



**THE FALLACY OF THE RIGHT TO ACCESS INFORMATION IN KENYA
DURING ELECTIONS: A CASE STUDY OF THE 2017 GENERAL ELECTIONS**

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DECLARATION

I declare that this research is my original work and has not been submitted elsewhere for any award.

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APPROVAL

The thesis has been submitted with my approval as the University Supervisor.

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DEDICATION

This thesis is dedicated to all those who yearn for unhindered access to information during elections as it is the foundation of transparent and transformative leadership in the country.

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LIST OF ABBREVIATIONS

ACDEG	African Charter on Democracy Governance and Elections
ACHPR	African Charter on Human Peoples Rights
ACTS	African Centre for Technology Studies
ANCL	African Network of Constitutional Lawyers
AIA	Access to Information Act
BVR	Biometric Voter Register
CAJ	Commission on Administrative Justice
CEDAW	Convention to End All Discrimination against Women
CRBD	Civil Registry Births and Deaths
CRPD	Convention on the Rights of Persons with Disabilities
CVR	Continuous Voter Registration
EACC	Ethics and Anti-Corruption Commission
EDR	Election Dispute Resolution
ECK	Electoral Commission of Kenya
ELOG	Elections Observation Group
EMB's	Electoral Management Bodies
ETAC	Elections Technology Advisory Committee
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic & Social Rights
ICERD	Convention on the Elimination of All Forms of Racial Discrimination
ICT	Information Communication and Technology
CSO	Civil Society Organization
ID	Identification document
IEBC	Independent Electoral and Boundaries Commission
IIBRC	Interim Independent Boundaries Review Commission
IIEC	Interim Independent Electoral Commission
IDEA	International Institute for Democracy and Electoral Assistance
IPPG	Inter-Parties Parliamentary Group
IREC	Independent Review Commission
KANU	Kenya African National Union

KIEMS	Kenya Integrated Elections Management System
KNBS	Kenya National Bureau of Statistics
KPMG	Klynveld Peat Marwick Goedeler
MVR	Mass Voter Registration
NACOSTI	National Council for Science Technology and Innovations
NAIC	National Accord Implementation Committee
NRB	National Bureau of Registration
NASA	National Super Alliance
ODM	Orange Democratic Movement
ORPP	Office of the Registrar of Political Parties
PAIA	Promotion of Access to Information Act
PEE	Post-Election Evaluation Report
PPDT	Political Parties Dispute Tribunal
PPLC	Political Parties Liaison Committee
PWD	Persons Living with Disabilities
RAI	Right to Access Information
SAHA	South African History Archive
SDG	Sustainable Development Goals
ToT	Training of Trainers
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Education, Science and Cultural Organization\
UNCHR	United Nations Commission on Human Rights

ABSTRACT

This study on the “Fallacy of the Right To Access Information During Elections in Kenya: Case Study of the 2017 Elections” was premised on the fact that access to information during elections has always been frustrated in the country with attendant grievous consequences. In the last elections held in 2017, disputes on elections hinged on management of information especially non-disclosure and denial of access to information leading to the 2017 presidential election being nullified for the first time in the history of the country. This study presents findings on how the right to access information during elections remains a challenge in the country. The study locates the right in the international, regional and legal framework and from the literature which justifies the necessity for participation in democratic activities including elections. The problem presented in the study is how the lacuna in the law and conduct by IEBC during the 2017 elections affected the enjoyment of the right to access information. Specifically, the study inquired whether the existing legal framework was adequate to enable access to information during the election, how the conduct of IEBC affected the right to access information, the challenges encountered by IEBC that impacted on access to information and suggests reforms to enhance access to information. In dealing with the problem, the study examined the background of the right to access information in the Kenyan context, reviewed relevant literature and the legal framework, collected data from primary and secondary sources on access to information at different stages of elections. It also sought to discuss the challenges that the Commission encountered which impacted on access on information and suggests reforms to increase access to information during elections. The findings of the study were that the legal framework in place is robust but requires some minor adjustments, and improved implementation to enhance access to information. The study also found that the conduct of the Commission frustrated access to information even though part of it was caused by factors beyond the Commission and several areas are suggested for reform to enhance access to information.

CHAPTER 1

BACKGROUND

1.1 Introduction

Elections take place in almost all countries. Whereas elections without competition still take place in some countries, there is usually some form of electoral competition even in authoritarian regimes.¹ Elections are the most competitive means of recruiting leaders to represent the electorate in governance institutions.² Holding credible elections therefore determine who will have the mandate to rule and to elect those who will pass legislation and for holding the government to account. Successful conduct of credible elections is the hallmark of adherence to democratic values and vice versa.

The template standards for holding credible elections are provided in the local, regional and international legislations. International and regional legislations are not prescriptive *per se* rather guiding principles for nations to strengthen or domesticate legislation, regulations and other enabling mechanisms that give meaning to these standards and strengthen electoral systems.³ Most of the provisions of these standards are now found in the laws that govern the conduct of elections. In Kenya, international law is applicable directly through Article 2 (5 and 6) of the Constitution.⁴

The electoral process in Kenya has evolved over time; with the first General Election at Independence in 1963, being held under a multi-party system. The Kenya Independence Order-in-Council⁵ created the first Electoral Commission with the Speaker of the Senate as its Chairman and the Speaker of the House of Representatives as the Vice Chairman with nine other members of the Electoral Commission being appointed by the Governor General. Following the Constitutional Amendment of 1966 (The Turn-Coat Rule), the

¹Grigore Pop-Eleches and Graeme B. Robertson in Information, Elections, and Political Change Comparative Politics, Vol. 47, No. 4 (July 2015), pp. 459-478 Published by: Comparative Politics, Ph.D. Programs in Political Science, City University of New York Stable URL: <https://www.jstor.org/stable/43664160> Accessed: 12-04-2019 20:01.

² Peter Wanyande: Electoral Politics and Election Outcomes in Kenya! Africa Development, Vol. XXXI, No. 3, 2006 *Council for the Development of Social Science Research in Africa 2006* PP. 64.

³ National Democratic Institute: Applying International Elections Standards' a Field Guide for Election Monitoring Groups. <https://www.ndi.org/node/23659>. PP 5-18.

⁴ Article 2 of the Kenya Constitution.

⁵ The Kenya Independence Order in Council 1963 (L.N. 718 OF 1963).

two-tier parliamentary system was abolished; and elections were managed by the Supervisor of Elections drawn from the Attorney General's Chambers.⁶ During this period, civil servants became increasingly involved in the management of the electoral processes.

Following the repeal of section 2 (A) of the 1969 Constitution of Kenya in 1991, the country reverted to a multiparty state and the Electoral Commission of Kenya (ECK) was established. However, the process of appointing Commissioners to the ECK remained contentious with political parties questioning its impartiality and independence because it was constituted by the president who was also a contestant.⁷ In 1997, the Inter-Parties Parliamentary Group (IPPG) agreed that political parties recommend names of commissioners to serve on the ECK prior to their appointment by the President. This arrangement was however, not anchored in the Constitution or any other law and was, therefore, still susceptible to manipulation. ECK conducted the 2002 General Election, 2005 Referendum and the 2007 General Election in addition to the 1992 and 1997 General Elections.⁸

Following the disputed results of the Presidential elections in 2007 and the resultant violence, a National Accord Implementation Committee (NAIC) was established which made far reaching recommendations, among them a review of the electoral process. This led to the establishment of the Independent Review Commission (IREC), to inquire into all the aspects of the December 2007 elections with particular emphasis on the presidential election and report back to the President and the African Panel of Eminent Persons.⁹ IREC's finding on the 2007 Elections was that it was not possible to know who won the presidential election, disputing the ECK's announcement of the winner and in the process, the credibility of the electoral body. To cure the shortcomings of the electoral body, IREC recommended a new or transformed ECK with a lean policy-making

⁶ The Constitution of Kenya (Amendment) (No 4) Act No 19 of 1966.

⁷ Section 41, Constitution of Kenya (Repealed).

⁸ The Post-Election Evaluation Report For The August 8, 2017 General Election and October 26, 2017 Fresh Presidential Election (Hereinafter the Post Election Evaluation Report) – IEBC. PP 6-7.

⁹ The Kriegler Commission – named so after Justice Kriegler who chaired the commission. Details are in Republic of Kenya, 2008. Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007. Nairobi: Government Printers. (Hereinafter the Kriegler Report).

structure and a professional secretariat. It also recommended review of the entire constitutional and legal framework, in line with the political and legal aspirations of Kenyans.¹⁰ Following these recommendations, Parliament in 2008, amended Section 41 of the Constitution (Repealed) leading to the disbandment of the ECK. The amendment resulted in the creation of the Interim Independent Electoral Commission (IIEC), and the Interim Independent Boundaries Review Commission (IIBRC). The promulgation of the Constitution of Kenya 2010 resulted in the establishment of the Independent Electoral and Boundaries Commission (IEBC) in November 2011.

Under the current Constitution, Kenya has held two General elections – in 2013 and 2017 and one repeat presidential poll in 2017. Both elections being challenged in court for lack of credibility, transparency, accountability, lack of adequate information infrastructure to manage the electoral process and willingness to provide access to information for those seeking accountability of the process.¹¹ For instance the IEBC was still plagued with a register that was fairly inaccurate as was the case in the 2007 and 2013 General Elections.¹² The Commission failed to update the register by removing dead voters, a factor that has always caused great suspicion in voter turnouts in areas perceived to be leaning heavily towards leading presidential contenders.¹³ According to a KPMG Independent Audit of the Voter Register, over 2 million dead voters were still on the voters register.¹⁴

Information during election cycles yields important clues to those competing for leadership to gauge their strengths and create new political formations which can transform politics before the election.¹⁵ Drawing on this strategy, the multiparty elections

¹⁰ Ibid.

¹¹ Supra Note 8.

¹² An Assessment of Kenya's Preparedness for the 8 August 2017 General Election April - June 2017, African Centre for Open Governance (Africog & Kenya for Peace with Truth & Justice).

¹³ Ibid.

¹⁴ Independent Electoral and Boundaries Commission, Independent Electoral and Boundaries Independent Audit of the Register of Voters PP. 107-140.

¹⁵ Peter Wanyande: Electoral Politics and Election Outcomes in Kenya. See Note 2.

held in Kenya of 2002 ended the then ruling party's hold on power for 39 years by voting in a new president who contested on an opposition party.¹⁶

The election results convey very important signals. The task for the incumbents is to get the vote for regime-supported candidates and parties. The incumbent's success may depend on having an effective network of officials who can effectively falsify results, if necessary, by using relatively benign administrative tactics such as short polling hours or insufficient ballots to systematic and large-scale violent campaigns against groups known to side with the opposition, as it happened during the eviction and killing of voters of from the Kikuyu community in some Rift Valley regions prior to the 1992 General Elections.¹⁷ This situation points to how information can be used as a tool to mobilize voters to participate in elections. It may be misused by political elites to manipulate the electoral process either by sending out information that can scare voters perceived to be leaning towards opposing camps or fail to provide information that can assist them in making decision to elect alternative leadership or even challenge the credibility of the electoral process.

Information emanating from elections has enormous potential to change the perceptions and strategies of key players. Authoritarian incumbents who are sure that they can compete and win in elections may liberalize information to reap the benefits of being viewed as more open. The opposite may also happen if authoritarian leaders find relatively free elections too risky and clamp down to secure control. Security forces might learn of incumbent weakness and decide that the costs of repressing the opposition are just not worth it if the regime is unstable.¹⁸ Information shapes the capacity of pivotal elites and regular citizens to gather accurate information about the relative strength of different political actors, and thus shape their beliefs about the feasibility of electoral challenges against the status quo.¹⁹ Any nation that boasts of a mature democracy must

¹⁶ Shem J Ochuodho Dawn of a Rainbow: The Untold Intrigues of Kenya's First Coalition Government. Adage Publishing & Information Services PP. 177-221.

¹⁷ Ibid page 222.

¹⁸ Laura Newman A key to Democracy: Access to Information Critical for Citizens and Governments www.cartercentre.org visited >October 31, 2017. PP 9-15.

¹⁹ Ibid.

have mechanisms in place to enhance the free flow of information. The right to access information curtails any attempt by the establishment from infringing the fundamental and constitutional rights.

This right without doubt is the hallmark of an effective constitutional democracy.²⁰ James Madison emphasized the right to information by maintaining that a popular government that hides popular information or that which suppresses ways of acquiring the information, is but a “Prologue to a Farce or a Tragedy”.²¹ Thus, when people access accurate and timely information, they use the knowledge to participate effectively in the democratic processes in any democratic society.²² Consequently, an informed public is more likely to contribute to the economic development of any society than an ignorant public, and may also act as a guard against corruption within and outside of government.²³

The right to information is referred to in various ways across the world – some talk of “freedom of information”, others talk of “access to information”, or “the right to know”, but all these terms have the same meaning – it is the right to seek and receive mainly government-held information. The right obligates governments to store and organize information in a way that makes it easily accessible to the public, to provide information proactively and to respond positively to requests for information. Information should only be withheld in the best public interest and as provided in law.²⁴

The right to information is a unique human right. Its status as a fundamental right has been recognized throughout international and regional human rights law including the

²⁰Salau; The right of access to information and national security in the African regional human rights system. *African Human Rights Law Journal*. PP 367-389.

²¹The writings of James Madison, vols. 9(1900). <https://oll.libertyfund.org/titles/madison-the-writings-of-james-madison-9-vols>. PP 1-26.

²²Gathu, Access to Information in Kenya: Transparency International <https://tikenya.org/wp-content/uploads/2017/06/adili-155-access-to-information-in-kenya.pdf>. PP 2-6.

²³ Ibid.

²⁴ The International Covenant on Economic, Social and Cultural Rights, www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf <visited January 20, 2018>.

Universal Declaration of Human Rights,²⁵ the International Covenant on Civil and Political Rights²⁶ and the African Charter on Human and Peoples Rights.²⁷ Information provides people with the knowledge to demand political, economic and social rights from their governments – from the right to food to the right to freedom from torture.

Countries collect information on several governance aspects including education, health, elections, politics, state of development and demographics among others. The government and its agencies is a repository of this information.²⁸ The information is collected at taxpayers' expense for the benefit of the public. It is therefore incumbent upon the government to ensure that its citizens enjoy the right to seek, access, and receive that information.

Several benefits accrue to the public when it accesses information held by the government. Primarily, access to the right information has an impact on the exercise of other rights and enjoyment of fundamental rights including life, health and education. It also affects other spheres of life, be they political, economic, social or cultural.²⁹

Access to information helps communities in decision making. According to Amartya Sen,³⁰ an effective access to information regime enables states to provide communities with the knowledge they need in order to participate in matters that affect their lives. Information empowers people to demand the government to fulfill its obligations such as providing its impoverished citizens with such basics as food, shelter, clean water, health care and education and ensure equitable distribution of the resources that are available.³¹

²⁵ Article 19, Universal Declaration of Human Rights

www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf <visited January 20, 2018>.

²⁶ Article 19, International Covenant on Civil and Political Rights

www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf <visited January 20, 2018>.

²⁷ African Charter on Human and Peoples' Rights, Article 9.

²⁸ Commonwealth Human Rights Initiative, 2007.

https://lib.ohchr.org/HRBodies/UPR/Documents/Session14/GH/CHRI_UPR_GHA_S14_CommonwealthHumanRightsInitiative_E.pdf. PP. 15-34.

²⁹ Article 19 Kenya: Realizing the Right to Information 2014

<https://www.article19.org/data/files/medialibrary/38388/Kenya-RTI-for-web.pdf>. PP 6-12.

³⁰ Sen, A (2000) '*Global Doubts*' 351st Commencement Day Address to University of Harvard, : <http://www.commencement.harvard.edu/2000/sen.htm>.

³¹ Ibid.

Access to information held by the government allows citizens to participate in priority setting and decision making, to hold their government accountable, and to assure equal treatment and justice. Information belongs to the people and the government is simply the trustee of that information.³²

The current Constitution of Kenya acknowledges the importance of information and provides the right to freedom of expression to every person³³. This right includes the right to seek, receive or impart information or ideas.³⁴ Further, the Constitution provides for access to information held by the state and any other person, which is required for the exercise and protection of rights and fundamental freedoms.³⁵ The state is further obliged to publicise and publish any important information that affects the nation.³⁶ IEBC, being a public body therefore has an obligation to facilitate access to information by the public to exercise this right.

The enactment of the Access to Information Act (AIA)³⁷ in 2016 gave public bodies the green light to facilitate the access to information in their custody. The Act filled this lacuna and provides for access to information held by public and private bodies, limitations to accessing information held by public bodies. The act also confers enforcement powers on the Commission on Administrative Justice (CAJ) for enforcement and oversight of access to information³⁸ and power to the Cabinet Secretary in charge of communication to ensure better implementation of the right to access information.³⁹ The Act provide for penalties against those who offend the provisions of the Act.⁴⁰ The Act also repealed legislations that countered access to information to bring them in tandem

³² Laura Newman *A key to Democracy: Access to Information Critical for Citizens and Governments* www.cartercentre.org visited >October 31, 2017. See note 18.

³³ Constitution of Kenya Article 33 (1).

³⁴ Article 33 (1) (a).

³⁵ Ibid 35 (1).

³⁶ Ibid 35 (3).

³⁷ Access to Information Act, 2016.

³⁸ Ibid Part V.

³⁹ Ibid. VI, AIA.

⁴⁰ Ibid 28, AIA.

with Article 35. With the AIA in place, IEBC was required to make information available to the public except as restricted under the Constitution.⁴¹

The right to information is not absolute and it can be limited by the state if it extends to propaganda for war, incitement to violence, hate speech or harm to others or on discrimination.⁴² Even with these provisions in the local legislation and international law which forms part of Kenyan law,⁴³ the right to access information in custody of IEBC, is neither assured nor is its limitation strictly as per the law.

1.2 Statement of the Problem

The study sought to find out what hampers the exercise of the right to access in information during elections in Kenya despite the legal recognition of the right. The study sought to find out why the right to access information cannot be fully exercised during elections with specific reference to the 2017 elections and how the conduct by the Commission affected the exercise of this right during the electoral period and make proposals for reform.

1.3 Research Question

The study seeks to answer the following questions:

- a) Were the legal provisions in place adequate to enable the public enjoy the right to access information held by the electoral body during the 2017 general election?
- b) To what extent did IEBC's conduct enable access to information in its custody during the 2017 election?
- c) What were the challenges IEBC faced in enabling citizens to access information in its custody during the 2017 election?
- d) What reforms can enhance public access to information held by IEBC during elections?

⁴¹ Article 25.

⁴² Ibid 33 (2).

⁴³ Ibid 2 (5,6).

1.4 Objectives of the Study

The overall objective of this paper is to discuss the right to access information held by IEBC in Kenya during the 2017 General Elections. The specific objectives are:

- a) Whether the legal provisions in place were adequate to provide the public access to information held by IEBC;
- b) The extent to which IEBC's conduct of the 2017 elections enabled access to information in its custody;
- c) To find the challenges encountered by IEBC in enabling citizens to access information in its custody; and
- d) To propose reforms that can enhance access to information held by IEBC to the public.

1.5 Justification of the Problem

The Constitution of Kenya provides for the exercise of rights and enjoyment of fundamental freedoms in the bill of rights.⁴⁴ Among those rights is the right to access information held by the State.⁴⁵ This right can only be limited as provided in the Bill of Right.⁴⁶ There is also a requirement for the state to publish and publicise important information affecting the nation.⁴⁷ The study sought to find out whether the legal provisions currently in place are adequate to protect the right to access information held by the electoral body, the extent IEBC's conduct enabled access to information, the challenges encountered by the electoral body in availing information to the public and make proposals on how access to information held by IEBC can be improved.

The study's basis was that though there is a supportive legal framework to provide access to information, there is still a lacuna which leads to bureaucratic delays that frustrates the public from accessing information held by IEBC. Specifically, little is known why certain information cannot be accessed during elections, when parties are competing for public endorsement for leadership. The effect of the non-disclosure of information held in public

⁴⁴ Chapter 4, COK.

⁴⁵ Article 35.

⁴⁶ Article 25.

⁴⁷ Article 35 (3).

trust has a negative consequence on the enjoyment of other rights. Public tensions that arise out of an electoral process have often led to loss of lives, destruction of property, disruption of social and economic activities and violation of fundamental rights and freedoms.

1.6 Hypothesis

The lacuna in the law and management of the elections undermine right to access information during elections.

1.7 Literature Review

1.7.1 Literature on enabling legal framework

Peled and Rabin analysed access to information as a constitutional right due to its importance and its unique role in protecting democracy.⁴⁸ According to the scholars, the precise scope and manner of implementation of this right still remains controversial in various jurisdictions.⁴⁹ Despite existence of various legislations in different countries on the right to access information, the scholars observed that the right to information has not been given adequate attention.⁵⁰ The scholars' main focus was on accessing information as a constitutional right due to its importance in protecting democracy.⁵¹ This study recognizes that access to information is a constitutional right in Kenya⁵² and explores how its access is faced with challenges during elections.

Edwin Abuya (2017)⁵³ underscores the importance of information in any country governed by the rule of law. He not only draws on constitutional imperatives of the right to information (RAI) but also recognizes the lacuna in law, which lacks comprehensive provision for the right to access information.⁵⁴ Abuya credits the courts for filling this

⁴⁸ A Roy Peled; Yoram Rabin, *The Constitutional Right to Information*, 42 *Colum. Hum. Rts. L. Rev.* 357 (2011) page 357 <accessed> Wed Jan 10 17:08:40 2018.

⁴⁹Ibid Page 360.

⁵⁰ Ibid Page 367.

⁵¹ Ibid.

⁵² Article 35.

⁵³ Edwin O. Abuya, *Promoting Transparency: Courts and Operationalization of the right to access information Kenya* *Common Law World Review* 2017, Vol 46(2) 112–139.

⁵⁴ Ibid.

void through precedents set in other jurisdictions and also provisions in the international instruments, which apply in Kenya, through Article 2 (5 and 6) of the Constitution, to ensure that the right to information is given effect and protected. While acknowledging this effort by the judiciary, Abuya states that this may not be adequate and other state actors need to play their role in ensuring that RAI is protected through legislation. RAI, he acknowledges, is an important right that affects the enjoyment of other rights and its protection must be prioritized.

While discussing the importance of RAI and its protection, Abuya is focused on the role that the judiciary has played in realization of this right in the absence of an enabling statute for accessing information held by public bodies. This study's focus was on how public bodies have frustrated the enjoyment of RIA. In particular it focuses on IEBC conduct and how it affected access to information during the 2017 Elections. Equally important is the enactment of the Access to Information Act⁵⁵ which commenced on 31st August 2016 and addresses the lack of legislation that had been discussed by Abuya. This study focused on the operation of IEBC when the Act is operational.

Iain Currie while discussing the Access to Information Act in South Africa draws on the background information that informs the enactment of the Act. Most critical is the enactment of the Act following the adoption of a new constitution in South Africa to provide for access to information for enjoyment of rights and its limitation as provided in the constitution.⁵⁶ The South African Constitution was the first in the world to provide for the right in the constitution as compared to other countries which had provided for the right through statutes.⁵⁷ The South African legislation has a strong resemblance with the Kenyan Access to Information Act and the fact that both countries have provided for the right in their respective constitutions. However differences abound regarding the contexts of the two countries. While South Africa enacted the legislation to tackle secrecy that surrounded the previous white minority government, Kenya's provision was out of

⁵⁵ Access to Information Act No 31 of 2016.

⁵⁶ Iain Currie, South Africa's Promotion to Access Information, 9 Eur. Pub L 59 (2003) PP. 59-72.

⁵⁷ Ibid.

intransigence of the government in releasing information under its custody.⁵⁸ Away from provision in the legislation, this study is concerned with how the right is violated during elections with specific reference to the 2017 election.

The International Institute for Democracy and Electoral Assistance (International IDEA)⁵⁹ published a policy paper on *Electoral Law Reform in Africa*. Its central preoccupation is on the role Electoral Management Bodies that (EMB's) can play in electoral reform in Africa in view of their capacities. The policy states how the engagement of electoral bodies ought to be guided by underlying principles of inclusivity, neutrality and transparency which imply that allowing access to information is imperative to the successful undertaking of this role.

The policy vouches for inclusive participation of all stakeholders including the marginalized groups such as the women, ethnic minorities and underscores the neutrality of the bodies to build positive perceptions of EMBs, partiality the absence of which, could jeopardize the outcome of the electoral reforms. To effectively undertake this role, information sharing is discussed as the key in ensuring that EMBs engagement is well received by stakeholders.⁶⁰ It recommends that for EMB's to achieve the overarching goal of enhancing integrity in elections, EMBs recommendations need to be guided by fundamental principles related to the right of every citizen to participate in political life as well as cast a vote in elections that are genuine, credible and peaceful.⁶¹ While the policy acknowledges the role of information in the process, it is tilted towards the role of information in the electoral law reform while this study's main focus is on how the

⁵⁸ The Final Report of the Constitution of Kenya Review Commission <http://kenyalaw.org/kl/fileadmin/CommissionReports/The-Final-Report-of-the-Constitution-of-Kenya-Review-Commission-2005.pdf>. PP. 111-131.

⁵⁹ The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide. The objectives of the Institute are to support stronger democratic institutions and processes, and more sustainable, effective and legitimate democracy.

⁶⁰ Electoral Law Reform in Africa: Insights into the Role of EMBs and Approaches to Engagement Policy Paper October 2014 <https://www.idea.int/sites/default/files/publications/electoral-law-reform-in-africa.pdf> visited April 12, 2019. PP 2-36.

⁶¹ Ibid.

EMB's conduct impedes exercising the right to access information. Further the policy's geographical scope is the whole continent while this study is confined to Kenya.

Collins Odote in *Access to Information Law in Kenya: Rationale and Policy Framework*⁶², argues that most countries, through their constitutions, recognize the importance of accessing information held by public bodies as a fundamental human right.⁶³ He underscores the lack of enabling legislation that can make this right realizable⁶⁴ and acknowledges that while Kenya has several legislations which provide for access to information there are several others that negate the effective realization of the right.⁶⁵ He proposes a solution to be found in the enactment of the access to information legislation to give effect to the constitutional right.⁶⁶ The paper's rationale is for the enactment of the access to information legislation and suggests that most solutions will be provided by the enabling legislation. This current study is a departure from this position as the enabling legislation Access to Information Act is in place, and investigates access to information during the 2017 Elections, under the new legal regime.⁶⁷

1.7.2 Literature on conduct of elections that impact on access to information

In the paper "*Can African States Conduct Free and Fair Presidential Elections?*"⁶⁸ Abuya E.O. discusses the recognition of the right to vote through periodic elections by stating that even though most states do recognize the right through periodic elections, the major obstacle lies in realizing the right. The paper evaluates the institutional and legal reforms that should take place in order to guarantee credible presidential elections in Africa. The study delves in the contested presidential polls of Kenya in 2007 and Zimbabwe in 2008 and suggests reforms to ensure transparency and credibility in future presidential polls. While Abuya's study was on disputed presidential polls in the two countries, this study is focused on how the right to information was impeded by the

⁶²Research Paper Prepared for the Kenya Section of International Commission of Jurists (ICJ Kenya) 2015..

⁶³ Ibid Page Viii.

⁶⁴ Ibid Page 13 and 14.

⁶⁵ Ibid Page 12.

⁶⁶ Ibid Page 39.

⁶⁷ Access to Information Act, No 31 of 2016.

⁶⁸ Edwin Odhiambo Abuya, *Can African States Conduct Free and Fair Presidential Elections?* Northwestern Journal of International Human Rights Volume 8|Issue 2|Article 1 PP 122- 164 (2010).

IEBC.⁶⁹ In addition, the Abuya study is contextualized under the 1969 constitution which allowed the president to unilaterally appoint officials of the Electoral body. This study's context is under the 2010 Constitution that has an elaborate bill of rights and provides for an independent electoral body as an independent commission with clear provisions on vetting and approval of the members by parliament before appointment by the president to manage elections.⁷⁰

Kate Allan's research on *Paper Wars: Access to Information in South Africa*, gives an account on how a transparent system should work in South Africa.⁷¹ She states that the country has some of the best legal framework in the world but even with this credit, the research conducted by the South African History Archive (SAHA) reveals that the provisions of the Promotion of Access to Information Act (PAIA) and sections of the constitution that promote access to information are yet to be fully implemented in many quarters.⁷² The implementation of PAIA is against the backdrop of the county's transition from apartheid to democracy. The Act serves to enable the government to make proper use of its information for the purposes of service delivery, thus bringing about a governance system that is quite different from that experienced under apartheid.⁷³ The book is concerned with the implementation of information legislation in South Africa from 2001 to 2007 and limits the focus to information submitted by SAHA to public bodies.⁷⁴ The records being sought was public information in the custody of public officials with most bodies being uncooperative save for the police department which was surprisingly responsive.⁷⁵

There are parallels between Allan's findings and the Kenyan situation particularly in having a robust legislative framework that fails to support the right to access information

⁶⁹ Ibid.

⁷⁰ Article 88 (1).

⁷¹ *Kate Allan, SAHA's Freedom of Information co-ordinator from 2005 to 2007 and published by Wits University Press PP. 34-68.(2009), available foip.saha.org.za/static/paper-wars-access-to-information-in-south-africa <accessed on January 11,2018.*

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

occasioned by lack of goodwill, political support and a new information era that is emerging from a background of repressiveness and secrecy in public information. This study is however concerned with the right to access information during elections in Kenya, which does not share the same history with South Africa and has been independent longer than South Africa, even though the former had a longer interaction with the colonizers, who are still part of the current independent South Africa.⁷⁶ This study is also particularly concerned with how the right to information is frustrated in an election period with attendant consequences that negatively affect other rights and freedoms.⁷⁷

A study by the African Network of Constitutional Lawyers (ANCL), *Towards Promoting Access to Information in Kenya*, discusses broadly an evaluation of the existing legal framework on the right to access information. It analyses current practices in respect to the supply and provision of information by selected government departments and the level and factors influencing demand for information by Kenyan residents.⁷⁸ It also assesses government responsiveness of access to information practices and identifies major opportunities and constraints for the promotion of access to information. It recommends measures that can advance access to information in the country.⁷⁹ While this paper is general in regard to accessing information in the country,⁸⁰ this study narrows down to challenges in accessing information under the custody of IEBC. The study was also undertaken after the Access to Information Act had been enacted which defines how public bodies should relate with the public whenever information is required.⁸¹

⁷⁶ A Chronology of Southern African Independence, <https://www.thoughtco.com/southern-african-independence-4069435> <visited January 12, 2018>.

⁷⁷ Ibid.

⁷⁸ African Network of Constitutional Lawyers, *Toward Promoting Access to Information in Kenya*, PP 1-32. April 2011 www.right2info.org/.../towards-promoting-access-to-information-in-kenya-2011 <Accessed January 11, 2018> Page. 4.

⁷⁹ Ibid Page 6.

⁸⁰ Ibid page 17.

⁸¹ Section 5 Access to Information Act, No. 31 of 2016.

Grigore Pop-Eleches and Graeme B. Robertson in *Information, Elections, and Political Change*⁸², developed a theoretical framework to explain why elections often play a key role in both political liberalizations and authoritarian retrenchment. They advanced the substantive debate on the role of elections in political change by showing that elections in authoritarian regimes do not only promote democratization, but can have a knife-edge quality. They showed that while elections usually do not upset the political apple-cart, when they do, the results can be positive from the perspective of liberalization, as in Ukraine in 2004, or negative, as in Iran in 2009.⁸³ They also discussed the impact of information generated during the elections and linked the information to liberalization or deliberalization of the political environment. While the two scholars discuss the role of information during elections, they do not discuss access to information by the electorate as a right and how it can be impeded by the bodies charged with managing elections even though they underscore that elections yield a lot of information that can be used by both players of the political divide.

1.7.3 Literature on improving access to information during elections

Mathieu Mérino explores the Role of the EMB in Electoral Reform⁸⁴ in several countries in Africa and traces the role played by EMBs in Kenya over time. He traces the evolution of the legal and electoral processes that have governed elections in Kenya especially during the transition period to the current Constitution that among others, created an independent electoral body. His works acknowledge the contribution by the Commission in advising parliament on legal (electoral) reforms. He outlines that the reform role undertaken by the Commission through its directorate that is incharge of legal affairs by engaging in research on aspects of electoral reform, use of information technology and other support to the Commission. He also outlines proposals that emanate from the Commission to parliament, for reforming the electoral reform. The need for engaging

⁸² Grigore Pop-Eleches and Graeme B. Robertson in *Information, Elections, and Political Change* Grigore Pop-Eleches and Graeme B. Robertson in *Information, Elections, and Political Change Comparative Politics*, Vol. 47, No. 4 (July 2015), pp. 459-478 Published by: Comparative Politics, Ph.D. Programs in Political Science, City University of New York Stable URL: <https://www.jstor.org/stable/43664160> Accessed: 12-04-2019 20:01 UTC.

⁸³ Ibid page 476.

⁸⁴ Mathieu Mérino, Kenya: The Role of the EMB in Electoral Reform ceproject.org/ace-en/topics/lf/annex/lfc/kenya-the-role-of-the-emb-in-electoral-reform/mobile_browsing/one Page.

stakeholders to embrace reforms and is also discussed in the paper as well as financing challenges that face the Commission.⁸⁵ This paper discusses general reforms of EMBs which may include some initiatives that will improve access to information such as stakeholder engagement, it is however scanty on confronting challenges affecting access to information under the custody of the EMB.

The International Idea⁸⁶ suggests engagement of several players in order to strengthen the management of election processes. This may include civil society organisations (CSO), faith based groups which play a critical role in reforming electoral processes. Their recommendations normally touch on several election activities including access to information held by the EMB. The CSOs critical role is founded on their large presence in Africa, their focus working areas of governance and democracy and the geographic spread on the continent.⁸⁷ Their importance, the paper argues is in identifying challenges and priority areas and because of working with local groups, their input in the electoral reforms will reflect a broad range of opinions and thus complement the engagement of EMB's interaction with the public.⁸⁸

The groups are also critical in pushing the reform agenda through lobbying and their networks which come in handy on issues that do not attract support from the ruling elite. The benefit of engaging CSO's in relation to accessing information is their role in sensitizing the public on reforms and how they affect the electoral process. Owing to the regular engagement with the media in pushing their agenda, the groups are pertinent in sensitizing the masses, however, it behooves the EMB to manage the process of managing engagement with the masses as some organizations have a partisan political agenda that run counter to the EMB's neutrality and agenda in reaching out the masses.

⁸⁵ Ibid.

⁸⁶International Idea, Electoral Management Design, 2014 Revised Edition.
<https://www.idea.int/publications/catalogue/electoral-management-design-revised-edition>.

⁸⁷ Ibid.

⁸⁸ Ibid.

Elisabeth Carter and David M. Farrell⁸⁹ discuss the growing worldwide recognition by government to run efficient and transparent electoral systems. However, most governments are unwilling to overhaul their entire electoral system and instead prefer to undertake piecemeal reforms that will strengthen the process.⁹⁰ They pitch on embracing technology as the main ingredient in enhancing efficiency, transparency and accountability and as cost saving as compared to the earlier processes used that were mainly manual.⁹¹ They discuss the shift of embracing electronic voting in countries such as India and Brazil and the increased reliance on technology to manage many electoral processes right from candidate nomination to announcement of results which contribute to improving the overall efficiency and integrity of the electoral process.⁹² While their focus is that embracing technology will improve the overall quality of electoral management, the paper is shy on how the same technology has been misused to compromise the quality of the process and ultimately the information that is disclosed to the public. In Kenya, the 2017 presidential election were annulled partly due to questions of credibility that arose out of a results transmission system relying on technology.⁹³ Lack of adequate ICT infrastructure also meant that voters could not fully access information from the system for identification and verification that had been put in place and had to resort to the manual records.

Nkansah Lydia Apori while examining electoral dispute resolution in Africa underscores the importance of aggrieved persons seeking justice from the courts as opposed to violence as a positive sign in the development of democracies in Africa and a big win for the rule of law.⁹⁴ The new spirit, she argues, facilitates constitutionalism and institutionalizes succession. She has misgivings about the outcomes of judicial processes with pointers at delays in the adjudication processes⁹⁵ as electoral matters are not

⁸⁹ Elisabeth Carter & David M. Farrell (2010) "Electoral Systems and Election Management" in *Comparing Democracies: Elections and Voting in the 21st Century*. Eds Lawrence LeDuc, Richard G. Niemi & Pippa Norris 3, PP 25 -50 London: Sage. <http://dx.doi.org/10.4135/9781446288740.n2>.

⁹⁰ Ibid

⁹¹ Ibid.

⁹² Ibid.

⁹³ *Raila Amolo Odinga and Another v IEBC and Two Others (2017) eKLR*.

⁹⁴ Lydia Apori Nkansah (2016) *Dispute Resolution and Electoral Justice in Africa: Africa Development / Afrique et Development*, Vol. 41, No. 2 (2016), pp. 97-131.

⁹⁵ Ibid.

adjudicated expeditiously with some outcomes being overtaken by events.⁹⁶ While in some cases the heavy numbers of cases place a lot of strain on the limited judicial resources, they point towards increased voter education as the solution to manage voter expectations so that elections end at the ballot and only genuine cases proceed for adjudication.⁹⁷ Whereas the Nkansah study underscores expedited resolution of disputes and managing voter expectations through increased informative initiatives to increase voters' knowledge on the process, this study is concerned with the entire election cycle and how access to information is impeded during various stages within the Kenyan context as opposed to the entire African region, which is Nkasa's reference point.⁹⁸

The lessons that emerge from the literature review are that first as argued by Grigore Pop-Eleches and Graeme B. Robertson access to information is an enabler of participatory democracy as it promotes transparency and accountability in conducting elections and legitimates the process through engagement of stakeholders.⁹⁹ Information generated during elections is an important link in liberalizing the political environment even though in some cases it can be used to deliberalize the political environment.¹⁰⁰ Access to information is an important right that ought to be legally protected as it affects enjoyment of other rights. Also, even with a supportive legal framework for access to information, its realization can be hampered by implementation.

Secondly as rightly put by scholars Odote C., Abuya E.O, ANCL and Allan K, the constitutional protection of access to information held by public bodies can be achieved by enacting enabling legislation to achieve the objective. However, enacting enabling legislation and implementing it are different. This research interrogates access at the implementation stage and challenges faced while exercising this right.

⁹⁶ Mwai Kibaki Vs Daniel Toroitich Arap Moi[1999] eKLR.

⁹⁷ See Note 104.

⁹⁸ Ibid.

⁹⁹ Grigore Pop-Eleches and Graeme B. Robertson in *Information, Elections, and Political Change* Grigore Pop-Eleches and Graeme B. Robertson in *Information, Elections, and Political Change Comparative Politics*, Vol. 47, No. 4 (July 2015), PP 59-478 Published by: Comparative Politics, Ph.D. Programs in Political Science, City University of New York Stable URL: <https://www.jstor.org/stable/43664160> Accessed: 12-04-2019 20:01 UTC.

¹⁰⁰ Ibid.

Thirdly, even with existence of enabling legislation, information in custody of IEBC during the 2017 elections was hampered by other factors such as technology which impact on the access and disclosure of information. This fact was not canvassed by Elisabeth Carter and David M. Farrell while arguing for embracing technology for better management of election. While it has emerged that technology has become an indispensable tool in modern electoral management, its implementation should be well thought out or else it can also be misused to cause irregularities in an election. This study seeks to find out whether the existing legislation, with provision for technology¹⁰¹ among other mechanisms to manage elections, is adequate to enable access to information held by the electoral body.

Finally, while most literature limit solutions of accessing information to enactment of legislation, this study attempts to unravel why enabling legislation alone may not be enough to guarantee access to information during elections and proposes reforms to enhance access by citizens of information held by IEBC. Mathieu Mérino put forward a case for overall reform of EMBs¹⁰² without being specific on reforming the bodies to improve enjoyment of the right to access information.

1.8 Theoretical Framework

This study is based on the liberal democracy approach. Liberalism is a political philosophy or worldview founded on the ideas of liberty and equality. It can be classified into classical liberalism which lays emphasis on the role of liberty and social liberalism which stresses the importance of equality. Liberals generally support ideas and programmes such as freedom of speech, freedom of the press, freedom of religion, free markets, civil rights, democratic societies, secular governments, gender equality and international cooperation.¹⁰³

¹⁰¹ Section 44 Elections Act, 2011.

¹⁰² Mathieu Mérino, Kenya: The Role of the EMB in Electoral Reform ceproject.org/ace-en/topics/lf/annex/lfc/kenya-the-role-of-the-emb-in-electoral-reform/mobile_browsing/onePage.

¹⁰³ <https://vpn.uonbi.ac.ke/proxy/00ab2b2a/https/www.jstor.org/topic/liberalism/>

The relevance of liberal democracy theory is underscored by the fact that democracy is the most predominant practice in most established democracies.¹⁰⁴ The origin and meaning of democracy can be traced from ancient Greek word “*demo*” meaning the people and “*kratein*” to rule.¹⁰⁵ Democracy thus denotes the power and participation of the people over their own affairs. Comparatively around the world different forms of democracy exist. These include social democracy, representative democracy, liberal democracy, monarchies, among others.

Citizens play a prominent role in a democracy as captured by President Abraham Lincoln of the United States of America in the Gettysburg Address in the middle of the American Civil War in 1864, where he stated „... the nation, shall have a new birth of freedom, and that government of the people, by the people and for the people shall not perish from the earth.”¹⁰⁶

Liberalists believe that everybody is free and equal and has the same rights and choices as anyone else. This is best summed up in the Constitution of the U.S.A., which states "all men are created equal"¹⁰⁷. In a modern Liberal democracy people enter in to a contract through elections with those who govern them for a fixed period of time. The making of this contract is governed by several rules and the government is not permitted to break this "contract". In Kenya, this is set at 5 years.

What is of interest to the liberalists is the attempt to place moral limits on the realm of politics and government. The context, within which Locke wrote his *Two Treatises of Government* (1690),¹⁰⁸ was to limit government by subjecting it to the law and limit the

¹⁰⁴ See Mamadou Gazibo, „The Forging of Institutional Autonomy: A Comparative Study of Electoral Management Commissions in Africa. (2006) 39(3) Canadian Journal of Political Science Publication 611.

¹⁰⁵ Kenneth Bollen, Liberal Democracy: Validity and Method Factors in Cross National Measures. (1993) 37(4) American Journal of Political Science PP. 1207, 1208.

¹⁰⁶ President Abraham Lincoln's Gettysburg Address (19 November 1863) <<http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>> accessed 23 April 2016.

¹⁰⁷ Civic Centre for Education <http://www.civiced.org/resources/curriculum/911-and-the-constitution/terms-to-know>.

¹⁰⁸ John Locke, *Two Treatises of Government* (1690) ed. Peter Laslett (Cambridge University Press, 1988). Though the *Two Treatises* were not published until after the Revolution of 1688, it is generally accepted now that they were, for the most part, written in the early 1680s.

extent upon which its authority over human affairs could be exercised legitimately. Liberals therefore lay emphasis on the primacy of individual freedom and choice. The function of government was thus solely to secure and protect these rights, and if it persistently and deliberately failed to do this, for whatever reason, or strayed beyond its bounds, then a right of resistance could be invoked, because the relationship between people and government was a contractual one, based on trust in performance of the terms of the contract. What was emphasized by employing a doctrine of natural rights was that individuals needed protection against government as much as against each other. Civil government itself was to ensure the latter, and the terms of the contract were designed to secure the former.¹⁰⁹

Once in Power, the government has to follow certain rules so that they do not take complete control over the country or the country be governed by a dictator. To ensure this, a liberal state would have a Constitution, which is a set of rules that must be obeyed by those in power and/or a Bill of Rights which entrench individual rights by providing a legal definition of the relationship between the individual and the state. Abuya E.O however cautions the blanket acceptance of this view point based on the uniqueness of African countries. According to him, liberalism best applies where there are more controls in the state and makes the theory prone to attacks by postcolonial scholars in view of its association with colonialism.¹¹⁰

According to Fareed Zakaria, liberal democracy is, “A political system marked not only by free and fair elections, but also by the rule of law, separation of powers and the protection of basic liberties of speech, assembly, religion and property...”¹¹¹ According to Zakaria, besides free and fair elections, the other aspects of liberal democracy fall under Constitutional Liberalism. He further elaborates that liberal democracy as a legal theory

¹⁰⁹ Ibid.

¹¹⁰ E. Odhiambo-Abuya (2005) A Critical Analysis of Liberalism and Postcolonial theory in the Context of Refugee Protection, King's Law Journal, 16:2, 263-291, DOI: 10.1080/09615768.2005.11427611 <https://www.tandfonline.com/action/showCitFormats?doi=10.1080%2F09615768.2005.11427611>.

¹¹¹ Fareed Zakaria, „The Rise of Illiberal Democracy. (1997) 76(6) Foreign Affairs PP. 22. <https://msuweb.montclair.edu/~lebelp/FZakariaIlliberalDemocracy1997.pdf>.

marries two closely connected ideas. It is liberal because it draws on the philosophical strain, beginning with the Greeks, that emphasizes individual liberty. It is constitutional because it rests on the tradition, beginning with the Romans, of the rule of law.¹¹²

The various definitions of liberal democracy have led to the development of global indicators for measuring liberal democracy.¹¹³ These indicators isolate the salient features that must be present in a democracy namely; universal suffrage, vibrant media, political pluralism, freedom of speech and assembly, and prudent management of the country resources.¹¹⁴ Three of these indicators that heavily rely on access to information are vibrant media, political pluralism and freedom of speech.

A critical analysis of liberal democracy theory encompasses four elements: citizens' participation; democratic rule; civil rights and liberties; and the rule of law. The four elements constitute pillars upon which most constitutions are premised.¹¹⁵ While the foregoing represents key pillars of liberal democracy theory, it is worth noting that individual or collective theories have emerged to explain the theories further. The government of the people, by the people and for the people, as defined by Abraham Lincoln, best illustrates the concept of citizens. On Kenya's path to democratic advancement P. Kagwanja and R. Southall¹¹⁶ locate enjoyment of liberties that are accessible to all among them, free and fair elections as a solution to prevent the country from sliding into chaos as it happened after the bungled 2007 general election. They advocate for political and property rights to apply equal to all and reconciliation as the foundation for democracy and stability of the country.¹¹⁷

¹¹² Ibid.

¹¹³ Majority of countries now have Chapters on the Bill of Rights and Fundamental Freedoms.

¹¹⁴ Robert Fatton, „Liberal Democracy in Africa. (1990) 105(3) Political Science Quarterly 455, 471.

¹¹⁵ Majority of countries now have Chapters on the Bill of Rights and Fundamental Freedoms.

¹¹⁶ Peter Kagwanja & Roger Southall (2009) Introduction: Kenya – Ademocracy in retreat?, Journal of Contemporary African Studies, 27:3, PP. 259-277.

¹¹⁷ Ibid.

Citizens' participation encompasses inclusion of citizens in the formation and affairs of government and the responsiveness of the government to the needs of the people.¹¹⁸ The Universal Declaration of Human Rights (UDHR) expressly elaborates both the substance of the right in article 21 which expresses the role of citizens in formation of government, centrality of regular credible elections through universal and equal through secret ballot or other credible procedures.¹¹⁹ Article 21 of the UDHR clearly establishes the nexus between citizens, participation and the legitimacy to govern.¹²⁰ To exercise this right, access to information during elections is underscored in General Comment 25 paragraph 12 on Article 25 of ICCPR which emphasizes freedom of expression and access to information as key in attaining citizens' participation in elections.¹²¹

The relationship between the governed and the governors is the essence of what John Locke defined as the Social Contract Theory.¹²² Citizens' participation in the democratic process is the hallmark of sovereignty, which is expressed collectively through periodic free and fair elections. Accordingly, political rights and the right to vote are recognized in Kenya as a fundamental right¹²³, which anchors and secures the enjoyment of all other rights. A critical element of the liberal democracy theory is the protection guaranteed in civil rights, fundamental freedoms and liberties. Increasingly, fundamental rights and freedoms are guaranteed in most Constitutions under the Bill of Rights Chapter, and are underpinned by the Natural Law Theory.¹²⁴ Within the context of elections, freedom of assembly, freedom of speech, freedom of the media, right to form political parties, and political rights are meant to play a facilitative role in enabling citizens to participate in

¹¹⁸ National Democratic Institute, „Increasing Citizen Participation through Advocacy Efforts: A Guidebook for Program Development. (200) PP. 5-8
<https://www.ndi.org/files/1170_citpart_advocacy122000.pdf> accessed 02. June 2015.

¹¹⁹ Universal Declaration of Human Rights, Art. 21 (3), GA Res. 217 A (III), U.N. GAOR, 3rd Session, U.N. DOC. A/810, at 71 (1948).

¹²⁰ See also International Covenant on Civil and Political rights, Art 19, GA Res 2200, (1966)

¹²¹ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25) : . 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No. 25. (General Comments) para 12.

¹²² See also writings of Jean-Jacques Rousseau and Thomas Paine on the Social Contract Theory and Natural Law.

¹²³ Article 38 (3) Kenya Constitution.

¹²⁴ Proponents of Natural Law Theory include scholars like Thomas Aquinas, John Austin and Thomas Finnis.

the governance process¹²⁵ Although the doctrine of the Rule of Law exists both as a legal and political theory, conceptually, the Rule of Law represents an important ingredient in the liberal democracy theory.

As argued by Lathi Jotia, embracing liberal values such as free and fair elections should not be the only yardstick for measuring democracy in Africa.¹²⁶ He points out the case of Zimbabwe during Robert Mugabe's reign as a country that never failed to hold regular elections, yet the socio-economic outcomes of embracing liberalism were not deliverable to the electorate despite successful elections.¹²⁷ The success of liberalism he argues has to do with mobilizing strategic agents to deliver true democracy that empowers nations politically and economically.¹²⁸ There is increasing frustration among the voters due to lack of transparency in governance in Kenya and the unfair electoral system only exacerbates the situation as it recycles the same leaders who are not committed to the ideals of democracy.¹²⁹

The clearest exposition of the rule of law was advanced by Albert Venn Dicey who brought out three critical elements of the doctrine namely: lack of arbitrariness and retrospectively; supremacy of the legally promulgated laws and legal principles that everybody is subjected to; equality before the law. The Rule of Law anticipates the existence of legally binding laws and subjects both the individuals and institutions to these laws. In most jurisdictions, electoral process, elective offices and elections administration are established under the constitution and statutory provisions. Non-compliance with the legal framework especially by the electoral management bodies has resulted in elections that fail the legitimacy test. Administrative action of state institutions are remedied by Judicial Review that ensures that acts that are both *intra vires* and *ultra vires* are dealt with within the confines of relief provided for under judicial review.¹³⁰

¹²⁵ Elkilt J and Reynolds A, „The Impact of Election Administration on the Legitimacy of Emerging Democracies: A New Research Agenda. (September 2000) Kellog Institute Working Paper No. 281, 33.

¹²⁶ Lathi Jotia, *Liberal Democracy: An African Perspective*, Academic Research Journal Vol 2, 2012 PP. 23-75. [http://www.savap.org.pk/journals/ARInt./Vol.2\(3\)/2012pdf](http://www.savap.org.pk/journals/ARInt./Vol.2(3)/2012pdf).

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.

1.9 Research Methodology

The study utilized both secondary and primary research. The Secondary research made use of information previously researched for other purposes and made publicly available. Secondary research included published research reports in a library, statutes, case law, and Internet research. It also included reports produced by legal organizations, universities or government.

1.9.1 Research Site

The study was conducted between June and August 2019 in Nairobi with respondents purposively selected based on their education level, gender and disability. Selection of organizations was also purposive and based on their relevance to the research topic and included political parties, civil society, media organizations, and government bodies directly linked with management of elections. All the individual respondents and organizations were based in Nairobi.

1.9.2 Population Sampling and Sampling Procedure

The population sample for individual respondents included lecturers, students, journalists and ordinary Kenyans totaling 56 individual respondents and 20 respondents from organizations. Identification of the respondents hugely benefited from the researcher's experience in higher education, the media, and the legal profession which comprised majority of the respondents. Other respondents were identified through snowballing while the list of 20 institutional respondents comprised of major parliamentary parties which took part in the 2017 elections and organizations working in the areas of governance and information.

The institutional respondents comprised of representatives of parliamentary political parties, IEBC, Registrar of Political Parties, Media Council of Kenya, journalists, representatives of civil society working in the areas of elections and information, lecturers, students, persons with disabilities (PWDs), women and members of the public.

The researcher approached a total of 76 prospective respondents. There were 56 responses from 44 individual respondents and 12 respondents from organisations. The respondents from organizations were from IEBC, Registrar of Political Parties, and Media Council of Kenya. Ford Kenya, Orange Democratic Movement (ODM), Wiper Democratic Party, Kenya African National Union (KANU), Centre for Multiparty Democracy, Article 19, Eastern Africa, Oslo Centre, African Centre for Technology Studies (ACTS), and African Investigative News.

The individual respondents were mainly drawn from the following social categories; academic staff from universities, journalists, students from tertiary institutions, women, people living with disabilities (PWDs) and members of the public bringing the total to 46 randomly selected respondents.

Due to constraints of time, the sample of respondents was restricted to Nairobi. However, its results are generalizable over the whole country due to: the cosmopolitan nature of Nairobi which has inhabitants of all social categories from different parts of the country and are members of different political parties; the political parties have headquarters in the city; the civil society groups working in the area of governance, elections and information conduct their activities countrywide but are based in Nairobi; and IEBC, the body in charge of managing elections is based in Nairobi.

To collect information from the stakeholders, the study utilized structured and semi structured questionnaires to realize answers to defined questions, while leaving room for further development on answers, by including open-ended questions. The advantage of using open ended questions was that they permitted greater in-depth responses and were also easy to formulate as the researcher is not forced to come up with appropriate response categories. The open ended questions also stimulated the respondents to be open-minded and express what they felt was important. The questionnaire was developed along the research themes that form the subject of the study: knowledge on the existing legislation on elections; access to information during elections at different

stages; problems encountered while accessing information at different stages; and suggested solutions to improve access to information during the electoral period.

The individual respondents either filled the hard copy or were provided with the soft copy which they filled and emailed to the researcher. Regarding institutional respondents, the research method employed was to pay a physical visit at their offices and request the relevant officer to be interviewed or fill the questionnaire and email it back or participate in a telephone interview which lasted about one and a half hours. In some cases the institutional respondents asked the researcher to collect the questionnaire on another date once filled by their relevant officer. Most of the respondents acceded to the request to fill the questionnaire or with a few being interviewed via telephone which took slightly over one hour per respondent. The few who did not fill the questionnaire stated that they did not have the time to fill the questionnaire while others declined without giving any reason.

To reach out to the respondents, the researcher used a formal introductory letter from the School stating the purpose of the interview and a research permit from the National Council for Science Technology and Innovations (NACOSTI). The research findings are analysed alongside findings from the secondary sources.

1.10 Chapter Breakdown

Chapter 1

The Chapter introduces the subject under study. It dwells on the elections and its importance and how the right to access information is a critical factor during electioneering. It looks at elections and the right to information and their complementary relationship and how the latter is useful in achieving the objectives of the former. It mentions the legal foundations of the right to access information and the imperatives of holding credible and transparent elections. It then narrows down to its contextual setting in Kenya by looking at the provision of the right in the independence constitution and how it is provided for in the current constitution. The study then contextualizes the problem statement and deals with the objectives of the study, hypotheses and research

questions. Several past works on the subject are also reviewed in this chapter to explore gaps that justified this study followed by the theoretical framework which contextualizes the study under the liberal democracy theory and finally the methodology employed in the study. The methodology included review of primary and secondary sources to collect information on accessing information during the 2017 General Elections.

Chapter 2

The chapter deals with the legal framework that governs the right to access information and the general elections in Kenya. It traces the legal foundations of both and the intersection of the two as established in legal instruments. It is divided into three parts; the international legal framework, the regional legal framework and the municipal law that governs the right to access information with a special emphasis on the conduct of the electoral management body. The municipal law is further divided into constitutional and statutory provision that govern access to information in the country. Selected decided cases relevant to this study and scholarly contributions are discussed under the appropriate categories. The study also evaluated the challenges encountered in accessing information held by public bodies and whether the legal framework is adequate to fulfill this right.

Chapter 3

The chapter discusses how IEBC's conduct impacted on access to information, the consequences of this conduct and how other rights were curtailed in the process. It focuses on the political, economic and social consequences of the conduct. Information collected through primary research on key stakeholders (IEBC, key political parties and the media), is complemented with information from secondary sources.

Chapter 4:

This chapter deals with proposals on how to overcome challenges in accessing information during elections. It discusses the challenges and also develops proposals on how to improve access to information during elections. This is based on views collected from primary and secondary sources.

Chapter 5

The Chapter focuses on recommendations and conclusions of the project paper.

CHAPTER 2

LEGAL FRAMEWORK GOVERNING ACCESS TO INFORMATION DURING ELECTIONS IN KENYA

2.1 Introduction

This Chapter discusses the legal framework governing the right to access information and how the right is provided for in the electoral legal framework in the country. The approach is to discuss the international, regional and national legislation that apply in Kenya.

The Constitutional underpinning of the right to information is provided in Article 35 which allows access to information held by the state, and that held by an individual and is required for protection of any right or fundamental freedom¹ and the requirement by the state to publish and publicise any important information affecting the nation.² Information in the custody of IEBC meets the two stage test of being a public body and executing a function that affects the nation and enjoyment of political rights as protected under the Constitution and operationalized under several statutes. The right to access information and the importance of information in realizing political rights is also provided in international legal instruments such as UDHR, ICCPR, and ICESR among others, which operate in Kenya by virtue of Article 2 (5, 6) of the Constitution.

The right to access information curtails any attempt by the establishment from infringing the fundamental rights which includes political rights.³ This right is without doubt, is the hallmark of an effective constitutional democracy⁴ and affirms the sovereign power of the people⁵ and how they choose their representatives who may exercise it on their behalf.⁶ While the Kenya Constitution provides for an individual to enjoy political rights, the exercise of some of these rights is predicated on free and fair elections administered in a

¹ Article 35 (1) Constitution of Kenya.

² Article 35 (3).

³ Article 38.

⁴ Salau; The right of access to information and national security in the African regional human rights system. See note 20.

⁵ Article 1.

⁶ Article 2

transparent, impartial, neutral, efficient, accurate and accountable manner.⁷This constitutional prescription directly links credible elections to access to information and lack of it affects the credibility of the polls. This is captured by James Madison when he emphasized the importance of the right to information by maintaining that a popular government that hides popular information or that which suppresses ways of acquiring the information, is but a Prologue to a Farce or a Tragedy.⁸ When people access accurate and timely information, they use the knowledge to participate effectively in the democratic processes in any democratic society⁹ including elections. Access to information fosters openness and transparency in decision-making hence the justification for its protection under different laws.

With an established legal mechanism in place, which facilitates the right to access information, holding credible elections becomes feasible.¹⁰ Since the promulgation of the new Constitution in 2010, there has been an intentional liberal shift backed by legislation towards freeing information held by public bodies. The conduct of elections in the country has also been affected by the legal reforms allowing access to information through provisions in the statutes such as the Independent Boundaries and Elections Commission (IEBC) Act 2011, Elections Act, 2011, the Elections Offences Act, 2016, Access to Information Act 2016 and Public Procurement and Asset Disposal Act, 2015 that require the IEBC to release information at different stages of the elections to the public.¹¹ Kenya's legal framework supportive of accessing information during elections and encompasses international, regional and national laws.

2.2 International Legal Framework

2.2.1 The Universal Declaration on Human Rights (UDHR)

The UDHR Article 19 provides everyone with the right to freedom of opinion and expression which right includes accessing information by seeking and receiving

⁷ Article 81.

⁸The writings of James Madison, vol. 9 See note 21.

⁹Gathu, Access to Information: Transparency International PP. 3-6.<https://tikenya.org/wp-content/uploads/2017/06/adili-155-access-to-information-in-kenya.pdf> <visited June 2,2019>.

¹⁰Article 35 (2).

¹¹ Elections Act 2011 Sec 41, IEBC Act Sec 27.

information through any media and regardless of frontiers.¹² Accessing information is essential in elections and is a useful input during campaigns when candidates seek endorsement from voters on one hand and voters are informed of manifestos by different parties and competing candidates.

The UDHR also provides everyone with the right to take part in governance either directly or through freely chosen representatives.¹³ It also provides for the will of the people to form the basis of the authority of government, which will is expressed in credible periodic elections by universal and equal suffrage, held by secret vote or equivalent free voting procedures.¹⁴ The UNHRC, General Comment 25, para.21 does not prescribe a particular electoral system, however the system operating in a state party is under obligation to give effect to the free expression of the will of the voters and under Para 25 prescribes free communication of information and ideas about public and political issues between citizens, candidates and elected representatives as an essential ingredient to the electoral process.

The UNHCR Comment 19 indicates that free and fair elections are conducted periodically within an environment that guarantees effective voting.¹⁵ Arguing for its importance in modern governance, Nsongurua J. Udombana states that the instrument has served as a benchmark even though some countries have failed to implement the spirit of the Declaration.¹⁶

The UNHCR Comment 19 indicates that free and fair elections are conducted periodically within an environment that guarantees effective voting.¹⁷ Many countries struggle to meet the UDHR declaration on free and fair elections and the UN engages monitoring groups to help governments to deliver credible elections by observing the

¹² Article 19 UDHR.

¹³ Article 21 (1) UDHR.

¹⁴ Article 21 (3).

¹⁵ UNHRC, General Comment 25, para.21:

¹⁶ Nsongurua J. Udombana Mission Accomplished? An Impact Assessment of the UDHR in Africa Hamline Journal of Public Law and Policy, Vol. 30, No. 1, 2008 PP. 334-385 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1810816.

¹⁷ UNHRC, General Comment 25, para.21.

elections from the beginning to the end. The observation is hinged on access to information including voter education, candidate campaigns, planning for the ballot and the end vote count. By declaring an election ‘free and fair’ monitors can legitimize the outcome of that election. Conversely, by not doing so, legitimacy is withheld.¹⁸

The right to access information curtails any attempt by the establishment from infringing the fundamental rights which includes political rights.¹⁹ This right without doubt is the hallmark of an effective constitutional democracy²⁰ and affirms the sovereign power of the people²¹ and how they choose their representatives who may exercise it on their behalf.²² Since its recognition in the UDHR, the importance of the right to information has been protected by all international legal instruments as it is considered essential to human development and a foundation to a society committed to democratic ideals.²³

2.2.2 International Covenant on Civil and Political Rights (ICCPR)

The Covenant commits state parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial.²⁴ ICCPR is the most relevant instrument when it comes to protection of civil and political liberties. It provides every person with the right and opportunity to participate in periodic elections as a voter or to be voted for, without discrimination based on distinctions and without unreasonable restrictions.²⁵

¹⁸ Study Guide: The Right to Vote, University of Minnesota, Human Rights Library
<http://hrlibrary.umn.edu/edumat/studyguides/votingrights.html>.

¹⁹ Article 38.

²⁰ Salau; The right of access to information and national security in the African regional human rights system. See note 20.

²¹ Article 1.

²² Article 2.

²³ Emily Howie (2018) Protecting the human right to freedom of expression in international law, *International Journal of Speech-Language Pathology* PP. 12-15.

²⁴ International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

²⁵ Article 25 ICCPR.

The UN General Comment 25 on ICCPR Article 25 elaborates on this right by linking the connection between access to information and effective participation in elections. It states "the right to participate in public affairs, voting rights and the right of equal access to public service and articulates, among other criteria for democratic elections, to include: freedom of information, i.e. to seek, receive, and offer information to make informed choices and freedom of political expression, and to articulate support for a choice without recrimination.

From the General Comment 25 on ICCPR Article 25, among the principles, the right to participate effectively in elections is the freedom to access information to make choices and freedom of expression in order to articulate support for a particular choice which expression is facilitated by access to information.

ICCPR's emphasis on the need for a genuine electoral process with the prerequisite of access to electoral information has been informed by past instances where states have adopted a mockery of electoral processes aimed at window dressing the quest for democracy. Even with the universal recognition of the right as a cornerstone of effective democratic governance, accessing information held by the state can still be hampered by the lacuna in the law, conduct by public bodies, red tape and bureaucratic delays and resistance sometimes unscrupulous exercise of administrative discretion and regressive legislative actions with grievous consequences to states.²⁶

The UDHR and ICCPR provisions on freedom of expression were clarified by the UN Special Rapporteur on Freedom of Opinion and Expression that the freedom to seek, receive and impart information is a distinct right which imposes a positive obligation on states to ensure access to information especially information held by the government in all types of storage and retrieval systems.²⁷ The application of the ICCPR is both extraterritorial and at state level binds all branches of government, regardless of the fact

²⁶ Vincent Kazmierski, *Something to Talk about: Is There a Charter Right to Access Government Information*, 31 *Dalhousie L.J.* 351 (2008) PP. 351-401.

²⁷ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>.

that the representation of the state is normally undertaken by the executive.²⁸ There have been different interpretations in regard to extraterritorial application of the Covenant with the United States denying this position and insisting that the Covenant does not apply to the war on terror.²⁹ The Rapporteur was also concerned with challenges posed to accessing information at the local, regional and national levels on projects and initiatives proposed by the government to advance the right to development and obstacles to participation in the decision-making process, as well as obstacles to access to information on other subjects such as environmental and health impact studies, national budgets, social spending, industrial development projects and trade policies.³⁰

2.2.3 International Covenant on Economic and Social Rights

The International Covenant on Economic and Social Rights (ICESR) in its preamble commits itself to promote universal respect for, and observance of, human rights and freedoms, as a foundation to fulfillment of social economic rights³¹ which freedoms include the freedom of expression and exercise of political rights.

The UDHR, ICCPR and its two optional protocols and the ICESR, now constitute the International Bill of Human Rights which a significant number of countries including Kenya have acceded to.³² The upshot of accession to the international legal instruments is that Kenya made a commitment to its citizens and the international community that it will facilitate access to information, which commitment plays a critical role in democratic activities including elections. More crucially the instruments now form part of Kenya's law. The international instruments form an important guide in the interpretation of socio economic rights as provided in the constitution³³ and more importantly in recognizing

²⁸ General Comment No 31 on ICCPR.

²⁹ Kevin John Heller, Opinion. Does the ICCPR Apply Extraterritorially? <http://opiniojuris.org/2006/07/18/does-the-iccpr-apply-extraterritorially/>.

³⁰ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression <https://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>.

³¹ International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

³² Universal Declaration on Human Rights <https://www.knchr.org/Universal-Declaration-of-Human-Rights> visited 22 February 2019.

³³ Orago NW, "The Place of the 'Minimum Core Approach' in the Realisation of the Entrenched Socio-Economic Rights in the 2010 Kenyan Constitution" (2015) 59 Journal of African Law PP. 237.

that all human rights are indivisible and interdependent and where one is violated, such as access to information it affects the enjoyment of other rights.³⁴

2.2.4 Convention to End All Discrimination against Women (CEDAW) (1979)

Convention to End All Discrimination against Women (CEDAW) often described as an international bill of rights for women. It defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. On Kenya, CEDAW notes that participation of women in political and public life has not been given effect as prescribed in the Constitution. Gender parity has not been achieved for either though elected or appointed offices. It is concerned about barriers that impede women from participating in political and public life on an equal basis with men, including threats and violence at all levels of political and public life.³⁵

In line with CEDAW Committee General Recommendation No. 23 (1997)³⁶ on women in political and public life, the Committee recommends Kenya to pursue sustained policies that support full and equal participation of women in decision-making at the national and local levels. Among measures recommended include increased empowerment of women to ensure that women can participate in elections and raise awareness in the country and the requirement for women participation on equal basis with men in political and public life as provided by the Convention, as well as for the political stability and economic development of the country.³⁷ These measures of necessity involve increased sensitization of various segments in society to increase women participation in democratic processes.

³⁴ Nsongurua J. Udombana *Mission Accomplished? An Impact Assessment of the UDHR in Africa* Hamline Journal of Public Law and Policy, Vol. 30, No. 1, 2008 PP. 335-386.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1810816.

³⁵ Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1).

³⁶ CEDAW General Recommendation No. 23: Political and Public Life Adopted at the Sixteenth Session of the Committee on the Elimination of Discrimination against Women, in 1997 (Contained in Document A/52/38)

³⁷ CEDAW Concluding observations: Kenya 2017 on the eighth periodic report of Kenya
<http://citizenshiprightsafrika.org/cedaw-concluding-observations-on-the-eighth-periodic-report-of-kenya/>.

Achievement of development goals in Kenya is hinged on empowerment of both genders to participate in development activities including democratic activities.³⁸ While the country has made some meaningful steps towards achieving gender equity through legal provisions and creation of commissions supportive of gender equity³⁹, participation in democratic activities is still hampered by the failure to enact the one third gender rule that will guarantee more women representation in elective positions. To fully include women in development activities, increased sensitization of various segments in society to appreciate the critical role played by women is paramount, a role that is recognized by the World Bank.⁴⁰

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

The Convention protects racial minorities and eliminates any forms of discrimination on the basis of one's race. Article 5 of the Convention obligates state parties 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 5, grants the right to participate in elections as voters and candidates on the basis of universal and equal suffrage, take part in the governance as well as in the conduct of public affairs at any level. 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 the principle object of the Convention is the elimination of racial discrimination, it also prohibits 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. The implication is for the Commission and other stakeholders to engage in massive public

³⁸Kariuki Muigwa, Attaining Gender Equity for Inclusive Development in Kenya :(2018) Journal of cmsd Vol 2(2) PP. 15-57.

³⁹ Ibid.

⁴⁰ Ibid.

sensitization to encourage communities to coexist peacefully particularly during the time of elections when tension is high.⁴¹

2.2.6 Convention on the Rights of Persons with Disabilities (CRPD) 2006

The Convention articulates the rights of persons with disabilities and in Article 21 requires state parties to guarantee freedom of expression and opinion, and allow persons living with disabilities access to information and grant them the opportunity to interact through different forms of communication which are accessible to them. On political rights the, Article 29 of the Convention requires states to take progressive measure to increase the numbers of PWDs role in government and participation in civic activities such as voting, right to stand for elections and take part in activities of political parties and organizations.⁴² These steps can only be successful if communities are adequately informed on the need to involve people with disabilities in public life.

2.2.7 The United Nations Education Science and Cultural Organization (UNESCO) conference on “Freedom of Expression, Access to Information and Empowerment of People,” The Maputo Declaration

The Maputo Declaration⁴³ was developed during the commemoration of of 60th anniversary of the United Nations Declaration of Human Rights, representative of nations under the auspices of United Nations Education Science and Cultural Organization (UNESCO) and made a commitment on behalf of the countries to secure their citizens’ freedom to freely express themselves and, allowing them to access information as a way of empowering them. The representatives committed to ensure that organizations owned by the state should embrace an open governance system, be transparent in its operations and allow the public to information under their custody.⁴⁴

⁴¹ Peter Wanyande: Electoral Politics and Election Outcomes in Kenya! Africa Development, Vol. XXXI, No. 3, 2006 *Council for the Development of Social Science Research in Africa 2006* See Note 2.

⁴² Article 29 of CRPD.

⁴³ The meeting took place in Maputo, Mozambique during the celebration of World Press Freedom Day, 3 May 2008. The event also marked the 60th anniversary of the United Nations Declaration of Human Rights.

⁴⁴ Ibid.

The Declaration dissects the importance of access to information in improving the achievement of other human rights and supports the utilization of technology and ending censorship by governments in order to increase access to information. In relation to elections, the Declaration recognizes freedom of expression and access to information as essential to democratic discourse and open and informed debate, thereby fostering government transparency and accountability, peoples' empowerment, and citizens' participation. The Declaration also sought to promote the freedom of expression as a right applicable to all human beings without exception and facilitate the norms on accessing information to be implemented by all states.⁴⁵

2.2.8 United Nations General Assembly Resolution 59 (1)

The place of accessing information under international law is well founded. The first session of the United Nations General Assembly resolved to that freedom is a fundamental right that forms the basis of all the other freedoms enshrined by the UN Charter.⁴⁶ This provision recognizes that for information to serve its purposes it must be accessed and processed before it is transmitted. Its importance in democracy and elections is equally provided internationally in the UN Charter and three main enabling instruments; UDHR, ICCPR, and ICSEC. These instruments have given birth to several regional conventions on human rights such as European Charter on Human Rights (ECHR) serving European countries, the American Convention on Human Rights (ACHR) and African Charter for Human and People's Rights (ACHPR) which formed the basis for enactment of national legislations protecting the right of accessing information and participation in elections. These laws form part of the Kenyan law by virtue of Article 2 (5 and 6). UDHR and ICCPR further the legal basis for accessing information during elections and the conditions antecedent for the conduct of credible elections.

⁴⁵ World Press Day 2016 Maputo Declaration.

⁴⁶ Resolution 59 (1) on freedom of information stating: "Freedom of Information is a fundamental right and is the touchstone of all the freedoms to which the United Nations is consecrated. By extension therefore participation in elections is consecrated on the freedom of expression. Freedom of Information implies the rights to gather transmit and publish news anywhere without fetters. As such it is an essential factor in any serious effort to promote the peace and progress of the world." Resolutions adopted by the UN during its first Session <http://www.un.org/documents/ga/res/1/ares1.htm>.

2.2.9 Sustainable Development Goal No 16

The Sustainable Development Goals (SDGs), are global goals with aim of ending worldwide poverty, protect the planet and ensure that all people prosper and enjoy peace. They are 17 goals in total and interconnected – meaning that success in one goal would involve tackling issues in other goals.⁴⁷ The most relevant goal for this study is Goal No 16 which concerns justice, peace and strong institutions. The goal's focal point is development on three fronts; justice, peace and strong institutions.⁴⁸ It calls on all countries to embrace development activities that encompass inclusivity, sustainable development, increased access to justice and build institutions that are effective, transparent and accountable.

For the agenda to be effective the states must embrace the fight against graft, increase public participation in its decision making and free information to be accessed by the public. Information on governance matters means that people can work from a point of information and participate in matters affecting their lives from a point of knowledge.⁴⁹ The process of electing officials across the world must be fair and the fairness cannot be achieved if the information required for effective participation in the process is not accessible. The international best practice on freedom to information to be embraced by the states is the principle of maximum disclosure which requires unlimited disclosure of information to anyone by public bodies and exceptions should only apply on limited circumstances. The principle does not require the person requesting for information to give any justification and shifts the burden to the public body to justify the legitimacy of denying accessing information under its custody.⁵⁰ Accessing information as provided in the SDG blue print is imperative in the goal of building democracies.

⁴⁷ What are the Sustainable Development Goals? <https://www.undp.org/content/undp/en/home/sustainable-development-goals.html> visited < June 1, 2019>.

⁴⁸The Sustainable Development Goals are a call for action by all countries – poor, rich and middle-income – to promote prosperity while protecting the planet. They recognize that ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs including education, health, social protection, and job opportunities, while tackling climate change and environmental protection.

⁴⁹ Ibid.

⁵⁰ *Zebedeo John Opore v The Independent Electoral And Boundaries Commission [2017] eKLR.*

2.3 African Regional Instruments

2.3.1 The African Charter on Human and People's Rights (ACPHR)

The Charter obliges member states of the Organization of African Unity to recognize rights, duties and freedoms enshrined in the Charter and must legal or other practical mechanisms of giving effect to them.⁵¹ The Charter expressly grants all persons the inherent right to receive, information, freedom of expression and the right to disseminate information on his/her opinions within the law.⁵²

Kenya, being a signatory to the African Charter on Human and Peoples Rights (ACPHRC), is bound by the Charter which in Article 13 provides for participation of people in governance. The provision require nations to recognize the rights, duties and freedoms as provided in the Charter and enact legislation and other measures to affect them.⁵³ It empowers citizens with right and freedom to participate in forming government either directly or through elected representatives.⁵⁴ In Article 9, the instrument provides an individual with the right to receive information and the right to express that opinion within the law. To fulfill the objects of Article 1 of the Charter, State Parties must ensure that all players in the electoral process proactively disclose information to the public and allow access to information under their custody.

According to the ACHPR Guidelines on Access to Information and Elections in Africa, experiences across the continent point to lack of information during elections as one of the causes of insecurity, instability and lack of peace. This problem is caused by the failure of players in the electoral process to provide information proactively, a situation which breeds mistrust and lack of confidence in the process. Where confidence in the process is lost in a country with many divisions based on ethnic, religious and such other tensions, the situation can be the starting point for wide scale violence as occurred in Kenya during the 2007 and 2017 elections, when voters expressed their frustration at real or perceived disenfranchisement. Civil tension can also occur due to lack of credible

⁵¹ Article 1 of the Charter.

⁵² Ibid Article.

⁵³ Ibid Article 1.

⁵⁴ Ibid Article 13 of the Charter.

information on the elections, leading to loss of life, internal displacement of many persons and helplessness as the aftermath of contested election⁵⁵

The draw back to the enforcement of the Charter is the legal requirement under which the complainants must prove exhaustion of local mechanism making it difficult to have a meaningful intervention during the electoral period when the timelines are limited for instance in presidential petitions and the intervention is required by a petitioner to address malpractices committed in an election that is time bound.⁵⁶ The African Commission has emphasized that exhausting the domestic remedies is one of the admissibility requirements.⁵⁷

The exhaustion requirement is grounded on the principle that a government should have an opportunity to remedy its own violations of rights before appearance at an international body.⁵⁸ Even where the application surpasses this hurdle, the Commission will still evaluate whether the remedy available is sufficient in addressing the alleged violation and the remedies have to be of judicial nature and not subject to the discretion of public authorities.⁵⁹ Thus a complainant is not required to pursue remedies that are extraordinary and of a non-judicial nature.⁶⁰

Even where a remedy is provided, implementation hurdles abound as the accused state is the same that is required to implement the judgment.⁶¹ Further, many states are yet to

⁵⁵ African Commission on Human & People's Rights Guidelines on Access to Information and Elections in Africa http://www.achpr.org/files/special-mechanisms/freedom-of-expression/guidelines_on_access_to_information_and_elections_in_africa_eng.pdf.

⁵⁶ Bight Theu, *Human Rights Litigation Using International Law: The IHRA Experience*. 17 *Law Democracy & Dev.* 504 (2013).

⁵⁷ ACommHPR, *Sir Dawda K. Jawara v. Gambia*, para. 30.

⁵⁸ ACommHPR, *World Organisation against Torture and Others v. Zaire*, *Communication Nos. 25/89*, 47/90, 56/91, 100/93, Merits Decision, 19th Ordinary Session (1996), para. 36, available at http://www.achpr.org/files/sessions/18th/communications/25.89-47.90-56.91-100.93/achpr18_25.89_47.90_56.91_100.93_eng.pdf; ACommHPR, *Rencontre Africaine pour la*

Defenese des Droits de l'Homme v. Zambia, *Communication No. 71/92*, Merits Decision, 20th Ordinary Session (1997), para. 11, available at <http://www.achpr.org/communications/decision/71.92>.

⁵⁹ *Ibid.*

⁶⁰ ACommHPR, *Priscilla Njeri Echaria (represented by Federation of Women Lawyers, Kenya and International Center for the Protection of Human Rights) v. Kenya*, paras. 53–55.

⁶¹ Bight Theu, *Human Rights Litigation Using International Law: The IHRA Experience*. 17 *Law Democracy & Dev.* 504 (2013).

make a declaration accepting communication from individuals to be submitted to the jurisdiction of the court. On the positive side the existence of the African Court of Human Rights (ACtHPR) has managed to push the issues raised against the states into the realm of public opinion forcing some to make reform their systems.⁶²

2.3.2 The Declaration of Principles on Freedom of Expression in Africa

The Declaration of Principles on Freedom of Expression in Africa⁶³ adopted by ACHPR gave a comment on the scope of Article 9 on which it noted that greater public transparency, accountabilities good governance cannot be achieved in circumstances where public bodies fail to grant access to information under their custody. The Charter is appreciative of the link between access to information and strengthening of democracies by underscoring the importance of the former in achieving the latter.

The Special Rapporteur on Freedom of Expression and Access of Information in Africa covered the rights of individuals and political parties to include unrestricted movement, peaceful campaigning and the freedom to ventilate their political opinions with unrestricted access to media and being allowed to access information as provided in the laws of the land.⁶⁴ The obligations on nations include ensuring impartial coverage of all political players devoid of language that can ignite violence or lead to incitement and hatred. Candidates and political parties are also obliged to respect the media and refrain from acts that limit the media from playing its role of informing the masses. The report by the Rapporteur relates effective participation in public affairs, to among other factors, access to information mainly conveyed by the media.

2.3.3 The African Charter on Democracy Governance and Elections (ACDEG)

The Charter reinforces the commitment by the States Parties of the African Union towards protecting democracy and the rule of law, as well as human rights. The Charter seeks entrench the culture of political change based on scheduled elections that meet the

⁶² Ibid.

⁶³ adopted by the African Commission on Human and Peoples' Rights (32nd Session, 17 - 23 October, 2002: Banjul, The Gambia).

⁶⁴ AHG/Decl.1 (XXXVIII), 2002, at par. (1) and (5). Elections: rights and obligations.

http://www.achpr.org/files/sessions/43rd/inter-act-reps/110/achpr43_specmec_fexp_actrep_2008_eng.pdf.

international standards of being free and fair and managed by an independent, impartial and competent election management bodies.⁶⁵

Under the Charter, state parties are bound to advance a participatory democracy where the majority rules but with the minority allowed to critic the government, have clear separation of powers, credible elections, empowerment of both gender and fight against corruption.⁶⁶ The African Court of Human Rights has applied ACDEG in finding state parties that have gone against the provisions of the instrument in election matters.⁶⁷ ACDEG therefore consolidates AU commitments under which member states are in a position to build concrete institutional and traditional foundations for sustainable democratic values that can help realize and perpetuate peace.

2.4 The National Legal Framework

This study will confine itself to the Constitution, the Elections Offences Act, 2016, Independent Electoral and Boundaries Act, 2011, the Elections Act, 2011, the Access to Information Act, 2016, and the Public Procurement and Disposal Act. These are the most important laws that have a direct impact on accessing information during elections.

2.4.1 Kenya Constitution

The current Constitution placed Kenya among the states that recognize and guarantee the right of access to information. The inclusion of the right in the Constitution is a useful first step⁶⁸ in recognizing the need for the citizenry to access information held by the public authorities and individuals that is necessary for exercising the rights and enjoyment of freedoms.

⁶⁵ The African Charter on Democracy Elections & Governance: The Role of National Human Rights Institutions. The Charter was adopted on 30 January 2007 during the 8th Ordinary Session of the Assembly of the African Union. <https://www.movedemocracy.org/wp-content/uploads/2018/06/African-Charter-on-Democracy-Elections-and-Governance.pdf>.

⁶⁶ Ibid.

⁶⁷ In The case of *Actions pour la Protection des Droits de l'Homme v Côte d'Ivoire* the Court found the Respondent State to have violated its commitment to establish an independent and impartial electoral body as provided under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol".³⁶The ACtHPR also held that "consequently...the violation of Article 17 of the African Charter on Democracy affects the right of every Ivorian citizen to participate freely in the conduct of the public affairs of his country as guaranteed by Article 13of the Charter on Human Rights."

⁶⁸ Collins Odote Access to Information Law in Kenya: Rationale and Policy Framework. See Note 121.

The drafters of the Constitution intended to commence a new era that placed sovereignty directly in citizens, delegated to the three arms of the government and to be exercised in accordance with the Constitution. The spirit of the constitution implies that every state organ must have regard for public participation while executing its mandate. Furthermore, public bodies are required to carry out their duties by considering the rights and fundamental freedoms that the state cannot derogate from.⁶⁹ Access to information is provided in Article 35 (1) and is one of the rights in the bill of rights that entitles every citizen the right of accessing information held by the public bodies or private persons and required for the exercise or protection of any right or enjoyment of a fundamental freedom. The Article also obliges the state to inform the public through available media of any important information that affects the country.⁷⁰ The Constitution of Kenya is a transformative and progressive legal instrument hence if fully implemented, can fulfill Kenya's political aspirations.

The Constitution is therefore clear that information held by the state must be accessible to the public on request. What this means is that once a citizen places a request to access information, the information should be available to the citizen without unnecessary delay. Article 35 of the Constitution does not require any one to provide reasons for the need for the information. The most important thing is that information is in possession of the state, its agencies or its officers or private person⁷¹ and is not limited by the Constitution.⁷² It is important to note that citizens are not required to give any justification to why they require the information neither are they affected by what the public officer perceives to be the reason for seeking information. This reinforces the fact that Article 35 does not in any way limit the right to access information.⁷³

The provision to access information in the current Constitution was, one of the recommendations from the Constitution of Kenya Review Commission (CKRC) whose

⁶⁹Articles 1, 10, 19(1) 21(1).

⁷⁰ Article 35 (3).

⁷¹*Katiba Institute v. President's Delivery Unit and 3 others (2018) eKLR.*

⁷² Article 24.

⁷³ Article 35 (1) provides: (1) Every citizen has the right of access to: (a) Information held by the State; and
(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

mandate was to review the 1969 Constitution. While reviewing the clause on information, delegates at the CKRC Constitutional Conference, held that there is need for the public to access information collected at tax payers expenses.⁷⁴ The current Constitution resolved this concern by providing for access to information and by dint of Article 35 (1), most of the information that was previously inaccessible became available to the public. Article 35, thus opened a new a chapter in securing human rights in the country in tandem with the Provisions of Articles 19 of the UDHR and ICCPR and the Preamble of the ICSEK.

Since 2010 when the current Constitution was promulgated, the country operated without an enabling legislation to implement the provisions of Article 35 up to 2016 when the Access to Information Act was enacted. However, the lack of this provision did not stop the courts from providing direction on how the right should be implemented. In the case of *Famy Care Limited vs. Public Procurement Administrative Review Board & Another*⁷⁵ it was stated that information held by the state can only be requested by citizens, and non-citizens, cannot access the information. The court clarified that there is a difference between the rights enjoyed by citizens and those enjoyed by other persons and the rights under Article 35 (1) are limited to citizens. Similar rights are also defined in Chapter Three and in Article 38.

The interpretation in *Famy Care* case limited access to information and was only cured by enacting Access to Information Act which enhanced accessing information to juristic bodies by expanding the definition of a citizen to include juristic bodies that have Kenyans on board.⁷⁶ The Court decision in *Katiba Institute v Presidents Delivery Unit & 3 others*⁷⁷ further clarified that the right to access information extends to private entities controlled by more than one Kenyan citizen.⁷⁸ Freedom of expression has also generally

⁷⁴ The Final Report of the Constitution of Kenya Review Commission. Final Draft. Approved for Issue at the 95 Plenary Meeting of Constitution of Kenya Review Commission 2005 PP. 131. <http://www.katibainstitute.org/Archives/images/CKRC%20Final%20Report.pdf>.

⁷⁵ *Famy Care Limited v Public Procurement Administrative Review board & another & 4 others* [2013]eKLR.

⁷⁶ Section 2, Access to Information Act, No 31 of 2016.

⁷⁷ *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR.

⁷⁸ Section 2 of the Access to Information Act.

been held to include accessing information and Article 33 of the Constitution of Kenya provides for the freedom to include seeking, receiving or communicating information.

Thus, accessing information in Kenya is provided for by both Articles 35 (1) and 33(1). Further, Article 232(1) (f) also obligates public bodies to embrace transparency by providing timely and accurate information to the public. The redress of infringement of this right is provided for in Article 22 which gives an aggrieved person the right to seek remedies through the High Court which can grant appropriate reliefs under Article 23 (3). As resolved by the United Nations General Assembly⁷⁹ freedom of information is the hallmark of all the freedoms on which the United Nations is founded, while the UDHR and ICCPR underscore the importance of information to free and fair elections. The Constitution in Articles 10, 33, 35, 38, 81, and 232 also binds IEBC, as a public body, to allow access to information while executing its mandate.

In recognition of the role of information in elections, several other legislations (discussed later in this chapter) that facilitate the conduct of elections have components of accessing information. The Constitution provides the principles for governance and administration of elections in the country. It provides for political rights for all citizens under Article 38 allows for freedom to make political choices, participate in elections as a voter and as a candidate for any seat so long as they are qualified, form political parties and vie for elective seats among other political rights. The Constitution establishes elective offices and institutions that manage elections and empowers people in electing their representatives through the conferment of the sovereign power to Kenyans, and expression of that sovereignty through the elected representatives⁸⁰.

In addition to political rights, there are rights that are instrumental to the realization of political rights. These rights include media freedom provided under Article 34, access to information in Article 35, freedom to associate provided under Article 36 and assembly

⁷⁹ Resolution 59 (1) United Nations General Assembly.

⁸⁰ Constitution of Kenya 2010, Art 1.

rights provided under Article 37. For this discourse, the most relevant right is the right to access information as provided in Article 35.

The functions of the IEBC provided under Article 88(4) include registration and revision of the voters register, delimitation of electoral boundaries, regulate nomination of candidates by political parties, resolves disputes apart from poll petitions, educate voters, accredit poll observers, regulate campaign financing, develop codes of conduct for parties and ensure compliance with the laws governing elections.

The constitutional order in Kenya imposed certain principles on the electoral systems. The function of such principles is to provide general and objective guidelines to IEBC as the player in the electoral system to make laws, rules, regulations and administrative decisions or guidelines.⁸¹ Principle 81 (e) requires IEBC to deliver free and fair elections through a secret ballot, that are peaceful and corruption free, are conducted by an independent body, are transparent and administered through an impartial, efficient and accountable process.⁸²

For the elections to be termed successful, free and fair, freedom to access information is a requirement to assess the IEBC's compliance with the above characteristics. The importance of the right of access to information is during its cross cutting nature. Its necessity is to facilitate the realization of other human rights, including participation in government directly by electing representatives freely.⁸³

Democratic governments cannot survive in an environment that lacks accountability and the responsibility is on government to allow people to receive information on its activities. The government and its agencies should create an enabling environment to

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

⁸²Ongoya, Z. Elisha & Willis E. Otieno (2012) 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, PP 15 <http://aceproject.org/ero-en/regions/africa/KE/kenya-handbook-on-kenyas-electoral-laws-and-system>.

⁸³ Article 13 African Charter on Human & People's Rights.

access information, ensure adequate disclosure and reduce obstacles to access information.⁸⁴

During elections there should be unfettered access to information at every stage of the electoral process. Without access to accurate, credible and reliable information on a wide range of issues at any stage, citizens cannot exercise their right to participate in choosing representatives as envisaged under Articles 38 and 81.

The foundational principle of the right of access to information is for the duty bearer to disclose information proactively.⁸⁵ The principle of proactive disclosure requires those with information of public interest to disclose the information without any prompting.⁸⁶ The information should be disclosed in formats that meet the different needs of its audience.⁸⁷ Disclosing information in this manner fosters accountability and transparency in the electoral management body, informs all stakeholders on its activities concerning the conduct of elections and builds credibility and assures the integrity of the process. In addition, the Constitution requires state organs to comply with principles of good governance which include; integrity, transparency and accountability⁸⁸ under which provision of timely and accurate information forms a major component of the principles.⁸⁹ All these constitutional provisions oblige IEBC to ensure access to information under its custody.

2.4.2 The Independent Electoral and Boundaries Commission Act 2011

The Independent Electoral and Boundaries Commission Act, 2011 restates and expounds on the functions of the IEBC and provides for access to information in the conduct of elections.⁹⁰ Section 27 of the Act provides for the management of information and requires the Commission to notify the public of all important information on its activities

⁸⁴ Navarro Gutiérrez v Lizano Fait, Supreme Court of Costa Rica judgement of 2 April 2002, Annual Report of the OAS Special Rapporteur on Freedom of Expression 2003, PP. 159-160.

⁸⁵ Freedom of information legislation should be guided by the principle of maximum disclosure <https://www.article19.org/resources/international-standards-right-information/>.

⁸⁶ Article 35 (3).

⁸⁷ Ibid.

⁸⁸ Article 10 (2c)

⁸⁹ Article 232 (f)

⁹⁰ Independent Electoral and Boundaries Commission Act, 2011, Section 27.

and functions affecting the nation. The citizens are also allowed to request for information which is addressed to the Secretary to the Commission or any other designated officer. However the availability of the information may come at a reasonable cost in circumstances where the Commission incurs expenses in making information available.⁹¹

The Commission is not inclined to give information that is still being deliberated or where the requester fails to pay the requisite fees or fails to abide by the confidentiality provisions.⁹² The Commission is required to publish and publicize its annual report detailing activities undertaken, financial statements, progress made on voter registration, and any other information considered pertinent. The annual report should be presented to parliament three months before the end of every financial year.⁹³ It is also a requirement under the Act that the Commission notifies the public on the location of its offices and contacts to be reached by members of the public.⁹⁴ The Act therefore envisages that the public will either receive or seek information from the Commission and the electoral body is required to grant that information. The Act therefore envisages that the public will either receive or seek information from the Commission and the electoral body is required to grant that information. Contrary to these provisions, the Commission at various stages of the election failed to provide information to the public or allow access to it.⁹⁵

2.4.3 The Elections Act 2011

The Elections Act⁹⁶ consolidated the previous laws on the procedures and processes regarding voter registration; nominations, elections, referendum, election offences and election dispute resolutions. The Act provides for registration of voters and resolves questions arising of the registration exercise, nomination and election of candidates from county assembly representatives all the way to the election of the head of state. It also

⁹¹ Ibid Section 27.

⁹² Ibid Section 27 (3).

⁹³ Ibid Section 24.

⁹⁴ Independent Electoral and Boundaries Commission Act, 2011, Section 28.

⁹⁵ *Raila Amolo Odinga & Another v IEBC & Two Others (2017) eKLR.*

⁹⁶ Elections Act 2011.

resolves matters arising out party nominations to parliament, recall of elected members of parliament; conduct of referendum; election offences; and resolution of election disputes.

The Elections Act 2011 has provisions that obligate IEBC to ensure accuracy of information in its custody. It mandates, IEBC to register and open the register of voters for inspection within sixty days before elections and undertake necessary rectifications after verification by voters.⁹⁷ The 2016 legislative amendments in the Act require the establishment of integrated technology covering identification and registration of voters, registration of candidates and transmission of candidates. The technology to manage all these electoral aspects is called the Kenya Integrated Election Management System (KIEMS) and was supposed to installed and tested at least 60 days before the elections were held.

However, procurement challenges delayed the acquisition of KIEMS and the ballot papers with the former being delivered two months before the date of elections.⁹⁸ Legal challenges staggered and delayed the delivery of the KIEMS kits and ballot papers. The initial kits arrived on April 14, 2017 and delivery was completed in early June 2017.⁹⁹ The late and staggered delivery of KIEMS negatively affected the process of verifying voters.

The Act requires the Commission to announce elections results at the polling stations, an amendment that was set in motion by the decision of the High Court pronounced in *Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others*¹⁰⁰ which declared IEBC regulations relating to the counting and announcement of presidential results at the national tallying centre to be unconstitutional. The Court ruled that presidential results announced at the constituency can only be questioned by the elections court.¹⁰¹ This was a progressive interpretation to enhance transparency, accuracy of results in the elections and access to information that is received at the source

⁹⁷Sec 6 (2) Elections Offences Act.

⁹⁸ The Post Elections Review Report .PP 91.

⁹⁹ Ibid PP 93..

¹⁰⁰ *Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & 2 others* [2017].

¹⁰¹ *Ibid*.

and not subject to any review by any person who was not present when tallying took place. Thus, the role of IEBC Chairman was limited to tallying and conveying presidential results as received from the returning officers without any further input.

The Act further empowers the Commission to audit the register by engaging a reputable audit firm, implement its recommendations and forward the audit report to Parliament. The purpose of the audit is to verify the register, update it and enhance its accuracy.¹⁰² This was an amendment in the Act that was meant to cure election fraud where details of dead and absentee voters may be used by some parties to gain advantage in the polls.

The Audit conducted by KPMG just before elections revealed over 2.9 million inaccuracies in the voter register relating to names, gender and dates of birth which was caused by inaccurate data entry. A further estimated 2.3 million were projected to have died since the first voter registration under the current Constitution was conducted which was blamed on lack of updated records of deaths and synchrony with the registration of deaths and the IEBC voter register.¹⁰³ On account of the shortcomings on available data, KPMG recommended that biometric identification be used to identify voters on the voting day which was meant to cure cases of using deceased persons' details to cast votes.

Owing to the shortcomings on the accuracy of data in the possession of IEBC, the KPMG Voter Audit report confirmed that data in possession may be inaccurate due to the errors in the register and exclusion of dead voters. Even though these problems were meant to be corrected by use of KIEMS kit in identification of voters, the problem may not have been solved entirely as no valid explanation convinced the Supreme Court as to why over 500,000 voters from certain regions only voted for the position of the president.¹⁰⁴

Bearing in mind that the Audit Report was also released too close to the election and required parliamentary approval, there was little time to correct the register in readiness

¹⁰² Elections Act, Section 8A.

¹⁰³ Independent Electoral and Boundaries Commission Independent Audit of the Register of Voters KPMG Kenya 31 May 2017.

¹⁰⁴ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

for the elections effectively leading to holding the 2017 elections on a register with irregularities. Other challenges that faced the audit included legal challenges with activist Okiya Omtatah and CORD raising problems with the way in which the IEBC procured the services of KPMG.¹⁰⁵ The plaintiffs filed suits challenging the appointment of the auditor, but both suits were dismissed.¹⁰⁶

The Act also provides for access to media by political parties and candidates for purposes of selling their policies and manifestos to the electorate. There is a provision for equitable use of state media by competing candidates and a requirement of accuracy in reporting in line with the Code of Conduct for the practice of journalism prescribed under the Media Act (No. 3 of 2007).¹⁰⁷ The role of the media in conveying information to the public makes it a key stakeholder in accessing information from the Commission and candidates.

A free and fair poll election is not determined by the freedom and knowledge to vote but is also a participatory process where public debates are arranged by the media for voters to interrogate parties and candidates on their policies to inform them in making choices and scrutinize the process on whether it meets requirements and expectations. The media thus plays a critical watchdog role in nurturing democratic ideals among them, elections, by safeguarding its transparency. Thus an election minus a free media providing information to the electorate is a contradiction.¹⁰⁸

Even though the media had access to cover elections, it was notable that during the transmission of presidential results, they were barred from running independent vote tallies and only relied on the information relayed by IEBC.¹⁰⁹ A further obstacle, was the coverage of political activities immediately before the repeat presidential poll and the “swearing in” of NASA presidential candidate Raila Odinga during which moment, television stations were barred from covering the events live. This affected access to

¹⁰⁵ *Okiya Omtatah Okiiti v Independent Electoral and Boundaries Commission & 2 others* [2017]

¹⁰⁶ *Ibid.*

¹⁰⁷ Elections Act, Section 41 (4).

¹⁰⁸ The Electoral Knowledge Network: Media and Elections <http://aceproject.org/ace-en/topics/me/default>

¹⁰⁹ The Carter Report. PP. 28.

information not only by the media house but to the public whose main source of information is through the media. The media were also subjected to punitive actions such as switching off broadcasts for NTV, KTN and Citizen TV for ignoring the warning of the government to televise the mock swearing in of the opposition presidential candidate.¹¹⁰ Positively, news media provided increasing scrutiny of the election process, and tallying. State media showed a marked improvement by providing equitable news coverage, although some programming favoured the ruling party Jubilee.¹¹¹ Private media, particularly vernacular radio stations, aligned their broadcasts to in favour of their choice political camp.¹¹² An extensive, paid media campaign, promoting government achievements raised concerns about incumbent advantage and was suspended by the High Court.¹¹³

The Elections Act also provides for deployment of technology in managing the elections to enhance accuracy and credibility of the elections in the stages of registration, identification and electronic transmission of voters. The adoption of technology in elections in the country has its genesis in the aftermath of the 2007-2008 post-election violence and the resultant evaluation and review by the Kriegler Commission. The Commission recommended deployment of technology, to manage elections in order to enhance its quality, transparency, accountability and credibility of the results.¹¹⁴

To give adequate lead time for adoption of technology during elections, it is required to be procured at least one hundred and twenty days before elections are held, be put in place and tested and verified sixty days before elections. This process should of necessity require participation by key stakeholders and the requirement by IEBC to acquire the systems in a transparent manner, testing and certification of the system, auditing the system, storage of data, access to electoral system and development of related technology

¹¹⁰ Matiang'i says 3 TV stations to remain shut pending probe <https://www.nation.co.ke/news/Matiangi-TV-stations-remain-shut/1056-4286150-10149h0/index.html>.

¹¹¹ The Carter Report PP 29.

¹¹² Ibid.

¹¹³ Final Report EU Election Observation Mission –KENYA 2017 PP 37.

¹¹⁴ IEBC Post Election Evaluation Report <https://www.iebc.or.ke/uploads/resources/V9UUoGqVBK.pdf..>

that will ensure the integrity of the technology to deliver credible polls.¹¹⁵ The provision is particularly important for the credibility of elections and the 2017 presidential election attracted a petition questioning the acquisition and deployment of technology through the stages of registering and identifying voters to tallying, announcing and verifying results.¹¹⁶

The main issue that arose here was verifiability of election results processed through the technology acquired by IEBC.¹¹⁷ The late acquisition of the KIEMS kits, for instance, impacted negatively on the registration of voters, registration of candidates, voting and transmission of results. The IEBC was accused of failing to offer access to information in its custody to verify the results announced.¹¹⁸ The provision for the use of technology is intended to ensure efficiency of the electoral process and deliver credible results. The 2016 legislative amendments in the Elections Act provided for deployment of integrated technology to manage identification, registration of voters and candidates and transmission of results. However the delivery of the kits behind schedule affected these activities¹¹⁹ and ultimately the voter register presented to the voters was not accurate.

The problems of technology were not only restricted to late procurement and voter registration but also extended to voting and transmission. While voting went on well in most areas without a hitch, in areas that had technical hitches, there was use of complementary voting systems which led to delayed transmission of results.¹²⁰ According to the Carter Report, the IEBC's results transmission system after the August 8th election undermined the transparency of the process, when election officials hindered the verification processes by parties and other stakeholders leading to legitimate questions on the integrity of the results that were announced.¹²¹ The Supreme Court, in the Raila 2017 case, found that the Commission failed to transmit results to the national tallying centre at

¹¹⁵ Section 44 Elections Act.

¹¹⁶ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ The Carter Report PP 29.

¹²⁰ Ibid.

¹²¹ Ibid.

the same time with the tally forms which was against Section 39(1c) of the Elections Act. The Court also found that the Commission used forms that were not genuine and it was criticized for failing to allow sufficient access to its transmission system which contravened the requirement of transparency and verifiability of the electoral process.

The use of ICTs in elections has advantages, including enhancing voter confidence and increasing the integrity, accuracy and transparency of the electoral processes. However, public participation is required before introducing new technology to boost voter confidence in the process. Lack of public participation by the public leads to mistrust and undermines the legitimacy of the electoral outcome. Also, to save on cost, IEBC should review on the technology adopted and be mindful of the short lifespan of the technology and match it with electoral cycle.¹²² This avoids a situation where expensive technology acquired is only used in one electoral cycle and becomes obsolete before the next elections as was the case in Kenya with Biometric Verification Register (BVR) Kits that were acquired for 2013 elections and could not be used in the 2017 general elections.¹²³

The Commission improved in deployment of technology for management of the presidential repeat poll held on October 26, 2107 particularly in transmitting and tabulating results, the IEBC did not win public confidence in the exercise.¹²⁴ In a nutshell, problems linked to technology affected the entire electoral process from registration, to voting, tallying and verification of results and was the main factor that caused the 2017 presidential election to be cancelled for failure to adhere to the Constitution.

Other forms of accessing and verifying information in the electoral process include the use of local and international poll observers who are accredited by the IEBC to observe the process.¹²⁵ According to Guidelines for African Union Electoral Observations and

¹²² International Idea: The Use of New Technologies in Electoral Processes, PP. 19.

<https://www.idea.int/sites/default/files/publications/the-use-of-new-technologies-in-electoral-processes.pdf>

¹²³ Report on the Examination of the Report of the Auditor General for the Financial Statements for the Independent Electoral and Boundaries Commission for the year ended 30th June 2017.

¹²⁴ Ibid.

¹²⁵ Section 42 of Elections Act.

Monitoring Missions the observer groups enhance the credibility of the electoral process, promote trust and give legitimacy to the process a position shared by the Declaration of principles for international election observation and code of conduct for international election observers.¹²⁶ In the 2017 General and Fresh Presidential elections, the Commission accredited almost 60,000 observers, out of which about 6,500 were long term observers while 51,308 were short term.¹²⁷ The observer groups made their observations on various stages of the elections –pre-election, during and after the elections. On the pre-election period, the observation relevant to this study was inability to register eligible Kenyans and delayed or inadequate voter education which in some cases was conducted when the registration process had commenced.¹²⁸

During the election period, the Carter Centre - one of the observer groups in the 2017 elections –outlined cases of media censorship which impacted on the flow information, inaccuracy in vote tallying and inconsistent messaging from the Commission.¹²⁹ On the other hand, the EU Observer Mission reported cases of harassment of the media and state ban on media activities such as the live coverage.¹³⁰ The Carter Centre, indicted IEBC in its final report for failure to provide adequate information as required by the law, particularly lack of communication regarding its decision making processes and failure to publish minutes of its meetings and how the decisions were reached.¹³¹ The Post Election Evaluation Report by the Commission’s accommodates most of the observer groups’ recommendations in dealing with the challenges that affected the flow of information during the electoral process, but also passed the blame to others quarters such as parliament to institute legal reform and government agencies that deal with data, affecting the accuracy of the register.¹³²

¹²⁶ Document endorsed by various international organizations on October 27 2005 at the United Nations, New York.

¹²⁷ IEBC Post Election Evaluation Report PP 116.

¹²⁸ Ibid.

¹²⁹ Carter Report PP. 24.

¹³⁰ Final Report EU Election Observation Mission –Kenya 2017 PP 41.

¹³¹ Ibid.

¹³² The Post Election Evaluation Report PP 93.

The role of party agents is also provided in the Elections Regulations to observe, verify and authenticate voting, counting and transmission of results.¹³³ The Supreme Court linked the role of agents to expectations of the public and to the overall legitimacy of the electoral process, and stated that IEBC was required to adhere to national values and principles of governance¹³⁴ by involving stakeholders in the electoral process.

Access to information in the custody of IEBC is important for petitioners seeking to enforce their rights after the elections. Of importance is that the right to scrutiny of votes specifically and generally as well as recount of votes in an election petition is anchored on Section 82(1) of the Elections Act and Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017. The Presidential Election Petition Rules, 2017 are however silent on the issue of scrutiny. Under Section 82 of the Elections Act, the election court determines the manner of scrutinizing votes. Jurisprudence from the courts has also justified scrutiny of votes. In *Philip Mukui Wasike v. James Lusweti Mukwe & 2 Others*,¹³⁵ it was observed that: scrutiny of votes assists the court in investigating irregularities and breaches of the law, determine valid votes cast in favour of each contestant and help in understanding the vital details of the electoral process. This is hinged on the ability of the petitioner to marshal evidence to persuade the court which should be made prior to the start of hearing of the petition.¹³⁶

The apex Court in the *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*¹³⁷ upheld the above jurisprudence and ordered IEBC to allow access and give the Court and petitioners certified copies of the original tally forms the polling stations that were used to generate the final tally of the Presidential election and the petitioners were also granted the request to use an aid or reading device to assist in establishing the authenticity of the forms and declared that the Presidential Election Results did not comply with the mandatory provisions of Sections 39(1C) and

¹³³ Section 82 Elections Regulations, 2017.

¹³⁴ Article 10 (2) (c).

¹³⁵ *Philip Mukui Wasike v. James Lusweti Mukwe & 2 Others*, [2013] eKLR,.

¹³⁶ *Philip Osore Ogutu v. Michael Aringo & 2 Others*, Busia High Court Petition No. 1 of 2013.

¹³⁷ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

44 of the Elections Act as well as the Elections (Technology) Regulations, 2017 – a finding that contributed to the nullification of the presidential election of 2017.

Under Regulation 15 of the Elections (Technology) Regulations 2017, those seeking information rely on Sections 2 and 4 of the Access to Information Act (No. 31 of 2016) to justify their entitlement to the information sought as a matter of right and access to information can also be invoked under Article 50 of the Constitution (on the right to a fair trial) and Article 259 thereof (construing and interpreting the Constitution). In *the Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*¹³⁸ the petitioners requested for computer and system logs as they are permanent and leave a perpetual trail that is relevant in determining some of the issues that arose in the petition. What emerges from this discussion is that courts are not hesitant in granting the right to access electoral information to address breaches of the law during the election.

The Commission is required to put in place mechanisms to ensure the availability of information which is accurate, and confidential.¹³⁹ The Commission is also required to keep data in a classified manner and provide for the procedure of accessing information from the Commission.¹⁴⁰ Some of the information sought from the Commission has security implications. For instance, some information sought from the Commission may compromise the system and privacy of individuals and affect the future use of the system and therefore it is important to ensure that there is absolute security of the system¹⁴¹ A challenge related to this, emerges in a situation where the software company hosting IEBC operations is foreign based and not party to court proceedings and therefore may hinder access to information by petitioners as contacting persons in charge of the

¹³⁸ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

¹³⁹ The Elections (Technology) Regulations, 2017, First Schedule.

¹⁴⁰ Regulation 15 The Elections (Technology) Regulations.

¹⁴¹ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

operations at the company may face challenges and delay the hearing and determination of the petition.¹⁴²

In a bid to give more powers to the Commission, the Elections Act introduced two more provisions that are a departure from the previous dispensation. These are; the prosecutorial powers of the IEBC with respect to Election Offences and the enforcement of the Election Code of Conduct.¹⁴³ In enforcing the Code, the Commission can issue a formal warning, disqualify a candidate or a political party from contesting the elections and may ban a candidate or a political party from contesting subsequent elections. Information on these actions is always communicated to the public through various communication channels

2.4.4 Election Offences Act 2011

The Act¹⁴⁴ criminalises intentional actions that interfere with the electoral process. The actions include those committed by the Commission staff that interferes with the electoral process; at registration of votes, voting, announcement of results, prevents voter of different abilities from voting, interferes with tallying of votes or fails to announce results. The act also criminalises wrongful use of technology which interferes with the results or data of elections.¹⁴⁵ In essence, the Elections Offences Act seeks to secure the sanctity of the voters' decision by penalizing certain acts that interferes with this right. These provisions have consequences on the integrity of the electoral process and seek to ensure that the elections results are transparent, accurate, verifiable and accountable and the information available to the public reflect the will of the people.

2.4.5 The Access to information Act No. 31 of 2016

The statute gives effect to the enjoyment of the right to access information.¹⁴⁶ The objective of this landmark statute is to provide a framework for public entities and private bodies to disclose information proactively, and to provide information when requested, as

¹⁴² Ibid.

¹⁴³ Elections Act, 2011, part VIII, cl 10.

¹⁴⁴ Election Offences Act, No 37 of 2016.

¹⁴⁵ Election Offences Act S.6.

¹⁴⁶ Access to information Act No. 31 of 2016.

required by the Constitution to promote the culture of disclosing information by both private and public entities.¹⁴⁷ The current institution heralded a new legal order and the Act protects those who disclose information of public interest in good faith. The Act expands the provision of Article 35 by extending the right to access information to juristic bodies.¹⁴⁸ The decision in *Katiba Institute v Presidential Delivery Unit*¹⁴⁹ upheld overriding the earlier decision in *Famy Care v Public Procurement Review Board*¹⁵⁰ which limited access to information to citizens.

Public institutions hold information in trust for the public and people in need of the same should access it expeditiously, at a reasonable cost. Access to information can only be denied in cases where disclosure is likely to undermine national security, impede the due process of law; endanger the safety, health or life of any person.¹⁵¹ Public institutions may limit sharing information if it is likely to cause substantial harm to the ability of the Government to manage the economy of Kenya.¹⁵² Within the context of democratic process, an election is transparent if various stakeholders have the prerequisite information to make decisions. For instance, the political parties are expected to have adequate and timely information on the election preparedness and the timelines which they utilize in realizing their political goals. Consequently, the voter makes an informed choice depending on how the political parties and the civil society convey information to the public. This is a chain that must be cautiously maintained to ensure transparent and verifiable elections as provided in the Constitution.¹⁵³

2.4.6 Public Procurement and Asset Disposal Act No 33 of 2015

This Act gives effect to Article 227 of the Constitution mainly by providing to provide procedures for efficient public procurement and disposal of assets disposal by public entities. In relation to this study, the Commission procures a lot of goods and services to

¹⁴⁷ Access to Information Act Section 4.

¹⁴⁸ Access to Information Act Section 2.

¹⁴⁹ *Katiba Institute v Presidents Delivery Unit & 3 others* [2017] eKLR.

¹⁵⁰ *Famy Care Limited v Public Procurement Administrative Review board & another & 4 others* [2013]eKLR.

¹⁵¹ Article 25 Constitution of Kenya.

¹⁵² Access to Information Act Section 6.

¹⁵³ Article 81 (e).

manage elections. Of critical importance, is the infrastructure that gathers, collates, processes, stores, disseminates vital information and allows access to that information required for the conduct of elections. Being a public entity, IEBC is required to follow the provisions of the Act when procuring materials for the elections. Some of the process may be too lengthy¹⁵⁴ in view of the deadlines involved in an election cycle and procurement can thus hamper efficient management of elections yet the delicate nature of electoral processes requires transparent procurement processes, to win the trust of stakeholders and the general public. The Court of Appeal endorsed procurement to be undertaken through direct procurement by the Commission without public participation due to limited lead time to the elections and taking care of the public interest as was the case for printing of presidential ballot papers.¹⁵⁵

2.5 Conclusion

This Chapter demonstrates the reality that the information the public gets from various public bodies determine how they make decisions regarding activities managed by those bodies, this includes a body managing the election process. Access to information is thus a condition antecedent for the public's participation in the democratic activities in the country. The review of the legal framework demonstrates that various laws link effective conduct of elections on accessing information. From the SDG to the international legal instruments, access to information is intertwined with the exercise of political rights and participation in governance matters that affect them.

The ACHPR resonates with the provisions of international instruments binding member countries to implement legislation on accessing information and enable citizens to participate in governance. The national laws have been enacted to effect the provisions of the international and regional instruments and guarantee the right to access information to fulfill the enjoyment of political rights. As highlighted in the UN General Resolution 59 (1) "Freedom of Information is a fundamental right and is the touchstone of all the freedoms..." captures the essence of this right and without it, exercise of political rights

¹⁵⁴ Part VI, VII and VIII of the Public Procurement and Asset Disposal Act 33 of 2015.

¹⁵⁵ *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR.*

cannot be effectively achieved. The next chapter will elucidate further on the right to access information during the electioneering period by seeking responses from different categories of respondents and secondary data on how this right is affected during the conduct of elections in Kenya and among the questions to be answered will be, whether these legal provisions are adequate to protect the exercise of the right to access information.

CHAPTER 3
RESEARCH FINDINGS ON EXERCISING THE RIGHT TO ACCESS
INFORMATION DURING THE 2017 ELECTIONS IN KENYA

3.1 Introduction

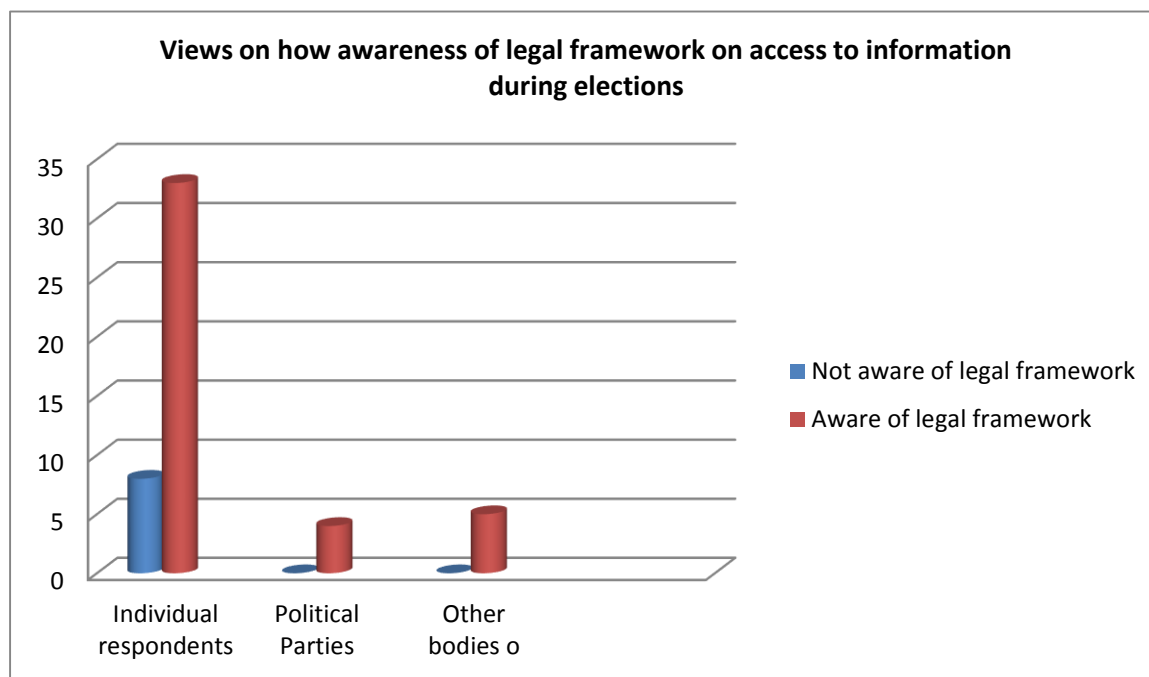
The Chapter compiled views on what hindered access to information during the 2017 elections including the effect of the legal framework and the conduct of the Commission at pre-election period, voter education, voter registration and verification, nomination of candidates, audit of the register, voting, tallying and transmission and dispute resolution. The Chapter also presents the challenges encountered by the Commission during elections that affected access to information during the electoral period. In *Zebedeo John Opore v The Independent Electoral and Boundaries Commission*¹ the court declared that accessing information held by the state is among the most effective ways to uphold the electoral values of transparency and accountability as provided in the Constitution. The court further explained that accountability in governance is only attainable if information in the custody of public bodies is accessible to enable the public participation in a democracy and increase confidence in government and enhance its legitimacy to govern.

3.2 Legal framework and access to information during elections

The study sought to find out the adequacy of existing legal frameworks in ensuring access to information during the 2017 elections. Unlike Chapter two on the legal framework, this section presents the views of respondents on the legal framework that supports access to information.

¹ *Zebedeo John Opore v The Independent Electoral And Boundaries Commission [2017] eKLR.*

Figure 1. Awareness on existing legal framework on access to information during elections



The feelings of most respondents were well captured by Fiimba who stated that:

“The Constitution and the Access to Information Act exist to facilitate access to information. However, the IEBC, like other government agencies has not been proactive in telling the public how to leverage on this law to make use information domiciled in the Commission”²

This assertion was supported by 33 individual respondents who stated that the legislative framework was highly supportive of access to information during elections and only eight (8) respondents were not aware of the legislation. The respondents, who were aware of legislation that facilitate access to information during elections, stated that implementation of laws was hampered by several challenges which included late procurement of equipment, malfunctioning equipment, and lack of supporting infrastructure, factors which affected access to information during verification and identification of voters. All respondents from political parties and organizations stated that there was an adequate legal framework to access all information in custody of the electoral body. According to one of the respondents in charge of elections in one of the political parties, the legal framework was largely in

² The respondent works as a communications professional in an organization dealing with ICT and Communications.

place save for a few adjustments to make it in tandem with the best electoral practices in the world.³ The IEBC representative was in agreement with this position and that of respondents that the legislative framework was robust save for the hitches that occurred during implementation.

Even with a supportive legislation in place, the 2017 electoral period exposed gaps in the prevailing legislation and the need to resolve the legal complaints swiftly.⁴ There were some significant changes affecting the electoral process in 2017, which included appointment of new IEBC commissioners and the introduction of complementary mechanisms to support technology during the registration and identification of voters and the process of transmission of results,⁵ much remained the same. The election like the preceding one of 2013 was marred by delays in procurement of technology, contestations on use of technology and complementary mechanisms, pre-election violence, irregularities in the poll register, flawed nomination processes by political parties and failure to legislate on the attainment of the two third gender rule in representation. Once again, the rhetoric around elections pitted peace against credible polls in the process falsely portraying these issues to the public as a winner-take-all choice between the two.⁶

According to Africog's Report on Preparedness of 2017 Elections⁷ the legal review on the electoral framework had provisions that implied the existence of multiple registers, did not provide for the Supreme Court to give orders while hearing petitions to scrutinize the recount of the presidential ballots and allows the Commission, through The Elections (Parliamentary and County Elections) Petition Rules, 2017 and The Supreme Court (Presidential Election Petition) Rules, 2017) to be the custodian of electoral materials during the determination of the petitions. The provision that allows more than one voters' register was meant to address failures that may arise out of use of the electronic register, however there were worries, particularly among the

³ Interview with a representative who chairs elections in one of the parties.

⁴ Final Report: 2017 Kenya General and Presidential Elections, March 7, 2018 Carter Centre <https://reliefweb.int/report/kenya/final-report-2017-kenya-general-and-presidential-elections-march-7-2018>

⁵ https://africog.org/wp-content/uploads/2017/05/Ready-Or-Not_An-Assessment-of-Kenya%E2%80%99s-Preparedness-for-General-Elections-on-8-August-2017.pdf.

⁶ Ibid.

⁷ Ibid.

opposition, that the complementary register may open doors for errors and fraud.⁸ The lack of legal provisions to order scrutiny of election materials or recount of votes in a presidential election was also noted by the Court in the *Raila & Another V IEBC and Two Others*⁹ as one of the impediments to the determination of the verifiability and accuracy of a presidential election.

Before the elections were held, the provisions for determining the valid votes cast were not clear and IEBC provided conflicting information to its employees.¹⁰ The changes that were made by the Commission and the courts so close to the General Election, and the subsequent repeat presidential polls, brought to the fore legal uncertainty prior to the polls. Before the August 8 election, the IEBC regulations on the verification and modification of presidential results,¹¹ the requirement that support signatures for independent candidates be submitted by non-party members, and the obligation of public officers contesting the elections to resign from their government jobs at least six months before an election were declared unconstitutional.¹² Although no formal changes were made to the regulations, the IEBC adapted its procedures to be in tandem with the judgments. According to IEBC's Post Election Evaluation Report, the last minute changes on election technology caused a shift by Commission to use technology without the necessary safeguards to the users and the Commission.¹³

The amendments to the IEBC Act, shortly after the annulled presidential elections lowering the quorum of meetings of the commission and designating the vice-chairperson to chair meeting in the absence of the Chairperson of the Commission, quorum meeting from five to three members effectively allowing important decisions to be taken by just two members were hurriedly passed through in the National

⁸ Ibid.

⁹ *Raila & Another V IEBC and Two Others [2017] eKLR*.

¹⁰ The IEBC issued conflicting clarifications on the validity of correctly marked but unstamped ballot papers. On Aug. 3, through an internal memo, the IEBC directed returning officers, constituency returning officers, and deputy returning officers to consider unstamped ballots as valid. Two days later, it reversed its opinion.

¹¹ *IEBC v Maina Kiai & 5 Others [2017] eKLR*.

¹² The ruling of the High Court on April 7, 2017, nullified Section 39(2) and (3) of the Elections Act and Regulations 83(2) and 87(2)(c) of Elections (General) Regulations 2012. Section 29 and 43(5) of the Elections Act were declared unconstitutional. The Employment & Labour Relations Court ruled that civil servants do not have to resign their positions to stand as candidates in an election.

¹³ The Post-Election Evaluation Report.

Assembly in a move that was widely perceived by the opposition to benefit the ruling party.¹⁴ More crucially, an amendment was passed that provided that presidential results issued through public broadcasters were interim and election results be transmitted electronically and with a physical copy from the polling stations to the constituency and national tallying centres without filling any prescribed form.¹⁵ The legal amendments did affect the access to information in the repeat presidential poll and were also contrary to the Kreigler recommendations and the Venice Code which prescribe a minimum period of one and a half years for changes to laws affecting elections. Confirming that the late amendments affected access to information, the High Court in *Katiba Institute & 3 others v. Attorney General & 2 others*,¹⁶ declared these provisions contrary to the national values and principles and the electoral principles, reasoning that the lack of a prescribed form to transmit results would make it difficult to achieve verifiable, accountable and transparent results transmission process and would open room for manipulation of the results.¹⁷ Further, the Court held that the amendment not to invalidate results which were not transmitted electronically was counter to the principles of free and fair elections..¹⁸

The other legal flaw is the overlapping mandate between IEBC and other bodies such as the Political Parties Dispute Tribunal (PPDT). Elections Observers recommended, streamlining the jurisdiction of the two bodies to eliminate overlapping jurisdictions of the IEBC and PPDT in order to eliminate delays in resolution of electoral disputes such as candidate nominations. They also recommended introduction of regulations for resolving election day disputes, application of consistent timelines for voter registration to reduce the duration for the resolution of candidate nominations, schedule activities such as voter registration consistently to allow verification and audit of the voter register on time, and clarify the procedures to voters and stakeholders.¹⁹

¹⁴ Ibid.

¹⁵ The Election Laws (Amendment) Act, 2017 November 2, 2017.

¹⁶ *Katiba Institute & 3 others v. Attorney General & 2 others Constitutional Petition No. 548 of 2017 [2018] eKLR.*

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ The Carter Report PP. 8.

The lack of a properly structured and functioning Political Parties Liaison Committee, (PPLC) deprived the Commission of the services of the body meant to promote dialogue between the Office of the Registrar of Political Parties (ORPP), Political Parties and the Commission²⁰ PPLC plays among others, the role of promoting access to information by promoting consultations, cooperation, and information sharing between the three entities on electoral matters in order to promote free, fair and credible elections.²¹

The lack of adequate consultations with political parties was captured by one of the respondents from political parties who stated:²²

“Consultations were not properly structured to included political parties on critical electoral issues. Issues related to technology particularly, were implemented with little input from political parties and candidates”

To effectively execute its mandate, the Committee is required to have functional offices at the county and national levels²³ however, during the 2017 elections, the Committee lacked county offices to execute its functions at the County level and there was dissatisfaction in the manner in which the national officials were elected.²⁴ Also, there were no procedures for election of various committees depriving it of structures to properly execute its mandate.²⁵ The absence of a well-functioning PPLC deprived IEBC of another platform to formalise regular and structured dialogue with political parties and candidates, deal with emerging challenges and proactively disclose information to the public to prevent unnecessary disputes²⁶ in matters that could have been dealt effectively by the PPLC.

²⁰ Political Parties Act, 2011, sec 38 (3).

²¹ The Political Parties (Political Parties Liaison Committee) Regulations 2016, section 7.

²² Respondent who representing one of the Parliamentary Political Parties.

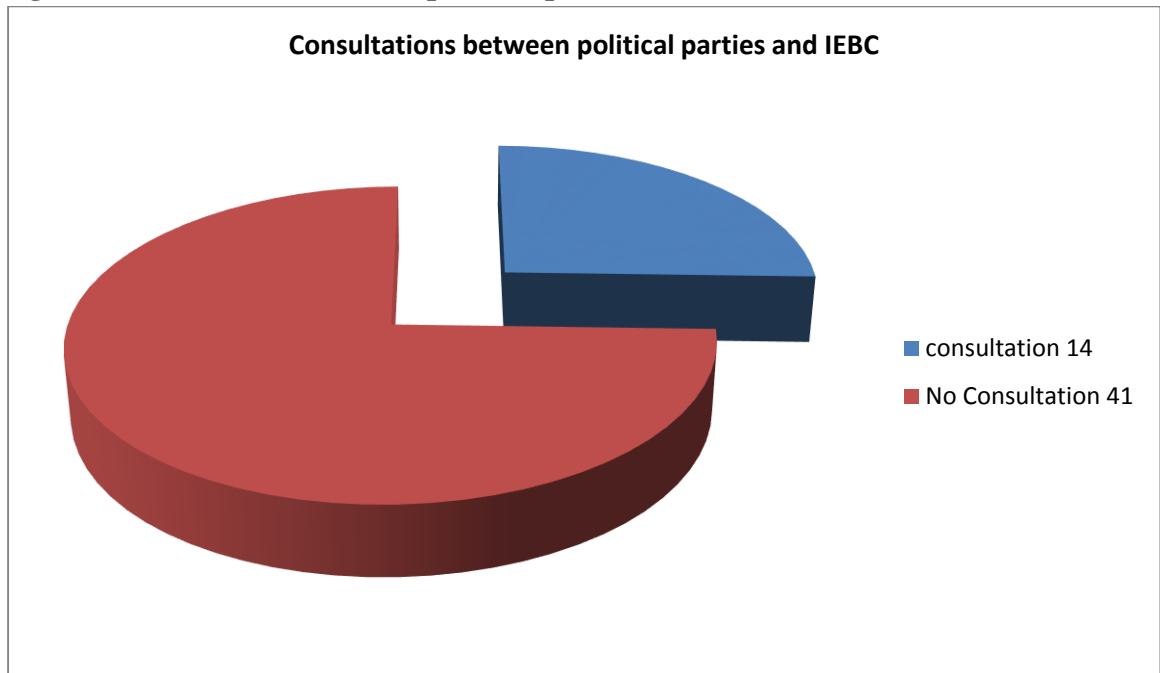
²³ Political Parties Act, 2011, sec 38 (2).

²⁴ From law to practice: a report on the assessment of political parties’ adherence to the law in Kenya. Institute for Education in Democracy (ied) 2015 Website: www.iedafrica.org.

²⁵ Ibid.

²⁶ Reflections on Electoral Management in Kenya - Violence and Intimidation: Lessons From the 2017 Presidential Elections in Kenya Felix Odhiambo Owuor in Reflections on the 2017 Elections in Kenya, Election Working Paper Series on Emerging Judicial Philosophy in Kenya Edited by James Gondi pg 141.

Figure 2 Consultation between political parties and IEBC



The absence of the PPLC is reflected by respondents in the study, with only 14 out of the 55 stating that the IEBC consulted parties in dispute resolution. Even those who acknowledged that there was consultation, complained that it was only on some matters. The finding from the study contradicts the IEBC position, whose representative maintained that PPLC was operationalized and remained the only forum for consultations with stakeholders after the Court outlawed the Elections Technology Advisory Committee (ETAC).²⁷

Moreover, parliament failed to enact legislation to enable representation of at least a third of either gender to any elected body; this was despite the court decision obliging it to do so.²⁸ The failure to enact the legislation, undermined the Constitution and denied women the right to equally participate in governance as required under the Convention on the Elimination of all Forms of Discrimination against Women, which Kenya has ratified.

The other shortfall in the legal framework is the time frame provided under the Constitution for resolution of disputes resulting from the presidential elections, is not

²⁷ Interview with IEBC Official.

²⁸ Kenya constitution, Article 81(b) provides that no more than two thirds of appointive or elective positions should be more than two thirds of one gender.

adequate to adjudicate the dispute adequately. The petition has to be filed seven (7) days after the announcement of the results and thereafter, the Supreme Court has 14 days to determine the petition.²⁹ The seven-day timeframe provided for filing the petition is hardly enough to access all the information required to prosecute the case, neither is the four-day timeframe provided enough for the respondents enough to prepare a response to the petition neither is it enough for the Supreme Court to consider all the evidence and pass judgment within time.³⁰ During the 2017 presidential election petition, it required a court order for the petitioner to access some information relating to the conduct of the election and even with the order, not all the information was made available to the court.³¹ The general opinion among stakeholders is that the 14-day period for hearing and determination of the presidential petition is too short. The short timeframe is a drawback to the right to an effective remedy, as it denies the court sufficient time to scrutinize evidence or conduct a recount where needed.³² The Supreme Court in the *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* Petition noted in its judgment that the short duration is inadequate for effective determination of the petition as it does not allow it to scrutinize and order verification of certain election activities which could clarify the accuracy of the results and affect the petition's outcome.³³

The Courts and IEBC made key decisions about the electoral framework very late in the electoral calendar, prior to both the August 8 and October 26, 2017 elections, and this had an effect on application of election procedures and also added to the legal uncertainty before the election date. On several occasions prior to the August 8 election, the courts declared some of the provisions of the IEBC regulations unconstitutional, including the verification and modification of presidential results by the IEBC.³⁴ The requirement that support signatures for independent candidates be supported by voter not aligned to any party was also quashed and the requirement for

²⁹ Article 140.

³⁰ Supreme Court (Presidential Election Petition) Rules, 2017.

³¹ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

³² The Carter Report.

³³ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017]

³⁴ *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR.

public servants, interested in contesting, to resign six before the election suffered a similar fate.³⁵ Although no formal changes were made to the regulations, the Commission had to change its procedures to align them to the court decisions. The ruling of the High Court on April 7, 2017, nullified Section 39(2) and (3) of the Elections Act and Regulations 83(2) and 87(2)(c) of Elections (General) Regulations 2012. Section 29 and 43(5) of the Elections Act and declared them unconstitutional. The Employment and Labour Relations Court ruled that civil servants do not have to resign their positions to vie in an election.³⁶

The Code of Good Practice in Electoral Matters of the Venice Commission requires a cautious approach to fundamental aspects of the electoral law, in particular the electoral system, membership of electoral bodies and the drawing of constituency boundaries, which should not be affected less than one year to the polls.³⁷ and the Kriegler Report also made similar recommendations.³⁸ However, in contravention of this Code, IEBC was reconstituted eight (8) months before the general election³⁹ which action gave the new commissioners hard time to jell and adapt to the new working environment at the Commission. The late appointment of commissioners was made worse by the lack of clear separation of roles between the Commissioners and the secretariat and the divisions among the commissioners with the end result being issuing conflicting information to the public.⁴⁰ For instance, the difference between the Chief Executive Officer and the Chairman of the Commission over procurement degenerated into a public spat leaving the public with no credible information on the subject being disclosed.⁴¹ There were also late amendments to the electoral laws in contravention of the provisions of the Venice Code of Electoral Conduct.

³⁵ The ruling of the High Court on April 7, 2017, nullified Section 39(2) and (3) of the Elections Act and Regulations 83(2) and 87(2)(c) of Elections (General) Regulations 2012. Section 29 and 43(5) of the Elections Act were declared unconstitutional. The Employment & Labour Relations Court ruled that civil servants do not have to resign their positions to stand as candidates in an election.

³⁶ *Eric Cheruiyot & 7 Others v Independent Electoral and Boundaries Commission & 7 others [2017] eKLR*

³⁷ Point II.2.b.

³⁸ The Kriegler Report .PP 153.

³⁹ The Kenya Gazette Vol. CXIX –No 8, Nairobi 18th January 2017.

⁴⁰ Nic Cheeseman, Karuti Kanyinga, Gabrielle Lynch, Mutuma Ruteere & Justin Willis (2019) Kenya's 2017 elections: winner-takes-all politics as usual?, *Journal of Eastern African Studies*. PP 215-234.

⁴¹ Leaked memo from Wafula Chebukati to Ezra Chiloba exposes scandal at IEBC *standard media.co.ke* visited August 8, 2019. <https://www.standardmedia.co.ke/article/2001253901/leaked-memo-from-wafula-chebukati-to-ezra-chiloba-exposes-scandal-at-iebc>

The Composition of the Commission with only the Chairman having a legal background made it hard for delegation of tasks such as adjudication of political party disputes on party nominations and enforcement of the electoral conduct forcing the commission to rely on the chairman on tasks which would ordinarily be handled by the chair of the legal affairs committee at the Commission⁴² in the process occasioning delays in delivery of decisions.

3.3 To what extent did IEBC's conduct enable access to information in its custody?

IEBC's obligation to share information in its custody is critical to the successful conduct of elections. The legal framework in place requires IEBC to allow access to information in its custody. Article 35 (1) every citizen has the right to access information held by a public body, while the IEBC Act section 27, Elections Act 2011 sections 39, 40, 41,42 and 44 obliges the Commission to share information at all stages of its activities. This position is further emphasized in the Access to Information Act 2016, sections 4 and 5. The importance of access to information was emphasized in the South African Case of *Brümmer vs Minister for Social Development and Others*⁴³ where the Court stated:- "*.....access to information is fundamental to the realization of the rights guaranteed in the Bill of Rights...*" this right can only be limited as provided by Article 24 of the Constitution.⁴⁴ This section looks at the access to information in the custody or control by the Commission under the subheads; pre-election period, voter education, voter registration, voting, tallying and transmission, dispute resolution, and information on anti-corruption and ethics of candidates.

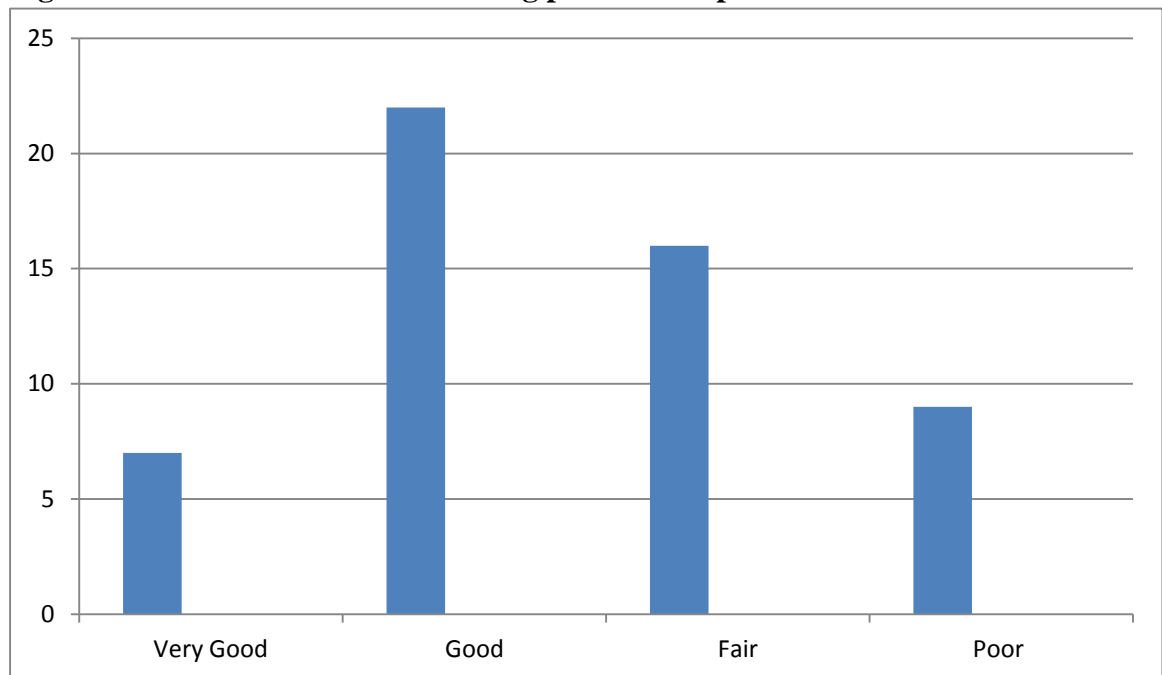
⁴² Interview with the IEBC Representative.

⁴³ *Zebedeo John Opore v The Independent Electoral and Boundaries Commission [2017] eKLR.*

⁴⁴ *Ibid.*

3.3.1 Pre-election period

Figure 3. Access to information during pre-election period



From the graph above only 7 out of 54 respondents rated the efforts by Commission in allowing access to information as very good, 22 as good, 16 rated the effort as fair while 9 respondents rated the Commission as poor in releasing information during the pre-election period. The Commission representative rates access to information as good with minor challenges which was attributed to late disbursement of funds to facilitate publicity.⁴⁵ The poor rating by respondents on access to information indicts the Commission for failing to make information available as required, yet, the general rule under the Article 35 and in the Access to Act favours disclosure unless as restricted by the law. This was held in the case of *Zebedeo John Opore v The Independent Electoral And Boundaries Commission*⁴⁶ when the court stated that the disclosure of information is the rule, and exemption from disclosure is the exception, only as provided by the law.

⁴⁵ Interview with the IEBC Representative.

⁴⁶ *Zebedeo John Opore v The Independent Electoral And Boundaries Commission* [2017] eKLR.

The new IEBC administration installed only seven months before the elections, began well by holding the National Elections Conference on elections and gave regular updates on election planning, however it failed on several occasions to give regular and consistent updates on the elections, did not release information on its internal working processes and failed to publish proceeding of how the commissioners voted ultimately compromising transparency of its activities.⁴⁷ This lack of transparency negatively affected the confidence and trust of the electorate, political parties, civil society actors and other stakeholders in the work of the IEBC claiming that the Commission was operating contrary to Article 81 of the Constitution which provides for transparency as one of the main principles of free and fair elections and Para.19 of the 2011 UNHRC General Comment No. 34 to Article 19 of the ICCPR that requires proactive disclosure of information on issues of national importance. Part of the reasons is in the IEBC structure which designates the Chairman as the official spokesman and does not delegate this role to a communications department which is in a better position to share most of the information generated by the Commission.⁴⁸

Access to information in the pre-election period was also affected by the late delivery of KIEMS kits contrary to the requirement that technology should be in place 60 days before the date of elections. The procurement of the KIEMS and ballot papers was delayed by legal challenges with the first consignment arriving on April 14, 2017 while delivery was completed in early June, 2017. The staggered and late delivery of KIEMS which were to be used for verification of the register negatively impacted the verification exercise as voters did not have adequate time to access the register and verify it.⁴⁹ This may have contributed to some of the flaws in the register used during the elections.

⁴⁷ The Carter Report PP 12.

⁴⁸ Interview with the IEBC Representative.

⁴⁹ Ibid.

3.3.2 Voter education

One of the ways of empowering voters to participate in elections is to provide information through voter education. IEBC embarked on a voter education programme for the election as per its strategic plan⁵⁰ in line with Article 84 (g) of the Constitution which stipulates voter education as one of the mandates of the Commission.

The activities for voter education include the voter education regulatory framework, a continuous voter education programme with the public and stakeholders and sensitization campaigns on voter registration, pre-election and General Election interventions. In the run up to the 2017 general election, the Commission reviewed the Voter Education Curriculum, Trainers of Trainers (ToT) Manual, a Handbook on Elective Positions, Voter Education Regulations, and development of a Voter Education Policy. The Commission complemented these interventions through development of voter education materials that included posters, brochures, handbooks, fliers, stickers and booklets. It also converted education materials to suit categories of voters who live with disabilities, particularly the braille formats, targeting those with visual disabilities and sign language experts for those with hearing disabilities. Sensitization was also undertaken for political parties on campaign financing, political party nominations rules and guidelines. The Commission also utilized mass media, social media interactive forums such as Twitter, Facebook among others to attract voters especially the youth to the Commission's website and various communication techniques targeting special interest groups such as people with disabilities, women, youth and the marginalized groups.⁵¹ Other groups used to mobilize voters included the provincial administration, civil society organizations, political parties, trade unions, education institutions, among others.⁵²

While there was notable increase in voter education by IEBC as the date for elections drew closer, Africog in its report on electoral preparedness noted that the Commission did not have materials until the end of June 2017, leaving it with just over a month to

⁵⁰ IEBC Strategic Plan 2015 -2020 PP. 15,

⁵¹ The Post Election Evaluation Report. PP. 17.

⁵² Interview with IEBC Representative.

distribute election materials.⁵³ This problem was exacerbated by lack of a good strategy for providing education as the Commission relied on events organized by other groups to disseminate information, which approach had flaws as not all target groups could be reached⁵⁴ and as observed by a respondent who is also an investigative journalist,⁵⁵

“Most of the materials were tailored for the literate and was unfriendly to the masses most of whom have modest education or in worst cases no formal education at all.”

The IEBC implemented its regular voter education programming, which took place in each ward with a crash programme which was launched just three weeks before Election Day a strategy which though premised to benefit on the high interest among voters as the polls drew closer, may not have worked successfully as the duration was too short to enable the Commission reach different segments of voters.⁵⁶ There was also information overload on voters as a lot of information was being released within a short duration as confirmed by the interview with the IEBC representative. The Post-Election Evaluation (PEE) Report alludes to late commencement of activities to late disbursement of funds to undertake most pre-election activities including voter education.⁵⁷

Some groups reported that they were accredited by the IEBC to conduct voter education, but the Commission did not provide them with new education materials. The lack of coordination between the providers of voter education, the Commission, and the government, made the exercise inefficient, and possibly with repetitive programming, leading to some voters being excluded and others being covered more than once.⁵⁸

⁵³ An Assessment of Kenya’s Preparedness for the 8 August 2017 General Election April - June 2017, African Centre for Open Governance (Africog & Kenya for Peace with Truth & Justice. PP. 23.

⁵⁴ Ibid.

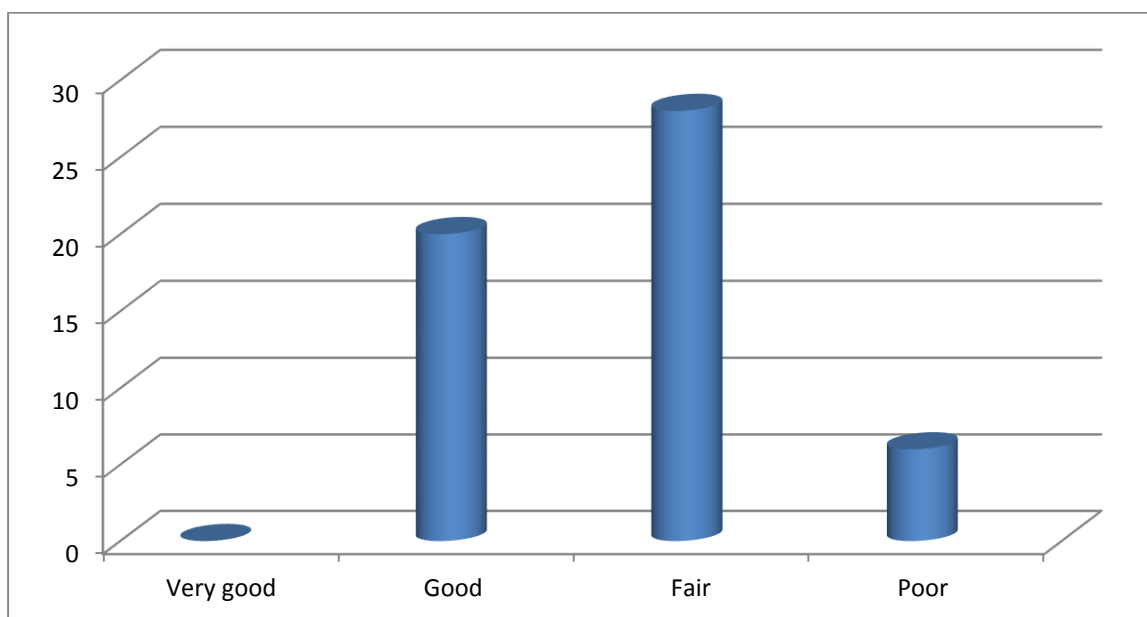
⁵⁵ Representative of African Investigative News.

⁵⁶ Ibid.

⁵⁷ The Post Election Evaluation Report pg.18.

⁵⁸ Supra Note 39.

Figure 4. Rating of access to information during voter registration



From the rating by the respondents The Commission could have impacted more by starting its voter education programme earlier than it did during the 2017 election cycle.

3.3.3 Voter Registration

Registration of voters is one of the core functions of the Commission.⁵⁹ The register is the critical document that Commission uses to validate the voters and where if one is not listed they cannot participate in elections. The registration of voters is a continuous exercise and the Commission is also required to revise and update the register to ensure its comprehensiveness, accuracy and completeness.⁶⁰ In the run up to the 2017 General Election, the Commission undertook several activities to register voter and ensure compliance with the legislation⁶¹ The activities included: reviewing voter registration and election training materials, continuous registration of voters, conducting to mass registration of voters (MRV), developing a database of Kenyans in the diaspora who are

⁵⁹ Article 84 (g) Kenya Constitution.

⁶⁰ Part 11, Elections Act, 2011.

⁶¹ The Post-Election Evaluation Report. PP. 17.

eligible to vote, mapping registration centres, engaging stakeholder who were crucial in updating the register, opening the register for inspection and verification and publishing the final register for purposes of elections.⁶²

The Constitution confers every eligible citizen with the right to be registered as a voter without unreasonable restrictions⁶³ and the IEBC Act section 5 provides for continuous registration of voters. The only requirement for one to qualify as a voter is a national identity card or passport. Once registered, the person is entitled to participate in electing leaders of all positions at the designated polling station. Voters are also entitled to transfer the votes to any other station so long as they meet the stipulated requirements set in Section 7 of the Elections Act, 2011.

The registration of voter registration was preceded by massive voter sensitization from the Commission, Community Service Organizations, political parties, candidates, religious organizations, lobby groups, the media among others as recorded from respondents. Owing to the high involvement of stakeholders, the approval ratings from the respondents for the exercise recorded a very high standing at more than 70 percent for those who rated it fair to very good.

Like advanced democracies, most African states including Kenya, hold periodic elections as regulated by the law which is often viewed as one of the basic institutional cores of democracy.⁶⁴ The problem, however, is that these elections are reportedly tainted with flaws and irregularities undermining the credibility of the outcome. There have been complaints of bloated voter registers, over-voting and tampering of election outcome, among others, in Kenya.⁶⁵ According to International IDEA CSO's structures at local and national level are useful complements to the EMB's efforts of sensitizing the public which they do effectively through public

⁶² Ibid.

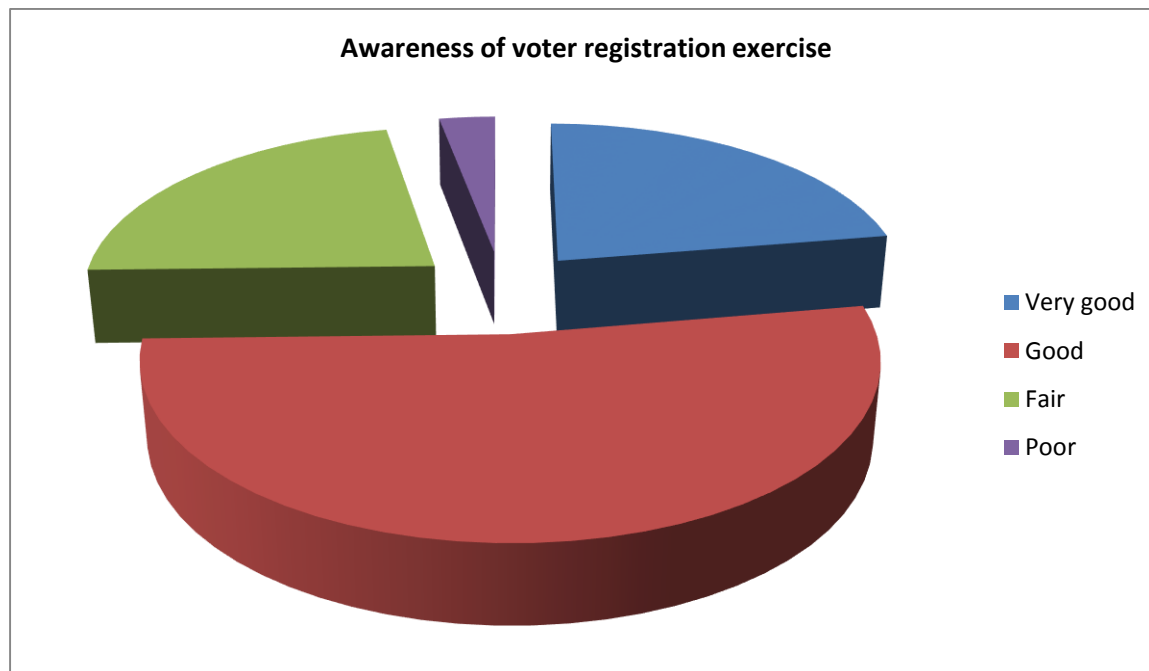
⁶³ Article 38 (3).

⁶⁴ Lydia Apori Nkansah, Dispute Resolution and Electoral Justice in Africa: The Way Forward. *Africa Development / Afrique et Développement*, Vol. 41, No. 2 (2016), pp. 97-131 <https://www.jstor.org/stable/10.2307/90013871> <Accessed April 17, 2019>.

⁶⁵ S. Omotola, Explaining Electoral Violence in Africa's (New) Democracies. *African Journal on Conflict Resolution* Vol 10, No 3 (2010) PP. 51-73. <https://www.ajol.info/index.php/ajcr/article/view/6332>.

engagement.⁶⁶ Structured engagement of IEBC's with CSOs and the media is crucial to increasing awareness of its activities.

Figure 5. Awareness of voter registration exercise



The registration activities included the Commission holding two massive voter registration (MVR) exercises immediately before the 2017 General election – both MVR exercises were held for one month in 2016 and another month at the start of 2017. The two MVR exercises raised the registered voters to 19.6 million, which was a 36 percent increase over the 2013 voters' register.⁶⁷ However, problems of the accuracy of the register persisted due to the manual civil registration system that is not backed with a consolidated database in the country, erroneous entries which posed additional challenges to maintenance of a reliable, accurate and up-to-date voter register, a position confirmed by the IEBC representative. Aside from accuracy, the Commission failed to achieve the projected voter registration target by 64 percent in the first MVR and by 39 percent in the second registration leaving out more than 2.5 million voters in the first registration exercise and more than 3.2 million in the second MVR exercise implying that either the sensitization efforts did not reach the unregistered voters or the target voters did not have identification documents required

⁶⁶ International IDEA *Electoral Management Design Revised Edition 2014* PP. 8. <https://www.idea.int/publications/catalogue/electoral-management-design-revised-edition>.

⁶⁷ The Post-Election Evaluation Report PP. 87.

for registration.⁶⁸ Cumulatively, the Commission managed to register over 19.6 million which was 89.1 percent of the targeted 22 million voters.⁶⁹

The lack of identification documents required for voter registration was not caused by IEBC as reported in KPMG Audit of the Voters Register as the registration of persons is coordinated by the Ministry of Interior and National Security. Nevertheless denial of the opportunity to vote due to lack of identification cards disenfranchised many people in choosing leaders. The effect it has on access to information is that not all Kenyans were facilitated to have a say in the election of their leaders.

The 2017 MVR exercises also witnessed use of coercive registration in some areas. For instance, some interested parties used gangs to restrict access to public services to citizens who could not produce voters' registration status. This was prevalent especially in Jubilee strongholds where political elites supplied chiefs with lists to target those who had not registered.⁷⁰ Cases of religious organizations requiring congregants to show of registration were also experience. In Embu, Rev. Isaiah Njagi, an Anglican clergyman, threatened to deny the Holy Eucharist to some member of his congregation unless they proved to have been registered as voters and threatened further not to extend the communion to those who did not vote.⁷¹ . While these activities enhanced voter registration, they infringed the right to privacy and the freedom of conscience.⁷²

⁶⁸ Ibid.

⁶⁹ The Post Election Evaluation Report 88.

⁷⁰ Ngige, Fred. 2017. "Revealed: Inside Jubilee's vote machine to beat Raila Odinga." Standard Digital. Available at <https://www.standardmedia.co.ke/article/2001228175/revealed-inside-jubilee-s-vote-machine-to-beat-raila-odinga>.

⁷¹ Craig, Jill. 2017. "Kiss the Bride, Mourn the Dead, Register to Vote in Kenya." Voice of America. Available at <http://www.voanews.com/a/kiss-the-bride-mourn-the-dead-register-to-vote-in-kenya/3681344.html>.

⁷² Article 31 (c) and Article 32 (1).

It was also noted in the study that persons living with disabilities (PWD's) were not well facilitated to participate in the registration. According to a respondent with physical disability,

*Those with physical challenges had to cover long distance to reach registration centres, while visual and hearing aids were not available in many parts of the country.*⁷³

The lack of facilitation for those with physical disabilities meant that many voters affected by this condition could not reach registration centres to access information to register as voters while lack of visual and hearing aids may have prevented many potential voters from accessing information about the registration exercise, hampering their participation in the elections. The IEBC representative stated that lack of facilitation to the physically challenged was due to the legal limitation on the Commission not to engage with voters beyond the radius of 400 metres from the registration centres and polling stations and lack of adequate financing to offer braille services to the visually challenged.

3.3.4 Voter verification

The Elections Act Section 6 (3) requires the Commission to make available the register for verification by voters to ensure its accuracy during the elections. The Commission invited all registered voters to inspect the register between the months of May and June 2017. In order to verify details, voters were required to visit polling stations within their county assembly wards where they presented identification document for the IEBC officials to verify their registration status in the biometric register.

The Commission failed to publish the register on time until just over two weeks to the election date which was hardly enough time for voters to verify the register consequently decreasing the overall transparency of the process.⁷⁴ This was despite protests from the opposition and a court case pressurizing the IEBC to publish the register. The delay in publication of the register for verification by voters is reflected

⁷³ Interview with Dorothy, a person living with physical disability.

⁷⁴ Elections Act, 6a (3) b. There are no regulations dictating a specific deadline for public posting of the official register.

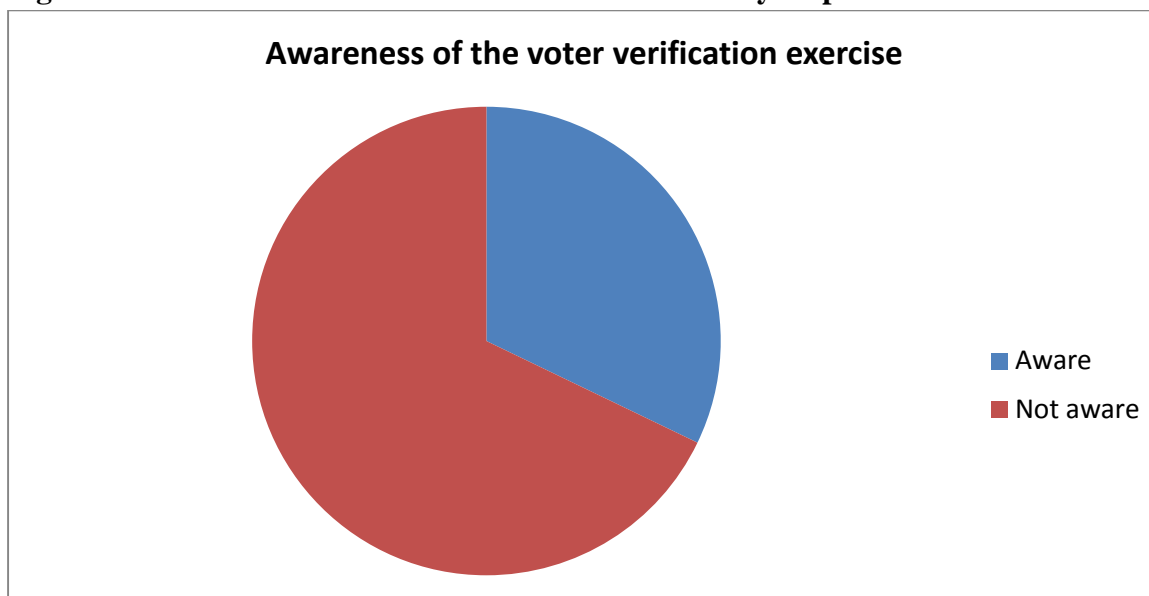
in the low awareness levels among respondents on the existence of verification of the voters roll. According to an investigative journalist⁷⁵

“The time allowed for inspection was very short especially for those who sought to inspect it physically. Inspection via mobile phones was problematic.”

IEBC in its PEE report acknowledges lack of adequate equipment as only 10000 BVR kits were available for biometric verification against 24,614 registrations centres and stringent timeliness as the reasons behind the failure to fully comply with the requirement but mitigated these by setting up a short message service for voters to verify their details. Verification through SMS comes at a cost and means that many eligible voters could not afford to verify their registration. The Commission however, asserts that that the law does not require it to publish a whole register but it is only required to notify, in the Kenya Gazette, that compilation of the register is complete. From the study, it was found that most respondents were not aware of the verification exercise as only 18 respondents of the 54 sampled took part in the exercise while the remaining respondents did not take part or were not aware of the verification. The lack of interest and awareness may have contributed to the inaccuracies of the register as voters did not receive adequate information and opportunity to inspect the register and verify the information.

⁷⁵ The Journalist works in an organization specializing in a media company specializing in investigative journalism.

Figure 6. Awareness of the voter verification exercise by respondents



3.3.5 Audit of the Voter Register

The Commission is required to within six months before the election to engage a professional reputable firm to audit the register of voters, verify its accuracy and make recommendations to enhance its accuracy and update it.⁷⁶ The IEBC engaged KPMG to undertake the audit, and found many cases of missing names in the voters roll, others had crucial details missing, while other voters had shared identification details with deceased voters. A related and troubling finding was the presence of deceased voters who had been transferred from their original polling stations. These cases raised fundamental questions about the accuracy and reliability of the process of registration and the overall credibility of the voters' register.

The KPMG Audit Report of the register found that out of 196,988 records KPMG investigated, 92,277 dead voters exactly matched records in the voters' register. The Report estimated dead voters at the time in the register to be about 1,037,260, representing over five (5) percent of the entire register in the country. The number indicates little achievement since 2007, when it was reported by the Independent Review Commission reported that the voters' register contained about 1.2 million deceased voters.⁷⁷ The situation is complicated by lack of a central register of deaths in the country and even if it was available, some of the deaths are unreported which

⁷⁶ Elections Act, Section 8A.

⁷⁷ IREC 2008, 79.

makes updating the register from official records to be a near impossibility.⁷⁸ The possibility of deceased voters being present in the register is increased due to lack of system integration between a reliable civil register and the voters register which could automatically remove deceased voters from the roll.⁷⁹

The KPMG, Audit also found the voters' list to include 171,476 records in which the national identification card (ID) number in the voters' list failed to match any identification in the data in the National Registration Bureau. For instance, 17,523 records of voters' details could not be found in the data from the Directorate of Immigration; 264,242 records were duplicate IDs or passports or were incomplete; and 5,247 records that did not have fingerprint images.⁸⁰

The late release of the Audit Report, just one month before the elections, made it difficult for the stakeholders and the public to read it and give their feedback. A post audit review of the register still yielded the mistakes that had been pointed out by the Audit Report even though the Commission had promised to correct the errors pointed by KPMG. Further since, KPMG only obtained partial information to audit the register, corrective measures that were undertaken by the Commission based on the audit, could not adequately yield an accurate register for the 2017 election.⁸¹ All respondents in the study, with varying degrees, stated that the register was not accurate with common complaints being missing voters' names, typographical errors, among others, with 36 respondents not being aware that the verification exercise existed which points to lack of information on the activity which eventually contributes to an inaccurate register being used in the polls. The IEBC representative however stated the register was fairly accurate with few mistakes, beyond the control of the Commission.

⁷⁸ KPMG Independent Audit of the Voter Register, April 2017 pg. 38 and as confirmed by the IEBC Representative in the interview.

⁷⁹ Ibid.

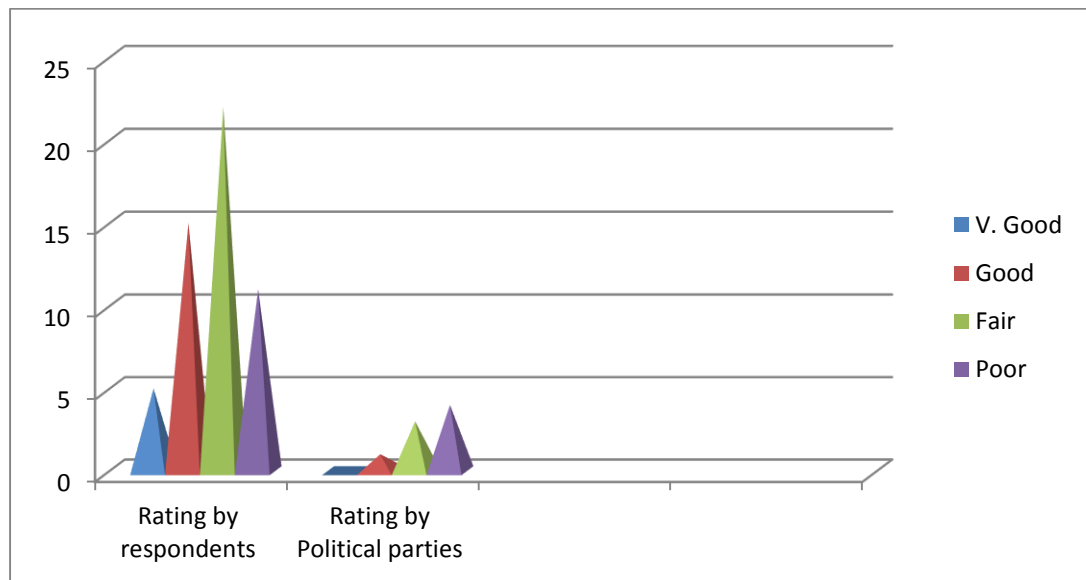
⁸⁰ KPMG Independent Audit of the Voter Register, PP 12.<https://home.kpmg/content/dam/kpmg/ke/pdf/rc/ita/iebc-stakeholder-presentation-13-april-17.pdf>.

⁸¹ Nancy Agutu. 29 June 2017. "IEBC under fire after Kenyans get curious feedback on registration status." The Star. t <http://www.the-star.co.ke/news/2017/06/29/iebc-under-fire-after-kenyans-get-curious-feedback-on-registration_c1588176>.

3.3.6 Political Party Primaries

Political parties rely on the IEBC register to undertake party nominations for the various positions to ensure that only registered voters participate in party primaries. The IEBC failed to provide parties with an updated voters' register to be used during party primaries forcing some parties to use the outdated 2013 register to identify voters. Other parties used their own membership lists which are often incomplete and inaccurate. Reports from observer groups, noted that lack of an updated register resulted in chaotic party nomination processes characterized by delays, cancellation of voting and multiple voting.⁸²

Figure 7 Rating by Respondents on accessing information during party primaries



The IEBC's position was that there were adequate consultations with political parties through PPLC, throughout the election cycle. The lack of a credible register provided by IEBC and or party membership list, makes it impossible for parties to verify the eligibility of voters who participate in party nominations. It also leads to the inability to gauge voter turnout or to have any real sense of who participates in party primaries.

⁸²“ELOG Preliminary Statement on the on-going political party primaries.”
<<http://elog.or.ke/index.php/2015-10-03-13-22-34/latest-news/item/78-elog-s-preliminary-statement-on-the-on-going-political-party-primaries>>.

3.3.7 Information on candidates' integrity

The Ethics and Anti-Corruption Commission (EACC) is the body charged with the responsibility of enforcing leadership and integrity provisions and helps in vetting candidates before during the nominations.⁸³ The nominations process brought to the fore the grey areas on the criteria to be used to vet candidates as provided under Chapter six of the Constitution on leadership and integrity, and its enforcement. There were concerns on the eligibility of various persons who have been convicted of various crimes and fiduciary questions on whether they could be barred from running for office. The EACC forwarded a list of 106 candidates who had questionable integrity ranging from forged academic certificates to criminal convictions to IEBC. Even though the report was forwarded before the deadline for nominations, the Commission cleared most of the candidates to contest for office⁸⁴ ultimately allowing candidates with questionable integrity to vie for elections. The Commission's Representative explained that only three cases of those forwarded were not eligible to vie and were disqualified from contesting. The remaining 103 cases were either being investigated, had on going proceedings in court, or there were pending appeals and the presumption of innocence could not allow the Commission to disqualify them before the due process was complete. Further, IEBC raised a legal issue with the Leadership and Integrity Act 2012 which does not provide for IEBC to enforce the Act.⁸⁵ In addition to time constraints, the Commission lacked enough personnel, financial and space to determine the cases within such a short time.⁸⁶

3.3.8 IEBC and Candidate Nomination Decisions

The IEBC owns up that there was insufficient voter education on party nominations, registration by the Commission and the period between nomination and actual announcement of results.⁸⁷

The IEBC Election Dispute Resolution (EDR) Committee considered many disputes totaling up to 250. The disputes involved nomination of candidates touching on IEBC's rejection of their candidature. The IEBC initially announced that

⁸³ Section 1, Ethics and Anti-Corruption Act No 22 of 2011.

⁸⁴ The Carter Report PP. 37.

⁸⁵ Interview with IEBC Representative.

⁸⁶ IEBC Post Election Evaluation Report PP. 112.

⁸⁷ Ibid PP. 71.

determination of the disputes will be concluded within 10 days before reducing the timelines to two days. This meant that the Commission had to determine all the cases within the short period, in the process constraining parties who did not get adequate time to present their evidence and depriving them of a fair hearing or effective remedy.⁸⁸

The Committee's conduct of the cases was wanting as judgments were issued the same day of hearing, raising questions on whether contested issues were properly considered before judgments were pronounced. Further, none of the decisions of the resolutions committee were made public thus undermining transparency in the dispute-resolution process.⁸⁹ An EMB should avoid obstruction to any access to information in its dispute resolution mechanisms in order to maintain good relations with stakeholders and inspire confidence in the process.⁹⁰

3.3.9 Voting

All respondents in this study confirmed that voting went on without any hitch in most polling stations. Observers however noted that the Commission's staff at the polling stations were not diligent in filling out a Supervisory Form 32A to document the voters, as required, in these instances. Some polling stations lacked sufficient quantities of the form⁹¹ implying that the Commission did not adhere to laid down regulations where they were required to record activities during voting. Another flaw during voting was the facilitation accorded to people living with disabilities (PWDs), to vote. Respondents in the study had mixed opinions on whether the PWDs were facilitated well to access information and effectively participate in elections.

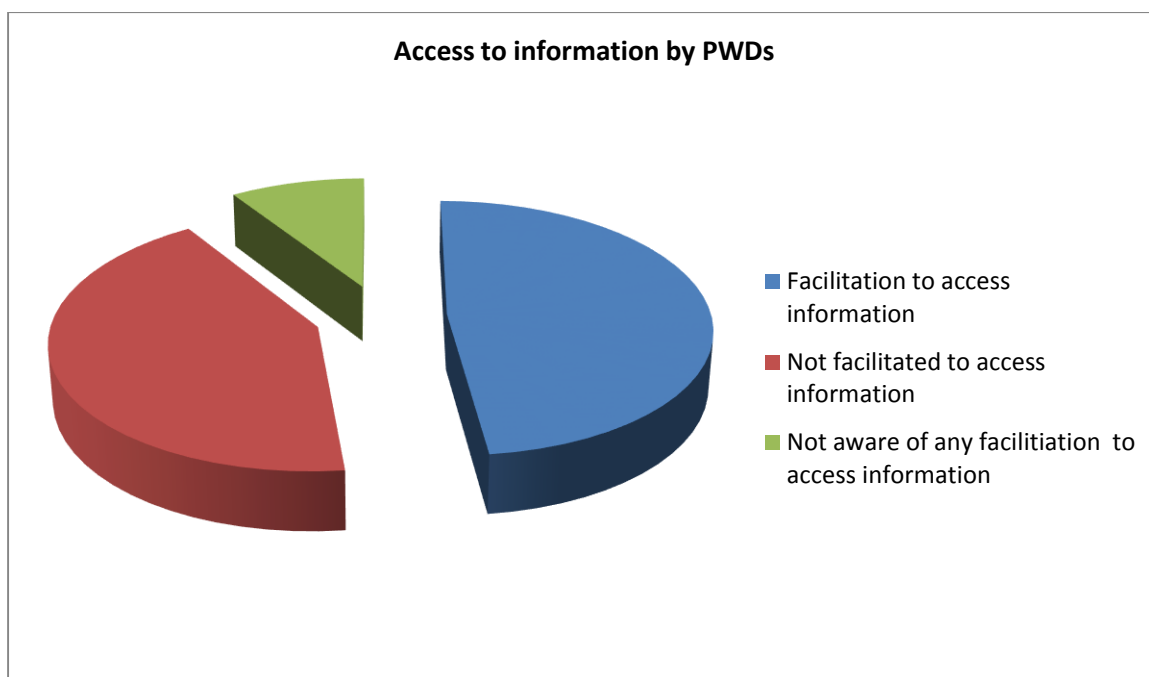
⁸⁸ Most cases were determined on the basis of information presented in writing at the filing of the complaint.

⁸⁹ The Cater Report PP 36.

⁹⁰ Ibid.

⁹¹ Ibid PP.17.

Figure 8. Rating by Respondents on access to information by PWDS



According to a PWD respondent states⁹²,

A PWD respondent states;

“There were inadequate visual and hearing aids to assist those suffering from blindness and hearing disabilities respectively, while those who had physical disabilities were not facilitated to access polling centres.

Even where support was provided by the Commission such as use of sign language specialists, it was not adequate to cover most parts of country and still there was no medium for those living with hearing and visual disabilities to access information, particularly, during live TV updates by the Commission.⁹³

Election results were announced procedurally in most polling centres, however observer groups noted multiple errors in results displayed at the National Tallying Centre as compared to those announced at the constituency tallying centres.⁹⁴For

⁹² Interview with a PWD respondent.

⁹³ Interview with a representative, working with a non-governmental organization that champions increasing access to information.

⁹⁴ Final Report: 2017 Kenya General and Presidential Elections, March 7, 2018 Carter Centre <https://reliefweb.int/report/kenya/final-report-2017-kenya-general-and-presidential-elections-march-7-2018> pg. 18 Carter Centre Election Teams in Saboti and Taita Taveta found the process lacked

instance, the numerical results from KIEMS kits for the presidential results, which were transmitted to the national tallying centre at Bomas were not accompanied by scanned copies of Forms 34 A as required by the law for verification, implying that the results posted were unverified, contrary to the laws. The problem exacerbated when the scanned Forms 34A and original Forms 34As did not reach the national tallying centre on time and several forms were unavailable a day before the deadline for lodging the presidential petition. While the IEBC communicated with the opposition National Super Alliance (NASA) coalition about their requests to make the scanned forms available, the Commission did not provide regular updates about the status of the tallying and tabulation process to the public.⁹⁵ Admitting the anomaly, the Commission's representative explained that the non-delivery of over 10,000 scanned copies of Forms 34s to lack of requisite technology infrastructure (lack of 3G network) in the affected areas that affected timely transmission in the presidential election, but, the representative failed to give reasons why regular updates over the issue were not provided to the public.

The Commission hurried in declaring presidential election results just three days after the Election Day, yet the Elections Act⁹⁶ requirement of publishing presidential election results forms on an online public portal had not been met. Only, 30,000 out of the 40,883 results forms, of the scanned 34A forms, were published by August 9 2017. The remainder of the forms, were published after the deadline for filing petitions for the presidential election on Aug. 25 while the constituency-results forms (34Bs) were posted two days before the deadline for filing a petition to challenge the results of the presidential elections⁹⁷ in the process, denying the petitioners adequate time to access information required for the petition. The lingering issue was the veracity of the results whose transparency, accuracy, verifiability, accountability were in question, and therefore could not be termed to be free and fair as required by the Constitution.⁹⁸

credibility because of significant disorder in the tally center and discrepancies between results being announced by the constituency returning officer and those displayed at Bomas, respectively.

⁹⁵ Ibid.

⁹⁶ Elections Act, 2011, Section 39 (1c).

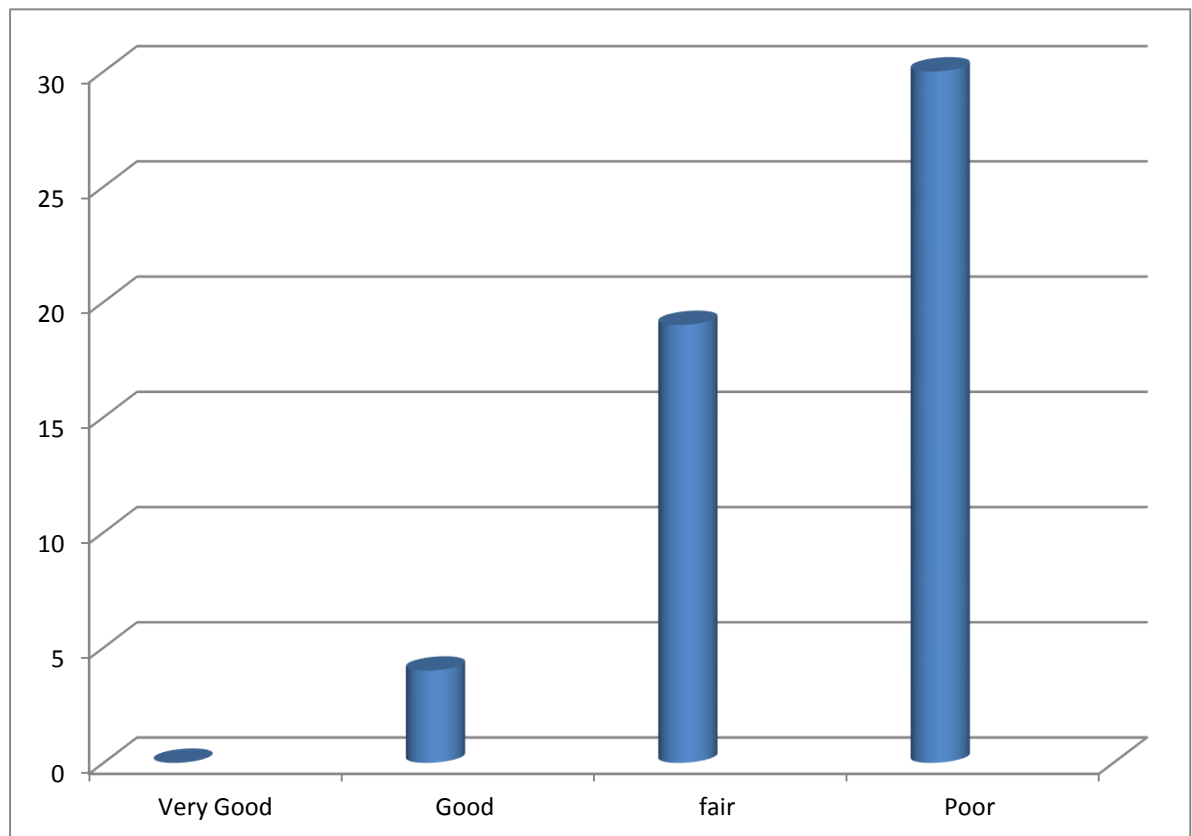
⁹⁷the Carter Report PP 18.

⁹⁸ Article 81 (e) of the Constitution of Kenya.

3.3.10 Tallying and transmission

Tallying of votes is conducted at the constituency for parliamentary and county assembly seats, while at the county level for woman representative, senator, and governor and at the national level for the presidential seat. Several challenges were experienced in the tallying of votes casting aspersion on the veracity of the results that were announced.

Figure 9. Rating of access to transmission of results by respondents



The poor rating of results transmission by respondents was vindicated in *Raila and Another v IEBC and two Others (2017) eKLR* when the Court stated that the IEBC acted contrary to the law when presidential results were announced before all constituency tally forms had been received. The Commission did not transmit results with the accompanying forms electronically to the national tallying centre as provided by Section 39(1c) of the Elections Act. In addition, it was the finding of the court that the Commission used elections materials which could not be authenticated, in total violation of the law. The court ruled that failure to grant sufficient access to the

servers as directed by the court was a violation of the requirement of conducting elections in a transparent manner.

The question of the accuracy of the presidential results was also affected by the breakdown of the results transmission system compromising the transparency of the tallying process and also hindered the verification exercises by interested parties and observers leading to questions about the legitimacy of the results. The failure of the transmission system formed the foundation of the opposition's challenge of the presidential results as announced, and informed the court's ruling to annul the election.⁹⁹

The Supreme Court's scrutiny of the tally forms revealed several errors. For instance, the Form 34C – used to declare presidential results lacked a water mark and a serial number and also appeared like a photocopy. The errors were also replicated on tally forms used to declare constituency results with 56 of the 291 constituency-level tally forms lacking water marks, five of them lacked the signature of the returning officer while others lacked serial numbers, and some had not been signed by party agents. There were other glaring errors such as many forms not being signed at the taking over and handing over sections. The Carter Center observer group which reviewed forms in some constituencies discovered that none of the 34B's in these constituencies had the takeover section signed while sixteen (16 percent) of the forms lacked watermarks, and eight (8 percent) did not have a serial number.¹⁰⁰ These acts compromised the accuracy of the information that was made available to the public.

The IEBC's failure to comply with the court's order to access computer servers, log in history and the logs for results transmission was fundamental in the court's decision. The court concluded that the Commission's failure to grant access, as directed by the Court, was contrary to the requirement of transparency and verifiability of the electoral process. According to the judgment, either the ICT was compromised and data was interfered with or IEBC was complicit and was unable to verify its own

⁹⁹ The Carter Report, PP. 21.

¹⁰⁰ Ibid.

information.¹⁰¹ Failure to disclose information went against Article 35 and Section 4 of the Access to Information Act.

Further, the court found that the IEBC failed to rebut the allegations by the petitioner including claims that several results originated from ungazetted polling stations. Neither could the Commission offer a convincing explanation as to why 500,000 voters only cast their votes for the presidency and not for other seats resulting in more votes in the presidential election than the aggregate of votes cast in gubernatorial or parliamentary elections.¹⁰²

Posting contradicting information was not restricted to the presidential election. Parliamentary elections were equally affected by the erratic activities of the Commission and in some cases leading to different results being posted in different forums. In *Sumra Irshadali Mohammed v Independent Electoral and Boundaries Commission & another [2018] eKLR*, the results that were announced by the Returning Officer, were different from those posted on the official declaration forms (Form 35B), those given in the portal hosted by the Commission and those published in the Gazette Notice.¹⁰³ The cases illustrate that some of the information published by the Commission was not accurate as confirmed by the study, whose most respondents believed that IEBC results for the general elections were not credible. A respondent, working with an international Non-Governmental Organization on access to information opined;

*“The results kept on changing and there was discrepancy between results announced at the polling centres and those released by the Commission.”*¹⁰⁴

The IEBC representative disputes that the transmission and tallying was heavily interfered with. According to him,

¹⁰¹ Ibid.

¹⁰² *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR*.

¹⁰³ *Sumra Irshadali Mohammed v Independent Electoral and Boundaries Commission & another [2018] eKLR*.

¹⁰⁴ Interview with the CEO working with a non-governmental organization that champions increasing access to information.

*The fact that only the presidential election, three parliamentary elections and three county assembly elections were voided is a pointer that the election was largely credible.*¹⁰⁵

On the presidential election he suggested that the annulment was mainly due to non-transmission of the Forms 34 As on time which was occasioned by lack of 3G coverage in the affected areas – a factor beyond the control of the Commission.¹⁰⁶ The admission by the IEBC representative confirms that results communicated to the public were not entirely accurate due to the technical challenges encountered.

3.4 The challenges faced by IEBC that affected access to information

Even with a robust legal framework that guarantees access to information, the commission was unable to assure access to information under its custody. The challenges to accessing information emanated from activities outside the Commission's control such as changes to the legal framework, court decisions and activities related to political party nominations as well those that stemmed from the Commission itself such as the late procurement of services and failure to adhere to the governing law.

3.4.1 Legal Challenges

The time frame provided under the Constitution for resolution of disputes arising from the presidential elections is not adequate to adjudicate the dispute adequately. The petition has to be filed seven (7) days after announcement of the results and thereafter, the Supreme Court has 14 days to determine the petition. This time frame is inadequate for filing the petition, responses to the petition and scrutiny of evidence by the courts such as recounting votes if need be.¹⁰⁷ These were meant to enhance the integrity of the elections and enhance prospects of future elections to be free and fair and avoid a repeat of violence that accompany contested elections as that which occurred after 2007 general election.¹⁰⁸

¹⁰⁵ Interview with the IEBC Representative.

¹⁰⁶ Ibid.

¹⁰⁷ *Raila & Another v IEBC & 2 others [2017] eKLR.*

¹⁰⁸ Akech M. "Institutional Reform in the New Constitution of Kenya." In: International Center for Transitional Justice. 2010. PP 21 <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf>.

Kenya's legislation on the resolution of electoral disputes is complex, with many bodies involved and sometimes with overlapping jurisdictions and inconsistent deadlines. Although the courts prioritized election-related cases and resolved most of the disputes timeously, the existence of several appeals processes and the short duration in which to resolve the electoral disputes failed to assure an effective remedy. This was particularly experienced in disputes involving party primaries, nomination and registration of candidates¹⁰⁹ which meant that aspirants and the public were unable to receive information on time as expected, over the dispute resolution process.

The use of expired passports as identification documents during voting is yet to be made clear, which is problematic because the document has validity and or can be replaced when it is full. The audit of the voter register recommended that the law on the use of the passport be reviewed to create more certainty¹¹⁰ even though IEBC insists that it is only concerned with validity of passport at the point of registration and an expired passport can be used for voting regardless of its validity at the time.¹¹¹

The Commission depends on allocation from the treasury to finance its activities. During the 2017 elections, the Commission was allocated over Kshs 33 billion to finance the election. The disbursement of funds so close to the elections adversely affected some of the programmes that are supposed to be undertaken early in the election cycle. For instance, voter education activities and publicity campaigns commenced late because of lack of funds in the early stages of the election cycle,¹¹² yet the two are key ingredients in the electoral process that inform voters to register and choose leaders during elections.

3.4.2 Composition of the Commission

The Commission was constituted so close to the election, which is contrary to the Venice Code of Good Electoral Practices and the recommendations by the Independent Review Commission (Kreigler Report) that composition of the electoral body should not be effected too close to an election. The reasoning behind the

¹⁰⁹ The Carter Report PP 5.

¹¹⁰ Ibid.

¹¹¹ Interview with IEBC Representative.

¹¹² IEBC Post-Election Evaluation Report PP. 72.

provision is that late appointments disrupt the smooth working of the Commission and does not accord newly appointed commissioners adequate time to learn the operations of the electoral body and prepare for an election. The flaws of the late appointments came to the fore, when lack of synergy and concurrence on critical decision and operational issues between the Commissioners and the secretariat sometimes became apparent to the public. The conflicts hurt the image of the Commission and denied the public the right to access accurate information that reflected its true position on some aspects of electoral governance. For instance there was disagreement between Chairman and the Chief Executive Officer of the Commission over the procurement of election materials leaving the public confused on the true position of the Commission over the issue.

3.4.3 Challenge of activating the Political Parties Liaison Committee

The Commission was unable to properly activate the Political Parties Liaison Committee to deal with emerging issues with political parties regarding the nomination of candidates, party membership and submission of party lists leading to contradicting lists between those filed online and those submitted to the Commission in hard copies.

While some engagement with political parties signaled a positive move in enhancing consultations and providing solutions to incessant problems associated with party lists as compared to the 2013 elections, there were notable challenges that should be tackled to ensure that future elections are managed smoothly. For instance, there were fraudulent changes made on party lists submitted online by party officials that resulted in discrepancies between lists uploaded online and the hard copies earlier submitted to the Commission. The other challenge was that parties continued to submitted lists long after the deadline of uploading party lists in the system. The upshot of these activities was inconsistent and inaccurate information available at the Commission on party lists.¹¹³

¹¹³ IEBC Post Election Evaluation Report .PP. 40.

It is imperative for IEBC to engage, stakeholders on all aspects of the electoral process especially where there are contestations on its neutrality.¹¹⁴ Consultations with political parties on electoral matters are beneficial to the electoral process as they may raise issues that may have been overlooked by the EMB thus strengthening the election management.¹¹⁵ Political parties may provide valuable input into the electoral reform debate. For example, they may raise issues and challenges that have not been identified or prioritized by EMBs and thus impact the reform agenda. However, political parties should be engaged with caution as their contributions may be partisan meant to entrench their own agenda at the expense of objectivity.¹¹⁶

3.4.4 Inaccurate data in the hands of other bodies

As demonstrated by the KPMG audit of the voters register, the voter register can be more accurate if data from other public agencies is provided. The audit revealed cases of many dead voters in the register yet, the Commission could not delete their names from the register because of lack of complete data from the Civil Registry Births and Deaths (CRBD). The KPMG reported over one million dead voters who still existed in the register yet only slightly over 92000 records of death, whose records were available, could be expunged from the register. There were also challenges in obtaining information from several government agencies such as Directorate of Immigration, National Bureau of Registration (NRB), and Kenya National Bureau of Statistics (KNBS) which do not have updated information.¹¹⁷ In the case of dead voters, not all the deaths were reported making it difficult even for CRBD to have an updated roll of deaths.

In addition, amendments to the timelines, created conflicting timelines on inspection, verification, audit and the order of the activities in respect of the verification of the register.¹¹⁸ In view of these shortcomings, the register used by voters for the 2017 elections was not accurate.

¹¹⁴ International Idea *Electoral Management Design Revised Edition 2014* PP 23.
<https://www.idea.int/publications/catalogue/electoral-management-design-revised-edition>.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ See Note 127 PP. 93.

¹¹⁸ IEBC Post Election Evaluation Report PP. 58.

3.4.5 Gazettement of the register

The Commission, in a gazette notice, published the voters' register affecting all electoral areas that is every Constituency, County Assembly Ward, Prison and the Diaspora. This was followed by the gazettement of all the 40,883 polling stations in the country which included the diaspora and prisons, in preparation for the 2017, August 8th 2017 General Election. The notification on publishing the voters' register was effected very close to the election, in the process making it difficult for verification of the information. The challenge was occasioned by lack of adequate BVR Kits with only 10000 kits being available for 24,614 registration centres at the time of verification.¹¹⁹

3.4.6 Security Challenges

There were security challenges especially during the repeat presidential polls of October 26, 2017 which made it difficult for the Commission to conduct trainings, pass information and deliver electoral materials to certain areas particularly in opposition strongholds where supporters heeded the call to boycott the repeat poll. The week before the repeat presidential poll was marred by violent protests in some parts of the country leading to loss of lives and destruction of property. As a result, the IEBC could not mount voter education or deliver election materials to voters in some areas and eventually postponed the elections indefinitely in the affected areas, disenfranchising voters who may have wanted to participate in elections regardless of the boycott called by opposition leaders.¹²⁰

3.4.7 Failure to adhere to legal requirements

The Commission faced the challenge of adherence to the legal requirements while transmitting results. While transmitting numerical results from the KIEMS kits to the national tallying centre, the results which were displayed did not show the accompanying polling station results in Forms 34As for the presidential position as required by the law neither were the results labeled unofficial. Even the official presidential results were announced using unverified Forms 34Bs. The official results took a longer time to arrive at the tallying centre and over 10,000 Forms 34As had not been received a day to the deadline of filing the presidential petition - this act was

¹¹⁹ Ibid PP. 57.

¹²⁰The Carter Report PP 3.

among others advanced in court by the petitioner to prove that the presidential elections of August 8, 2017 were not conducted constitutionally.¹²¹

The IEBC's failure to comply with the Supreme Court Order to verify the results transmission process led the court to also make a finding that the elections were not held as per the provisions of the Constitution.¹²² The failure to follow the law by IEBC was not limited to the presidential election. In several petitions including parliamentary seats, the commission was adjudged to have breached the law by releasing unverifiable results leading to the annulment of elections in three constituencies – Ugenya, Embakasi South and Wajir West Constituencies.

The PEE report notes that the conduct of six elections in a day may have compromised its standards for instance, there were complaints that the counting took a long time. IEBC justified this on fatigue that affected the Commission staff, which factor led to the commission of some errors that were observed in some statutory forms.

3.4.8 The procurement of materials and services

The Commission faced several challenges while procuring materials and services for the election. All public entities are required to follow the provisions of the Public Procurement and Asset Disposal Act (2105) which prescribe various procedures for efficient procurement of goods and services and disposal of assets. The first challenge faced by the Commission was the several courts cases challenging the procedure and identity of suppliers for materials and services. The Procurement of ballot papers, auditing of the final register, and the integrated electoral equipment faced legal challenges and hindered the Commission from finalizing procurement activities required for the elections on time. The procurement of voter registration materials faced numerous challenges that ranged from suppliers, political parties and other stakeholders who challenged the process leading to delays in the acquisition of the materials.¹²³ The delay had a ripple effect on timelines set for the exercise such as auditing the register, verification of the register and eventual publication of the

¹²¹ *Raila Odinga and Another V IEBC and 2 others 2017eKLR.*

¹²² *Ibid.*

¹²³ Suppliers, Political Parties and interested challenged the procurement of election materials fearing vested interests.

register for inspection and access of the register by stakeholders thus affecting the credibility, accuracy, and verifiability of the information availed.¹²⁴

For instance, the procurement of printing of ballot papers and electoral materials which began almost a year before the election, were not delivered until July 20th, 2017, after the Commission was given the green light to procure materials by the Court of Appeal after¹²⁵ the Commission successfully challenged the High Court decision which cancelled the award of the printing of ballot papers to Al Ghurair Printing & Publishing LLC.¹²⁶

IEBC invoked Section 103 of Public Procurement and Asset Disposal Act and went for direct procurement a decision that was successfully challenged again in the High Court. On appeal in the High Court and the Court of Appeal, the Commission was given a go ahead to single source voting materials, which is allowed under Section 13 of the Act.¹²⁷ While litigating on the matter, it emerged that there was no evidence that IEBC consulted with the stakeholders before embarking on single sourcing the supplier, and where it did, the consultations did not include all the stakeholders as revealed by the study findings in which only 14 respondents out of 56 felt that the Commission consulted stakeholders. The revelation on lack of public participation exposed a dearth in sharing information by IEBC with stakeholders.

The Auditor Report on IEBC also accuses the Commission of circumventing its own process¹²⁸

“IEBC caused an intentional delay through discriminatory issuance of bid documents and ambiguity of the award criteria resulting in the award of contracts being challenged and nullified by the Procurement Administrative Review Board or courts.”¹²⁹

¹²⁴ Interview with IEBC Representative.

¹²⁵ *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR.*

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ The Public Account Committee Report on the Examination of the Report of the Auditor General on Financial Statements of Independent & Electoral Boundaries Commission for the Year Ended 30th June 2017. February 2019PP. 129. <http://www.parliament.go.ke/sites/default/files/2019-03/IEBC%20Report%202016-2017%20-%20Final.pdf> visited <July 31, 2019>.

¹²⁹ Ibid.

The Report also made a finding on overpriced acquisition of KIEMS Kits and technology which were overpriced for the repeat presidential election held on October 26, 2017 as compared to the general election held on August 26, 2017 which had six positions being contested for. There was thus an accusation of portraying a false impression of constraints of time and giving out wrong information on the procurement process.¹³⁰ The Commission was also accused of favouring procurement of ballot papers from All Ghurair Printing and Publishing LLC and the procurement of technology from Safran Identity & Security (SIS).¹³¹ The two companies featured prominently in the first presidential petition with accusations of being complicit in compromising the integrity of the presidential election.¹³²

The genesis of the delay in procurement of materials for the election can thus partly be attributed to IEBC's late commencement of procurement processes and predetermined suppliers which occasioned the lengthy litigation process by stakeholders. The late changes in the Elections Act¹³³ which required a single identifying kit for voter registration, identification and vote transmission in late 2016 also forced the Commission to abandon the earlier procurement process and were forced to invoke Section 103 of the Public Procurement and Asset Disposal Act (2015) to single source some materials and services required to meet election timelines and also comply with the amendments in the electoral law.

3.4.9 Conflicts within the Commission

The lack of unity in IEBC witnessed by conflicts among commissioners and between the Commission and the secretariat led to conflicting information about the operations of the Commission. For instance, the leaked memo from the Chairman to the Commission Chief Executive Officer, questioning certain activities and decisions made during the election, after the nullification of the August 8, 2017 presidential election was a pointer that the conduct of IEBC's was not above board.¹³⁴ This

¹³⁰ Ken Opala: *The Dark Business of Election 2017 article is drawn from research commissioned by the Africa Centre for Open Governance (AFRICOG).*

¹³¹ *Ibid*

¹³² *Raila Odinga and Another V IEBC and two Others eKLR 2017.*

¹³³ The Elections Laws (Amendment) Act, No 36 OF 2016.

¹³⁴ *Leaked memo from Wafula Chebukati to Ezra Chiloba exposes scandal at IEBC standard media.co.ke* visited August 8, 2019 <https://www.standardmedia.co.ke/article/2001253901/leaked-memo-from-wafula-chebukati-to-ezra-chiloba-exposes-scandal-at-iebc>.

incident demonstrates that either the Commission failed to disclose pertinent information about its activities to the public contrary to the Article 35 (1) (a) and (3) or was giving inaccurate information casting doubts on transparency of its actions contrary to Article 10 (c).

3.5 Conclusion

The conduct of the 2017 elections infringed on the right to access information at almost all the stages of the electoral process. While some challenges that curtailed access to information was caused by factors beyond IEBC's control such as the late composition of the Commission, financing, legislative amendments, inaccurate and unreliable register of deaths, overlapping disputes resolution mechanisms, and court decisions, the bulk of the challenges were occasioned by the conduct of the Commission itself. The conduct by the Commission that affected access to information include, failure to adhere to the legislations allowing access to information, failure to disclose information and regularly update the public on its activities, lack of good corporate governance witnessed by incessant fights between the secretariat and the commissioners and among the commissioners leading to contradicting information being released to the public, late procurement of key infrastructural equipment used to convey information, lack of adequate facilitation of PWD's to participate in elections.

The bulk of the weaknesses emanate from errors of commission and omission which if rectified then access to information during elections can be enjoyed and the credibility of future elections will be enhanced. The next chapter will discuss proposals for reforms that will enhance access to information during elections.

CHAPTER 4

REFORMING THE ELECTORAL PROCESS TO ENHANCE ACCESS TO INFORMATION

4.1 Introduction

Chapter two discussed the legal framework and its adequacy to support access to information during the electoral cycle while Chapter three was concerned with the research findings on how the existing legal framework affected access to information during elections, how the conduct of elections affected the realization of the right to access to information; and the challenges encountered by the Commission in enabling access to information. Chapter four suggests reforms to address challenges posted by the: legal framework; conduct by the Commission; and confronting challenges encountered by the Commission to ensure that the right to information is fulfilled by the Commission during the election process.

For free, fair and credible polls, the electorate must have access information at every stage of the electoral process. Failure to access accurate, credible and reliable information on various electoral aspects prior, during and after elections, makes it is difficult for citizens to participate in the elections as provided by the law.¹ Electoral processes must adhere to the rule of law, and the state must commit itself to taking measures that ensure realization of human rights.² Among the rights to be protected include access to information.

The fundamental link in democracy is the access to information by voters to enable them scrutinize information on party manifestos, candidates, and the electoral process and make an informed choice in exercising their sovereign power and will in electing leaders. This information is accessed at various stages of the electoral process from pre-election

¹ Guidelines on Access to Information in Africa During Elections
https://www.achpr.org/public/Document/file/English/guidelines_on_access_to_information_and_elections_in_africa_eng.pdf.

² Avery Davis-Roberts “ International obligations for electoral dispute resolution” in Electoral Justice: The International Idea Handbook PP.15 <https://www.idea.int/sites/default/files/publications/electoral-justice-handbook.pdf>.

activities to dispute resolution. According to Guidelines on Access to Information in Africa During Elections,³ election bodies are required to facilitate access to information in its custody and cause to be published information proactively electoral activities at various stages. The Kenyan laws also require IEBC to allow access to information⁴ and publish information in its custody for public consumption.⁵

Elections in Kenya encompass several processes from the pre-election period, nomination of candidates, voter education, voter registration, voter verification, auditing the register, identification of voters, voting, vote counting and tallying, transmission and announcement of results and dispute resolution. At each of these stages, the public has a right to access information on the activities of the Commission. From the findings in Chapter three, the Commission experienced several challenges during the conduct of elections that affected access to information negatively. This chapter suggests reforms in the conduct of elections that can improve access to information by the voters.

4.2 Reforming the legal framework

The conduct of the 2017 elections exposed several loopholes that affected access to information held by the Commission. The weaknesses in the legal framework ranged from late composition of the Commission, complexity of the pre-election activities, dispute resolution process, transparency of the results transmission system, scrutiny and recount of presidential votes and timelines on determination of the presidential poll petition.

According to International Idea⁶ clamour for electoral reforms always emerge from a background of failure to deliver expected results, electoral fraud and misconduct. In South Africa for instance two famous cases in South Africa of *Richter v The Minister for*

³ Ibid.

⁴ Article 35 (1).

⁵ Article 35 (3).

⁶ International Idea, *Electoral Law Reform in Africa Insights into the Role of EMBs and Approaches to Engagement*. Policy Briefing Paper 2014 PP 7. <https://www.idea.int/sites/default/files/publications/electoral-law-reform-in-africa.pdf>.

*Home Affairs and Others*⁷ and *Minister of Home Affairs v. NICRO and Others*⁸ led to inclusion of South Africans residing outside the country and prisoners to vote respectively.

The IEBC Act should be reviewed to provide for composition of the Commission to be effected strictly in compliance with the international best practice and in compliance with the recommendations of the Kriegler Report that appointments to the electoral body should not be undertaken later than one and half years to the general elections and should be made in a staggered manner to ensure that continuity and institutional memory is not lost by the exiting Commissioners. This would give the appointed commissioners enough time to understand the working environment at the Commission, to bond and nurture good corporate governance and reduce unnecessary divisions in the Commission on critical governance issues⁹ that leads to conflicting information being relayed to the public which undermine the image of the Commission and cast aspersions on its ability to conduct credible polls. The failure to exhibit professionalism in managing elections exposes the electoral body to suspicions of underhand dealings making it easier for poll losers to find public support regardless of the authenticity of their claims.¹⁰ This is well captured by the respondent Fimba who stated;

“Parliament, IEBC and other stakeholders should review laws in advance to avoid last minute amendments.”¹¹

There is need to streamline the appeals process during primaries to one process to guarantee an effective and timeous remedy to those contesting the outcomes of the party

⁷ *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* (CCT03/09, CCT 09/09) [2009] ZACC 3; 2009 (3) SA 615 (CC); 2009 (5) BCLR 448 (CC) (12 March 2009).

⁸ *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) (3 March 2004).

⁹ There was a misunderstanding between the Commission Chairman and the Commission’s Chief Executive Officer over the handling of various matters at the Commission. While one of the Commissioners resigned in a huff and left the country before the conduct of the repeat presidential election.

¹⁰ International IDEA, Electoral Management Design, Revised Edition 2014 PP 7.
<https://www.idea.int/sites/default/files/publications/electoral-management-design-2014.pdf>.

¹¹ Fimba works with an Information and Technology Company.

primaries and improve the quality of information available to the public and the candidates.¹² The Commission should to protect the right to seek and receive information, including information on procedures for filing complaints and on the essential findings, evidence presented and the legal reasoning of a tribunal, even when the hearing is not open to the public.¹³ Equally important, is clarification of the jurisdiction of the IEBC and the Political Parties Dispute Tribunal (PPDT) prioritizing reforms that will lead to reduction of timelines for the resolution of some electoral disputes such as candidate nominations; introduction of mechanisms to resolve election-day disputes; provide adequate time for voter registration and related audits and verification exercises; and clarification of nomination rules and election-day procedures to parties and the electorate.¹⁴

“Fiimba stated that, “legislation should be clear on the overlaps between IEBC and Political Parties Dispute Tribunal and there should be absolute deadlines of resolving pre-election disputes.”¹⁵

The lack of a single appeals process and the hasty manner in which IEEBC abbreviated resolved some complaints failed to offer and an effective and timely remedy on a consistent basis, contrary to international and regional standards¹⁶ which recognize access to information as an electoral right. An effective legal framework should provide for effective dispute resolution mechanisms in order to overcome unnecessary political conflicts in the country.¹⁷ As part of the solution to this problem, it is suggested that the

¹² The Carter Report PP. 5.

¹³ Avery Davis-Roberts “International obligations for electoral dispute resolution” in Electoral Justice: The International Idea Handbook PP. 15. <https://www.idea.int/sites/default/files/publications/electoral-justice-handbook.pdf> <visited July 22, 2019>.

¹⁴ Ibid.

¹⁵ See Note 11.

¹⁶ The Universal Declaration of Human Rights states, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." (Article8), and "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." (Article10). The ICCPR, Article2, states, "... any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...." Article14.1 of the ICCPR states, "... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

¹⁷Ibid.

appointment of Commissioners should include more than one advocate as opposed to the current one where only the Chairman has a legal background stretching the Commission during adjudication of pre-election disputes¹⁸ which leads to delays in determining and communicating decisions reached by the Commission. There is also need to reform the legal framework to enable scrutiny of election materials or recount of votes in a presidential election as noted by the Supreme Court¹⁹ as one of the impediments to the determination of the verifiability and accuracy of a presidential election results and increase the timelines for determining presidential petitions to give the parties adequate time to collect evidence and adequate time for the courts to determine the matter.

Reforming the legal framework in Kenya is a delicate balance as enacting legislative changes is a preserve of parliament. This is unlike countries like Zambia where the EMB has a final say on any changes to the law that may affect electoral management.²⁰ The electoral body's proposals can only work where it favours those enacting the laws and where it counters the interest of the party with the majority; its legislative proposals are unlikely to be enacted.²¹ However from experience, enacting the law is very different from implementing it as legal solutions do not necessarily resolve the problem.²² This difficulty was alluded to by one of the representatives of political parties who stated:

*“The legal system supporting transparency during election that give rise to access to information are largely in place, but the practice falls below the required international threshold.”*²³

¹⁸ Interview with IEBC Representative.

¹⁹ *Raila & Another V IEBC and two Others [2017] eKLR.*

²⁰ International Idea, Electoral Management Design 2014.
[https://www.idea.int/publications/catalogue/electoral-management-design-revised-edition.](https://www.idea.int/publications/catalogue/electoral-management-design-revised-edition)

²¹ Ibid.

²² Abuya E. Realizing the right of access to Information in Kenya: The Legal Framework. In Access to Information in Africa. Law Culture and Practice Edited by Fatima Diallo and Richard Calland Leiden Boston 2013.

²³ Kived, Respondent from a political a party.

4.3 Reforming the candidate nomination process

The candidate nomination process should be reformed and made clear to the public and stakeholders to ensure that candidates vying for party nominations meet the established legal criteria. The conduct of party primaries by political parties should be strengthened to ensure consistent application of procedures that only allow eligible party members to participate in nominations. The information on standards and procedures on verifying candidate eligibility should be communicated clearly to all stakeholders in the elections and the role of the Commission to determine whether candidates meet should be made clear to avoid clearing candidates who do not meet the leadership and integrity test from contesting.²⁴

4.4 Reforming voter education

The Constitution in Article 84 (g) requires IEBC to undertake voter education. The requirement for voter education is to ensure that voters are well sensitized ahead of the electoral processes to be undertaken and thus forms the foundation of a successful electoral process. Information imparted at this stage, include the importance and the right to register in order to participate in elections and how to vote. From the study findings it was apparent that IEBC did not commence voter education as originally scheduled owing to the delayed disbursement of funds meant for the exercise ²⁵leading to an ineffective exercise that could not reach to some voters.

Other challenges during voter education were occasioned by failure by the Commission to distribute voter education materials to accredited organizations undertaking the voter education, and as alluded to by one of the respondents, poorly designed education materials that did not fit all the categories of voters particularly those who do not have adequate formal education and those living with disabilities. To address these problems, first the Commission should engage the government to release funding for voter education earlier on in the election cycle to ensure that the exercise commences on time in order to access more voters. Second, it should rationalize its engagement with other

²⁴ The Carter Report.

²⁵ Post-Election Evaluation Report PP 130.

organizations involved in voter education to avoid duplicity, save on cost and maximize on reaching most voters. Third, the Commission should make voter education to be a continuous exercise with voter education materials in accessible formats to different voters and tied to voter registration which is also a continuous activity.

To increase sensitization among voters, this study agreed with the African Centre for Open Governance (Africog) recommendation that the Commission should prioritise voter education and facilitate its grassroots educators based at the wards with adequate educational materials and funding to establish a system to reach out to most people in the country and abroad. The Commission should also implement continuous voter education as required by the law²⁶ and avoid limiting it to MVR exercises which are normally held just before the general elections.

Even though IEBC is not allowed to engage in civic education, the Commission should increase access to its activities by expanding its voter education curriculum to cover other areas beyond management of elections. The curriculum can be expanded to cover issues such as negative ethnicity, ethnic vs. policy-based political parties, the leadership and integrity provisions in the Constitution to inform citizens on their role in developing democracy.²⁷ This strategy would broaden the voters' perceptions beyond the narrow interests of politicians and reclaim their position as the ultimate determinant in the governance value chain.

IEBC should therefore work with stakeholders to develop a rich voter education curriculum and equip voters with the knowledge and understanding on exercising their sovereign rights as provided by the Constitution. The Commission should also be more proactive, invoke Article 35 of the Constitution and engage other government

²⁶ An Assessment of Kenya's Preparedness for the 8 August 2017 General Election April - June 2017, African Centre for Open Governance PP. 15(Africog & Kenya for Peace with Truth & Justice.) https://africog.org/wp-content/uploads/2017/07/Ready-Or-Not_An-Assessment-of-Kenya%E2%80%99s-Preparedness-for-General-Elections-on-8-August-2017_Edition2_Final1.pdf.

²⁷ Ibid.

departments to provide information that will facilitate updating of the voter register and enlist more voters.²⁸

4.5 Reforming voter registration

The registration of voters is a continuous exercise saves for the 60-day period before a general election and the period between the declaration of a vacant seat in a particular electoral area and the date of such an election, and the date of announcement of a referendum and the date of such a referendum.²⁹ However, the number of voters registered during the continuous voter registration (CRV) exercise pales in comparison to those registered during mass voter registration (MVR) exercises which are shorter in duration.

In preparation for the 2017 elections slightly over 121,000 voters were registered through CRV while 5.2 over million were registered in the two MVR exercises held in 2016 and early 2017. IEBC failed to meet the targeted voters by two million after registering slightly over 19 million voters from 2012 to 2017.³⁰ The huge difference in voter registration returns between CRV and MVR point to lack of proper sensitization of prospective voters to register, lack of identification documents and lack of adequate voter registration kits during the CRV as compared to MVR.³¹ The Commission should increase sensitization efforts and work with other government agencies to move towards registering the targeted voters during registration. Also, IEBC should be allocated more resources to ensure that turnout during the CRV is well coordinated ³² Further, the Commission should embark on more sensitization activities to increase registration of women voters which declined from 49 percent in 2013 down to 46 percent of the total voters in 2017.³³

²⁸ Elog Report: In Their Own Voices – Citizens Independent Audit on the Quality of 2017, Register of Voters PP. 58. <https://elog.or.ke/index.php/resource-centre> visited < July 28, 2019>.

²⁹ Section 5, Elections Act 2011.

³⁰ IEBC Post Election Evaluation Review Report PP. 86.

³¹ Ibid PP.88.

³² Karuti Kanyinga (2014) *Kenya Democracy and Political Participation* A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS), University of Nairobi <https://www.opensocietyfoundations.org/uploads/b24bc86e-9fa4-4771-980d-0888a7871e60/kenya-democracy-political-participation-20140514.pdf>.

³³ Ibid.

“The Commission should receive funding on time to finance voter sensitization activities that commence early in the electoral cycle.”³⁴

4.6 Reforming voter verification

The audit of a voter register is now a statutory requirement.³⁵ During the 2017 general election, KPMG, a professional audit firm was engaged to audit the register and its report was published.³⁶ In view of the intricate nature of elections with many issues that do not conform to the regular assignments of a general professional audit firm, the IEBC should consider engaging specialist election audit experts to supplement audits conducted by professional commercial audit firms. Such an audit would shed light on problems faced by Kenyans when registering and the reasons why some fail to register as voters.³⁷ The supplementary audit will also reveal different ways in which voters’ information is misrepresented in the register. One of the problems highlighted by the KPMG Audit was the presence of deceased persons in the voters roll. It is therefore important that the Civil Registration Department addresses deficiencies in the public’s registration of deaths system and come up with solutions ensuring all deceased persons are systematically and timeously registered and share the updated data with the Commission on regular basis for updating the register. This study agrees with the KPMP audit recommendation for the rationalization of the registration of births and deaths.

Equally important in helping improve the accuracy of the voters register is the need to amend the Births and Registration Act Cap 149 which provides for manual records and indices which are cumbersome to extract at the point of need. This shortcoming is compounded further by lack of a national system that integrates all information appertaining to individuals such as the identity card, passport or register of voters. This makes it imperative to reform the data systems at the Civil Registry which may include use of modern technology and integration.³⁸ Hopefully, with the recent introduction of

³⁴ IEBC Respondent.

³⁵ Elections (Amendment) Act, No. 36 of 2016.

³⁶ KPMG Report Independent Audit of the Voter Register, PP 112...

³⁷ OSCE and ODIHR (2012) Handbook for the Observation of Voter Registration PP. 42.
<https://www.osce.org/odihr/92058?download=true>.

³⁸ Ibid.

the National Integrated Identity Management System (NIIMS) unique identification number, popularly known as Huduma Number, integrating all information on personal details, it would be easier to update the voter register by accessing the central repository of information.³⁹

There are grey areas surrounding the use of expired passports as a document for voting when it was valid during registration. Even though IEBC clarified that it was concerned with validity of the passport at registration and the same document could be used for voting regardless of its validity⁴⁰, the law should be reviewed to create more certainty and clarify the status of an expired passport which was valid during registration to the public in regard to voting.

4.7 Reforming the results transmission process

Section 39 (1 C) (C) of the Elections Act requires IEBC to publish presidential election results forms on an online public portal for ease of access. There is requirement for the results transmitted to be accompanied by the scanned forms used to capture the results. However after August 2017 election, more than a quarter of the forms were published with remaining being published just a few days before the deadline for contesting the presidential results. The same scenario was repeated with the constituency-results Forms (34Bs) which were also posted later after announcement of the results.⁴¹

This breakdown in the results-transmission system critically undermined the transparency of the tallying process and affected the verification process by stakeholders and in the process led to questions about the credibility of the poll. The failure of the transmission system to work as expected informed the grounds of the petition by the opposition to challenge the elections and also formed part of the basis by the Supreme Court to annul the election. To improve monitoring of the results transmission, IEBC proposes

³⁹ National Integrated Identity Management System (NIIMS) program through Executive Order No. 1 (2018). The purpose of this initiative is to create and manage a central master population database which will be the ‘single source of truth’ on a person’s identity. The database will contain information of all Kenyan citizens and foreign nationals residing in Kenya and will serve as a reference point for ease of service delivery to the people of Kenya.

⁴⁰ Interview with IEBC Representative.

⁴¹ Ibid.

deployment of block chain technology which allows all accredited and interested parties to monitor real time transmission of results from the polling stations.⁴² A similar view was proposed by several respondents including political parties and the civil society respondents who vouched for a real time monitoring system of election results by the stakeholders and the media to increase accuracy, transparency and accountability of the results transmission and boost voters' confidence in the information published.⁴³ Transparency in vote counting and tallying can also be enhanced by parallel tabulation of votes by stakeholders so long as the ultimate announcement of the official results remains the preserve of the Commission.⁴⁴

These recommendations were well captured by Keopa⁴⁵ who stated that;

“The process of transmission and tallying should be fully computerized and monitored by all parties to eliminate human interference in the process.”

4.8 Reforming the presidential petition period

There is general consensus among stakeholders that the duration for filing and determination of the presidential petition is not adequate and hinders access to information by parties to the petition. The timeframe is a drawback to an effective remedy since it does not allow sufficient time for the court to scrutinize evidence or conduct a recount if deemed necessary and does not allow parties enough time to petition or respond to the petition.⁴⁶

In *Raila and Another v IEBC and two others (2017)eKLR* the Supreme Court noted that the 14-day period is inadequate as it does not offer sufficient for certain verification exercises such as vote recount or scrutiny of election materials which could clarify some

⁴² Ibid.

⁴³ Views of majority of the respondents generally.

⁴⁴ USAID (2013) Best Practices in Electoral Security. A Guide for Democracy, Human Rights & Electoral Programming PP 22 -25.

https://www.usaid.gov/sites/default/files/documents/1860/Electoral_Security_Best_Practices_USAID-1.pdf.

⁴⁶ The Carter Report PP.36.

concerns about the veracity of the results announced. The law which had been discussed in parliament but left unchanged should be revived and timelines for determination of the presidential election petition should be extended.⁴⁷ A time frame of 30 days was proposed by the IEBC respondent and political party representatives.

4.9 Reforming procurement

IEBC procures many items ranging from ballot papers, technological devices, legal services among others for the effective conduct of an election. Being a public entity it is required to comply with Public Procurement and Asset Disposal Act 2015. *In Republic -v-Independent Electoral and Boundaries Commission &3 Others Ex-Parte Coalition for Reform and Democracy*⁴⁸, it was held that procuring election materials should meet the legal requirement in place to ensure that transparency of the electoral system is attained. It was further held that preparations leading to elections must meet the minimum electoral principles and standards articulated in Article 81 of the Constitution. The standards are prescribe the qualities of an election system to free and fair, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

In the run up to the 2017, elections the procurement process of ballot papers and KIEMS kits attracted lengthy litigation that affected timelines for other electoral activities and impacted on various activities affecting access to information such as voter verification, identification and transmission exercises.

The Election Laws (Amendment) Act 2016 Sec 44 (1) provides for the KIEMS technology that integrates identification of voters, registration, registration of candidates, and transmission of results with a requirement to test the KIEMS kits 60 days before the elections.⁴⁹ The technology should be in place at least eight months before the date of elections⁵⁰ to ensure that other electoral activities such as voter registration and verification proceed as scheduled. The delivery of the kits was however affected by

⁴⁷ Ibid.

⁴⁸ *Republic -v-Independent Electoral and Boundaries Commission &3 Others Ex-Parte Coalition for Reform and Democracy* Misc. Application No 637 of 2016.

⁴⁹ Section 44 (4) (b).

⁵⁰ Section 44 4 (a).

several delays caused by legal challenges resulting in delayed delivery which impacted the voter registration and verification processes. On the other hand the printing of presidential ballot papers had to be decided by the Court of Appeal just 18 days to the election.⁵¹ Further the Commission was accused by the Auditor General of authoring its misfortunes by circumventing the procurement rules resulting in the Courts and the Procurement Appeals Board quashing its decisions. Moving forward, the Commission should undertake procurement early in the election cycle in strict compliance with the law to ensure that scheduled election processes that affect access to information such as voter registration, verification and transmission are not affected by the delays and avoidable litigation. Fiimba⁵² sums review of the procurement system by stating

“Proper ICT system that works without hitches should be identified and procured in advance to allow rigorous testing months before elections.”

4.10 Reforming use of technology

*Credible tendering and sourcing of the necessary technology will minimize problems encountered in the past.*⁵³

The credibility of the 2017 elections was affected by challenges related to technology as confirmed by all the sampled respondents who felt that management of electoral technology particularly during transmission of results was wanting.

The use of technology was meant to guard against interference with poll results and guarantee accuracy of the election results to reflect the will of the voters. In *IEBC -v- Maina Kiai & 5 Others, Civil Appeal No. 105 of 2017*, the Court of Appeal stated that deployment of technology in elections was to achieve accuracy and protect the integrity of the process.

⁵¹ *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others [2017] eKLR.*

⁵² Fiimba is a communications specialist working with an ICT company.

⁵³ Keopa, is an investigative journalist.

Section 44 of the Elections Act secures the place of technology in the management of elections in Kenya. Section 6A (3) (b) of the Elections Act as amended in 2016 requires the Commission to publish the voters' register online and any other prescribed manner. The register comprises a poll register for the ward, constituency and for voters in the diaspora.⁵⁴ The requirement to publish the register online is critical in an election petition particularly where an allegation is made that the number of votes cast exceeded the registered voters.

The Commission faced technology challenges ranging from failure to follow the procurement procedures, late enactment of laws leaving it with little time to test the system properly and eventually interfering with the schedule of activities such as voter registration and verification. System failure in some areas, failure to transmit results and failure to grant access to information impacted negatively on the credibility of the polls.⁵⁵ The August 2017 presidential election was nullified due to failure to meet the legal requirements of transparency, verifiability, accountability and accuracy courtesy of management of technology used in the conduct of the election.⁵⁶

Appreciating the role technology plays in increasing access to information in all stages of elections, it is opportune for the Commission to tackle changes affecting deployment of technology through: building capacity of the Commission's ICT staff to adapt to changing industry trends; creating a framework to govern the scrutiny of election technology during petition proceedings; work in consultation with other players in the electoral process to effect legal reforms that govern the use of technology; and install technology at least 2-3 years before an election is held to give enough time for the implementation and adoption and allow the Commission to reach a consensus with critical players on proposed changes and avoid misunderstandings and unrealistic expectations. Since early installation of technology is key to its successful

⁵⁴ Section 4, Elections Act, 2011.

⁵⁵ Election Technology Law and the Concept of "Did Technology Affect the Credibility of Elections, Paper by Justice Otieno-Odek Esq - . <https://www.judiciary.go.ke/wp-content/uploads/2017/12/.pdf>.

⁵⁶ *Raila Odinga & Another v IEBC & two Others [2017] eKLR*.

implementation, the National Treasury should provide timely and adequate funding for procurement of required materials. Where the Commission is required to procure new technology, this should be done transparently by allowing public participation to eliminate delays caused by contestations at the Public Procurement Administrative Review Board and the courts.

4.11 Conclusion

This chapter demonstrated that confronting challenges that impede access to information during elections will involve a review of the management of the electoral processes. Some of the reforms involve review of the laws while others involve the management of various activities undertaken by the Commission. Some of the solutions to tackle challenges will emanate from within the Commission while others will require other institutions such as parliament to amend legislation, while others will require updating records kept by public bodies. The next Chapter discusses conclusions of the study and makes recommendations.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Conclusion

The study was how the right to access information was affected by the conduct of 2017 elections. The research questions included; adequacy of the existing laws in enabling access to information and lead to a finding that although there is a robust legal framework to assure the exercise of the right to information, it requires minor reforms to assure access to information during elections. The post liberal architecture of the Constitution which allows access to information was frustrated due to several legal weaknesses and administrative challenges caused by the Commission.

The study also inquired on the conduct of the IEBC at various stages of the electoral cycle in terms of enabling access to information. The Constitution prescribes how elections should be conducted to ensure that they are free and fair, transparent and administered in an impartial, neutral, efficient, accurate and impartial manner.¹ It was found that shortcomings occasioned by the Commission and outside the Commission interfered with timeliness, accuracy, verifiability, transparency and accountability of information that voters received during the electoral period.

Article 86 of the Constitution and various provisions of enabling legislations require the Commission to put in place a system that is simple, accurate, verifiable, secure, accountable and transparent and ensure that votes are properly and promptly counted and announced at a polling station and appropriate structures and mechanisms are put in place to eliminate electoral malpractices. These requirements, that run through the entire electoral cycle are meant to secure the sanctity of the voters' decisions which is an end product based on information accessed at various stages of the elections² and were breached by the conduct of the election by the Commission.

¹¹ Article 86.

² International Idea, Electoral Management Design 2014.

<https://www.idea.int/publications/catalogue/electoral-management-design-revised-edition>.

This study found that in some cases, there was denial of access to information, for instance to the petitioners of the presidential poll after the general election.³ Stakeholders such as the media and observers also encountered various problems in accessing information, while sections of the general public failed to access information due to their physical disabilities or the information released was not entirely accurate.

PWDs were not well catered for during transmissions, other than use of sign language during briefings, those unsighted had no recourse of receiving information broadcasted on television or social media platforms.⁴

At various stages of the electoral cycle, this study found that there were several challenges that may have interfered with access to information and which affected voters' participation in the electoral exercise. At the onset, not all stakeholders accessed information to participate in the pre-election activities such as voter education, voter registration, voter verification, party nominations, and also during voting and announcement of results and dispute resolution.⁵ Some of the challenges that affected access to information were caused by factors external to the Commission, such as late disbursement of funds meant for the activities that commence early in the electoral cycle such as voter education, legal challenges such as failure to adhere to the best practices when effecting amendments, to legislation and late changes in constituting the Commission,⁶ existence of multiple dispute resolution mechanisms during nominations and the short duration provided for the resolution of presidential disputes.⁷

“There is need to extend the period to for determining the presidential petition, for players in the petition to access information required for determining the dispute”⁸

³ Raila Odinga & Another V IEBC & two Others (2017) eKLR.

⁴ Sawa, a respondent who works with an organization concerned with access to information.

⁵ Africog.

⁶ The Carter Report. PP 4.

⁷ Ibid.

⁸ IEBC Respondent.

Other challenges were caused by the Commission itself such as late commencement of the procurement process and failure to factor in risks such as legal challenges into the process.⁹ Failure in some cases to inform stakeholders promptly on the activities of the Commission, bad corporate governance characterized by frequent conflicts in the Commission, releasing conflicting information to the public, errant commission officials who failed to follow the election rules and ended up releasing conflicting information that occasioned by elections in Embakasi South, Ugenya and Wajir West Constituencies¹⁰ and failure by the Commission to grant access to information in its custody which occasioned nullification of the presidential poll were but just an indictment of the Commission.¹¹

The study hypothesis has been answered in the affirmative that even though there is a robust legal framework for accessing information during elections, the problem majorly lie in the implementation. Several minor amendments to the legal framework can be enacted to address some emerging problems caused to the accuracy of the voter register, address the conundrum on the integrity of nominees who participate in elections, review of the legislation regarding dispute resolution in party nominations process and extension of the duration for resolution of the presidential petitions. The study is also affirmative to the hypothesis that access to information held by the Commission is frustrated by improper implementation mechanisms in place.

“The legal framework is largely in place but implementation is the key problem.”¹²”

Finally, the study confirmed that failure to access information during elections affects other rights and enjoyment of freedoms. Reforming the electoral process to ensure access to information should therefore hinge on minor legal adjustments to accommodate the problems encountered in the conduct of elections but, the major reform is conformity to the dictates of the law governing conduct of elections.

⁹ KPMG Audit Report.

¹⁰ Responses from IEBC representative.

¹¹ *Raila Odinga & Another V IEBC & two Others (2017) eKLR.*

¹² Wabu, Respondent from a political party.

5.2 Recommendations

The electoral process in Kenya must adhere to the rule of law, and the commitment of the state to take measures that ensure exercise of human rights. Of particular importance is the centrality of information on various activities of the Commission such as the right to an effective remedy, to a fair and impartial process and to equality before the IEBC. The Commission should therefore enable access to information in its custody and publish information proactively on electoral activities at various stages.

“There should be increased effort to implement the spirit of the AIA to enable access to electoral information.”¹³

The study recommends amendment of the IEBC Act, Section 5 to provide for composition of the Commission in compliance with the best international practice, and the Kriegler Committee, recommendations that appointments to the electoral body should not be undertaken later than one and a half years to the general elections and should be staggered to ensure that continuity and institutional memory is not affected by the exit of all commissioners at once.¹⁴ Appointments made in this manner also accord the Commission ample time to orientate the new commissioners on corporate governance, enabling IEBC to present a unified position on issues of public concern and avoid unnecessary squabbles in the Commission. Further, the appointments should comprise more than one advocate to assist the chairman in executing duties of a legal nature such as dispute resolutions and misconduct and enable timely updates to the public.

The jurisdiction of the IEBC and the Political Parties Dispute Tribunal (PPDT) in resolution of party disputes during nominations should be clarified to stakeholders. This would ensure effective flow of information, standards and procedures for verifying candidate eligibility to all the stakeholders. This clarification should include the role of

¹³ Respondent Dionda who works with a media regulatory organization.

¹⁴ The Kriegler Report.

the IEBC vis-à-vis that of EACC in determining candidates who meet the leadership and integrity standards should be administered to avoid disputes after the elections.¹⁵

To increase voter registration, improve voter verification and audit of the register and create certainty on the process, particularly during MVR, the Commission should come up with reasonable timelines for these exercises to increase public participation in the activities. While the National Assembly is legally empowered to amend legislation, changes to the electoral law, should be undertaken at least one and half years before the elections are held, in line with the recommendations of the Kriegler Committee Report and the Venice Code of Good Practice in Electoral Matters, to avoid complicating management of the electoral process.

*Amend legislation early to align electoral systems affected the amendment.*¹⁶

The procedure for nominating candidates should be reformed to ensure that candidates vying for party nominations meet the established legal criteria. This would of necessity call for the Commission to release an accurate and current voter register and the ORPP to release an updated register of party members on time for use by political parties during the party primaries to ensure the credibility of the process.¹⁷ The ability of the parties to conduct the primary nomination processes should also be strengthened to ensure application of procedures that are consistent and allow only eligible party members to vote in nominations.

The Commission highlighted a perennial problem of late funding from the national treasury which results in late commencement of its activities such as voter education, registration and publicity in the process affecting access to information. The Commission and stakeholders should engage the national treasury to release funding on time to ensure that critical activities that are scheduled to commence early in the election cycle among

¹⁵ The Carter Report, PP 27.

¹⁶ Kived, respondent of a political party.

¹⁷ Ibid.

them; voter education, registration and verification, proceed without delays in order to reach out to more voters.

For effective use of resources and in order to maximize on impact of its voter education programmes, the Commission should rationalize its engagement with other organizations engaged in voter education to avoid duplicity and to maximize coverage and save on cost.

The Commission should in the process, enforce the spirit of Article 88 (4) (g) and Section 40 of the Elections Act, to ensure that voter education is a continuous exercise. To maximize impact, the voter education materials should be packaged in accessible formats to target different segments of voters such as those living with disabilities and those who are illiterate and tie up the process to the continuous voter registration to enlighten voters on the need to take part in elections. The voter education curriculum should be broad based to sensitize voters on their role in democracies.¹⁸

The Commission should in the process, work with other government agencies to register most targeted voters and also address the emerging drop in registered women voters as evidenced in the registration disparities of 2017 elections which had (8) percent less than their male counterparts as compared to the 2013 election which had a disparity of only one percent.

The Births and Registration Act Cap 149 should be reviewed to reform information management systems at the Civil Registry which may include use of modern technology and integration. To ensure that this is accomplished, the Commission should invoke Article 35 of the Constitution and engage other relevant government bodies to provide information that will facilitate updating of the voter register and enlist more voters. The review should also aim at creating more certainty and clarity on the status of an expired passport after registration, in regard to voting.¹⁹

¹⁸ Views of Keopa, Investigative Journalist Respondent.

¹⁹ Interview with IEBC Respondent.

To restore credibility in elections results, there is need for transparency in the results transmission process. This would of necessity require IEBC to restructure the involvement of stakeholders in the results management process. Since technology is integral in the management of election results, IEBC should deploy block chain technology which allows all accredited and interested stakeholders to monitor results from polling stations, in real time.

*Eliminate any human interference from counting to results transmission and announcement of results by deploying appropriate technology and allowing all stakeholders to observe the process.*²⁰

The short period in filing and responding to the presidential petition was a challenge faced by the parties. The deadlines were not adequate for the petitioners to acquire all the information neither is it adequate for the respondents preparing their defence. The Supreme Court decried the short period as being inadequate for just determination of the dispute. The law on the duration of determination of the presidential election petition should be reviewed and reasonable timelines set to ensure just determination of the presidential election petition.

From the study findings, the Commission faced legal challenges relating to procurement of election materials some of which affected voter registration and verification exercises. To arrest this problem, the Commission should commence procurement of election materials early in the election cycle, in strict compliance with the law, to avoid spilling into and delaying scheduled election processes such as voter registration and verification and avoid unnecessary litigation.²¹

Finally, IEBC should build the capacity of its ICT staff to continually adapt to the industry standards that keep on changing.²² Where review of legislation is required, it

²⁰ Keopa, investigative journalist..

²¹The Post Election Evaluation Review Report PP 175-176.

²² European Commission for Democracy through Law. Code of Good Practice in Electoral Matters PP. 10.. [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023rev2-cor-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e).

should be within the internationally set standards to allow sufficient time for the implementation and adoption.²³ To implement technology successfully, the government should provide adequate funding for its timely acquisition, testing and implementation.

5.3 Areas for Further Research

This study recommends further research to be conducted on the impact of technology in enabling access to information since technology was introduced to increase efficiency and address challenges that encumbered the process of free and fair elections. Further study should also be conducted on how other institutions affect access to information during elections.

²³ Ibid.

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APPENDICES

APPENDIX 1: RESEARCH QUESTIONNAIRE

The Fallacy of the Right to Access Information in Kenya During Elections: A Case Study of the 2017 General Elections

I request your acceptance to participate in my research as a respondent. I Charles Edward Sikulu a Masters of Law student at the University of Nairobi undertaking Masters studies in Law. My research topic is, **The Fallacy of the Right to Access Information in Kenya During Elections: A Case Study of the 2017 General Elections**

All information shall be strictly used for study purposes and shall remain confidential to the extent of the respondents' wishes.

Name :

(Optional) Organization:

Designation:

Profession:

Gender: Male () Female () (tick the appropriate)

II Preliminary Questions

1. How many General Elections have you participated in Kenya
2. Did you participate in the 2017 General Elections Yes No
3. How would you rate access to electoral information in Kenya's past General Elections prior to 2017?
 - A. Very accessible
 - B. Accessible
 - C. Accessible with challenges
 - D. Not Accessible
4. What key information does the public require during general elections?
5. Which information was made accessible during the 2017 General elections?
6. What is your assessment of the level of access to information?
 - A. Very Good
 - B. Good
 - C. Fair
 - D. Poor

5. If the answer is yes, which type of information is not allowed?
6. What are the reasons for not allowing the public to access the information mentioned above?

7. Please rate the performance of IEBC in allowing access to information during the 2017 Elections (in a scale of 1-5 where 1 being the lowest and 5 being the highest).
 - 1) Not accessible
 - 2) Highly limited access with many barriers
 - 3) Accessible with barriers
 - 4) Accessible with very limited barriers
 - 5) Highly Accessible

V1) How do you rate access to information at the following stages (A – very good, B –Good C – Fair D- Poor. Please tick the appropriate choice)

Pre-election

A () B () C () D ()

Registration of voters

A () B () C () D ()

Nomination of candidates

A () B () C () D ()

Campaign period

A () B () C () D ()

Voting

A () B () C () D ()

Vote counting, announcement and transmission

A () B () C () D ()

1) Was there adequate information available to the public on the activities?

Yes () NO ()

2) In what form was the information available

3) Was the information available in use friendly formats to people with disabilities (PWDs)?

4) What barriers were experienced by PWDs in accessing information?

VI. Voter Registration

1. Did the voters access adequate information to facilitate their registration to participate in the electoral process?
2. What was the logistical and administrative support for voter registration process?
3. What was the accuracy of the voter register the 2017 elections?
4. Was the voter register a complete representation of eligible voters? Yes or No
5. Were the voters allowed to inspect the register? Yes/NO
6. If yes, what were the challenges involved in inspecting the register?

VII. Polling Operations

1. Was there adequate information on polling stations, hours and management of queues during polling?

2. Was there effective information to ensure that polling stations opened and closed on time?
3. Was adequate information available to voters on the voting process?
4. Was the counting process conducted in a manner consistent with the laws and regulations?

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

5. How did the candidates and the general public access elections results?
6. Assess the performance of the election officials in managing polling operations particularly in releasing information?
7. Were there any challenges that prevented candidates and stakeholders in accessing results or any other information from the election officials? Yes or No?

If yes what were the challenges?

VIII. Transmission, Tallying, and Publication of Results

1. Assess whether the process of tallying and relaying of results from polling stations; constituencies; county level and national levels was consistent in practice and with the regulations?

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

3. Was there adequate participation of parties, candidates, agents and observers in overseeing the results management process? Yes/NO
4. Were there any complaints raised on the counting, transmission, tallying and publication of results? Yes/NO
5. Were complaints and objections during counting, transmission, tallying and publication of results effectively dealt with? Yes/NO

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

IX Integration of ICT in Election Process:

1. Was there a clear legal and administrative framework for integration of ICT in the electoral process?
Yes/ NO
2. In your assessment, did the ICT integration improve transparency, accountability and efficiency in managing elections?
3. Was there adequate inclusion of political parties and other stakeholders in the process of integrating technology?
4. In your assessment, was there adequate precaution in respect to the process of technology integration?

Were there failures in electronic voter identification or voter register material in respect to free and fair elections? If yes, what were the failures?

What challenges were experienced in respect to result transmission, publication, and access by interested parties?

APPENDIX 2: LIST OF RESPONDENTS

Individual respondents living with disabilities (PWD's)

Name	Gender	Occupation	Organization
1. Doro	F	Lecturer	UoN
2. Siti	F	Librarian	UoN
3. Kunde	M	Journalist	Freelance
4. Bonya	F	Advocate	Court of Appeal

Individual respondents


1. Name	Gender	Occupation	Organization
2. Jane	Female	Businesswoman	-
3. Lin	Female	Administrator	UON
4. Caroli	Female	Administrator	KNEC
5. Mer	Female	ICT specialist	UON
6. Bali	Female	Journalist	Standard Group
7. Kuba	Male	Lecturer	UON
8. Jeke	Male	Wireless Engineer	Huawei Technologies
9. Esne	Female	Communications	UON
10. Wagi	Male	Communications	Nyayo Tea Zones
11. Nasa	Female	Communications	Evolution
12. Husa	Male	Accountant	Private Practice
13. Kika	Female	Writer	Blackstar Media
14. Jokya	Male	Radio presenter	Royal Media Services
15. Zawa	Male	Lecturer	UON
16. Olike	Male	Lawyer	ODPP
17. Mori	Male	Public servant	Min of Agriculture
18. Miria	Female	Communications	UoN
19. Bewa	Female	Lawyer	Nyagah & Mugisha
20. Hebu	Male	Lawyer	A.G.
21. Beki	Male	Administrator	UoN
22. Glacha	Female	Secretary	UoN
23. Jaora	Male	Lecturer	UON
24. Odijo	Male	Lecturer	UON
25. Joshi	Male	Research Fellow	UON
26. Daka	Male	Lecturer	UON
27. Grambu	Female	Administrator	UON
28. Genya	Male	Accountant	Ernest & Young
29. Njemu	Female	Editor	UON
30. Isanywa	Male	Student	UON
31. Kevi	Male	Graphic Artist	UON
32. Mernje	Female	Student	UON
33. Mamu	Female	Fashion Designer	Auvazzi
34. Mimu	Female	Public servant	Min of Information
35. Kiro	Female	Student	MKU
36. Dinama	Female	Court Clerk	Maina Kagura Adv


37. Irenjo	Female	Court Clerk	Maina Kagura Adv
38. Luodi	Male	Psychologist	UON
39. Zoope	Male	ICT	UON
40. Steka	Male	ICT	UON

Respondents for organizations

Name	Organization	Occupation	Gender
1. Dionda	Media Council of Kenya	Manager	F
2. Fiimba	African Centre for Technology Studies	Programme administrator	F
3. Keopa	African Investigative News	Founding Editor	M
4. Sawa	Article 19	Advocate	F
5. Criowi	IEBC	Manager/Lawyer	M
6. Siosi	Oslo	Director	F
7. Lama	ORPP	Manager	F
8. Mohali	CMD-Kenya	Manager	M
9. Wabu	ODM	Director	M
10. Khamu	FordK	Director	F
11. Kived	KANU	Director	M
12. Jasi	Wiper Democratic	Director	M


APPENDIX 3: RESEARCH PERMIT


REPUBLIC OF KENYA


**NATIONAL COMMISSION FOR
SCIENCE, TECHNOLOGY & INNOVATION**

Ref No: **818425** Date of Issue: **25/July/2019**


RESEARCH LICENSE




This is to Certify that Mr. Charles Sikula of University of Nairobi, has been licensed to conduct research in Nairobi on the topic: THE FALLACY OF THE RIGHT TO ACCESS INFORMATION IN KENYA DURING ELECTIONS: A CASE STUDY OF THE 2017 G for the period ending : 25/July/2020.

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