



**The Kenyan Section of the International
Commission of Jurists - (ICJ - Kenya)**

**Memorandum to the Independent Review
Commission (IREC)**

**Recommendations on Regulation of Electoral
Campaign and Dispute Resolution.**

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Introduction.

The Kenyan Section of the International Commission of Jurists (ICJ-Kenya) is a membership, non partisan, non for profit registered organisation. It is an autonomous section of the International Commission of Jurists. As a membership body of Jurists, both locally and globally, ICJ Kenya has a great interest in the administration of justice and has been working in Kenya and around the African Continent since 1959.

The ICJ Kenya's vision and mandate is to promote the adoption of systems that foster Democratic governance, the Rule of Law and respect for all Human Rights. It organises activities and programmes that inform, agitate, and advocate, in an innovative manner, for the recognition and protection of human dignity at all times bench marked against international standards.

Through its Judiciary programme, ICJ Kenya has actively and continuously advocated for the reforms of the Electoral Justice Systems including the speedy resolution of Election Petitions. The theme of its Annual Jurist Conference dubbed '**Beyond Elections 2007 – Essential Urgent Reforms**' held in August 2007 - Mombasa and subsequent Consultative meetings and Public Forums discussed heavily matters of electoral justice. Its members and the general public proposed far reaching measures that have been articulated in this Memorandum which aim to strengthen the judicial process as regards elections petitions.

Comments on International best practice on resolution of election disputes

International best practice demands that the Electoral systems should establish effective mechanisms and remedies for enforcement of electoral rights during and after elections. There are a number of mechanisms that have been devised around the world to resolve electoral disputes. These include:-

1. Resolution by the electoral organisation that also organizes elections
2. Resolution by a designated tribunal or body that is not tasked with organizing elections
3. Resolution by the judiciary or a special branch of the judiciary
4. Resolution by Parliament or the Executive
5. Use of international tribunals and commissions
6. Alternative dispute resolution

ICJ Kenya firmly contends that every voter, candidate or political party should have a right to lodge a complaint with the competent body when an infringement of electoral rights occurs. Such a body must render a prompt and fair decision with a right to appeal to a higher court or commission. These international standards also provide for time frames for rendering a decision to the complaint. The body must have the capacity to deal conclusively and fairly with electoral disputes. Otherwise, there is a potential chance to derail the electoral process in the hearing and determination of the disputes relating to the election results.

A. Comments on Kenya's Electoral Disputes Resolution Process.

a) Jurisdiction

The jurisdiction to hear electoral disputes is vested in the High Court under section 44¹ of the Constitution. The mode of presentation to the High Court to hear the above is provided for under section 19 of the National Assembly and Presidential Elections Act (CAP 7).²

Petitions that challenge whether a person has been validly nominated or elected as President are heard by a bench consisting of three judges³. A petition to challenge the validity of election of a member to the National Assembly or whether a seat has become vacant is heard by a court consisting of one Judge. Civic elections disputes are handled in the Magistrate Courts⁴ under the provisions of Local Government Act, CAP 265 of the Laws of Kenya. Under section 44(3)⁵ of the Constitution, such an application to the High Court may be made by any person who was entitled to vote in the election therefore deemed 'the Petitioner'. There is a legislative requirement that these petitions 'shall be heard on a priority basis'⁶.

b) Presentation of Petitions and Procedure.

A petition to question the validity of an election must be presented and served within 28 days after the date of publication of election results in the Gazette⁷. The election Petition defines a Respondent to be the person whose election is complained of or if the petition complains of the conduct of the returning officer or any person under him or her or any person whose conduct is complained of in relation to the election. It is a requirement that within 3 days of making a presentation of the petition, the Petitioner must give security for costs⁸ and cannot be extended beyond three days.

c. An overview of Election Petitions in Kenya – salient features of the electoral justice Jurisprudence.

¹ Section 44 (1) 'The High Court shall have jurisdiction to hear and determine any question whether.....'

² Section 19(1) '.....shall be made by way of petition' CAP 7 Laws of Kenya

³ Section 19 (3)

⁴ Section 61 (2) ' The Resident Magistrates Court shall , after due inquiry declare whether the candidate whose election is questioned, or any and what other person, is duly elected, or whether the election is void'

⁵ a person who is registered as a voter in the elections of elected members of the Assembly or by the Attorney General'

⁶ Section 19(4)

⁷ Section 20(1) (a) of National Assembly and Presidential Elections Act, CAP 7

⁸ Section 21(2), CAP 7 'the amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money'

i) Issues of Jurisdiction – the courts have reaffirmed their constitutionally conferred powers to hear and determine election petitions

ii) Signing of Petitions – they have insisted that the Petitions must be personally signed by the Petitioner⁹

iii) Personal Service – this has drawn a lot of controversy and conflicting jurisprudence. In the case of *Mwai Kibaki –vs- Daniel Toroitich Arap Moi, SM Kivuitu and The Electoral Commission of Kenya*¹⁰ the Court held that a petition must be served personally to the Respondent

iii) Security for costs – the courts have held this to be a mandatory requirement, much to the detriment of those who are unable to raise this amount

Coupled with the courts reasoning above, it is the persistent question of the time it takes to dispose the Petitions. There is no disputing resolution of electoral disputes have been characterised by unreasonable delays, resulting in ineffectual decisions and dismissal or petitions on grounds of technicality.

ICJ Kenya makes the following recommendations noting that they will enhance the credibility of the Courts systems and public confidence in the electoral process;

I) Establishment of an Elections Tribunal

The Electoral Commission is mandated to manage and oversee elections. Its also has the oversight role to enforce the electoral code of conduct. Breach of the electoral code of conduct is a contentious subject matter during elections period and campaigns as they are committed all the time

It is for this reason that ICJ Kenya reiterates the recommendation made to the Independent Review Commission at the workshop dated 8th August 2008.¹¹ that **‘there be established an Electoral Tribunal under the proposed Electoral Commission Act to handle elections disputes on matters of fact, disputes between political parties disputes and enforcement of the electoral code of conduct given that the codes are not normally part of the formal legal framework’.**

ICJ Kenya further proposes and encourages the Electoral Tribunal to use or adopt Alternative Dispute Resolution mechanisms such as mediation and conciliation. This will empower the Electoral Commission to handle matters as preliminary step before they are taken to court.

⁹ Daniel Toroitich Arap Moi VS. Kenneth Stanley Njindo Matiba & Others Civil Appeal No. 176 of 1993

¹⁰ Election Petition no.1 of 1998

¹¹ See ICJ Kenya’s ‘Memorandum on the ECK Structure and Organisation’ pg. 8

II) Establishment of a special Registry and separate division of the High Court to handle Electoral Matters

The proposed High Court division will have the jurisdiction to hear disputes on matters of law only relating to presidential, parliamentary and Civic elections. At the moment, the state of election matters around the country are scattered all over the courts making it difficult to set up standard practice and procedure comparable to other jurisdictions

This recommendation is meant to improve the efficiency of the court system and make it responsive to the needs of the people. It will also allow for the development of a comprehensive electoral system, increase access to justice and enhance public confidence in the dispensation of electoral justice, as they both the litigants and the public will have a legitimate expectation to have tangible and quick results. In addition, this would also assist in streamlining the electoral justice jurisprudence by making it stable and static.

In setting the time frame for case management of election petitions under this division, ICJ Kenya recommends that in order to aid the speedy resolution of presidential election disputes for example, the time frame contained in the Proposed Bomas Draft Constitution¹² is adopted. and the court required to dispense the same at its earliest opportunity e.g. within one month.

In the same spirit, ICJ Kenya recommends the adoption of a similar time limit for resolution of the parliamentary election dispute to be 6 months as stated in the Bomas Draft Constitution.¹³

III) Review of the Election Laws and procedures of handling Election Petitions.

Under section 23(3) of the National Assembly and Presidential Elections Act¹⁴ the Rules Committee is empowered to make rules regulating the conduct and procedures of election petitions. By the same token, under the Local Government Act, CAP 265 and in particular section. 61(4), the statute confers on the Chief Justice to make rules for the conduct of an inquiry of a Resident Magistrate into disputed civic elections The Rules simply provide the guidelines that the court must follow.

ICJ Kenya highly recommends that the statutory powers conferred on the Chief Justice pertaining to civic election disputes and Rules Committee for Election Petitions on presidential, parliament are reviewed

¹² Section 162(2) ‘The petition shall be filled within 7 days after the date of announcement of the results if the presidential elections by the electoral and boundaries commission’

¹³ Section 127 (2) ‘ a question to determine membership of the National Assembly shall be heard and determined within 6 months of the date of lodging the petition’

¹⁴ Section 23(3) The Rules Committee may make rules of court regulating the practice and proceedings concerning petitions’

On procedural matters for example, the condition setting the deposit of Ksh. 250,000 as security for costs is a stringent and rather harsh requirement for a common 'mwanaichi'. In addition, many petitions have failed or been struck out due to failure by a Petitioner to effect personal service to the Respondent. The law as it currently stands does not allow for any other means of service in the event that personal service cannot be effected. A look at the current 2008 election petitions court rulings appears to suggest the same trend in the strict application of the law.

On matters of evidence of election petitions, this is given by way of affidavits, which before the hearing, are sealed in an envelope and opened at the day of the actual hearing. This process delays cases as often the opposing side will ask for time to respond to the affidavit causing the matter to be adjourned and delayed further. Matters deponed to in the affidavit are confined to matters within the Petitioner's knowledge which defeats the purpose of the petition as any violations done or complaint made could have been perceived and witnessed by someone other than the deponent

The forms used in elections are many and cause confusion; these should be reduced to few documents. It is also a setback that forms allowed under the law to be availed as evidence in the election petition by the returning officer are irrelevant as they are in many cases incomplete without any other supplementary documents that confirm their content.

ICJ further highly recommends that a uniform set of rules are drafted to be used under the proposed Election Division of the High Court to encourage uniform development of election jurisprudence in Kenya. When reviewing such a legal framework and any other related legislation touching on electoral disputes, there must be ample consultation time allocated to analyse and ensure that they do not conflict with one another and that they meet international standards. Written law provides the benefit of certainty, visibility and transparency. It is more readily subject to judicial interpretation and review and is more useful to interested parties including electors.

IV) Essential and Urgent Reform of the Judiciary

The central role of the Judiciary to safeguard the right to vote as a universal human right cannot be gainsaid.

It is ICJ Kenya's contention that, as far as democracy is concerned, the Courts have a Constitutional task to promote free and fair elections by safeguarding the citizen's freedom to vote freely and elect leaders of their choice. Following the 2007 general elections, the Judiciary should have been able to act as a safety mechanism to diffuse the political tension and thereby avert the violence that followed the announcement of Hon. Mwai Kibaki as President. The Judiciary should have provided an alternative arena where political players could have fought out the heated political battles by proxy through lawyers.

However, this was not the case in our Kenyan scenario. The failure of the Judiciary to play its role in relation to the election process can indeed subject the country to political instability. After the announcement of the elections results, members of the electorate

viewed the courts as not sufficiently strong and independent to deal with the dispute and resorted to extreme methods in a bid to redress their grievances.

Furthermore, the open declaration of the lack of confidence in the Judiciary was further demonstrated and compounded by the refusal of ODM to seek redress or challenge the results in court. Thus the lack of both public confidence in our Kenyan judiciary and that of the disputing party was and is still a clear indication of the urgent and necessary reforms needed in our Judiciary.

Moreover, the role of the Judiciary in handling past election petitions has been disappointing. An analysis drawn from the previous judicial decisions indicated a tendency by the Judiciary to reflect and uphold the prevailing political status, thereby rendering itself ineffective. However, an overview analysis of the recent pronouncements of election petitions have seen progressive rulings and increased speed in resolving election disputes. This is the direction ICJ Kenya firmly holds and should be fully embraced by the Judiciary as it complements its mandate of playing an oversight role over governance institutions.

The main delays experienced and hindrances attributed to the lack of expeditious hearing of election petition cases have included the following factors,

- a) lack of sufficient judges to ensure prompt conclusion of election petitions. In addition, the gazetted judges this year and the administrative transfers create delays in the conclusion of the petitions. This is a perennial problem that causes serious backlogs and delays in the conclusion of the case.
- b) Lack of rules to introduce case management of election petitions to ensure that time lines are met and interlocutory matters are dealt with expeditiously, such as specific time frames to ensure that pending petitions are completed within a specific period of time both in the High Court and the Court of Appeal.
- c) lack of information technology and adequate administrative facilities such as stenographers to ensure the petition proceedings are typed to aid speedy preparations of appeals. This would ensure that a record of appeal is filed expeditiously as the typed proceedings should be ready upon conclusion of the trial.
- d) lack of specialised capacity among Judicial Officers due to the technical nature of this area of law

It is ICJ Kenya's contends that for the proposed amendments to work, the number of Judges must be dramatically increased. If not possible in the short term, the Commissioner's of Assize may be appointed to deal with normal civil matters thus releasing the Judge to hear the election petitions.

B. Electoral Campaigns Regulation.

Comment on Electoral Campaigns.

Elections are a means of translating the general will of the electorate into representative government. In order to achieve this objective, it is necessary that all parties and candidates are able to put out their manifestos, the political issues and their proposed solutions, freely to the electorate during the electoral campaign period.

ICJ Kenya proposes that there be established a legal framework that regulate the Electoral Campaigns.

The electoral period should be clearly and well defined. In our Kenyan experience, campaigns begin way before the formal campaign period which should commence after the valid nomination of parties and candidates ending one or two days before polling.

ICJ Kenya proposes that the legal framework should ensure that;

- There are no unreasonable restrictions on the right to freedom of expression and whatever restrictions there are set out in the law
- Every party and candidate has equitable access to the media, especially the electronic media to undertake their campaign
- Where state or private funding is permissible every candidate has equitable access to resources to undertake a credible election campaign
- No party or candidate (especially the ruling party) is favoured, financially or otherwise through the availability of use of state resources over the other parties and all stakeholders in the election process have an equal chance of success
- No party or candidate threatens or does violence to another party or candidate or incites anyone to violence or otherwise impedes the freedom to campaign
- All parties and candidates should normally cease active campaigning one or two days prior to polling day allowing the electorate to weigh the options and to exercise their franchise freely and without undue pressure.

Other legislative considerations will include the following;

Campaign Violence

The proposed legal framework should state in clear and unambiguous language the type of conduct and behaviour prohibited during the electoral campaign. It should be consistent with other legislation and not be unduly restrictive providing the opportunity for active and open campaigning, free from interference.

Campaign Sanctions

It is ICJ Kenya's contention that merely incorporating provisions for a free electoral campaign in the legal framework is not sufficient unless it is backed by a reasonable

effective and credible sanction regime. If a code of conduct is incorporated in the propose Election Act for example, ICJ Kenya contends that criminal or civil penalties should apply. Other specific electoral penalties such as the disqualification of candidates or parties are also proposed. However, the penalties should not be disproportionate to the offences

ICJ Kenya proposes that there be enacted within the proposed Elections Act a Code of conduct reflecting campaign legislation provisions, which will ensure that all parties and candidates;

- Respect the right and freedom of all other parties and candidates to campaign and disseminate their political ideas and principles without fear
- Conduct themselves in a manner that respects the rights of other parties and candidates, and respects the rights of voters and other members of the community
- Respect the freedom of the press
- Use their good offices to seek to ensure reasonable freedom and access by all parties and candidates to all potential voters and
- Seek to ensure that potential voters wishing to participate in related political actives have the freedom to do so

At the same time, the code of conduct should ensure that no party or candidate will

- Harass or obstruct media representatives engaged in their professional activates
- Disrupt, destroy or frustrate the campaign efforts of any party and in particular will not
 - I) Prevent the distribution of handbills and leaflets, nor the display of posters of other parties and candidates
 - II) Deface or destroy the posters of other parties and candidates
 - III) Deface private property or government or public buildings by writing slogans pasting posters etc
 - IV) Prevent any other party from holding rallies, meetings, marches or demonstration.
 - V) Seek to prevent any person from attending the political rallies of another party
 - VI) Permit their supporters to do anything prohibited by the code of conduct.

Electoral Campaign Financing

The proposed legal framework should provide for electoral campaign financing on the following internationally recognised standards;

- That there should be a transparent system of disclosure of the funding received by any party or candidate
- That there should be no discrimination with regard to access to public funds for any party or candidate
- That public funding should be available to parties on an equitable basis and
- That there should be a level playing field among the parties or candidates
- For public funding, that this should be provided on the basis of equity, clearly stating in the law the objective criteria that will not be open to subjective interpretation by government authorities.
- That state resources are not used or issued for campaign purposes by the party in power.
- That the state resources used for campaign purposes such as the state media, buildings, property and other resources are also made available to all electoral participants on an equitable basis.
- For private contributions to campaign expenses incurred on behalf of parties and candidates, that the regulations ensure equality of freedom to raise private funds
- For election expenditure of the parties and candidates, in order to bring about some semblance of an equal chance of success, certain financial limits are prescribed for varying levels of elections, presidential, legislative and local.
- That Parties and candidates will be required to periodically file statements and reports of election expenditure to the Electoral Commission
- That periodic reporting at reasonable intervals on all contributions received and expenditure incurred by an electoral contestant as campaign expenditure is made mandatory. This provision would be meaningless without transparent reporting and disclosure requirements.
- Specifically identify the agency responsible for receiving, compiling and holding campaign contributions and expenditure reports and specify when they will be available for public inspection.
- That the law permits public access to campaign contribution and expenditure reports so that the contents are made available to other interested parties, candidates and voters
- That mechanisms for monitoring and enforcing compliance with political finance laws are put in place

The points outlined above are not exhaustive, but merely provide for the minimum legal standards that must be included in the Electoral Campaign legal framework.

Conclusion

ICJ-Kenya's firmly believes that the implementation of the issues raised in this memorandum will go a long way in creating a more efficient system of delivery of electoral justice in Kenya and regulation of electoral campaigns.