

Stakeholders' Evaluation Report

ON THE PERFORMANCE OF THE POLITICAL PARTIES DISPUTES TRIBUNAL IN THE 2017 PARTY NOMINATIONS



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Stakeholders' Evaluation Report on the Performance of the
Political Parties Disputes Tribunal in the 2017 Party Nominations

© The Kenyan Section of the International Commission of Jurists (ICJ Kenya) and
the Political Parties Disputes Tribunal (PPDT), Nairobi

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Abbreviations and Acronyms

ACHPR	African Charter on Human and People's Rights
ADR	Alternative Disputes Resolution
ANC	Amani National Congress
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CERD	Convention on the Elimination of all Forms of Racial Discrimination
CEO	Chief Executive Officer
CMS	Case Management System
EDR	Election Dispute Resolution
EOM	Election Observer Mission
EU	European Union
FORD-K	Forum for Restoration of Democracy in Kenya
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ Kenya	The Kenyan Section of the International Commission of Jurists
IDLO	International Development Law Organisation
IDRM	Internal Disputes Resolution Mechanism
IEBC	Independent Electoral and Boundaries Commission
IEC	Independent Election Commission
IFE	International Foundation for Electoral Systems
JCE	Judiciary Committee on Elections
JSC	Judicial Service Commission
JTI	Judiciary Training Institute
KANU	Kenya African National Union
LPK	Labour Party of Kenya
MOU	Memorandum of Understanding
NARC	National Rainbow Coalition
NEI	National Electoral Institute
LSK	Law Society of Kenya
ODM	Orange Democratic Party
PDP	People's Democratic Party
PNU	Party of National Unity
PPDT	Political Parties Disputes Tribunal
UDP	United Democratic Party
UDHR	Universal Declaration on Human Rights
UN	United Nation
UNDP	United Nations Development Programme

Glossary

Inter-party	“between parties; in case of a political party, between one party and another party”
Intra-party	“being or occurring within the membership or scope of a political party”
Party List	“comprises the appropriate number of qualified candidates for nomination slots in conformity with Article 90 of the Constitution of Kenya, 2010, and alternates between male and female candidates in the priority in which they are listed”
Party Nomination	“the submission to the Commission of the name of a candidate in accordance with the Constitution and Section 2 of the Elections Act, 2011”
Party Primaries	“the selection of candidates for presidential, parliamentary and county election by persons who are members of respective political parties and whose names appear on the party membership list as submitted to the IEBC under Section 28”
PPDT	This is the Political Parties Dispute Tribunal. In the text, “PPDT” is used interchangeably with “the Tribunal”

Foreword

An important factor that distinguishes a well-functioning institution is whether the principles of good governance are respected and deeply rooted in its practices and processes. In addition, there is also need to include good governance elements in the daily practices of a national institution over a long period of time for sustainability beyond the current leadership of the institution.

Scholars and organizations alike have attempted to provide a clear and concise definition to the term good governance, however, there has been no consensus over a particular definition of the term as it is constantly evolving thereby reflecting the fast development of the current societies. The definition provided by the United Nations Development Programme (UNDP) states: good governance is “... among other things participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law.”

PPDT strongly believes in transparency and accountability and embraces a stakeholder involvement and engagement approach in not only building its processes, but also in systematically assessing the impact of its processes and adjusting as and where necessary for improved impact.

The role played by the Tribunal in the electoral process is one that its Stakeholders continue to take seriously. This is because Elections provide citizens with an opportunity every five years to determine their leaders, thereby delegating the exercise of their sovereign power as guaranteed by the Constitution of Kenya. Thus, the Tribunal's responsibility is to help give meaning to the will of the people.

Within the electoral context PPDT is grounded on the need to ensure disputes emanating from Political Parties Electoral Cycle are addressed in a just and expeditious manner, thereby infusing confidence and trust in the entire Political Parties electoral process. The Tribunal not only provides redress to the contending parties but also to the aggrieved electorate, who may feel marginalized or excluded from certain parts of the electoral process. Thus a robust and fair electorate dispute resolution mechanism is a key ingredient for an effective electoral system of any country.

The preparation of this report is part of the long-term commitment of the PPDT to play its rightful role in the country's electoral and democratic processes, as there is an increase in pre-election disputes. As matters brought before the Tribunal require to be determined under very short timelines, this puts pressure on the Tribunal members.

Bearing all this in mind, there was need for the Tribunal to interact with its Stakeholders to collect feedback on what worked and what failed, to enable the Tribunal to chart its way forward in its preparation for the fulfilment of its mandate towards the next elections.

On behalf of PPDT, I wish to express my sincere gratitude to ICJ Kenya for the role it has played in supporting us to come up with this report. I would like to acknowledge the hard work of the ICJ Kenya Access to Justice Program Team comprised of Teresa Mutua, Silas Kamanza, and Vincent Muthaura for offering their legal expertise and guiding the development of this publication. Particularly, I wish to thank Mr Paul Otieno, and Mrs Mediatrix Tuju for their professional contribution in carrying out this research as well as all our stakeholders whose input tremendously contributed to a successful compilation of this report.



Mr. Kyalo Mbobu,
Chairman, Political Parties Disputes Tribunal (PPDT)

Introduction

The Political Parties Disputes Tribunal (PPDT) is a tribunal established with the mandate of resolving disputes arising from the activities of political parties in Kenya.¹ It is among the pre-election disputes resolution bodies created in the aftermath of the 2007/08 general elections that was marred with violence. Its establishment as a pre-election adjudication mechanism was predicated on the understanding that effective management of pre-election disputes is central in reducing the number of election petitions filed following the conduct of an election. Therefore, it relieves the post-election tension that is normally associated with such cases having not been resolved as soon as they occur.²

The creation of the Tribunal was envisioned in Articles 87 (1) and 169 (1) (d) of the Constitution of Kenya, 2010, as a subordinate court, with the mandate of resolving disputes arising from the activities of political parties in Kenya. Initially, the Tribunal was set up under the provisions of section 5 of the Political Parties Act (No. 10 of 2007), which was repealed by the Political Parties Act, 2011. The latter legislation brought its operations within the structures and control of the Judiciary.³

The resolution of party nomination complaints by the Tribunal was one of the major activities undertaken in preparation for August 8, 2017 general elections. This was done in line with the Elections Act, 2011, the Political Parties Act, 2011 and the IEBC's timetable.⁴ Disputes came in various forms including establishing the jurisdiction of the Tribunal, issues about political parties' internal disputes resolution mechanisms, and complaints about party membership and party membership lists. Other issues were related to party primary contestants lists, failures by political parties to conduct free and fair nominations, refusal by a political party to accept the nomination papers of certain candidates et cetera.

In adjudicating disputes, the Tribunal is expected to act fairly and expeditiously while ensuring that each case is determined within a period of three months from date it is lodged except for party primaries where time can be extended or reduced as may be appropriate.⁵ The Elections Act, 2011, as amended by the Election Laws Amendment Act No. 36 of 2016, requires political parties to conduct their party primaries and party list nominations at least sixty and forty-five days, respectively, to the date of the general election.⁶

1 Section 40 (1) of the Political Parties Act, 2011.

2 See the recommendations in the Kriegler's Commission 2007 Election Report.

3 Refer to the Political Parties Dispute Tribunal (PPDT) Strategic Plan 2013-2018 at p ii.

4 Gazette Notice Vol. CXIX- 35 dated 13th March 2017.

5 Section 41 (1) of the Political Parties Act, 2011 as read with Regulation 8 (2) of Political Parties Disputes Tribunal (Procedure) Regulations, 2017.

6 Section 31 of the Elections Act, 2011.

In total, 306 of the cases arose from party primaries, were resolved within three months (April 1 to June 30, 2017) whereas 235 emerged from party list exercise, and were determined within 10 day (July 24 to August 2, 2017).⁷

The Tribunal therefore plays a central function in strengthening intra-party and inter-party structures, which improves governance in political parties and contributes to the process of deepening a citizens-centred democracy in Kenya. It works closely with other stakeholders in the political process such as the political parties themselves, the Independent Electoral and Boundaries Commission (IEBC), the Office of the Registrar of Political Parties (ORPP), and the Political Parties Liaison Committee in order to achieve the said goal.⁸

The rise in the number of cases adjudicated by the Tribunal from 33 in 2013 to over 500 party nominations cases in 2017 is an indication that the Tribunal has gained traction among political parties and indeed the public. It goes to validate the need for establishing the Tribunal. The time is ripe therefore, for the Tribunal to reflect on its performance noting the challenges it faced, identifying best practices and lessons learnt, with a view making recommendations that strengthen the Tribunal as an electoral disputes resolution mechanism. A holistic reflection must fuse the Tribunal's reflection with a stakeholders' evaluation on the work of the Tribunal.

It is on this basis that ICJ Kenya in partnership with the Tribunal and with the support of Uraia conducted a stakeholders' evaluation of the Tribunal. The process entailed assessing the Tribunal's performance vis a vis its mandate, structure and the underlying legal and policy factors in a comparative context with reference to South Africa and Mexico in order to identify how best to overcome the challenges in an effective and efficient manner. Specifically, the stakeholders' evaluation sought to:

1. Create awareness on the Tribunal and its mandate in election dispute resolution.
2. Document the Tribunal's experiences in resolution of pre-election disputes of 2017.
3. Document stakeholder perceptions on the work of the Tribunal in the course of their interaction with the same.
4. Highlight challenges faced by the Tribunal and gaps in development of laws and/ or implementation of laws with recommendations for legislative, policy and administrative reforms.

The ultimate goal is to improve public confidence in the management of elections in Kenya.

⁷ The Tribunal's records 2019.

⁸ Above note 1 (Political Parties Act, 2011) at sections 33 and 38.

Research Methodology

The evaluation incorporated both primary and secondary sources of data collection. Primary data was obtained through dissemination of key informant evaluation questions⁹ developed around the principles of effective electoral disputes resolution. The evaluation targeted 34 people, carefully selected based on both their knowledge of the Tribunal's operations and interaction with it during the 2017 party nomination dispute resolutions process. These included members of the Tribunal, PPDT staff, Judges who presided over appeals arising from PPDT, Judiciary Training Institute (JTI), Litigants including self-represented litigants, development partners, Election Observer Missions such as the EU and the Carter Foundation, the Independent Electoral and Boundaries Commission (IEBC), the Office of the Registrar of Political Parties (ORPP), Law Society of Kenya (LSK). Others were Judiciary Committee on Elections (JCE), security agencies and the media.

The evaluation obtained responses from 25 participants representing 73% of the target population and is therefore a good representative sample for basing this evaluation.

In terms of secondary data, this evaluation conducted a desktop review of enabling laws namely the Constitution of Kenya, 2010, the Electoral Act, 2011, Political Parties Act, 2011 and relevant regulations. It also involved a review of relevant literature materials on electoral dispute resolutions such as the Election Observers' reports. Additionally, the evaluation utilized comparative analysis of the legal and policy frameworks applicable in South Africa and Mexico concerning the conduct and management of party nomination disputes as well as a study of regional and international instruments and standards establishing the legal basis for promoting civil and political rights on elections.

Scope and Limitation of the Study

The resolution of the 2017 pre-election disputes involved a number of institutions including the political parties' Internal Dispute Resolution Mechanisms (IDRMs), IEBC and the Tribunal, among others. However, the focus of this study is on the role of the Tribunal, which, as explained, was done with a view of highlighting the problems encountered and providing solutions. In this regard, the study assessed the Tribunal's performance in terms of capacity building, legal and policy framework, and the systems developed to manage the EDR process in relation to their effectiveness, efficiency and sustainability. This study was guided by key principles as follows:

⁹ The questionnaire is attached to this report as annexure 1

Key Principles

1. Timeliness

Speedy resolution of disputes is one of the essential characteristics of a sound justice system. Accordingly, delayed dispute resolution may deprive the process of practical relevance in that the remedy given may be out of time. In this regard, the Tribunal was expected to be punctual in the manner in which it dealt with the 2017 nomination complaints once filed. Therefore, the stakeholders' evaluation study assessed the Tribunal's timeliness in disposing of the party nomination disputes by doing a comparison between the time taken to resolve disputes arising in respect to the 2017 party primaries and party list with the set timeframes and with time taken to resolve such complaints in 2013 elections.

2. Fairness

Fairness in any dispute resolution implies impartiality and just treatment of a case without favouritism or discrimination. In terms of election management, fair adjudication of electoral complaints is key in fostering public confidence in such systems or processes.

To this end, this report evaluated the measures instituted to ensure fairness and impartiality of the Tribunal.

3. Accessibility

An EDR system should be accessible to the community it serves to prevent parties that should use such a system from seeking other avenues for resolving electoral disputes. Factors determining accessibility include the location, rules and procedures for resolving disputes in court and cost. This evaluation report reviewed the extent to which the Tribunal's location, the rules and procedures governing its operations, and cost influenced its accessibility.

4. Transparency

Transparency means openness in the way an institution operates. With regard to an EDR mechanism such as the Tribunal, this is made possible by ensuring that all the relevant information regarding its operations and procedures are available. This report established the extent to which the Tribunal provided information on the resolution of party nomination disputes to enhance the transparency of its operations during the period under study.

5. Independence

Judicial independence in an electoral dispute resolution system is key in establishing the integrity of the Judiciary as dispute resolution forum and makes courts decisions legitimate in the eyes of the public.

Accordingly, a judicial body is expected to be free from any external influence, pressure, intimidation and control, and it should be seen to be acting independently by the parties using it to resolve disputes. Judicial independence is determined by factors such as the system for appointment of judicial officers, laws, regulations and procedures governing the electoral disputes resolution process and financing of the Judiciary among others. For these reasons, this stakeholders' evaluation research assessed both the actions taken to ensure independence of the Tribunal as an EDR system and the evaluation on its independence by stakeholders including the disputants who used it to resolve disputes.

6. Enforcement of decisions

The ability to enforce or implement the Tribunal's orders, sanctions or rulings is one of the building blocks for effectiveness, efficiency and a key indicator of its legitimacy as a dispute resolution mechanism. Proper and timely implementation of decisions is critical to the effectiveness of an EDR system and requires the Tribunal to be vested with power to enforce its decisions within reasonable timeframe to encourage parties entangled in disputes to use it as a forum for adjudication of complaints. Therefore, this research evaluated stakeholders' experience with enforcement of the Tribunal's orders during the 2017 party nomination disputes resolution.

7. Responsiveness

Responsiveness refers to the extent to which the Tribunal took into account the political, economic and social realities in which it operated in during party nomination exercise of 2017. This evaluation assessed the extent to which the procedures, regulations and sanctions, and their enforcement took into consideration the Kenyan political and social realities in general and the specific contextual issues that prevailed at various stages of the party nomination process.

Evaluation Questions

The evaluation questions guiding the feedback from stakeholders were developed based on the principles enumerated above:

1. What procedures and regulations did the Tribunal establish to ensure accessibility and efficiency in the resolution of electoral disputes arising from the 2017 party nominations?
 - a. How were the procedures developed and which stakeholders participated in their development?
 - b. How effective were the procedures and regulations in improving efficiency ensuring accessibility of “parties” using the Tribunal as an EDR?
2. To what extent did the Tribunal resolve party nomination disputes in a timeline manner?
 - a. What factors facilitated or hindered prompt resolution of these disputes?
 - b. How many cases were resolved within the set timeframes?
 - c. How does the performance of the Tribunal in prompt resolution of party primary disputes in 2017 compare with past experience in Kenya and other jurisdictions (where data is available)?
3. To what extent was the Tribunal’s management of party nomination disputes viewed as fair and impartial?
 - a. What measures did the Tribunal put in place to ensure fairness?
 - b. What factors facilitated or undermined fairness?
 - c. What are the stakeholder’s evaluations on the Tribunal’s fairness in management of party nomination disputes? What factors inform the evaluation of the various stakeholders?
4. To what extent was the Tribunal viewed as independent in the management of electoral disputes pertaining to party nominations? What were the evaluations of various stakeholders with regard to the Tribunal’s independence? What factors facilitated or undermined the independence of the Tribunal?
5. What measures did the Tribunal take to ensure transparency in the management of both party primary and party list disputes? What were the stakeholders’ evaluations on transparency of the Tribunal in management of party nomination disputes?
6. How effective was the Tribunal in implementing the rules and regulations for sanctions and enforcement of sanctions arising from electoral disputes

relating to party nominations? How uniform were the sanctions applied across cases and was the enforcement timely?

7. To what extent did the Tribunal take into account the political and social realities in Kenya in the management of electoral disputes? What specific measures were taken to demonstrate the Tribunal's sensitivity and responsiveness to these realities?
8. What challenges did the Tribunal face in managing party nomination disputes?
9. What were key lessons learnt in the management of the 2017 party nomination disputes?

Structure of the report

This report is organized into eight sections. The first section introduces this report and details the background of the problem, the definition of key terms and the research methodology. It also includes the scope and the limitations of this research. The second part examines the Tribunal's structure and mandate while part three highlights the comparative best practices for managing party nomination disputes as drawn from South Africa and Mexico. Section four covers the research findings obtained from analysis of the data collected. The fifth part is on the tables summarising the number of party primary disputes lodged with the Tribunal during the period under review. The sixth section relates Kenya's EDR experience with South Africa and Mexico. The seventh section of this report deals with recommendations arising from the research findings, aimed at informing strategic interventions for relevant duty-bearers. Lastly, section eight concludes the report.

Structure, Mandates and the Governing Framework of the PPDT

PPDT Structure

The Tribunal is established under the Political Parties Act, 2011.¹⁰ It is composed of seven members all of whom are appointed by the Judicial Service Commission: A chairperson who must be qualified for an appointment as a High Court judge; three members who are advocates of the High Court of Kenya with a post admission experience of least seven years and three other members who must be professionals with outstanding governance, administrative, social, political and economic record. These members are required to serve on part-time basis and hold office for a non-renewable term of six years.¹¹

To qualify for appointment at the Tribunal, a person must neither be a member of the public service nor play an active role in the activities of a political party. They should meet the requirements of Chapter Six of the Constitution on leadership and integrity.

The chairperson's responsibilities are dichotomous in character: duties to the Tribunal as an institution and as a court. With respect to the former, the chairperson takes charge of the overall administration and management of the Tribunal and is responsible for ensuring that the Tribunal's business is carried out in an orderly and prompt manner.¹² The chairperson also presides over the Tribunal's sittings and is required to constitute panels of three or more as the circumstances may demand to adjudicate disputes before the Tribunal.¹³

Apart from members, the Tribunal also has a secretariat made up of the chief executive officer (CEO), registry staff, programme officer(s) and legal researcher(s). The secretariat provides administrative support to the Tribunal and it is responsible for its general management as an institution.

Mandate of the Tribunal

The Political Parties Disputes Tribunal (PPDT) is established under section 39 of the Political Parties Act, 2011 with the objective of adjudicating disputes emanating from political activities of registered political parties as envisaged by Articles 87 (1) and

10 Above note 3 (PPDT's Strategic Plan 2013-2018) at page ii.

11 Above note 1 (Political Parties Act, 2011) at section 39.

12 Ibid.

13 Ibid.

169 (1) (d) of the Constitution of Kenya, 2010 as a subordinate court.¹⁴ Section 40 of the Act gives the Tribunal the jurisdiction to determine disputes, which, as observed, covers cases ranging from those involving the members of a political party, a member of a political party and a political party, disputes between political parties, an independent candidate and a political party and disputes between coalition partners. It also presides over appeals from decisions of the Registrar of Political Parties and resolve disputes arising from party primaries.¹⁵

The Tribunal is expected to adjudicate complaints impartially and expeditiously and should determine each case within a period of three months from date it is lodged except for party primaries where time can be extended or reduced as may be appropriate to enable parties to comply with the provisions of the Elections Act, 2011.¹⁶ As a court, it is bound by the principles on administration of justice provided for in Article 159 of the Constitution of Kenya, 2010. It is therefore expected to arbitrate fairly, transparently, timely, independently and effectively while upholding the Bill of Rights and giving effect to the right of every Kenyan to participate in the political affairs of the country.¹⁷

The Legal Framework

The Elections Act, 2011 and the Fair Administrative of Actions Act, 2015 undergird the Tribunal's work. The Political Parties Disputes Tribunal (Procedure) Regulations, 2017 constitutes the procedural rules that guide the Tribunal in course of determining complaints filed before it¹⁸ whereas the Elections (Party Primaries and Party Lists) Regulations, 2017¹⁹ and IEBC's Gazette Notice Vol. CXIX- 35 provided the timetable for accomplishing various activities in preparation for the 2017 general elections. One of these was the Tribunal's function in resolving disputes emerging from party nominations that was expected to take place on or before 8th May 2017.

Further guide lights are derived from the Judiciary's policy "Sustaining Judiciary Transformation: A Service Delivery Agenda 2017-2021" with a view to improve service provision to Kenyans through enhanced access to quality justice. The Tribunal's "The Political Parties Dispute Tribunal (PPDT) Strategic Plan 2013-2018"²⁰ also embodied a policy commitment by the Tribunal to manage the 2017 political disputes effectively and sustainably, and promote the realisation of multiparty democracy through collaboration with key stakeholders and increasing public awareness through public education on the its core business.

14 Article 87 (1) of the Constitution of Kenya, 2010 provides that "Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes" whereas Article 169 (1) (d) stipulates, "The subordinate courts are any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2).

15 Above note 1 (Political Parties Act, 2011) at section 40 (1).

16 Section 41 (1) of the Political Parties Act, 2011 as read with Regulation 8 (2) of Political Parties Disputes Tribunal (Procedure) Regulations, 2017.

17 See the Preambular section as well as Article 1(1) and (2) of the Constitution of Kenya, 2010.

18 Kenya Gazette Supplement No. 60, 21st April 2017.

19 Kenya Gazette Supplement No. 62, 21st April 2017.

20 See PPDT's Strategic Objectives at <http://ppdt.judiciary.go.ke/strategic-objectives/> accessed on February 7, 2019.

Apart from the Constitution of Kenya, 2010, the domestic legislations and policies, the Tribunal is bound by the principles of international law contained in various global instruments to which Kenya is state party by virtue of Article 2(6) of the Constitution.

These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination against Women and the African Charter on Human and People's Rights.²¹ These instruments recognise the inalienable right of all individuals to determine their political status and participate in the formation of governments without the arbitrary deprivation of one's liberty to do so.

Procedure for filing and determination of Cases by the Tribunal

1. The Applicant presents a claim at the Tribunal's Registry through:
 - a. Statement of Claim;
 - b. Supporting Affidavit; and
 - c. Other relevant documents in support of the Claim.
2. The Statement of Claim and other accompanying documents are assessed.
3. The Applicant makes payment for the assessed fee.
4. The Claim is assigned a Complaint number.
5. The Claim is placed before the Tribunal for directions.
6. The Claimant is directed to serve the Respondent and given directions with regard to the hearing on the matter.
7. The Respondent files a reply to the Claim. The reply is also served on the Claimant.
8. The Claim is heard and parties present evidence.
9. The Tribunal gives a judgment or ruling date.
10. On the judgment date the Tribunal may allow or dismiss the Claim.
11. After delivery of judgment, a party may extract a decree upon payment of the requisite fee.
12. The decree is certified by the Deputy Registrar as the true copy of the original judgment and thereafter served upon all affected persons for implementation.
13. Any party dissatisfied with the decision of the Tribunal may appeal to the High Court.

PPDT as a Special Subordinate Court

As a subordinate court, the Tribunal's rulings, judgments or orders are enforceable in the same manner as those of magistrate's courts and whoever is dissatisfied is free

²¹ See the National Council for Law Reporting's Treaties and Agreements Database available at <http://kenyalaw.org/treaties/> accessed on February 6, 2019.

to appeal to the High Court as a matter of right. In addition, it is obligated by the Political Parties Act, 2011 to apply the rules of evidence and procedure under the Evidence Act (Cap. 80) and the Civil Procedure Act (Cap. 21), with the necessary modifications to ensure that justice administered to parties without undue regard to procedural technicalities.²²

However, there are vital differences between the Tribunal and magistrate's courts. First, unlike a magistrate's court, which generally enjoys a wide range of powers over civil and criminal matters, the Tribunal only exercises a special jurisdiction, which is limited to adjudicating only political disputes. This explains why the Political Parties Act, 2011 empowers the Chief Justice to prescribe regulations to guide the exercise of these special powers by the Tribunal.²³ This resulted into the enactment of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017.²⁴

Second, the Tribunal is properly constituted for its purposes if it has a quorum of three members one of whom must be a lawyer.²⁵ In the case of a magistrate's court, only one person is required to preside. Nevertheless, there are circumstances when a single member of the Tribunal designated by the chairperson may hear applications and make orders. They include change of representation, admission and recording of consent, consolidation of matters, correction of errors on the face of the record, withdrawal of documents, leave to file additional document and grant of interim orders.²⁶

The third difference lies in the qualifications to serve as a member of the Tribunal. As explained, the chairperson must have the same qualifications as a High Court judge while the three of the remaining six members should be advocates of the High Court of Kenya of seven years standing.²⁷ For one to qualify as a magistrate, on the other hand, the requirement is evidence of admission into the Roll of Advocates, among other requirements. The law does not require such candidates to have any number of years of post-admission experience.²⁸

Fourth, the Tribunal enjoys appellate jurisdiction over the decisions of the Registrar of Political Parties.²⁹ It is the first port of call for anyone seeking to appeal the Registrar's decision before proceeding to higher appellate courts in Kenya. In addition, the Political Parties Act, 2011 requires certain disputes to be referred to a political party's internal disputes resolution mechanism before the Tribunal can assume jurisdiction. They include disputes between the members of a political party, disputes between a member of a political party and a political party, disputes between political parties and disputes between coalition partners. This is however not the case with the magistrates' court as they are courts of first instance.

22 Above note 1 (Political Parties Act, 2011) at section 41.

23 Ibid at section 41(3A).

24 Kenya Gazette Supplement No. 60, 28th April 2017.

25 section 39 (7) of the Political Parties Act, 2011 as read together with Regulation 5 (3) of Political Parties Disputes Tribunal (Procedure) Regulations, 2017

26 These are set out in Political Parties Disputes Tribunal (Procedure) Regulations, 2017.

27 Above note (Political Parties Act, 2011) at section 39.

28 Section 32 (2) of the Judicial Service Act, 2011.

29 Above note (Political Parties Act, 2011) at section 40 (1) (f).

Comparative State Experience

South Africa

South Africans go to elections after every five years since the first general polls of 1994 following transition from long decades of apartheid and colonial rule, which was characterised by racial discrimination of Africans and the deprivation of the right to vote, among other human rights violations against the coloured race. The transition led to the adoption of the South Africa's Constitution founded on the principles of democratic governance, the rule of law, respect for human rights, equality of freedoms and liberties of citizens and so on.³⁰ Therefore to safeguard to these ideals, the supreme law established a number of institutions such as the Independent Elections Commission (IEC) and the Electoral Court.

IEC is created under Chapter 97 of South Africa's Constitution and it is responsible for managing elections and registers and regulates the activities of political parties taking part in the polls. An integral part of the IEC's functions includes the development of election timetable outlining the activities to be carried out in preparation for the elections.³¹ One such examples is the determination of objections by the Commission lodged by individuals challenging the nomination of candidates.³² IEC is obligated to resolve such disputes expeditiously and communicate its decision in a timely manner to both the objector and the political party in question to enable those dissatisfied with its determination to appeal to the Electoral Court.³³

The Court is created by section 19 (1) of Electoral Commission Act and replaced the Special Electoral Court that oversaw the 1994 general elections. It has the status equivalent to the country's Supreme Court, and it is composed of five members, a Supreme Court judge, two High Court judges and two other members appointed by the President on the recommendation of JSC. It is in charge of settling election disputes including determining appeals arising from IEC's decisions on party nominations.

The Court's judgments on nominations are delivered within a period of three days and are binding on the Commission.³⁴ Quite important for note in this regard is that South Africa does not have a stand-alone Political Parties Act³⁵ that creates additional dispute resolution forums, for instance the political parties IDRM and the Tribunal

30 See EISA's South Africa: Electoral legislation available at <https://www.eisa.org.za/wep/soulaws.htm> accessed on February 10, 2019.

31 Section 20 of the South Africa's Electoral Act, 1998.

32 Ibid at section 30.

33 Ibid.

34 Ibid.

35 Konrad Adenauer Stiftung, *Legal Framework for Political Parties in Selected Countries of Sub-Saharan Africa* at page 13 available at https://www.kas.de/c/document_library/get_file?uuid=1069e650-1d5f-8acd-0572-eaf-80e175547&groupId=252038 accessed on February 20, 2019.

from which further lies the right of appeal to High Court, Court of Appeal and Supreme Court as is the case in Kenya.³⁶

Mexico

Mexico is a Federal country made up of 32 states including the Federal District, the Mexico City, which is the headquarters of the Federal Branches.³⁷ Elections in Mexico, as is the case with most democratic countries worldwide, is the mechanism used to decide who becomes the President and the Legislature and the electoral system is based on the principle of proportional representation.³⁸ The country's electoral justice system establishes the Electoral Tribunal with the goal of promoting democracy and subjecting political activities of various political parties to the rule of law.³⁹

The Electoral Tribunal is a specialized organ of the Federal Judicial Branch and has the highest authority on electoral matters. It therefore has the responsibility to supervise that all acts and rulings pronounced by the electoral authorities meet the Constitution and the laws derived from it.⁴⁰ The Tribunal was first created in 1987 as an autonomous administrative body, responsible for solving various electoral conflicts emerging from political contests for different positions. It has undergone reforms making it the highest judicial organ for resolving election disputes including those ones relating to party nominations according to the Mexican Constitution.

The Electoral Tribunal is free to devolve as may be necessary to enhance its accessibility to the complainants. This requirement got the light of day in 2007 following the establishment of the five permanent regional courtrooms, which further strengthened it. The main courtroom is situated in the Mexico City, which, as already explained is also the headquarters of the Federal Branches.⁴¹ It is composed of seven judges who serve a non-renewable term of nine years and are appointed by the Supreme Court of Justice of the Nation upon election by two-thirds of the current members of the Senate.⁴²

The receiving authorities whether the National Electoral Institute (NEI) or the Tribunal are required to publicize cases immediately upon receipt in order to allow interested parties to become involved in the case. This is taken as adequate service of notice on parties and it is meant to prompt one to respond to the claim.⁴³

36 USAID *Procedural Justice in Electoral Disputes* at page 10 available at <http://www.electoralmanagement.com/wp-content/uploads/2017/01/K.-Ellena-Procedural-Justice-in-Electoral-Disputes-Draft-for-ECPR.pdf> accessed on February 20, 2019. See also section 40 of the Political Parties Act, 2011 of the Law of Kenya.

37 Refer to the National Election Institute on The Mexican Electoral System available at https://portalanterior.ine.mx/archivos3/portal/historico/contenido/The_Mexican_Electoral_System/ accessed on February 10, 2019.

38 Ibid.

39 Tribunal Electoral, The Electoral Tribunal of the Federal Judicial Branch: Guarantees the Constitutionality of Elections at page 3 available at https://www.te.gob.mx/publicaciones/sites/default/files/archivos_libros/The%20Electoral%20Tribunal%20of%20the%20Federal%20Judicial%20Branch%20Guarantees%20the%20Constitutionality%20of%20the%20Elections.pdf accessed on February 10, 2019.

40 Ibid.

41 Above note 43 (National Election Institute on The Mexican Electoral System).

42 Above note 46 (Tribunal Electoral, The Electoral Tribunal of the Federal Judicial Branch) at page 3.

43 Above note 42 (USAID *Procedural Justice in Electoral Disputes*) at page 14.

However, the practice has been criticised for hurrying the process because of the expedient manner of service denies parties of the opportunity to prepare adequately for proceedings.⁴⁴ The decision is final and irrefutable; that is not subject to appeal to any other court.⁴⁵

⁴⁴ Ibid.

⁴⁵ Above note 46 (Tribunal Electoral, The Electoral Tribunal of the Federal Judicial Branch) at page 3.

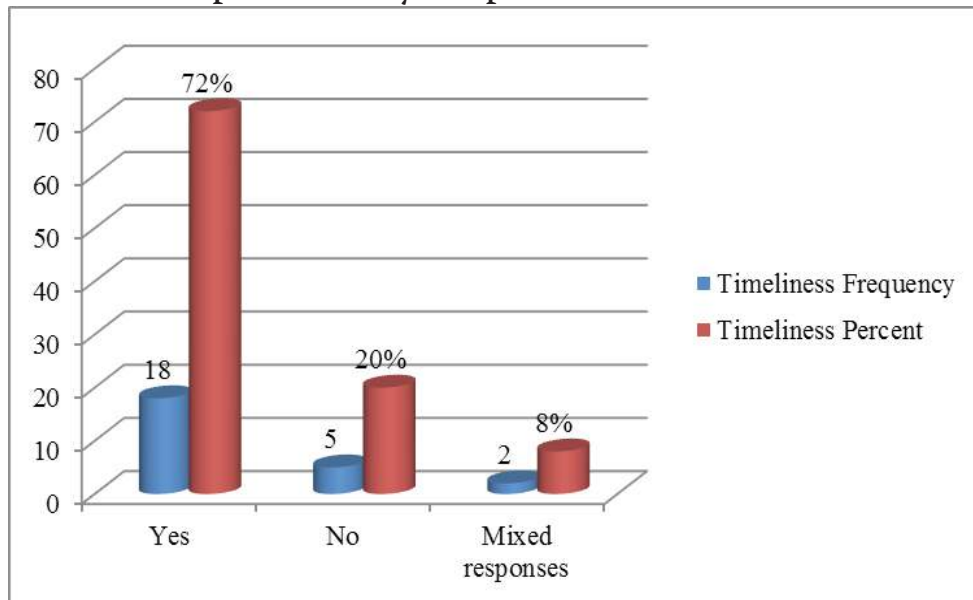
Analysis of Feedback From Sampled Key Informants

As noted, the evaluation was carried out based on the principles set out in Article 159 of the Constitution of Kenya, 2010. Therefore, the focus was on the Tribunal's timeliness and fairness in dealing with complaints as well as its accessibility to the litigants, transparency and perception of independence during that period. The stakeholders' experience with the implementation of the Tribunal's orders and its ability to remain responsive in light of the prevailing social and political realities was also used to guide this evaluation.

1. Timeliness in Resolving Disputes

Key Findings

Chart 1: Respondents by Proportions on Timeliness



Response by 72% of Key Informants

According to the chart, 18 respondents representing 72% of those interviewed felt that the Tribunal settled all the disputes in a timely manner, in accordance with the timelines set by the relevant laws and considering the prevailing realities. This they attributed to the various legislative, regulatory and administrative measures instituted on the run up to the August 8 general elections.

These were identified to include the following:

- a. **Setting timelines for resolving disputes by the Tribunal:** The stakeholders explained that the Tribunal was able to deal with complaints expeditiously because the Political Parties Act, 2011 and the Elections Act, 2011 had outlined the timeframes, which alerted parties of the expected completion date for dealing with complaints. This was further reinforced by the IEBC's Gazette Notice Vol. CXIX- 35, which required all party primary disputes to be resolved by the Tribunal on or before 8th May 2017 and the exception created by the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 with regard to the time it takes settle party primary disputes. As pointed out, the Tribunal is empowered under these Regulations to extend or reduce the time prescribed for resolving party primary complaints to ensure justice to affected parties.
- b. **Increase in the membership of the Tribunal:** The respondents observed that the amendment of the Political Parties Act, 2011 to increase the number of members of the Tribunal from five to seven made it possible to constitute two benches to determine disputes and hence saving the time spent hearing individual complaints. The Tribunal is properly composed for the proceedings if it has a quorum of three members one of who must be a lawyer. This is according to section 39 (7) of the Political Parties Act, 2011 as read together with Regulation 5 (3) of Political Parties Disputes Tribunal (Procedure) Regulations, 2017.
- c. **Publishing of the nomination rules:** The stakeholders observed that in making available the IEBC's timetable, the Elections (Party Primaries and Party Lists) Regulations, 2017 and the Political Parties Disputes Tribunal (Procedure) Regulations, 2017, the litigants and other stakeholders were made aware of the timelines for resolving disputes by the Tribunal. The Political Parties Disputes Tribunal (Procedure) Regulations, 2017 also provided simplified complaint forms, which helped fast track filing of disputes at the Tribunal even by litigants who were non-lawyers.
- d. **Memorandum of Understanding between the Tribunal and IEBC:** The key informants praised the cooperation between these bodies during the 2017 party nominations and observed that the MOU was necessary in eliminating incidences of forum shopping by litigants and minimise the confusion caused by the overlap in jurisdiction between these bodies. This, in turn saved the time spent in disposing of nomination.
- e. **Administrative arrangements to foster timeliness:** These respondents pointed out that the Tribunal's decision to work extra time, and sometimes late into the night and even on weekends, was strategic in speeding the EDR process. In addition, the outsourcing of staff, keeping the registry open for long hours including Saturdays and Sundays, providing meals and accommodation in the nearby hotels and so on, greatly enhanced the Tribunal's capacity to beat the deadline for resolving nomination disputes.

Response by 20% of Key Informants

However, 20% of the stakeholders held the view that the Tribunal was not timely, which to them was one of the reasons why some complaints were resolved in less than one week to August polls. This they blamed on a number of challenges including:

- a. ***Legal conflicts on the timelines for resolving disputes by the Tribunal:*** The respondents noted that there were several conflicts, first between the Political Parties Act, 2011 and the Political Parties Disputes Tribunal (Procedure) Regulations, 2017. The Tribunal, according to both the Act and Regulations has three months to resolve a dispute from date it is lodged. However, the latter makes a saving with regard party primary disputes and allows the Tribunal to reduce or extend time as the case may for the demands of justice to be met. This exception, although identified by stakeholders as a step in the right direction in terms of enhancing timeliness, went against the parent statute; the Political Parties Act, which does not exempt nomination disputes from the three months requirement.

The second conflict is between the Political Parties Act, 2011 and the Elections Act, 2011 in relation to whether IDRM is mandatory or optional. The Political Parties Act is silent on issue of IDRM in the case party primary complaints while section 13 2A of the Elections Act gave political parties thirty days within which to resolve such disputes internally before seeking recourse at the Tribunal. The respondents observed that this confused the complainants because there was no clarity on the issue of IDRM and as a result rendered the issue of timeline uncertain.

The third conflict was between the Elections Act and the IEBC's Gazette Notice Vol. CXIX- 35. The latter provided a dispute settlement period (inclusive of both the time spent in IDRM and PPDT) of less than one month contrary to time set by the former, which gave disputants thirty days to attempt IDRM as a condition for filing complaints at the Tribunal. According to this timetable, for instance, party primaries were scheduled to start on or before April 26, 2017 and completion of disputes resolution expected on May 8, 2017. The clash between these laws was apparent.

- b. ***Contradicting High Court decisions:*** The requirement by section 13 2A of the Elections Act, 2011 begs the question as to whether IDRM mandatory or optional in case of a party primary dispute. The High Court seemed to have adopted conflicting positions on this question. In one case; *Eric Kyalo Mutua v Wiper Democratic Movement & Anor* High Court Election Appeal 4 of 2017 the Court held that IDRM was not mandatory and that a party was at liberty to refer his or her case a political party's internal disputes resolution mechanism only on appropriate circumstances. In another instance, Judge Muchelule in *Rachael Nyamai v Jubilee Party of Kenya & another* Election Petition Appeal No. 58 of 2017 ruled that it was mandatory on the aggrieved

party to attempt an IDRM before the Tribunal could assume jurisdiction. This is because nomination disputes are in actual sense disputes involving either members of a political party or a member of a political party and a political party. These contradictions undermined the Tribunal's capacity to be punctual in resolving disputes as some parties sought for the correct interpretation of the said section 13 2A of the Elections Act, 2011 from High Court thereby causing delays.

- c. *Delays caused by political parties:* The respondents observed in this regard that political parties took advantage of the conflicting timelines set in law by the Political Parties Act, 2011 and the Elections Act, 2011 to drag the EDR process and deprive the Tribunal of the opportunity to resolve nomination disputes. Coupled with the weak IDRM structures, some political parties are reported to have delayed dealing with complaints filed by their party members only to release the determination thereof on May 6, 2017 as a way of stemming a mass walk out, as those disgruntled would consider vying as independent candidates. To qualify as an independent candidate, one must not be a member of any political party three months to the general elections. This meant May 8 since general polls were held on August 8.
- d. *Retrial of cases by the Tribunal due orders by appellate courts:* As a challenge, the respondents explained that the ordering of fresh trial by appellate courts such as High Court, Court of Appeal or even the Supreme Court implied that the Tribunal had to keep the timelines open and deal with such eventualities whenever called upon to do so. It therefore lost control of time, as it was unable to comply with the deadlines set either in the Political Parties Act, the Elections Act, 2011 or IEBC's timetable contained in Gazette Notice Vol. CXIX- 35.

Response by 8% of Key Informants

Eight per cent (8%) of the interviewees held mixed views on the question of timeliness. One of them pointed out that in answering the question as to the Tribunal's timelines, it was important to contextualise or specify the law being referred to because when considered in terms of the Political Parties Act the Tribunal was timely but not according to the Elections Act. It was further pointed out speedy resolution of disputes added little value because justice was made a casualty of a hurried process.

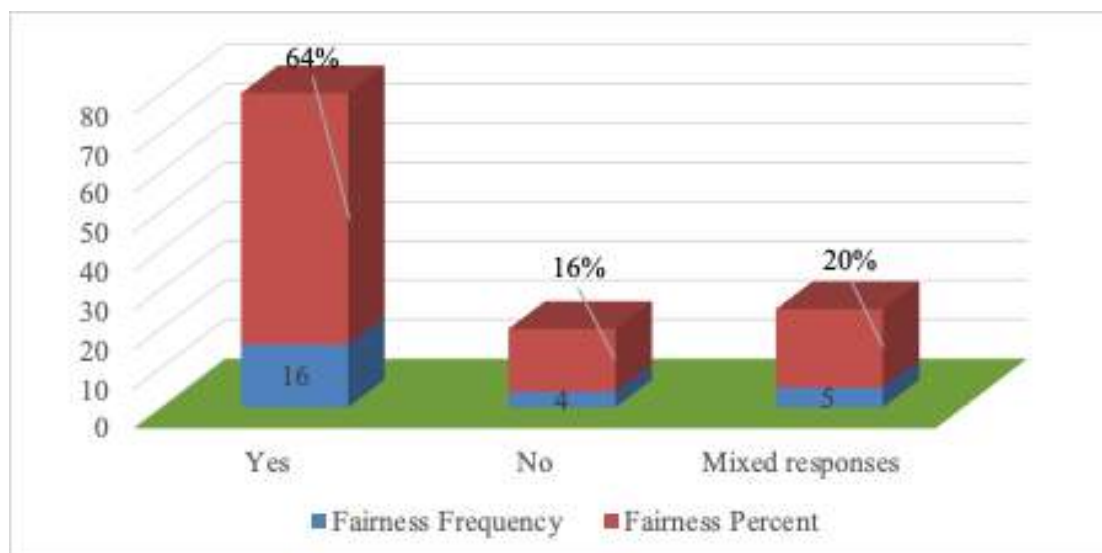
Analysis of response on Timeliness

Timelines are legislative requirements; fixed by law and hence, it was not within the Tribunal's power to change the situation except to comply. Accordingly, notwithstanding the conflicts, for instance, between the Political Parties Act, 2011 and the Political Parties Disputes Tribunal (Procedure) Regulations, 2017, the Political Parties Act, 2011 and the Elections Act, 2011 or the Elections Act, 2011 and the IEBC's Gazette Notice Vol. CXIX- 35, the Tribunal's performance ought to be assessed based on the timeframes that existed in 2017. That is, the responsibility to ensure a harmonised timeframes for resolving nomination disputes lies with institutions such as Parliament as the lawmaker and not the Tribunal.

2. Fairness

Key Findings

Chart 2: Respondents by Proportions on Fairness



Response by 64% of Key Informants

Of those interviewed, 64% stated that the Tribunal acted fairly despite the pressure caused by both short timelines as well as high political stakes characterising the process. Its ability to demonstrate impartiality to those people who approached it as an EDR was due to a number factors, namely:

- a. ***Publication of the rules of procedure:*** The respondents lauded the publication, for example, of the IEBC's timetable in the Commission's Gazette Notice Vol. CXIX- 35, the Elections (Party Primaries and Party Lists) Regulations, 2017 and the Political Parties Disputes Tribunal (Procedure) Regulations, 2017. These helped to level the playing for disputants, gave predictability to the Tribunal's decisions, ensured uniformity in the application of rules and enabled the Tribunal to focus on substance as oppose to procedural technicalities.
- b. ***Presence of non-lawyers in the membership of PPDT:*** The stakeholders believed that the mixing of lawyers and non-lawyers in the constitution of the Tribunal membership helped improved the PPDT's ability to be in touch with the reality on the ground. This helped it to be fair and realistic in its decision.
- c. ***Three-member composition of benches:*** It was explained that the benches were made of more than one member, which minimised chances for biases and influence by litigants. The inter-transfer of files of cases between benches

and reallocation of cases in the event of a retrial following the decision of an appellate court also helped minimise bias and ensured fairness.

- d. ***Frequent consultations among Tribunal members and legal researchers:*** According to the majority of those interviewed, holding of prior discussions among the Tribunal members and legal researchers came in handy to assist it speak with one voice thereby giving predictability to its decisions and ensuring uniformity in the direction taken on points of law. It also gave members the opportunity to iron out conflict of interests, if any, arising from cases.
- e. ***Maintaining safe distance with Litigants:*** The respondents observed that the Tribunal was keen to operate like a court and complied with the general rules on impartiality. The members of the Tribunal are said to have generally avoided unnecessary interactions with litigants so as to ward off allegations of favouritism.
- f. ***Location of the Tribunal in Milimani Law Courts buildings:*** This was perceived by most stakeholders as a strategic advantage enjoyed by the Tribunal during the 2017 party nomination disputes resolution. This particular location, they observed, created a court atmosphere, which in turn helped to raise its profile as a court of law.

Response by 16% of Key Informants

Despite the overall view that the Tribunal managed disputes fairly, four respondents felt that it was partial because of various challenges. These were:

- a. ***Unequal treatment of Litigants:*** As a challenge, it was pointed out especially by advocates representing clients at the Tribunal that PPDT was too pro-Wanjiku (friendly to lay litigants) and anti-lawyers. Advocates complained that they were not accorded the same amount of time as was done to lay litigants to submit their arguments or present evidence. Some interviewees also observed that certain lawyers were favoured in that they always got orders while others experienced delays.
- b. ***Same gender benches:*** These stakeholders criticised the establishment of the men-only and women-only benches, and interpreted to mean that the Tribunal had settled positions. This explained the frequent reference to these benches by litigants as either ile bench ya wamama or bench ya wazee (the women's bench or the men's bench) and associated certain decisions or directions with these benches in that regard. To these respondents, the composition of same gender benches manifested outright bias in the manner the Tribunal elected to deal with the complaints.
- a. ***Allegations of bribery:*** These respondents alleged that some Tribunal members and the staff were taking bribes. It was further explained that

even though no one lodged a formal complaint, these allegations tainted the Tribunal's reputation and significantly undermined its credibility during the nomination period.

Response by 20% of Key Informants

The issue of same-gender bench, which was perceived by some respondents as a sign of unfairness by the Tribunal, received a different explanation from 20% of respondents; majority of whom were internal stakeholders. They observed that the problem was inadvertent and merely coincidental, and blamed it on the part time basis on which the Tribunal's members served. It was further pointed out that external stakeholders were not privy to this challenge, which explained the position they took on the issue of bench composition. As regards the allegations of bribery, these respondents were of the contrary opinion and asserted it would only be fair if a formal complaint was lodged against the suspect members or staff rather than allege impropriety and leave it at that. One of respondents explained:

"I am yet to come across a dissatisfied party who will accept the decision of a court and walk away without alleging bias on the part a judge or magistrate in coming up with the ruling."

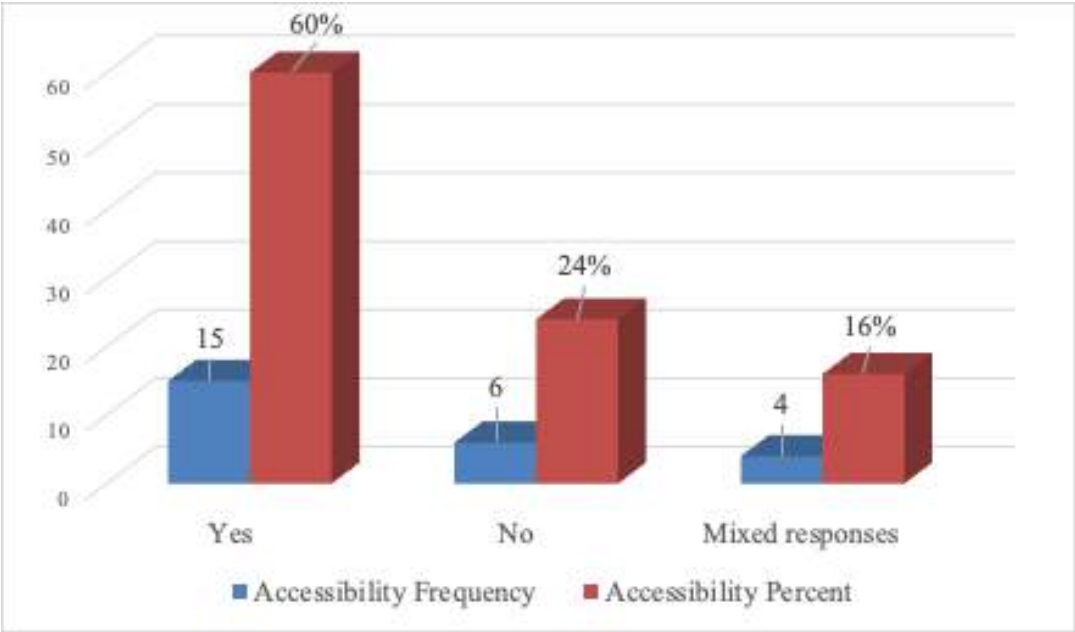
Analysis of response on Fairness

The Tribunal's ability to be fair, as already noted, is largely built on public perception and citizens would only approach the Tribunal if they see it as a system that resolves disputes without discrimination of any party to a dispute. The post-election violence of 2007/2008, which was triggered by the opposition's refusal to challenge the electoral outcomes in Kenya's courts, highlighted the importance of fairness in electoral disputes resolution. Therefore, in view of the challenges experienced in 2017, it is important identifying ways of managing cases impartially in order to instil public confidence in the Tribunal as an EDR system. In this regard, there is need for proper planning prior to the adjudication of cases and adequate citizens' sensitization on the Tribunal's procedures, the filing of complaints against members and staff in the event of impropriety et cetera.

3. Accessibility

Key Findings

Chart 3: Respondents by Proportions on Accessibility



Response by 60% of Key Informants

Sixty percent (60%) of the stakeholders held the opinion that the Tribunal was accessible to those disputants who approached it and attributed this phenomenon to the following measures:

- a. **Publication of the rules of procedure:** It was noted that the publication of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017, which also provided simplified complaint forms, did not only save time by helping fast track the filing of disputes at the Tribunal but also enhanced access to litigants. The lay litigants were particular pleased by this move as it made it easy to file a case.
- b. **Signing an MOU with IEBC:** Fundamentally, the MOU was meant to clarify the Tribunal's role in relation to that of the Commission with regard to the settling of nomination grievances. It should be recalled that the latter is also empowered by the Constitution to deal with pre-election disputes, which creates overlapping mandate with the Tribunal. Therefore, in recognition of the potential confusion that might be created by this overlap, the two institutions

came up with MOU to clarify their respective mandates in this regard. This clarity, in turn, enhanced accessibility of the Tribunal as complainants as they were made aware of the disputes to lodge with PPDT and the ones to present to IEBC.

- c. *Stakeholder engagements with other organisations such the Law Society of Kenya:* The Tribunal tried making itself known to the public by attending forums organised by LSK, for instance, interacting with lawyers and informing them of its role, the governing procedures et cetera. The Tribunal also held breakfast meetings with the media to popularise its work and raise awareness among Kenyans.
- d. *Attempting public outreach through the media and the Tribunal's website:* The chairperson is on record for attending media talk shows organised by TV stations so as to reach out to the public with information on the location of the Tribunal and its role in resolving disputes. The respondents also noted that as part of its preparation for 2017 disputes, PPDT put up a website to help create access to information regarding what it does and the rules of procedure.
- e. *Securing a sub registry at the entrance of the Milimani Law Courts:* The stakeholders noted that this made it easy locating where to file complaints. The move was also considered strategic in reducing congestion and human traffic within the court corridors, which also improved security of the environment.
- f. *Fulltime availability of the Tribunal members and administrative staff:* Other than being a time saving measure, the respondents explained that the Tribunal's decision to work beyond the official hours including weekends also ensured its accessibility to the litigants. Complaints could be filed even on Saturdays and Sundays, and members sitting around to determine the same.
- g. *Accessible courtrooms:* Some of the litigants interviewed in the course of this research, identified the availability of courtrooms as one of the important steps taken by the Tribunal to ensure it was accessible to clients to follow its proceedings.
- h. *Affordable filing fees:* The stakeholders praised the Tribunal for ensuring that the cost of filing complaints before it was affordable to anyone who seeking to lodge a case.

Response by 24% of Key Informants

Twenty four percent (24%) of the interviewees were of the opinion that the Tribunal was not accessible, which challenge they blamed on the following factors:

- a. ***Centralisation of the Tribunal in Nairobi:*** The respondents blamed the stationing of Tribunal in the capital city as a major hindrance to accessing justice during the 2017 party nomination disputes. For those living in upcountry, this meant that one would either be forced to travel long distances to the city so as to lodge a complaint or abandon the pursuit for justice all together because of being unable to afford to travel to Nairobi.
- b. ***Lack of adequate public awareness:*** It was observed that despite the positive steps taken to reach out to Kenyans, for example, the chairperson of the Tribunal attending talk shows on TV stations and the putting up of the website, organising breakfast meetings with the media, sensitising lawyers in LSK forums, a significant section of the citizens; advocates included, were still not ware or informed of the Tribunal and its processes. The lack of adequate knowledge compromised the Tribunal's accessibility.
- c. ***Inadequate resource capacity:*** The stakeholders explained in this regard that the inadequate human resource capacity both at the level of Tribunal membership and the staff meant that the Tribunal was overstretched making it difficult to pay adequate attention to those complainants or parties seeking for direction on the procedure for filing disputes, the determination thereof and so on.
- d. ***Inadequate time for resolving disputes:*** According to those interviewed, the time set, particularly by the IEBC's Gazette Notice Vol. CXIX- 35 was not enough to give parties the chance to ventilate their grievances through the existing dispute settlement channels. For instance, party primaries were scheduled to start on or before April 26, 2017 and completion of disputes resolution expected on May 8, 2017. This time was too short. The foregoing when combined with the conflicting timelines between the Political Parties Act and the Elections Act undermined accessibility of the Tribunal.

Response by 16% of Key Informants

Four respondents, which translate to 16% of the key informants, stated that accessibility of the Tribunal was subject to public awareness of its existence and accordingly, it only those people who knew about it that would lodged their complaints with it. On the issue of filing fees, these respondents observed that making charges affordable was not enough to guarantee access. The information on the fees chargeable ought to have been adequately publicised to reach many people to avoid instances of disputants being overcharged as was witnessed in 2017.

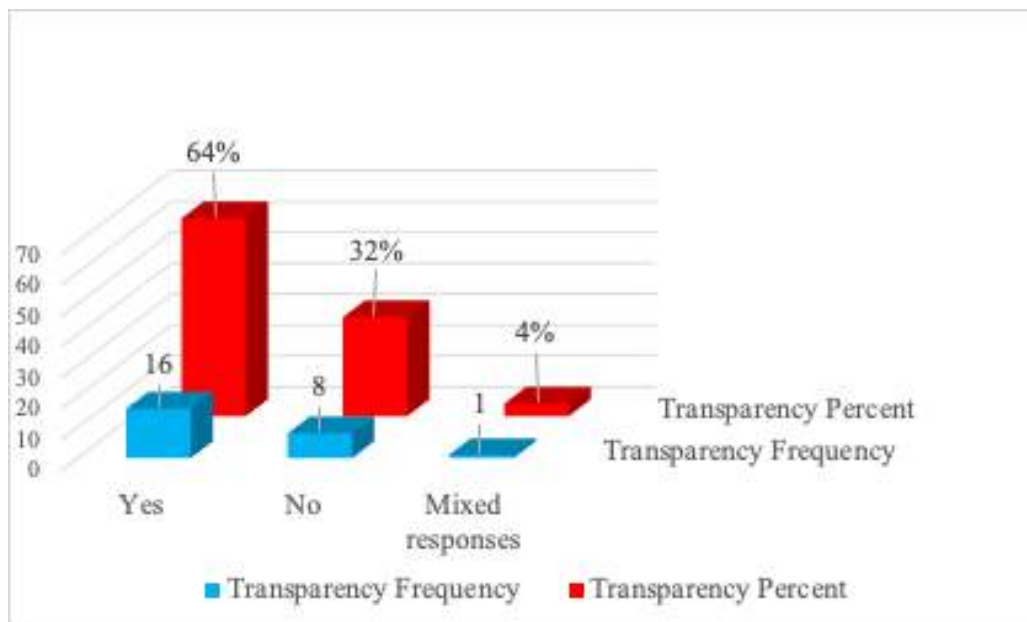
Analysis of response on Accessibility

From the responses, it is apparent that the Tribunal's accessibility was not only hampered by clashing timelines created in the rules but also the failure to publish the cost of filing cases online, restrictive timelines for resolving disputes and its centralisation in Nairobi. This, therefore, means that going forward there should be timely publication of the rules governing the Tribunal's operations with clear timelines including the filing fees, allocation of adequate resources in terms of work force, time and courtrooms, and situating the Tribunal within citizens' reach to facilitate lodging of cases. As observed, it is essential for an EDR system to be accessible to the community it serves to prevent parties from resorting to illegal channels to resolve disputes.

4. Transparency

Key Findings

Chart 4: Respondents by Proportions on Transparency



Response by 64% of Key Informants

Sixty four per cent (64%) of the stakeholders turned a verdict of openness in the manner in which the Tribunal managed the 2017 disputes. To them, this was made possible due to a number of legislative, regulatory and administrative initiatives taken to maintain transparency. They included:

- a. ***Publication of the rules of procedure:*** The stakeholders observed in this regard that apart from the publication of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 assisting PPDT manage time, ensure fairness and accessibility, these Regulations also made Tribunal's operations open and transparent.
- b. ***MOU between the Tribunal and IEBC:*** In addition to enhancing the accessibility of the Tribunal, the clarification of the PPDT's mandates vis a vis the Commission by the MOU also benefitted the country greatly in the sense that it promoted transparency. By minimising the challenge created by the jurisdictional overlap between these bodies, this MOU also eliminated incidences of forum shopping by litigants because the Tribunal's functions were made clearer and transparent.

- c. *Conducting proceedings in open court:* Those interviewed singled out the carrying out of the Tribunal's business in an open environment as being essential in fostering transparency of the Tribunal making it readily accountable to the public during the 2017 party nominations. That is to say, Kenyans were able follow the Tribunal's proceedings so that they could judge its fairness and transparency for themselves.
- d. *Typed judgments and rulings:* All Tribunal's decisions were typed and records of the same kept or maintained for reference. The keeping of such records also facilitated appeal processes, as they would be made available to the High Court and other appellate courts when required.
- e. *Stakeholder engagements with the media, LSK and other institutions:* As a measure for promoting openness of the Tribunal's operations, the engagement with these bodies proved essential because it helped raise public awareness of the work and so on. Following these engagements, the media, for example, was able to give the Tribunal's proceedings coverage thereby providing platform for communication with the public.

Response by 32% of Key Informants

While 64% of the key informants agree that the Tribunal was transparent, 32% were of the view that it was not. They blamed this on the following challenges:

- a. *Conflicting timelines set by the Political Parties Act and the Elections Act:* In addition to derailing the speedy settlement of disputes by the Tribunal, the respondents also pointed out that the different deadlines provided by these laws also undermined PPDT's transparency as parties were left confused and wondering as to whether the Tribunal was complying with the law. These cast aspersions on its integrity as court of law since it was unable to manage its own calendar in this regard.
- b. *Inadequate court space:* Aside from the human resource constraints experienced during the 2017 party nomination dispute resolution process, the stakeholders also identified lack of adequate court premises as a challenge that threatened PPDT's ability to maintain transparency. In other words, there was no enough space in courts to accommodate members of the public who were interested in following court proceedings.
- c. *Inadequate records to enable determination by appellate courts:* This problem was caused by a number of factors, namely; inadequate human resource capacity at the level of Tribunal members and the support staff and restrictive timelines set for dispute resolution. This meant that there was not enough time to come up with cause list, do proper recording of proceedings and writing of quality judgments. This made it difficult for appellate judges to discern an appellant's case with certainty since some of files were scanty and lacked information relevant for appellate determination.

Response by 4% of Key Informants

Nevertheless, 4% of the respondents argued that just as was the case with accessibility, the Tribunal's openness was subject to public knowledge of its existence and the rules governing its operations as an adjudication forum. They explained that the Tribunal was not widely known to Kenyans because it did little to sensitise the public about its work, location and guiding procedures. The Tribunal was also criticised for not taking full opportunities presented, for example, by the Political Parties Liaison Committee to engage with political parties on dispute resolution.

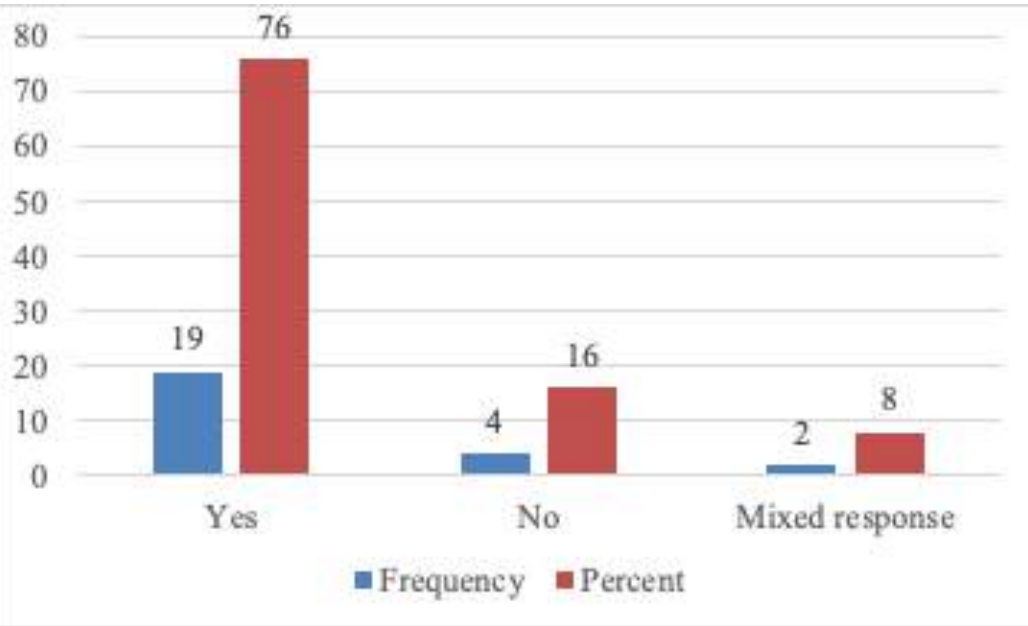
Analysis of response on Transparency

As demonstrated by the above responses, maintaining transparency involves more than the publication of the rules of procedure, typing of judgements and rulings, ensuring accessibility of courtrooms and conduct of proceedings in the open and so on as was witnessed in 2017. The process also demands the provision of quality services to litigants. Therefore, this means that in the future there would be need for setting adequate timelines for settling disputes, timely publication of clear guidelines, creation public awareness of the Tribunal's work, providing enough space to accommodate the public during proceedings and making sure that the Tribunal is within reach of those desiring to lodge complaints with it.

5. Independence

Key Findings

Chart 5: Respondents by Proportions on Independence



Response by 76% of Key Informants

The general stand as shown by 76% of those interviewed was that the Tribunal was independent and largely operated freely without receiving directions from anybody or being influenced by external forces and this made possible because of; namely:

- a. **Creation of the Tribunal by an Act of Parliament:** The respondents explained that the establishment by the Political Parties Act, 2011 greatly enhanced the Tribunal’s autonomy. According to them, the law gives it the institutional independence and a legal niche to work in. The Act is the constituting law that defines the structure and the mandate of the Tribunal.
- b. **Rules of procedure to guide the Tribunal’s work:** The Political Parties Act, 2011, in addition, to establishing the Tribunal and clothing it with the mandate to resolve political parties’ complaints associated also stipulates the procedure for determining such disputes. This, according to the majority of the respondents, is further supplemented by the Political Parties Disputes Tribunal (Procedure) Regulations, 2017, which emphasises on a timely, fair, accessible, just and transparent settlement of disputes.

- c. ***The Tribunal's own financial allocation:*** The Tribunal has a budgetary provision and it is among the institutions funded from the Judiciary Fund thereby according it financial autonomy. The CEO is responsible for coming up with the Tribunal's annual plans and budget estimates; overseeing the financial and administrative management of the Tribunal and accounting for PPDT's expenditure in conformity with laid accounting procedures.
- d. ***Office space, Tribunal's members and staff:*** The Tribunal has a registry, a boardroom, CEO's office and other office spaces for its operations. It also has members and administrative staff. The interviewees noted that this gave the Tribunal operational independence during the 2017 EDR process.

Response by 16% of Key Informants

However, 16% of the stakeholders did not think the Tribunal managed the disputes freely without succumbing to by external influence, which was due to the following challenges:

- a. ***Inability to control its dispute resolution calendar:*** The stakeholders also argued that in addition to the conflicting timelines causing the problems already discussed, the clash effectively meant that the Tribunal was not in control of its EDR calendar.
- b. ***Lack of adequate courtrooms:*** The Tribunal did not have its own courtroom and as such, it was compelled to share with other courts the available courtrooms forcing it to only sit when the courtrooms are free and sometimes having to shift sittings from place to another during the nomination period. This challenge undermined its institutional and operational autonomy.
- c. ***Undue control by superior courts:*** The stakeholders observed in this regard that on several occasions, the Tribunal was ordered by judges to keep the registry open, to receive the nomination cases and to continue with their determination. This affected its autonomy because it was no longer in charge but subject to direction by external forces.
- d. ***Inadequate supervisory control of the outsourced staff:*** Due to inadequate staffing experienced at the onset of party primary disputes resolution process, it became necessary to outsource registry staffs and legal researchers from other departments of the Judiciary. However, the outsourced staffs were subject to the directional control of their respective regular supervisors. One respondent highlighted an instance when one of the outsourced staff reported to her supervisor that they had not provided with food prompting an explanation by the Tribunal.

Response by 8% of Key Informants

Eight per cent (8%) of the stakeholders noted that the reallocation of the resources in terms allocating the Tribunal courtrooms and outsourcing staff from other departments within the Judiciary was important in 2017 and did not necessary translate into depriving the Tribunal of independence. It was explained that as a court, the Tribunal was required to explore areas for institutional collaboration with other institutions and it was necessary that it work with JCE, JTI other offices within the Judiciary to build its capacity for effective management of the 2017 disputes.

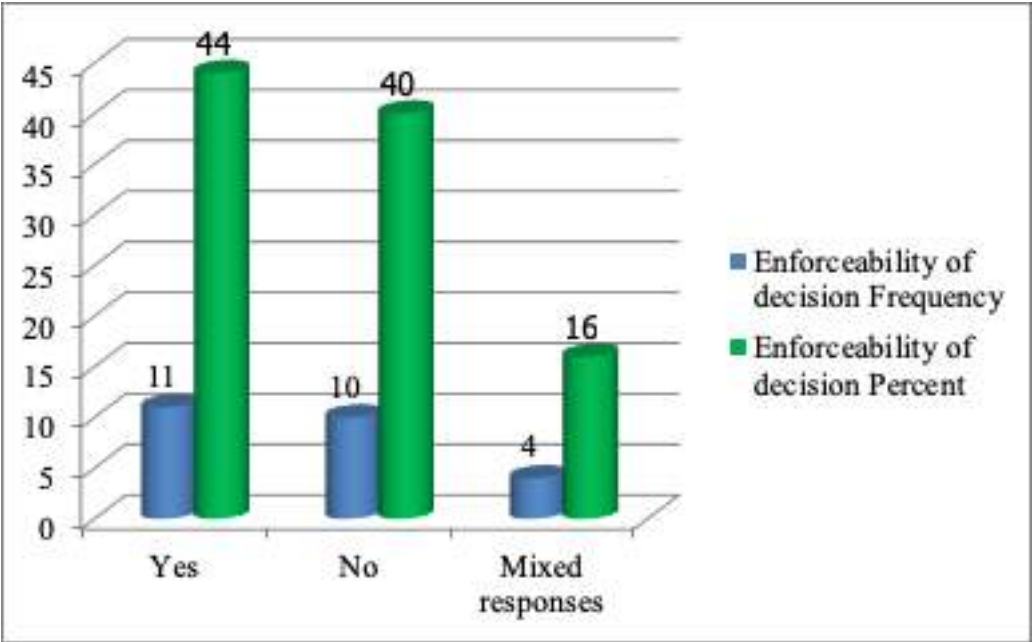
Analysis of response on Independence

The Tribunal's ability to demonstrate free thought and function in accordance with the laid down rules, regulations, law or the organisational objectives without external interference was critical in lending legitimacy to its decisions as a court of law. However, it should be noted that the concept of independence exists in various forms such as personnel, finance and legal independence, among others, which requires to be realised in a seamless manner for the overall institutional independence of the Tribunal to be effectively attained. Any shortfall in this regard risks watering down the Tribunal's effectiveness as an EDR mechanism to the detriment of the overall Judiciary's reputation.

6. Enforceability of decisions

Key Findings

Chart 6: Respondents by Proportions on Enforceability of decisions



Response by 44% of Key Informants

The stakeholders' assessment of the implementation of the Tribunal's orders showed that the Tribunal was generally not effective. As the chart shows, 44% representing only 11 out of 25 respondents thought it was effective. This, they justified on the MOU signed between the Tribunal and IEBC in preparation for the 2017 party nominations. Apart from clarifying the Tribunal's role versus the Commission's in relation to the settling of nomination grievances, it was also agreed in the MOU that the Commission would implement orders and directives delivered by the Tribunal in that regard.

Response by 40% of Key Informants

However, 40% stated that the Tribunal was not effective despite its rulings being enforceable in the same manner as the decision of a magistrate's court and, in some instances, political parties repeating party primaries or party officials attending Tribunal to explain certain decision when summoned. This view is attributable to the

lack of adequate enforcement powers making it difficult for the Tribunal to punish disobedience of its rulings. It can cite neither IEBC nor political parties for contempt and it had to rely on the High Court to punish for disobedience.

Other challenges that undermined the implementation of the Tribunal's decisions included wrong service of orders and restrictive timelines: The interviewees reasoned that the first problem was caused by litigants' failure to understand the party structures of their political parties, lack of adequate information on the process of service of orders and last minute rush in seeking for justice, among others.

The second challenge, on the other hand, was occasioned by short and inadequate timeframe for resolving disputes; in particular those relating to party nominations. This explains why many orders of the Tribunal were rendered stale and without practical benefits to complainants. The most affected cases were those ones that were determined close to August 8, 2017: the date for general elections.

Response by 16% of Key Informants

However, 16% of the stakeholders held mixed views. It was explained that since the decisions of the Tribunal were enforceable in the same manner as the decision of a magistrate's court, there was a legal basis on which it could cite for contempt and enforce its orders. They also observed that disobedience of court orders was nothing new in Kenya and did not only affect the Tribunal's rulings but was generally crosscutting and affected, also, the decisions delivered by superior courts.

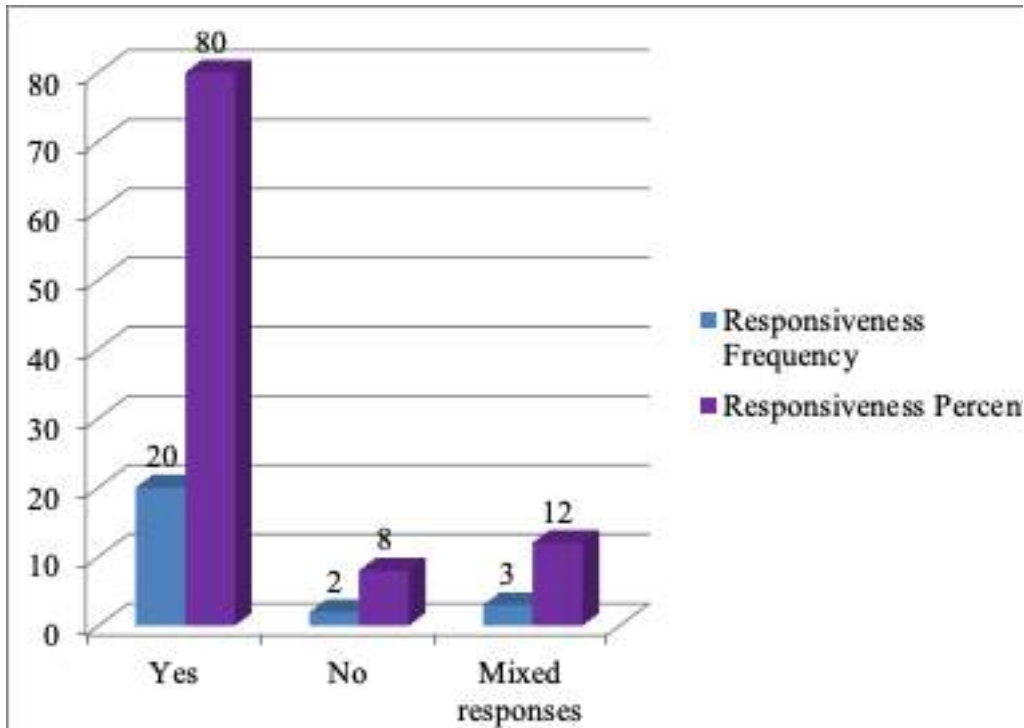
Analysis of response on Enforceability of the Tribunal's decisions

Enforcement completes the circle of the Tribunal's effectiveness and efficiency in managing disputes. Without the power to implement its own decisions, the Tribunal is deprived of relevance as a dispute resolution mechanism and its decisions remain important only in paper and without benefit to the disputants. The stakeholders' responses have demonstrated the centrality of enforcement in aiding the realisation of other principles such as timeliness, fairness and the independence of the Tribunal. To this end, overcoming the challenges experienced is one single most important step towards improving pre-election dispute resolution process in Kenya.

7. Responsiveness

Key Findings

Chart 7: Respondents by Proportions on Responsiveness



Response by 80% of Key Informants

Eighty per cent (80%) of the stakeholders agreed that the Tribunal was responsive in the manner it resolved the 2017 disputes and explored several measures to enable it adjust to the prevailing challenges and administer justice to the greatest extent possible.

Although the various initiatives already discussed had a bearing on the Tribunal's performance and generally went along way to enhance its effectiveness, there were others specifically tailored as stopgap measures to address certain legal loopholes and directly improve the Tribunal's operational capacity during this period. They included:

- a. *The MOU between the Tribunal and IEBC:* Aware of the lacking enforcement powers, the Tribunal opted for cooperation with IEBC and relied on the good will established in the agreement to ensure compliance with its orders for the entire period. This arrangement worked well and the stakeholders attributed the willingness of political parties, in some instances, to repeat

party primaries, honour Tribunal's summons and so on the MOU for fear of missing candidates on the Commission's elections list.

- a. *Accepting a complaint letter as evidence of attempted IDRM:* As pointed out, High Court adopted conflicting positions in interpreting the provisions of section 13 2A of the Elections Act, 2011 that raised the question as to whether IDRM mandatory or optional in case of a party primary dispute. To overcome this legal problem, the Tribunal insisted on IDRM as condition for assuming jurisdiction over such cases compelling it to accept mere complaint letters as evidence of attempted IDRM by disputants considering the restrictive timelines coupled with the weak IDRM structures of most political parties.
- a. *Administrative by support by JCE and JTI:* JCE, formerly known as the Judiciary Working Committee on Election Preparation (JWCEP), was established on May 10, 2012, with a mission to “design and execute a Judiciary programme to build the capacity of judicial officers and staff on electoral matters, and suggest ways of working with other stakeholders.” It is mandated, for instance, to advise the Judiciary on administrative arrangements and measures for the efficient disposal of election related disputes, develop, implement, in conjunction with the Judiciary Training Institute (JTI), a training programme for the efficient and effective management of election disputes for judicial officers, and support staff, among others.

In effect, the committee's overall role was to strengthen and to improve the Tribunal's capacity to resolve disputes in a “people-focused and expeditious justice” manner. It worked with JTI to plan trainings for Tribunal members and the secretariat, advised, and proposed the necessary legislative measures. JCE also assisted with administrative arrangements resulted in the outsourcing of staff from other Judiciary departments, extension of work hours by both the members of the Tribunal and the secretariat, securing of courtrooms in time and collaborating with the police to provide security to enhance the Tribunal's operational capacity.

In addition, JCE attempted to pilot the Case Management System (CMS) in the hope that it would help the Tribunal to manage disputes more efficiently and determining them within stipulated timeframes. However, the CMS failed because the members of the Tribunal and the secretariat were not trained on the use of this technology. This was due to the coinciding commencement of the CMS implementation with the hearing of the large volume of cases during this period, which meant that there was no time for learning in this regard.

Response by 8% of Key Informants

In spite of the efforts by JCE and JTI to enhance the Tribunal's capacity, 8% of the respondents nonetheless felt that it was not a relevant body because it lacked enforcement powers of court forcing it to rely on goodwill by IEBC to implement its orders during the 2017 disputes. These respondents also cited court cases that have

declared unconstitutional the Tribunal's involvement in the resolution of nomination disputes arguing that it was only IEBC that was mandated by the Constitution, 2010, to do so. For these reasons, it was explained the Tribunal overstepped its mandate and that the MOU ought to have been challenged in court for illegality.

Response by 12% of Key Informants

Twelve per cent (12%) of the stakeholders, on the other hand, emphasised that the Tribunal's involvement in the resolution of the cases was more about IEBC accepting to cede its mandate under Article 88 of the Constitution and allowing the Tribunal to arbitrate than the jurisdiction given to the latter by the Political Parties Act, 2011. It was also noted that IEBC signed the MOU as a strategy to minimise its involvement in the pre-election disputes, which was thought exposed it to the dangers of conflict of interests. This is because it is normally made the first respondent in any election petition and there were instances when the Commission's role in arbitrating nomination disputes was raised in such petitions and hence raising conflict of interests.

Analysis of response on responsiveness

From the responses, it is important for the Tribunal to seek for greater collaboration with other departments of the Judiciary, for instance JCE and JTI and engage with IEBC and security agencies planning purposes to ensure efficient management of nomination disputes in the future. The Tribunal should work in partnership with the civil society groups, LSK, political parties, ORPP and the media to create public awareness and popularise its mandate and processes among Kenyans. Else, there is need to seek the Supreme Court's advisory opinion on the meaning of Article 87 (1) of the Constitution in relation to Article 88 (4) (e) to determine whether it is the Tribunal that is contemplated by these provisions or a different form of court to resolve the constitutional question surrounding PPDT's involvement in nomination disputes.

Article 87 (1) mandates Parliament to enact a law establishing mechanism for timely settlement of electoral disputes and it is basis on which the Political Parties Act, 2011 was passed leading to the establishment of the Tribunal with the responsibility to adjudicate nomination complaints. Article 88(4) (e), on the other hand, gives IEBC jurisdiction to resolve nomination disputes and thus makes the settlement of nomination complaints a shared responsibility between the Tribunal and the Commission. Clarity on this question is therefore highly desirable to put to rest the jurisdictional conflict that is the ever lingering between these bodies with the overall gain of improved EDR management.

Summary of Party Primary Cases Filed at the Tribunal

Table 1: Party Primary Disputes per Counties

No.	Description	Number of Disputes
1.	Mombasa	12
2.	Kwale	2
3.	Kilifi	2
4.	Tana River	0
5.	Lamu	0
6.	Taita-Taveta	3
7.	Garissa	5
8.	Wajir	0
9.	Mandera	0
10.	Marsabit	2
11.	Isiolo	0
12.	Meru	1
13.	Tharaka-Nithi	0
14.	Embu	3
15.	Kitui	10
16.	Machakos	8
17.	Makueni	3
18.	Nyandarua	1
19.	Nyeri	0
20.	Kirinyaga	2
21.	Muranga	3
22.	Kiambu	4
23.	Turkana	1
24.	West Pokot	0
25.	Samburu	0
26.	Trans Nzoia	7
27.	Uasin Gishu	3
28.	Elgeyo Marakwet	0
29.	Nandi	3
30.	Baringo	2

No.	Description	Number of Disputes
31.	Laikipia	3
32.	Nakuru	8
33.	Narok	4
34.	Kajiado	5
35.	Kericho	2
36.	Bomet	2
37.	Kakamega	8
38.	Vihiga	4
39.	Bungoma	8
40.	Busia	12
41.	Siaya	13
42.	Kisumu	26
43.	Homa Bay	19
44.	Migori	19
45.	Kisii	19
46.	Nyamira	5
47.	Nairobi City	73
	Total	306

Source: Field Data 2019

Table 2: Party Primary Disputes per Political Parties

No.	Political Party	Number of Disputes
1.	Amani National Congress (ANC)	12
2.	Chama Cha Mashinani (CCM)	1
3.	Forum for Restoration of Democracy Kenya (FORD-K)	9
4.	Jubilee Party of Kenya	76
5.	Kenya African National Union (KANU)	18
6.	Labour Party of Kenya (LPK)	1
7.	Maendeleo Chap Chap	1
8.	National Rainbow Coalition (NARC)	1
9.	Orange Democratic Party (ODM)	160
10.	Party of National Unity (PNU)	2
11.	People's Democratic Party (PDP)	2
12.	United Democratic Party (UDP)	1
13.	Wiper Democratic Movement	22
	Total	306

Source: Field Data 2019

Understanding the Tables

Table 1 shows that Nairobi County led with 73 party primary complaints filed at the Tribunal followed by Kisumu at 26 while Homa Bay, Migori and Kisii trailed closely with 19 disputes. Siaya had 13 disputes whereas Mombasa and Busia counties both had 12. Kitui County recorded 10 as Bungoma, Kakamega, Nakuru and Machakos had 8 cases lodged with PPDT. However, the counties of Tana River, Lamu, Wajir, Mandera, Isiolo, Nyeri, Kirinyaga, West Pokot, Samburu and Elgeyo Marakwet recorded nil disputes in this regard.

Table 2, on the other hand, indicates that ODM candidates filed the majority of party primary cases. A total of 160 complaints were filed representing nearly a half of the complaints lodged at the Tribunal during the 2017 nominations. Jubilee came second with 76 followed by Wiper, KANU, Amani and FORD-K, with each scoring 22, 18, 12 and 9, respectively. PNU and People's Democratic Party each had 2 disputes each while the Labour Party of Kenya, Maendeleo Chap Chap, NARC and UDP each filed 1 case.

These outcomes can be explained from four main perspectives that are also interrelated. They include the location of the Tribunal, restrictive timelines for resolving nomination disputes, the role of political parties' IDRM and regional political influence of various political parties.

1. Location of the Tribunal

The centralisation of the Tribunal in Nairobi is one of the factors identified to have hindered majority of the people aggrieved by the party primary exercise from filing complaints at the Tribunal. Whereas the filing fees were affordable, the cost associated with the long travels to the capital city coupled with other logistical difficulties, discouraged most potential complainants from seeking justice. Perhaps, this explains why some counties such as Wajir, Mandera, Lamu or even Elgeyo Marakwet as shown in Table 1 recorded zero disputes at the Tribunal. In other words, there would be more disputes lodged had it been devolved to several parts of the country.

2. Restrictive Timelines

The low number of disputes at the Tribunal from places such as Marsabit, Garissa and Taita-Taveta counties or even the nil figures recorded from Wajir, Mandera, Lamu or even Elgeyo Marakwet as indicated by Table 1 can also be blamed on the short timeframe. This was worsened by the uncertainties underlining Political Parties Act, the Elections Act, 2011 and IEBC's timetable. The Tribunal spent three months settling party primary complaints while those from party list were determined within 10 days. However, while, for instance, the time used in the first phase might appear enough for a disputant to file a complaint at the Tribunal; the uncertainties in the said laws made it difficult predicting the amount of time one would spend seeking justice at the Tribunal. These can be said to have undermined the accessibility of the Tribunal by discouraged filing of disputes.

3. IDRM Approaches by Political Parties

Another perspective for interpretation is in relation to the approaches used by political parties in dealing with disputes. Some political parties, for example Orange Democratic Movement (ODM), are said to have devolved their complaint settling mechanisms particularly with respect to county assembly party primaries. This helped fast-track the disposal of such disputes thereby giving aggrieved parties opportunity to file their cases at the Tribunal.

Others such as Jubilee and Wiper, on the other hand, had centralised IDRM. These are said to have not only delayed the disposal of nomination complaints but also denied the majority of complainants of these political parties who were unable to make it to the locations of their parties IDRM the chance to seek redress both at such IDRM and at the Tribunal. Perhaps, this explains why table 2 shows that ODM recorded 160 party primary cases while Jubilee, equally a big party, had only 76 complaints filed.

4. Political influence by various political parties

The extent of a political party's regional influence also affected the performance of different counties in terms of the number of party primary complaints filed at the Tribunal. That is, areas where certain political parties had strong presence registered relatively high number of cases than places where such political parties had little influence. For instance, Kiambu County being potentially Jubilee in the same manner Kisumu or Migori was ODM's political zone, it was expected that Kiambu would have more Jubilee related complaints at the Tribunal than would ODM, FORD-K, Wiper or Amani party from the same region. See Tables 1 and 2 for more information.

Coupled with different IDRM approaches, a political party with a centralised mechanism would most probably record lower number of complaints with the Tribunal than the number a political with decentralised IDRM would have owing to the relatively less time spent settling disputes by the latter approach. As already observed, the centralisation of IDRM by some political parties was a strategy employed to drag the process with the benefit of stopping their aggrieved members from jumping ship and opting to vie as independent candidates instead.

Perhaps, this explains why both Table 1 and 2 shows that regions that were perceived as being potentially Jubilee including those nearby such as Kiambu registered fewer party primary disputes at the Tribunal than far flung places such as Mombasa, Homa Bay or Migori, which are regarded as ODM zones. Furthermore, the aspect of a political party's regional influence also meant that an area characterised by low presence of a political party would be ignored or receive little attention from such a party in terms of establishing IDRM to resolve emerging complaints. As a result, and coupled with the other difficulties already discussed, the disputants hailing from such places might have been compelled to abandon the quest for justice and therefore fail to access the Tribunal, which, in any case, only assumes jurisdiction upon a party attempting IDRM.

Relating Kenya's EDR Experience With South Africa and Mexico

The analysis of South Africa's and Mexican approaches to managing pre-election disputes provides an insight into how Kenya can handle such complaints effectively and sustainably with the overall gain of fostering a citizens-based democracy and deepening multiparty politics in the country. The preoccupation with the stakeholders' assessment of the Tribunal's performance, as explained, aimed at identifying the problems faced and addressing them for a better management of nomination disputes in the future.

This evaluation has revealed that the Tribunal encounter several challenges, which revolved largely around timelines, accessibility and enforcement of its orders. In this regard, Kenya could draw from the experiences of South Africa and Mexico best practices to enable it improve the EDR processes and ensure timeliness, fairness, accessibility and effectiveness of the Tribunal's decisions. These countries have been able to handle disputes efficiently due to various measures; the notable ones being the establishment of election courts, their devolution and harmonised election timelines.

Establishment of Election Courts

South Africa's Electoral Court is the highest judicial organ established to settle election disputes including ones arising from party nominations. It has appellate jurisdiction over the decisions of IEC and a party has no right to further appeal in respect its judgments. Mexico, on the other hand, has the Electoral Tribunal, which has the highest authority on electoral matters. The Tribunal determines appeals from rulings of election bodies and its decisions are final and irrefutable as is the case with South Africa's Electoral Court. The establishment of these bodies has several advantages such as reduction of time spent resolving cases because of the reduced number of dispute channels.

In Kenya, the EDR system comprises of political parties IDRM, which are the lowest in the cadre of pre-election disputes bodies. Others include the Tribunal and IEBC, which as explained, share jurisdiction in nomination disputes. The Tribunal is seized only upon a party attempting IDRM although there is no such requirement in the case of IEBC. In addition, an aggrieved party has the right to appeal the decisions of the Tribunal and IEBC to the High Court and can appeal further to the Court of Appeal and lastly the Supreme Court. The creation of many complaint channels coupled with the Tribunal's lack of enforcement powers was one of the factors blamed for ineffectiveness of orders and delayed pre-election processes in Kenya.

As seen, both South Africa's Electoral Court and Mexican Electoral Tribunal exercise judicial oversight over their respective election management bodies. Kenya's Tribunal

lacks such a mandate, which is why it was unable to punish for disobedience of its orders and instead had to depend on IEBC and High Court for enforcement. Therefore, to improve elections management, there are two options open to Kenya in this regard. First, amend the Political Parties Act, 2011 to empower the Tribunal to punish for disobedience of its orders in the same way magistrate courts have the power to cite for contempt without having to rely on High Court, IEBC or any other institution to enforce its decisions.

Second, Kenya could consider establishing an elections court with a similar status as the High Court as an alternative to the Tribunal. The court's decisions should be final and not subject to further appeals as is presently the case. Having such a court would be beneficial in that it ensures enhanced judicial oversight over the entire electoral process; including having supervisory mandate over IEBC. This would not only help reduce the number of dispute resolution mechanisms but also save time and lend clarity in terms of electoral jurisdiction over nomination cases. In addition, and unlike South Africa's or Mexican system, the elections court could be composed of judges drawn from the pool of judges in the Judiciary and gazetted for purposes of hearing and determining disputes during the electioneering period for wise use of judicial resources.

However, as regards the need for political parties' IDRM, the failure by South Africa's EDR processes to cater for such a procedure is not a good example to emulate. It denies the country the opportunity to promote alternative dispute resolutions (ADR) in political parties and build the capacity of South Africans to manage their political grievances without having to go to court for dispute resolution. In Kenya, IDRM are encouraged with the objective of strengthening the inter-party and intra-party structures, which, in turn, is expected to improve governance of political parties.

Decentralisation of Electoral Courts

The second step taken by South Africa's and Mexican system relates to decentralisation of their Electoral Court and Electoral Tribunal, respectively, to enhance accessibility to the complainants when necessary. These courts are established in various places within these countries and judges serve on permanent basis. During peak season in the case of Mexico, both the Tribunal and the National Electoral Institute are also required to publicize cases immediately upon receipt in order to notify interested parties to become involved in the case. In this regard, apart from enhancing accessibility, such initiatives help save time for litigants and ensure expeditious delivery of judgments.

On the contrary, Kenya's Tribunal and IEBC did not decentralise their operation during the 2017 party nominations. These bodies were situated in Nairobi, which meant that disputants had to travel long distances to the capital city to lodge disputes. This greatly undermined the accessibility of the Tribunal because many citizens were unable to make it to Nairobi bearing in mind the restrictive timelines set for pre-election dispute resolution. To this end, there is need to decentralise the EDR process

during the electioneering period; in which case the Tribunal, for instance, should be devolved to at least five regions countrywide, namely Nairobi, Mombasa, Meru, Nakuru and Kisumu to eliminate the logistical difficulties experienced by citizens in 2017 and facilitate access during this period.

The foregoing would require legislative amendments to allow the Judicial Service Commission to appoint additional ad hoc members during the peak periods in Kenya's electoral cycle to improve the Tribunal's capacity determine cases expeditiously. To be effective, the country could consider amending its electoral laws to require timely publication of complaints filed with different bodies to serve as notice to interested parties. In Mexico, as pointed out, both the Electoral Tribunal and the National Electoral Institute must publicize disputes filed as a measure for notifying interested parties to become involved in the case.

With regard to Kenya, the foregoing should be explored alongside digitisation of the Tribunal's registry processes, inclusion of the Tribunal's process in the integrated case management system and developing institutional policy on the same and provision of transcription services to assist in capturing of the proceedings. Use of other technologies such as SMS codes, toll number, websites, emails for public to ask questions/ get information, filing electronically or teleconferencing for parties who are far and using mobile money to fast track payment of filing fees should be encouraged.

Harmonised Election Timelines

The third measure relates to election timelines being harmonised, and in the case of South Africa, IEC is the only body empowered in law to decide the electoral timelines. South Africa does not have a stand-alone Political Parties Act, which provides different timelines for EDRs like the one Kenya have. The Act does not only establish the Tribunal but also outlines the timeframe for resolving disputes and requires cases to be resolved within three months from the date of filing at the Tribunal.

The Elections Act, 2011, on the other hand, also provides a complaint settlement period of thirty days for disputants to sort out disputes internally within their respective political parties before approaching the Tribunal and mandates IEBC to design timelines for accomplishing various activities in preparation for a general election. In this regard, the Commission came up with the Gazette Notice Vol. CXIX-35, which required all party primary disputes to be resolved by the Tribunal on or before 8th May 2017, which was less than one month contrary to the expectation by the Elections Act, 2011 and Political Parties Act, 2011.

These created conflicts were blamed for undermining the Tribunal's accessibility, transparency, enforcement of orders and its general effectiveness as a court of law. For these reasons, Kenya should harmonise Elections Act, 2011 and Political Parties Act, 2011 to iron out the conflicting for improved time management in addition to making IEBC the only body with the mandate to set times.

What is more, dispute resolution period should not be put too close to the date for holding general elections as was witnessed in 2017 in which some cases were determined barely five days to the August 8 polls.

Recommendations

1. Devolve the Tribunal during the nomination period.
2. Amend the Political Parties Act, 2011 to empower the Tribunal to punish for disobedience of its orders.
3. Consider establishing an elections court as an alternative to the Tribunal.
4. Allocate adequate and clear timelines for resolving nomination disputes.
5. Enhance institutional collaboration with other state agencies.
6. Explore wider stakeholders' engagements with key stakeholders.
7. Embrace technology for increased efficiency, accountability, effectiveness and transparency of the Tribunal's process.

Conclusion

The Tribunal played a major role in dealing with the 2017 party nomination disputes and its determination to succeed witnessed the resolution of more than 500 cases from various parts of the country in three months. This was despite the numerous daunting challenges ranging from human resource constraints experienced in terms of few members and support staff, inadequate physical space, legal uncertainties and the inability to engage technology in managing the filing of cases and court records, among others that faced the Tribunal during this period.

As demonstrated in the course of this research, the 2017 elections marked the first time of the Tribunal's active involvement in settling party nomination disputes compared to the 2013 general elections when less than 40 cases were adjudicated. The resolution of the nomination complaints was a shared responsibility between the Tribunal and IEBC. In addition to collaborating with the Commission in this regard, the Tribunal also forged partnership with judicial departments, for example JCE and JTI to assist with planning and administrative arrangements. Other institutions such as the media, development partners, civil society groups, LSK, ORPP and political parties were also engaged. Further, collaboration with security agencies proved vital and went along way to provide an atmosphere conducive for the operations of the Tribunal during this period.

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Appendix A: List of Respondents

No.	Stakeholders
	Independent Electoral and Boundaries Commission (IEBC)
	Office of the Registrar of Political Parties (ORPP)
	Carter Center
	European Observer Mission (EOM)
	United Nations Development Programme (UNDP)
	International Development Law Organisation (IDLO)
	International Foundations for Electoral Systems (IFES)
	Media: Nation, Citizen and Standard/KTN
	Security
	Law Society of Kenya (LSK)
	Judiciary Training Institute (JTI)
	Judiciary Committee on Elections (JCE)
	Appeal Judges
	Former Chief Executive Officer (CEO) of the Tribunal
	Deputy Registrar of the Tribunal
	Tribunal's Chairperson-Bench 1
	Tribunal's Chairperson- Bench 2
	Registry Staff
	Legal Researchers
	Tribunal's Program Officer
	Ford Kenya's Advocates
	Orange Democratic Movement's Advocates
	Jubilee's Advocates
	Amani Party's Advocates
	Wiper Party's Advocates
	Kenya African National Union's Advocates
	Self-represented complainants
33.	Advocates from the ICJ Kenya membership

Appendix B: Interview Questions

1. Time

- a. To what extent did PPDT resolve party nomination disputes in a timely manner?(If the respondents point out delay ask question 2; If no delay ask question 3)
- b. What hindered PPDT's ability to resolve party nomination disputes in a timely manner?
- c. What is your experience with the time it took to resolve party nomination disputes?
- d. What measures should be put in place to ensure timely resolution of disputes by PPDT?

2. Fairness/Impartiality

- a. To what extent was PPDT fair in resolving the 2017 party nomination disputes?
- b. Were you aware of the measures PPDT put in place to ensure fairness in the resolution of party nomination disputes?
- c. What were these measures PPDT put in place to ensure fairness in the resolution of party nomination disputes?
- d. What were the challenges that undermined PPDT's capacity to resolve party nomination disputes fairly?
- e. What measures should be put in place to ensure fair resolution disputes by PPDT?

3. Accessibility

- a. How accessible was PPDT during the resolution of the party nomination disputes?
- b. Were you aware of the measures put in place to ensure accessibility of PPDT during dispute resolutions? (If Yes Ask question 3)
- c. Which were these measures?
- d. Were these procedures, rules or regulations effective in ensuring accessibility of the Tribunal?
- e. What is your proposal on improving accessibility of PPDT during dispute resolutions?

4. Transparency

- a. To what extent was PPDT transparent in managing the 2017 party nomination disputes?
- b. What measures did PPDT put in place to ensure transparency in the management of the 2017 party nomination disputes?
- c. What hindered PPDT's capacity to ensure transparency?
- d. What is your proposal on improving transparency of the tribunal?

5. Independence

- a. What is your assessment of PPDT's independence during the resolution of the 2017 party nomination disputes?
- b. What hindered PPDT's ability to resolve party nomination disputes in an independent manner?
- c. What measures do you propose be put in place to help address the challenges identified above?

6. Enforcement

- a. How effective was PPDT in enforcing its orders, ruling or judgments?
- b. What measures were put in place to ensure that the PPDT's orders are complied with? (Question asked to the members of the tribunal)
- c. What were the challenges that faced the enforcement of the PPDT's orders, ruling or judgments?
- d. What are your proposals on improving the enforcement of the tribunal orders?

7. Relevance

- a. To what extent was the Tribunal alive to the prevailing political and social realities in the management of the 2017 party nomination disputes?
- b. What specific measures did PPDT take to demonstrate its sensitivity and responsiveness to the said realities?
- c. What challenges did the Tribunal face during the 2017 party nomination disputes resolution?
- d. What were the key lessons learnt in the management of the 2017 party nomination disputes?



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