;
- Undertaking or promising to reward a voter to refrain from voting before or during an election.
- Before or during an election, giving or causing to be given to or for any voter expenses for food, drinks, and refreshments for the purpose of corruptly influencing that person or any other person to vote or refrain from voting.
- Before or during an election, paying or promising to pay to or for

98 Section 61 of the Elections Act.
99 Section 106 of the Elections Act.
100 Section 62 of the Elections Act

any voter expenses for food, drinks or refreshment for the purpose of corruptly influencing that person or any other person to vote or refrain from voting

- Before or during an election, providing any money, ticket or other means to enable the procurement of any food, drink or refreshment for the purpose of corruptly influencing that person or any other person to vote or refrain from voting
- Giving, providing or paying any expense wholly or in part to or for any particular voter or any other voter for having voted or refrained from voting after an election.

It also entails a voter accepting or taking any food, drink or refreshment, provision, money, ticket or adopting other means to enable him procure food, drink, refreshment or provision with the knowledge that it is intended to influence them to vote or refrain from voting for a particular candidate or for any political party at an election[101].

The foregoing offences collectively known as treating attract the general penalty of a fine not exceeding one million shillings or imprisonment for a term not exceeding three years or both such fine and imprisonment

## (h) Undue influence[102];

This offence of committed by a person who directly or indirectly either uses or threatens to use any of the following in an election:

- any force,
- violence (including sexual violence),
- restraint
- material, physical or spiritual injury
- harmful cultural practices
- damage or loss
- any fraudulent device, trick or deception

For the above to constitute an offence of undue influence, they must be done for purposes of achieving any of the following ends:

101 Section 62(2) of the Elections Act

102 Section 63 of the Elections Act

(a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;
(b) impeding or preventing the free exercise of franchise of a voter;
(c) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has already become a candidate; or
(d) impeding or preventing a person from being nominated as a candidate or from being registered as a voter.

Other acts of undue influence under the Elections Act are the following:

- inducing , influencing or procuring any other person to vote in an election knowing that the person is not entitled to vote in that election;
- directly or indirectly either by duress of intimidation impeding, preventing or threatening to impede or prevent a voter from voting;
- directly or indirectly by duress or intimidation influencing the result of an election in any manner;
- directly or indirectly by duress, intimidation or otherwise compelling or inducing any voter who has already voted at an election to inform one of the name of the candidate or political party for which the voter has voted.
- directly or indirectly by duress, intimidation or otherwise compelling or inducing any voter who has already voted at an election to display the ballot paper on which the voter has marked his vote.

An offence of undue influence attracts the general penalty of a fine not exceeding one million shillings or imprisonment for a term not exceeding three years or both such fine and imprisonment.

## (i) Bribery;

It is an offence for any candidate to directly or indirectly commit what are described as acts of bribery under the Act. It is also an offence for any person to vote or refrain from voting in consequence of accepting any consideration that amounts to bribery.

Other election offences under the Act are:

(a) Use of force or violence during election period;
(b) Use of national security organs;
(c) Offences relating to elections; and
(d) Use of public resources

The following are categorized as illegal practices, namely;

(a) Certain expenditures;
(b) Employers' failure to allow employees reasonable period for voting;
(c) Aiding and abetting offences
(d) Election offence by candidate of political party
(e) Postponement of elections by the Commission.

## 15.2 Power to prosecute election offences and offences under the Electoral Code of Conduct

The law now vests in the Independent Electoral and Boundaries Commission the power to prosecute election offenders who violated the Election Act or the Electoral Code of Conduct[103]. This power is expressed to be subject to the Criminal Procedure Code. This is understood to mean that the officers of the Commission to conduct such prosecutions must be appointed to serve as such prosecutors by the Director of Public Prosecutions[104]. Whereas the Elections Act expressly makes the power of the Independent Electoral and Boundaries Commission to prosecute election offenders subject to the Criminal Procedure Code, where the said offences are alleged as against candidates, political parties or their agents, the Independent Electoral and Boundaries Commission Act expressly vests the power to investigate and prosecute in the Commission. This express vesting of powers is expressed to be pursuant to Article 157(12) of the Constitution that allows parliament to enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions.

103 Sections 107(2) and 110(6) of the Elections Act
104 See Section 85 of the Criminal Procedure Code

# Notes

# Notes

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