

Policy Brief

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

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Introduction

The Political Parties Disputes Tribunal (PPDT) is a Tribunal established in section 40 of the Political Parties Act, 2011 with the mandate of resolving disputes arising from the activities of political parties in Kenya¹. Its creation is envisioned in Articles 87 (1) and 169 (1) (d) of the Constitution of Kenya, 2010, as a subordinate court. It is among the pre-election disputes resolution bodies created in the aftermath of the 2007/08 general elections upon the realization that election day and post-election violence is a culmination of unresolved tension emanating from seemingly unfair pre-election processes- and therefore the need to have an elaborate mechanism for determining dispute arising from the pre-election process. Apart from the Tribunal, other pre-election dispute resolution forums such as the political parties' internal disputes resolutions mechanisms (IDRMs) and the Independent Electoral and Boundaries Commission (IEBC) were also involved.

In the run up to the August 8 2017 general elections, the Tribunal adjudicated over 500 party nominations cases, which arose from both party primary and party list processes. This was unlike in 2013 when only 33 cases were dealt with. It can be argued that the increase in the number of disputes before the Tribunal is an indication of its increase in popularity among political party aspirants and the legal profession. It is therefore important to assess the perceptions of those who interacted with the Tribunal, either as parties to a dispute, their legal representatives, or as the givers of the services sought from the Tribunal. As the Tribunal is gaining traction, it is important to analyse the challenges faced and gaps identified in execution of its mandate- and to make recommendations for reform in preparation of the next election cycle- where the Tribunal is expected to handle even more cases.

It is against this background that the ICJ Kenya conducted a stakeholders' evaluation to gauge the Tribunal's performance in terms of timeliness, fairness, accessibility, transparency, independence, enforcement and relevance. This was done with the aim of understanding the challenges it encountered and come up with practical recommendations and solutions going forward.

This policy brief, presents a strong case for legal, policy and institutional reforms regarding effective, efficient and sustainable management of pre-election disputes by the Tribunal in conformity with the civil and political rights of Kenyans and and other constitutional standards.

¹ It covers disputes 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

Objectives of the evaluation and guiding principles

The evaluation process entailed assessing the PPDT's performance vis a vis its mandate, structure and the underlying legal and policy factors in a comparative context in order to identify how best to overcome the challenges in an effective and efficient manner.

Specifically, the stakeholders' evaluation has the following objectives:

- a. Create awareness on the Tribunal and its mandate in election dispute resolution.
- b. Document the Tribunal's experiences in resolution of pre-election disputes of 2017.
- c. Document stakeholder perceptions on the work of the PPDT in the course of their interaction with the same.
- d. Highlight challenges faced by PPDT and gaps in development of laws and/ or implementation of laws with recommendations to inform ongoing electoral reform processes.

Further the evaluation was done bearing in mind guiding principles in resolution of cases, specifically election related cases. These guiding principles are as follows:

a) **Timeliness (adherence to timelines and efficiency of process including use of ICT)**

In adjudicating disputes, the Tribunal is required to act expeditiously ensuring that each case is determined within a period of three months from date it is lodged save for party primaries in which case it is empowered to extend or reduce the time prescribed as may be appropriate to ensure that the ends of justice are met.

The Tribunal resolved more nomination cases in 2017 amounting to 574 than it did in 2013 where only 33 suits were determined. 306 of these came from party primaries and resolved within three months beginning from April 1 to June 30, 2017 while 235 disputes arose from party list exercise and were determined within 10 days; July 24 to August 2, 2017.

b) **Fairness (of process and outcome, right of appeal, etc.)**

As a court, the Tribunal is bound by the principles of the administration of justice contained 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.

The Tribunal is obligated under 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.

The political parties' IDRM was the first port of call for those dissatisfied with the political decisions of their respective parties since it is a requirement for one to attempt the resolution of complaints internally before seeking recourse at the Tribunal.

This is set out in section 13 2A of the Elections Act that gave political parties thirty days to do so.

c) Accessibility (location, accessibility of information and processes e.g. registry)

Access to justice is one of principles set out in Article 159 of the Constitution of Kenya, 2010 to guide the Tribunal's work as an EDR mechanism. Enabling access to courts helps to prevent aggrieved parties from seeking illegal avenues or resorting to violence as a way of resolving electoral disputes. As such, locating the Tribunal with the reach of citizens, ensuring availability of rules and procedures governing its operations and affordable cost of filing cases, among others, are central in realising accessibility of the Tribunal. The publication of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 provides simplified complaint forms to help fast track the filing of disputes at the Tribunal, accessible courtrooms and affordable filing fees are also handy in ensuring accessibility of the Tribunal to parties.

d) Transparency (proceedings, rules of procedure, information availability etc.)

Transparency is recognised by Article 10 of the Constitution of Kenya, 2010 as one of the constitutional values that the Tribunal is bound to promote as it adjudicates disputes. Transparency implies openness in the way an institution operates and, with regard to the Tribunal, it is realised when all the relevant information regarding its operations, location and procedures are availed to the public in simple forms and in a timely manner. This ensures that justice is not only be done but also manifestly seen to be done, which explains the conduct of the Tribunal's proceedings in open court and so on. In this regard, section 41 (3A) of the Political Parties Act, 2011 empowers the Chief Justice to prescribe regulations to guide the exercise of these special powers by the Tribunal culminating into the Political Parties Disputes Tribunal (Procedure) Regulations, 2017.

e) Independence (institutional space, recruitment of own staff, financial allocation et cetera)

The Tribunal's independence is essential in establishing its integrity as an electoral dispute resolution system making its decisions legitimate in the eyes of the public. The establishment of the Tribunal by the Political Parties Act, 2011 enhances its autonomy and gives it a legal niche to work in. The Act is the constituting law and as such defines the structure and the mandate of the Tribunal and empowers the Chief Justice in section 41 (3A) to prescribe the Political Parties Disputes Tribunal (Procedure) Regulations, 2017.

Section 39 of the Act mandates the Judicial Service Commission to appoint the Tribunal's membership and it composes of a chairperson who must be qualified for an appointment as a High Court judge and other six members; three of whom must be advocates of the High Court of Kenya with a post admission experience of least seven years. The remaining three members 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. The Tribunal has office space to house its administrative staff and has financial allocation from the Judiciary Fund.

f) Enforcement (judgments, rulings and orders)

Its ruling, judgment or order are enforceable in the same manner as those of magistrate's courts and whoever is dissatisfied is free to appeal to the High Court as a matter of right. Tribunal is required to act expeditiously ensuring that each case is determined within a period of three months from date it is lodged save for party primaries in which case it is empowered to extend or reduce the time prescribed as may be appropriate to ensure that the ends of justice are met. This is in addition to applying 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.

g) Responsive (acceptance of complaints letters as evidence of IDRM, MOU with IEBC were necessary for justice to be served)

The application of the rules of evidence and procedure under the Evidence Act (Cap. 80) and the Civil Procedure Act (Cap. 21), with the necessary modifications is important in ensuring the administration of justice without undue regard to procedural technicalities. Regulation 8 of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 gives the Tribunal three months within which to

resolve a complaint except for party primary cases where it is allowed to spend more or less time to enable parties with the Elections Act. The exploration of institutional collaboration with other bodies such as the Judiciary Committee on Election, Judiciary Training Institute and IEBC are critical in improving the Tribunal's capacity a dispute resolution forum.

Research Methodology

The evaluation was conducted incorporating both primary and secondary sources of data collection. Primary data was obtained through dissemination of key evaluation questions² developed around the principles of effective electoral disputes resolution explained above for responses from targeted stakeholders. The evaluation targeted 34 people, carefully selected from representatives from the following:

- a. Members of the Tribunal
- b. PPDT staff
- c. Judges who presided over appeals arising from PPDT
- d. Judiciary Training Institute (JTI)
- e. Litigants including self-represented litigants
- f. Development partners
- g. Election Observer Missions such as the EU and the Carter Foundation
- h. The Independent Electoral and Boundaries Commission (IEBC)
- i. Office of the Registrar of Political Parties
- j. Law Society of Kenya
- k. Judiciary Committee on Elections
- l. Security agencies
- m. Media.

These representatives were chosen based on both their knowledge of the Tribunal's operations and interaction with it during the 2017 party nomination dispute resolutions process. 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 and relevant literature materials on electoral dispute resolutions such as the Election Observers' reports.

An analysis of the country's laws on elections, namely the Constitution of Kenya, 2010, the Electoral Act, 2011, Political Parties Act, 2011 and so on was also done. The evaluation also 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.

² The questionnaire is attached to this policy brief as annexure 1

A summary of the findings from the evaluation

In summary, the key findings on the performance of the Tribunal in managing nomination disputes have been summarized below as notable successes, challenges and recommendations. These have been organized as per the principles outlined by this evaluation.

Notable Successes

a) Timelines

- i. Fixing timelines for resolving disputes;
- ii. Increase in the Tribunal's membership;
- iii. Publishing of the nomination rules;
- iv. Signing of the Memorandum of Understanding between the Tribunal and IEBC;
- v. Work overtime time including late into the night and even on weekends;
- vi. Outsourcing staff from other departments of the Judiciary;
- vii. Keeping the registry open for long hours including Saturdays and Sundays to enable continuous filing of cases; and
- viii. Providing meals and accommodation in the nearby hotels for Tribunal members and staff.

b) Fairness

- i. Publication of the rules of procedure;
- ii. Mixing of lawyers and non-lawyers in the composition of the Tribunal's membership;
- iii. Three-member composition of benches;
- iv. Prior frequent consultations between Tribunal members and legal researchers before the commencement of proceedings;
- v. Keeping safe distance with litigants to avoid perceptions of bias; and
- vi. Location of the Tribunal in Milimani Law Courts buildings to raise the Tribunal's profile as a court.

c) Accessibility

- i. Provision of simplified complaint forms by the Political Parties Disputes Tribunal (Procedure) Regulations, 2017;
- ii. Stakeholder engagements with other organisations such as the Law Society of Kenya;
- iii. Public outreach through the media and the Tribunal's website;
- iv. Fulltime availability of the Tribunal members and administrative staff;
- v. Availability of courtrooms;

- vi. Affordable filing fees; and
- vii. Securing a sub registry at the entrance of the Milimani Law Courts.

d) **Transparency**

- i. Publication of the Political Parties Disputes Tribunal (Procedure) Regulations, 2017 made Tribunal's operations open and transparent;
- ii. Conducting proceedings in open court;
- iii. Ensuring that judgments and rulings were typed;
- iv. Clarification of the Tribunal's jurisdiction in Memorandum of Understanding with IEBC

e) **Independence**

- i. Creation of autonomous Tribunal by the Political Parties Act, 2011;
- ii. The Political Parties Disputes Tribunal (Procedure) Regulations, 2017 provided the procedure to guide the Tribunal's work;
- iii. Allocation of finances to aid the Tribunal's operations; and
- iv. Own office space to accommodate the Tribunal's members, administrative staff and storage of files.

f) **Enforcement**

- i. Using the Memorandum of Understanding with IEBC as an enforcement strategy; and
- ii. Recognition of the Tribunal's rulings being enforceable in the same manner as the decision of a magistrate's court.

g) **Responsiveness**

- i. Establishing enforcement mechanism through MOU with the IEBC;
- ii. Accepting a complaint letter as evidence of attempted IDRM; and
- iii. Liaising with the Judiciary Committee on Election and Judiciary Training Institute to provide administrative support.

Summarized table of challenges and recommendations:

Principle	Challenges Identified	Possible Recommendations
Timeliness	Legal conflicts on the dispute resolution timelines	Amend Political Parties Act, 2011 and the Elections Act, 2011 to harmonise the provisions election timelines.
	Contradicting High Court position on whether IDRMs is mandatory or optional in the case of party primaries	Amend the Political Parties Act, 2011 to include IDRMs requirement for party primaries.
	Political parties using their IDRM to drag the Tribunal and deprive it of the opportunity to resolve nomination disputes	Amend the Political Parties Act, 2011 and the Elections Act, 2011 to specify timeframes for resolution of disputes by both IDRM and the Tribunal.
	Retrial of cases by the Tribunal following orders by appellate courts	Amend the Political Parties Act, 2011 and the Elections Act, 2011 to limit the right of appeal on party nomination disputes to High Court or Electoral Court, if establish.
Fairness	Unequal treatment of Litigants	Amend the Political Parties Act, 2011 and the Elections Act, 2011 to provide adequate time for dispute resolution.
	Perception of bias created by same gender benches	Ensure gender balance in the composition of the benches
	Allegations of bribery	Lodge formal complaint to enable investigation take place.
Accessibility	Centralisation of the Tribunal in Nairobi	Amend the Political Parties Act, 2011 to enable devolution of the Tribunal during the peak of party nominations.
	Lack of adequate public awareness	Collaboration with stakeholders to carry out effective public outreach to popularise the Tribunal's work.
	Inadequate human resource capacity	Amend the Political Parties Act, 2011 to allow hiring of more members and staff during the resolution of party nomination disputes.
	Inadequate time for resolving disputes	Amend the Political Parties Act, 2011 and the Elections Act, 2011 to create adequate time for resolving party

Principle	Challenges Identified	Possible Recommendations
		nomination disputes.
Transparency	Conflicts between the Political Parties Act and the Elections Act raising doubts on the Tribunal's compliance with timelines	Amend the Political Parties Act, 2011 and the Elections Act, 2011 to harmonise the provisions election timelines.
	Inadequate court space to accommodate members of the public interested in following court proceedings	Allocate adequate courtrooms for the Tribunal during party nomination dispute resolutions
	Inadequate records to enable proper determination by appellate courts	Hire adequate staff for the Tribunal
Independency	Tribunals' inability to control its calendar for dispute resolution	Amend the Political Parties Act, 2011 and the Elections Act, 2011 to harmonise the provisions on election timelines.
	Lack of adequate courtrooms	Allocate adequate courtrooms for the Tribunal during party nomination dispute resolutions
	Undue control by superior courts	Amend the Political Parties Act, 2011 to establish an Elections Court with the equal status as the High Court.
	Inadequate supervisory control of the outsourced staff	Hire adequate staff for the Tribunal.
Enforcement	Lack of adequate enforcement powers	Amend the Political Parties Act, 2011 to empower the Tribunal to punish for disobedience of its orders.
	Wrong service of orders	Sensitize the public on the process of enforcing the Tribunal's orders.
	Inadequate timeframe for resolving disputes	Amend the Political Parties Act, 2011 and the Elections Act, 2011 to create adequate time for resolving party nomination disputes.
Responsiveness	Failed Case Management System	Timely training of the Tribunal's members and staff on the use of Case Management System and other technologies.

- i) All nomination disputes were settled within the set timeline. This was made possible by the various legislative, regulatory and administrative measures instituted by either the Tribunal or other bodies, which enhanced the Tribunal's capacity to deal with disputes effectively.
- ii) The fixing of timelines for settling nomination disputes, increase in the number of members of the Tribunal, the publishing of the nomination rules and the Memorandum of Understanding with IEBC, among other examples, improved the Tribunal's capacity to handle cases efficiently.
- iii) The Tribunal collaborated with the Judiciary Committee on Elections and Judiciary Training Institute to train members and the secretariat, to make the necessary administrative arrangements such as the outsourcing of staff from other Judiciary departments, extension of work hours and securing of courtrooms in time, among others. The collaboration also witnessed the tabling of legislative proposals, which, for instance, resulted into the amendment of the Political Parties Act, 2011 that in turn increased the membership of the Tribunal and giving it the mandate to resolve party primary complaints. These measures contributed to the Tribunal's success in handling disputes.
- iv) The Tribunal was generally perceived to have managed disputes fairly and was keen to demonstrate impartiality to those people who approached it as a complaint resolution forum despite the pressure caused by short timelines as well as high political stakes characterising the process.
- v) Broad consultations with IEBC, the Law Society of Kenya and the media, among other institutions, improved the stakeholders' perception of Tribunal transparency, accessibility and fairness despite its location in Nairobi posing a major challenge in this regard.
- vi) There was a general perception that the Tribunal was independent in managing disputes.

Recommendations

This evaluation makes brief recommendations that stakeholders should focus on in order to improve the management of pre-election disputes resolution processes and ensure that such cases are dealt with effectively, efficiently and sustainably going forward. The findings of this report are intended to create awareness on the Tribunal and its mandate in election dispute resolution, document its experiences in resolution of pre-election disputes of 2017 and document stakeholder perceptions on the work of the Tribunal in the course of their interaction with the same. It is also intended to highlight challenges it faced and gaps in development of laws and/ or implementation of laws with recommendations for legislative, policy and administrative reforms.

- i) Devolved the Tribunal during the nomination period: PPDT should decentralised 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. This 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.
- ii) 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.
- iii) Consider establishing an elections court as an alternative to the Tribunal to improve judicial oversight over the entire electoral process; including having supervisory mandate over IEBC, to reduce in the number of dispute resolution mechanisms and the time spent settling complains and to lend clarity on the electoral jurisdiction over nomination cases.
- iv) Allocate adequate time for resolving nomination disputes. There is need to harmonise the Political Parties Act, 2011 and the Elections Act, 2011 to iron out the conflicting provisions regarding elections timelines. Again, 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.
- v) Enhanced institutional collaboration with other state agencies. The Tribunal should seek for greater collaboration with other departments of the Judiciary, for instance Judiciary Committee on Elections and Judiciary Training Institute and security agencies for planning purposes in terms of building human resource capacity through trainings, hiring adequate staff, securing adequate courtrooms and so on, in readiness for hearing and determining party nomination disputes.

- vi) Wide stakeholders' engagements with the civil society groups, Law Society of Kenya, political parties, IEBC, Office of the Registrar of Political Parties and the media is important to provide the Tribunal with awareness creation forums to assist popularise its mandate and processes and sensitise the public about its work.

- vii) Embrace technology for increased efficiency, accountability, effectiveness and transparency of the Tribunal's process. This should include the 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. The 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.



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