



# PROACTIVE DISCLOSURE OF INFORMATION DURING ELECTIONS IN KENYA

(2021 General Elections)

AN ASSESSMENT OF THE KENYA'S COMPLIANCE WITH THE ***GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA***, ISSUED BY THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

GOVERNANCE

FREEDOM

INDEPENDENCE

DEMOCRACY

CREDIBILITY

TRANSPARENCY

MEDIA

INFORMATION

CITIZENS

VOTE

ELECTIONS

BALLOT

RIGHTS



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UNIVERSITY OF PRETORIA



EASTERN AFRICA

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*COMMISSIONED BY THE CENTRE FOR HUMAN RIGHTS  
WITH SUPPORT OF ARTICLE 19*



**Centre for  
Human Rights**  
UNIVERSITY OF PRETORIA









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# ABBREVIATIONS AND ACRONYMS

<b>ACHPR:</b>	African Commission on Human and Peoples' Rights
<b>African Charter:</b>	African Charter on Human and Peoples' Rights
<b>ACDEG:</b>	African Charter on Democracy, Elections and Governance
<b>AIA:</b>	Access to Information Act
<b>AU:</b>	African Union
<b>Azimio:</b>	Azimio la Umoja One Kenya Alliance
<b>BBI:</b>	Building Bridges Initiative
<b>CAJ:</b>	Commission on Administrative Justice
<b>CAK:</b>	Communications Authority of Kenya
<b>CMCA:</b>	Computer Misuse and Cybercrimes Act
<b>CRECO:</b>	Constitution and Reform Education Consortium
<b>CSOs:</b>	Civil society organisations
<b>CUE:</b>	Commission for University Education
<b>DPA:</b>	Data Protection Act
<b>EA:</b>	Elections Act
<b>EACC:</b>	Economic and Anti-Corruption Authority
<b>EACCA:</b>	Economic and Anti-Corruption Commission Act
<b>ECFA:</b>	Election Campaign Financing Act
<b>ELOG:</b>	Elections Observation Group
<b>EMBs:</b>	Electoral management bodies
<b>EOA:</b>	Election Offences Act
<b>EUEOM:</b>	European Union Election Observation Mission
<b>FBOs:</b>	Faith-based organisations
<b>IEBC:</b>	Independent Electoral and Boundaries Commission
<b>IEBCA:</b>	Independent Electoral and Boundaries Commission Act
<b>KBC:</b>	Kenya Broadcasting Corporation
<b>Kenya Kwanza:</b>	Kenya Kwanza Alliance
<b>KHRC:</b>	Kenya Human Rights Commission
<b>KI:</b>	Katiba Institute
<b>KICA:</b>	Kenya Information and Communications Act
<b>KIEMS:</b>	Kenya Integrated Election Management System
<b>LEA:</b>	Leadership and Integrity Act
<b>MCA:</b>	Media Council Act
<b>MCC:</b>	Media Complaints Commission
<b>MCK:</b>	Media Council of Kenya
<b>Model Law:</b>	Model Law for Access to Information in Africa
<b>NCIC:</b>	National Cohesion and Integration Commission
<b>NGOs:</b>	Non-governmental organisations
<b>NMG:</b>	Nation Media Group
<b>NPS:</b>	National Police Service



<b>ODPC:</b>	Office of the Data Protection Commissioner
<b>ODPP:</b>	Office of the Director of Public Prosecutions
<b>ODM:</b>	Orange Democratic Movement
<b>ORPP:</b>	Office of the Registrar of Political Parties
<b>PAPA:</b>	Public Appointments (Parliamentary Approval) Act
<b>POEA:</b>	Public Officer Ethics Act
<b>PPA:</b>	Political Parties Act
<b>PPF:</b>	Political Parties Fund
<b>PSC:</b>	Parliamentary Service Commission
<b>RPP:</b>	Registrar of Political Parties
<b>SRC:</b>	Salaries and Remuneration Commission
<b>UDA:</b>	United Democratic Alliance
<b>UDPK:</b>	United Disabled Persons of Kenya

# TABLE OF STATUTES AND OTHER LEGAL INSTRUMENTS

Access to Information Act (No. 31 of 2016)  
African Charter on Democracy, Elections and Governance  
African Charter on Human and Peoples' Rights (OAU, 1981)  
Bribery Act (No. 47 of 2016)  
Commission on Administrative Justice Act (No. 23 of 2011)  
Computer Misuse and Cybercrimes Act (No. 5 of 2018)  
Constitution of Kenya (2010)  
Data Protection Act (No. 24 of 2019)  
Declaration on Principles of Freedom of Expression and Access to Information in Africa (ACHPR, 2019)  
Election Campaign Financing Act (No. 42 of 2013)  
Election Offences Act (No. 37 of 2016)  
Elections Act (No. 24 of 2011)  
Ethics and Anti-Corruption Commission Act (No. 22 of 2011)  
Fair Administrative Action Act (No. 4 of 2015)  
Guidelines for Election Coverage 2022 (MCK, 2021)  
Guidelines on Access to Information and Elections in Africa (ACHPR, 2017)  
Guidelines on Access to Information Requests (CAJ, 2019)  
Kenya Broadcasting Corporation Act (Cap. 221)  
Kenya Information and Communications Act (No. 2 of 1998)  
Leadership and Integrity Act (No. 19 of 2012)  
Media Council Act (No. 46 of 2013)  
Model Law on Access to Information for Africa (ACHPR, 2013)  
National Cohesion and Integration Act (No. 12 of 2008)  
National Intelligence Service Act (No. 28 of 2012)  
Non-Governmental Co-ordination Act (No. 19 of 1990)  
Political Parties Act (No. 11 of 2011)  
Programming Code for Broadcasting Services in Kenya (CAK, 2019) section 2.3.2 (h)  
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (AU, 2018))  
Public Appointments (Parliamentary Approval) Act (PAPA) (No. 33 of 2011)  
Public Benefits Organisations Act (No. 18 of 2013)  
Public Officer Ethics Act (No. 4 of 2003)  
Public Procurement and Asset Disposal Act (No. 33 of 2015)  
Witness Protection Act (No. 16 of 2006)



## TABLE OF CASES

*Attorney-General et al v David Ndii et al (Supreme Court Petition No. 12 of 2021 consolidated with Petition Nos 11 and 13 of 2021)*

*Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties) [2020] eKLR <http://kenyalaw.org/caselaw/cases/view/191276>*

*Free Kenya Initiative & 17 others v Independent Electoral & Boundaries Commission & 5 others; Kenya National Commission on Human Rights & another (Interested Party) [2022] KEHC 10217 (KLR)*  
*G'Oganyo v Independent Electoral Commission Selection Panel & 2 others; Independent Electoral and Boundaries Commission & 6 others (Interested Party) (Constitutional Petition E345 of 2022) [2022] KEHC 10184 (KLR)*

*Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 others; Law Society of Kenya & another (Interested parties) [2022] eKLR*

*Katiba Institute v Independent Electoral & Boundaries Commission [2017] eKLR*

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

*Kenya Broadcasting Corporation Act (Cap. 221)*

*Kenya Human Rights Commission & 6 others v Independent Electoral and Boundaries Commission & 2 others; Communication Authority of Kenya & 3 others [2022] KEHC 10579 (KLR)*

*Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others [2021] eKLR*

*Khelef Khalifa & another v CS Transport & Others (Petition E032 of 2021)*

*Lichete v Independent Electoral and Boundaries Commission & another; Attorney General (Interested Party) [2022] KEHC 13244 (KLR)*

*Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) [2021] eKLR*

*Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR)*

*Okiya Omtata Okiiti v Attorney General & 5 others [2021] KEHC 439 (KLR)*

*Okiiti & 15 others v Attorney General & 7 others; Commission on Administrative Justice & 15 others (Interested Party) [2022] KEHC 3209 (KLR)*

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

*Republic v National Cohesion and Integration Commission; Chama Cha Mawakili Limited (Exparte) [2022] KEHC 10206 (KLR) (Judicial Review)*

*Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission [2022] eKLR*

*Salesio Mutuma Thurairira & 4 others v Attorney General & 2 others; Registrar of Political Parties & 4 other (Interested Parties) [2022] eKLR*

*Sonko v Clerk, County Assembly of Nairobi City & 11 others [2022] KESC 26 (KLR)*

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

## PREFACE

I welcome this report that assesses Kenya's compliance with the Guidelines on Access to Information and Elections in Africa (the Guidelines) that were adopted by the African Commission on Human and Peoples' Rights (the African Commission) in 2017. The report evaluates the extent to which the right to access information was realised during the general election held in August 2022 in Kenya. The right to access information is enshrined in article 9 of the African Charter on Human and Peoples' Rights (the African Charter). It plays a fundamental role in promoting democracy by facilitating active engagement in public affairs. The right to access information is also interconnected with other human rights, such as the right to participate in government directly or through elected representatives, as safeguarded by article 13 of the African Charter. This assessment of Kenyan elections takes into account the Guidelines, relevant national access to information legal and policy framework, and other regional and international human rights laws and standards.

The study primarily examines the proactive disclosure of information related to the election process by electoral stakeholders. The Guidelines provide guidance on the obligation of election stakeholders to proactively disclose categories of information to enable the electorate to exercise the right to vote for their representatives from an informed perspective. These electoral stakeholders include: the appointing authority of the electoral management body, the election management body (EMB), law enforcement agencies, political parties and candidates, media and regulatory bodies, election observers and monitors, and civil society organisations (CSOs). By evaluating their adherence to the Guidelines, the study sheds light on the level of transparency, and information disclosure and accessibility throughout the electoral process.

For nearly five decades, Kenya grappled with legislative, institutional and political obstacles that hindered good governance and democracy. This contributed to lack of transparency in the public sector. However, the turning point was the adoption of the 2010 Constitution, which embraced the principles of transparency, accountability, and public participation as foundational elements of good governance and democracy. Another significant milestone was the explicit integration of international treaties and conventions ratified by Kenya into the legal framework, which elucidated legal obligations to comply with international law.

Kenya is a signatory to key international and regional instruments such as the African Charter, the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), the United Nations Convention Against Corruption (UNCAC), and the African Union Convention Against Corruption. Therefore, Kenya bears the responsibility of implementing provisions related to the right of access to information, as established in these instruments. Given that Kenya follows a monist approach to international law, these international and regional instruments are automatically incorporated as domestic law and can be enforced in national courts as provided in article 2 (6) of the Constitution.

Kenya enacted the Access to Information Act in September 2016 to facilitate the realisation of the right of access to information, in accordance with article 35 of the Constitution, which guarantees every Kenyan the right to seek and receive information from both public bodies and private entities operating in a public capacity. This legislation establishes key principles governing access to public information; identifies the individuals entitled to exercise this right; and provides a framework for the process of obtaining public information. At the county level, the County Governments Act of 2012, specifically section 87, recognizes the importance of timely access to information, data, documents, and other relevant information for citizen participation in county governance. Part IX of the Act addresses Public Communication and Access to Information, while sections 93, 95, and 96 contain explicit provisions on access to information. Section 96, mandates all county governments to enact access to information laws.

The nexus between access to information and election integrity in Kenya cannot be overemphasised. Kenya's electoral process has often been a charged affair, marred by concerns over credibility, transparency, accountability, inadequate information infrastructure, and a lack of willingness to provide access to information for accountability purposes. Since the adoption of the 2010 Constitution, Kenya has conducted three general elections—in 2013, 2017 (including a repeat presidential poll), and 2022. These elections have been marked by significant legal disputes and varying levels of civil conflict sparked by allegations of wanting credibility, transparency, and accountability. The inadequate information infrastructure to manage the electoral process, and an unwillingness by state actors to provide information for those seeking accountability also contributed to the public trust deficit and unrest. The crucial role of transparency and the right to information in safeguarding peace, security, and stability within the electoral context, therefore, is undeniable.

That being said, I would like to commend the Government of Kenya for its significant efforts in ensuring the free flow of ideas and information during the 2022 general elections. The government's commitment to maintaining a fair, open, and accessible internet, as well as the establishment of a strong legislative framework for access to information, has been instrumental in enabling citizens to access election-related information. I also commend the Independent Electoral and Boundaries Commission (IEBC) for its proactive information disclosure initiatives, including the publication of polling locations and the establishment of a voter verification system, enabling voters to independently verify their details. The incorporation of technology through the Kenya Integrated Election Management System (KIEMS) for voter registration and identification, and the implementation of robust systems for counting, tallying, transmission, and announcement of results, has significantly enhanced transparency, security, and accuracy in the electoral process. Moreover, the decision to make the election results portal publicly accessible and provide raw data from polling stations arguably played a pivotal role in enhancing transparency and public trust during the 2022 general elections.

I also commend the Commission on Administrative Justice (CAJ) for its active role in ensuring the effective implementation of the Access to Information Act and promoting access to information

during elections, either independently or collaboratively. Civil society organisations also promoted the right of access to information during the electoral process. One such instance was the collaboration between ARTICLE 19 Eastern Africa and the CAJ to undertake activities to enhance the capacity of electoral stakeholders regarding the significance of access to information during the 2022 elections. The initiative relied on both the African Commission's Guidelines and the CAJ's Guidelines on Access to Information and Elections.

This current assessment of information disclosure practices highlights a concerning lack of specific knowledge among stakeholders regarding the Guidelines on Access to Information and Elections in Africa. To address this knowledge gap, I recommend a multi-stakeholder approach to promote the Guidelines. The IEBC, the Office of the Registrar of Political Parties (ORPP), and the Access to Information Commissioner should collaborate with media outlets and civil society organisations to undertake approaches to implement the Guidelines including updating electoral training materials and protocols, and further measures to enhance compliance with the Guidelines. Although Kenya has a solid legislative framework for access to information, there is a need to enhance existing frameworks and ensure their effective implementation. Specifically, I urge the parliament to adopt the access to information regulations prepared by the CAJ.

Technology has been a critical aspect of Kenyan elections, yet it continues to pose significant challenges. For instance, social media has greatly enhanced freedom of expression during elections. On the other hand, the dissemination of hate speech, disinformation, misinformation, and mal-information on social media platforms during elections should be carefully examined, from a human rights perspective by relevant stakeholders including online media platform providers. The regulatory framework for social media should be assessed to ensure alignment with international human rights laws and standards. Given increased public discourse during elections on online platforms, social media platforms should effectively undertake content moderation to protect the quality of information online with due consideration for international law on freedom of expression.

While the Guidelines promote proactive disclosure of information, it is important to acknowledge that information can be legitimately withheld. In this regard, I urge the Office of the Data Protection Commissioner (ODPC) to take proactive steps to safeguard the protection of personal information and ensure that electoral stakeholders align their procedures with the Data Protection Act (DPA).

In light of this invaluable research output, I encourage all key electoral stakeholders in Kenya to take note of its findings and recommendations and actively collaborate in furthering the promotion of access to information generally and in the context of elections.

I wish to extend my sincere gratitude to the former African Commission Special Rapporteur on Freedom of Expression and Access to Information in Africa, Lawrence Mute, for drafting this comprehensive report. Finally, I wish to congratulate the Centre for Human Rights at

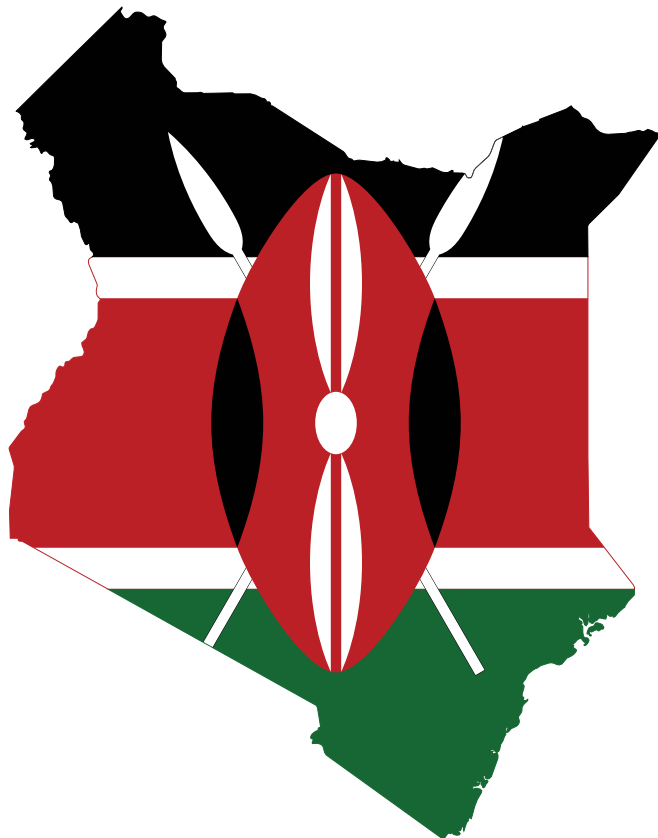
the University of Pretoria, and ARTICLE 19 Eastern Africa for undertaking this initiative that highlights the status of proactive disclosure of access to information during elections in line with the African Commission's Guidelines. The implementation of the recommendations of the report will significantly contribute to meaningful public participation, and promote electoral transparency and integrity.

**Honourable Commissioner Ourveena Geereesha Topsy-Sonoo**  
*Special Rapporteur on Freedom of Expression and Access to Information in Africa, African  
Commission on Human and Peoples' Rights*





# CHAPTER 1



# CHAPTER 1

## 1. INTRODUCTION

### 1.1 BACKGROUND

Kenya's 12<sup>th</sup> general election since independence and its third under its 2010 Constitution took place on 9 August 2022.<sup>1</sup> Previous general elections under that Constitution happened on 4 March 2013 and on 8 August 2017. The country's elections had historically been high-stakes affairs which quite often triggered or fuelled the sorts of civil conflicts which at their most vicious was witnessed in the post-election violence following the 2007 general election. That violence resulted in the death of nearly 1,100 people and the displacement of around 600,000 others.<sup>2</sup>

The 2022 general election involved 16,105 candidates vying for 1,879 elective positions contested across six elections in 46,229 polling stations, with 22,120,458 registered voters.<sup>3</sup> These contests were:

1. A presidential election involving four candidates run in 290 geographic constituencies and one diaspora constituency;
2. The election of 290 members of the National Assembly, 47 women elected from each county, and 12 other members elected using the party list system to represent special interests;
3. The election of senators in 47 counties and other senators elected using the party list system to represent women (16 senators), and youth and persons with disabilities (two senators each);
4. The election of governors in 47 counties; and
5. The election of members of county assemblies in 1,450 wards across the country.

The elections were unique in several ways. The incumbent president, Uhuru Kenyatta, was leaving office after serving for two five-year terms. Kenyatta had early in his second term in 2018 established a political alliance with the opposition leader, Raila Odinga, thereby causing a rift with William Ruto, his Deputy President, which effectively turned Ruto into the country's de facto opposition leader. Kenyatta had made his desire clear that he wanted Odinga to succeed him, and Ruto had become Odinga's nemesis for the presidency.<sup>4</sup>

<sup>1</sup> Constitution of Kenya, 2010.

<sup>2</sup> International Crisis Group 'Kenya's 2022 election: high stakes' *Crisis Group Africa Briefing* 9 June 2022 <https://www.crisisgroup.org/africa/horn-africa/kenya/b182-kenyas-2022-election-high-stakes>; see also, 'On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 election Violence' (KNCHR, 2008) [https://www.knchr.org/portals/0/reports/knchr\\_report\\_on\\_the\\_brink\\_of\\_the\\_precipice.pdf](https://www.knchr.org/portals/0/reports/knchr_report_on_the_brink_of_the_precipice.pdf) (accessed 05 September 2022).

<sup>3</sup> Independent Electoral and Boundaries Commission 'Remarks by the Chairman', Wafula Chebukati to the Nation on 8<sup>th</sup> August 2022' <https://www.iebc.or.ke/uploads/resources/S9h22zMAog.pdf> (accessed 04 September 2022).

<sup>4</sup> For example, see O K'Onyango 'How Uhuru Kenyatta ditched buddy William Ruto and turned to 'enemy'

The contending leaders had cobbled together two often fractious political coalitions, marshalling disparate parties to campaign against each other for the presidency. At the last count, the Kenya Kwanza Alliance (Kenya Kwanza) comprised 12 political parties, spearheaded by Ruto's own political party, the United Democratic Alliance (UDA). Odinga's Azimio La Umoja one Kenya Alliance (Azimio) comprised 24 political parties, including his own Orange Democratic Movement (ODM) and Kenyatta's Jubilee Alliance. Matters were made even more complicated by the fact that while the two political formations rallied around two presidential candidates, individual political parties within the alliances put up their own candidates for the other elective positions. This meant that political parties were as much in alliance as in sometimes cut-throat competition with each other.<sup>5</sup>

The significance of the 2022 general election could not be gainsaid for an electorate facing dire economic and social times. In the months leading up to the elections, cost of living indicators such as the lingering economic and social effects of the COVID-19 pandemic, stiff fuel prices and the inordinate cost of basic foodstuffs such as maize flour highlighted the dire situation facing the electorate. This state of affairs was epitomised by the annual inflation rate which in July 2022 had increased to 8.3%, a situation last experienced just before the 2017 general election.<sup>6</sup> Fraught accusations and counter-accusations of corruption, state capture and misuse of public resources were made by and against the two political alliances.<sup>7</sup>

The elections were also going to be important in the context of the country's geopolitical positioning. Kenya's landlocked neighbours were concerned that conflictual elections could disrupt the free flow of imports such as fuel, reminiscent of the post-2007 election violence which disrupted the transportation of goods to Uganda, Rwanda and the Eastern Democratic Republic of the Congo.<sup>8</sup>

The Independent Electoral and Boundaries Commission (IEBC) was again called upon to oversee a general election, led by its Chairperson, Wafula Chebukati, who had umpired the presidential election in 2017 which had been nullified by the Supreme Court largely on the basis of the failings of the IEBC.<sup>9</sup> Scepticism on the IEBC's capacity and competence to run

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Raila Odinga' *The East African* 30 July 2022 <https://www.theeastafrican.co.ke/tea/news/east-africa/how-uhuru-kenyatta-ditched-buddy-william-ruto-and-turned-to-enemy-raila-odinga-3897204> (accessed 03 September 2022).

5 For example see V Raballa 'Raila Odinga backs down on "weak" candidates' *Nation* 3 July 2022) <https://nation.africa/kenya/news/politics/raila-backs-down-on-weak-candidates-3867096>; Mwangi Muiruri *Nation* "Kiunjuri: Gachagua is promoting conflict in Kenya Kwanza" 20 June 2022) <https://nation.africa/kenya/news/politics/mwangi-kiunjuri-gachagua-is-a-dictator--3853558> (accessed 05 September 2022).

6 'Kenya inflation rate (CPI) – Kenya inflation forecast and outlook FocusEconomics' <https://www.focus-economics.com/country-indicator/kenya/inflation> (accessed 01 May 2023).

7 Nation Reporter 'Azimio leaders fault Ruto over plan to probe Uhuru as Kenya Kwanza fights claim' *Nation* 3 July 2022 <https://nation.africa/kenya/news/politics/azimio-leaders-fault-ruto-over-plan-to-probe-uhuru-3867208> (accessed 08 September 2022).

8 East African Reporter 'All eyes on Kenya as election campaign enters home stretch' *The East African* 16 July 2022 <https://www.theeastafrican.co.ke/tea/news/east-africa/all-eyes-on-kenya-as-election-campaign-enters-homestretch-3881416> (accessed 08 September 2022).

9 See *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR <http://kenyalaw.org/caselaw/cases/view/140716/> (accessed 08 September 2022) .

another election remained writ large.<sup>10</sup> Significant doubts remained on whether the IEBC and other institutions had responded to lessons from the 2017 presidential election debacle. For example, specifically on transparency in election information, one election observation mission of the 2017 elections had found that The IEBC provided intermittent public updates on election planning during the electoral period; but that it did not inform the public of its decision-making processes; consistently failed to publish the minutes of its meetings and its internal voting records; and failed to communicate clearly and regularly about the status of preparations, challenges and plans for addressing issues proactively.<sup>11</sup>

## 1.2 AIMS

This is the context within which this study was undertaken to evaluate the realisation of the right of access to information during the 2022 general election. A number of studies on the continent in the past decade had highlighted the significant symbiotic relationship between access to information and elections. One of the studies noted that elections had been undermined by lack of transparency on the planning, conduct, management and announcement of election results, and that this had in some instances led to widespread violence.<sup>12</sup> A study on Nigeria recalled how civil society recognised that it could have a positive influence on the overall elections process without awaiting a *fait accompli* on polling day if it used access to information legislation to make requests for information from the elections monitoring body on how it was ensuring that the 2015 elections would be free and fair.<sup>13</sup>

This study was commissioned by the Centre for Human Rights of the University of Pretoria in partnership with Article 19 Eastern Africa. The Centre for Human Rights has initiated similar studies on elections and access to information covering elections in South Africa, Ghana, Tanzania, Uganda and The Gambia.<sup>14</sup> ARTICLE 19 Eastern Africa mounted an initiative to build the capacities of Kenyan stakeholders on the importance of access to information during the 2022 general election.

The study evaluates the realisation of the right of access to information during the 2022 general election in Kenya, on the basis of the Guidelines on Access to Information and Elections in Africa<sup>15</sup> and relevant national access to information laws as well as other regional and international

10 For example, see D Kahura 'IEBC up to its usual mischief' *The Elephant* 20 June 2022 <https://www.theelephant.info/op-eds/2022/06/20/iebc-up-to-its-usual-mischief/> (accessed 02 September 2022).

11 The Carter Center 'Kenya 2017 General and Presidential Elections Final Report'(2018) 20 [https://www.cartercenter.org/resources/pdfs/news/peace\\_publications/election\\_reports/kenya-2017-final-election-report.pdf](https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/kenya-2017-final-election-report.pdf) (accessed 04 September 2022).

12 Africa Freedom of Information Centre 'The state of the right to information in Africa report' (2011)

13 G Razzano (ed), *State of Access to Information in Africa* (2017) <https://www.africanplatform.org/fileadmin/Content/PDF/Resources/State-of-ATI-in-Africa-2017.pdf> (accessed 02 September 2022).

14 For example, see Centre for Human Rights & Others 'Proactive Disclosure of Information and Elections in South Africa' (2020) [https://www.chr.up.ac.za/images/researchunits/dgdr/documents/reports/Proactive\\_Disclosure\\_of\\_Information\\_and\\_Elections\\_in\\_South\\_Africa.pdf](https://www.chr.up.ac.za/images/researchunits/dgdr/documents/reports/Proactive_Disclosure_of_Information_and_Elections_in_South_Africa.pdf) (accessed 02 September 2022).

15 ACHPR 'Guidelines on Access to Information and Elections in Africa' (2017) [https://www.achpr.org/public/Document/file/English/guidelines\\_on\\_access\\_to\\_information\\_and\\_elections\\_in\\_africa\\_eng.pdf](https://www.achpr.org/public/Document/file/English/guidelines_on_access_to_information_and_elections_in_africa_eng.pdf) (accessed 07 September).

human rights standards. The study assesses the performance of electoral stakeholders in the proactive disclosure of election-related information as envisaged under the Guidelines on Access to Information and Elections in Africa. These stakeholders are the election management bodies (EMBs); the appointing authority; law enforcement agencies; political parties and candidates; media and regulatory bodies; election observers; and civil society organisations (CSOs).

The study covers the state of access to information in Kenya. It analyses the relevant legislative framework, and assesses the measures taken by the relevant stakeholders to facilitate access to information during elections. It also assesses the application and impact of digital technologies on access to information during elections, and analyses access to information for vulnerable and disadvantaged groups. The study finally provides sector-specific recommendations.

### **1.3 METHODOLOGY**

The study used a qualitative approach to examine the extent to which Kenya's electoral stakeholders (the EMBs, appointing authority, law enforcement agencies, political parties and candidates, media and regulatory bodies, election observers, and CSOs) complied with the Guidelines on Access to Information and Elections in Africa. The author of the study undertook detailed review of information provided by the stakeholders through publications on digital media and social media. The author also reviewed the day-by-day reporting of the actions and counteractions of various actors from the pre-polls, the polls and post-polls periods. This was particularly important since this was the very same media that disseminated information on unfolding events to the public during the election. He also reviewed multiple statutory instruments and judicial pronouncements. Finally, he interviewed a couple of individuals from some of the relevant stakeholders for background information.

The qualitative variables used to assess compliance with the Guidelines are four: complied (over 75%); mostly complied (50-75%); partly complied (25-50%); and not complied (below 25%).

### **1.4 OUTLINE OF STUDY**

The study is segmented into this introductory chapter and 11 other chapters. Chapter 2 provides a summary of the study's findings and recommendations. Chapter 3 discusses the legal framework on access to information in Kenya. chapters 4 to 11 assess the compliance of the various electoral stakeholders with the Guidelines on Access to Information and Elections in Africa during the 2022 general election. Chapter 12 of the study is the conclusion to the study.





## CHAPTER 2



# CHAPTER 2

## 2. SUMMARY OF FINDINGS AND RECOMMENDATIONS

Guidelines 31 to 34 of the Guidelines on Access to Information and Elections in Africa require Kenya to take steps to give effect to the Guidelines, including by adopting legislative, administrative, judicial and other measures. This study evaluates the extent to which electoral stakeholders complied with the Guidelines during the country's 2022 general election.

The study's findings and recommendations are set out here.

Compliance with Guideline 12 (appointment)		
	Description	Status
a	That the process for the selection and appointment of members of EMBs is clearly stipulated in law, and that it is transparent, widely publicised and allows for public participation	Complied
b	It proactively discloses the following categories of information in relation to the EMBs:	
	<ul style="list-style-type: none"><li>• Mode, criteria and process of appointment of members, including any requisite considerations such as gender balance, qualifications and experience</li></ul>	Complied
	<ul style="list-style-type: none"><li>• Appointment process of members</li></ul>	Complied
	<ul style="list-style-type: none"><li>• Remuneration and conditions of service of members</li></ul>	Partly complied
	<ul style="list-style-type: none"><li>• Procedure for the termination of appointed members of the IEBC</li></ul>	Complied

### Recommendation:

1. Relevant authorities, including Parliament, the Salaries and Remuneration Commission, the IEBC and ORPP, should ensure the proactive disclosure of the actual remuneration and conditions of service of each member of the IEBC and the ORPP.

<b>Compliance with Guideline 13 (operations)</b>		
	<b>Description</b>	<b>Compliance status</b>
a	Creating, keeping, organising and maintaining records in a manner that facilitates access to information, including for vulnerable and marginalised groups	Partly Complied
b	Adopting and implementing flexible proactive disclosure arrangements that enable access to information without the need for individual applications	Mostly complied
C	Establishing clear and effective processes and procedures to deal with requests for information	Mostly Complied
d	Formulating clear procedures for making requests for information (including the required format of requests, costs for reproduction, timeframes and formats for providing requested information)	Complied

### **Recommendations:**

2. The IEBC and ORPP should:
  - a. Create, keep, organise and maintain their records in a manner that facilitates access to information. In particular, they should ensure that the platforms on which they disseminate information, including their websites and social media platforms, are accessible to vulnerable and marginalised groups including persons with disabilities.
  - b. Adopt and implement flexible proactive disclosure arrangements that enable access to information without the need for individual applications. In particular, the IEBC should call on Parliament to align the Independent Electoral and Boundaries Commission Act with Section 5 of the Access to Information Act which establishes an expansive list of the information which public entities should disclose proactively.

<b>Compliance with Guideline 14 (annual publication)</b>		
	<b>Description</b>	<b>Status of compliance</b>
a	Organisational structure	Complied
b	Strategic plan	Complied

c	Decision-making process	Complied
d	Procedure for the recruitment of both permanent and temporary staff and their conditions of service	Complied
e	Training policies	Complied
f	Code of conduct for employees, including declaration of assets	Complied
g	Budget and sources of funding, including donor funding, which shall be disaggregated accordingly	Partly complied
h	Mechanisms for voter identification	Complied
i	Procurement policy, processes and award of contracts	Partly complied
j	Annual report, including audited accounts	Complied

### Recommendations:

3. The IEBC and ORPP should publish on an annual basis:
  - a. Accurate and updated information on their budgets and sources of funding; and
  - b. Their procurement policies, processes and awards of contracts.

Compliance with Guideline 15 (Membership)		
	Description	Status of compliance
a	Details of the professional backgrounds of its members	Complied
b	Policy on declaration of assets and interests by its members	Complied
c	Its code of conduct and ethics	Complied

Compliance with Guideline 17 (pre-election period)		
	Description	Status of compliance
a	Detailed electoral calendar	Complied

b	Criteria, process and results for the delimitation of electoral boundaries in a simplified manner	Not applicable in 2022 election cycle
c	List of constituencies or voting districts	Complied
d	Full details of the voter registration process including criteria, qualifications, requirements and location of voter registration centres	Complied
e	Voters roll containing information allowing the unique identification of each voter, including the full name, identity number, photograph (where it exists), gender and age of each voter, and any subsequent amendments to this information	Complied
f	Information on arrangements for the inspection of the voters roll by the public to allow for any necessary corrections to be made	Complied
g	Operational plan for diaspora voting relating to dates, time and method, including storage and security of ballot boxes until the general count	Mostly complied
h	Criteria for identification of the location of voting stations	Mostly complied
i	Location and number of voting stations	Complied
j	Criteria and requirements for registration of political parties	Complied

## Recommendations:

4. The ORPP should provide details of applications made by political parties for registration as participants in the electoral process. In particular, it should provide information on the number of applications made, the number of applications granted, the number denied and reason(s) for each denial.
5. The IEBC should provide information on:
  - a. The storage and security of the ballot boxes of diaspora voters until the general count;
  - b. The criteria for identification of the location of voting stations;
  - c. How it has addressed all complaints or petitions throughout an electoral cycle;
  - d. Its service providers, the criteria for their selection and the content of their service contracts and details of the procurement process;
  - e. Details of applications for accreditation by election observers and monitors, including the number of applications rejected and reasons for the rejection;



- f. Details of the number of applications for accreditation by the media received, and the number rejected and the reasons for the rejection; and
- g. The register of the different categories of observers and deployment areas.

<b>Compliance with Guideline 18 (election day)</b>		
	<b>Description</b>	<b>Status of compliance</b>
a	Location, as well as opening and closing times of voting stations	Complied
b	Support mechanisms for voters and election officials through the provision of episodic and periodic reports of election day activities	Complied
c	Information on the closing of voting and vote reconciliation, counting and results management system starting from vote counts at the voting station up to the announcement of final results	Mostly Complied
d	Information on the occurrence of any technical glitches and how these have been addressed	Mostly complied
e	Information on all complaints or petitions received and how these have been addressed	Partly complied
f	Election results by polling station, which shall be conspicuously posted at each voting station and in publicly accessible electronic and online formats	Partly complied

### **Recommendations:**

- 6. The IEBC should ensure that it continues to provide information on vote counts at the voting stations until the final results are announced, and that it provides full information on all complaints or petitions received and how these have been addressed.
- 7. The IEBC should also ensure that results are posted conspicuously at each voting station and in publicly accessible electronic and online formats.

**Compliance with Guideline 19  
(post-election day)**

	<b>Description</b>	<b>Status of compliance</b>
a	Progress in achieving timelines for the declaration of collated results which shall be within a reasonable time or as stipulated by law	Complied
b	Declaration and publication of final election results, down to the polling station level	Complied
c	Details of all objections, complaints or petitions received and how they were addressed	Partly complied
d	Calculations or allocations of seats and timeframes and processes for the adjustment of political party lists, where applicable	Complied
e	Evaluation reports on the elections produced by the IEBC	Complied

**Recommendation:**

8. The IEBC should proactively provide information on details of all objections, complaints or petitions received and how they were addressed.

**Compliance with Guideline 20  
(internal information)**

	<b>Description</b>	<b>Status of compliance</b>
a	Constitution, names of office bearers as well as the policies of the political party	Mostly complied
b	Symbols, logos or trademarks associated with the political party	Complied
c	Number of registered members	Not complied
d	Criteria and procedure for nomination and election of candidates for internal and external office	Mostly complied
e	Process for dispute resolution and the relevant appeal mechanisms	Complied
f	Mechanisms for public participation, including any special mechanisms for persons with disabilities	Partly complied

g	Mechanisms for monitoring of the nomination process and proceedings	Mostly complied
h	Names of party agents or representatives responsible for or on duty at various stages of the electoral process	Not complied
i	Assets, investments, membership subscriptions, subventions and donations	Not complied

### Recommendations:

9. Political parties should proactively provide information on the number of their registered members.
10. They should also provide information on the names of party agents or representatives responsible for or on duty at various stages of the electoral process.

Compliance with Guideline 21 (legal framework)		
	Description	Status of compliance
a	Receipt of campaign funding from both public and private sources	Partly complied
b	Campaign expenditure broken down into distinct line items and specifying the sources of funding and actual amounts	Not complied
c	Annual audited financial reports	Partly complied

### Recommendation:

11. The IEBC and Parliament should establish and implement regulations to operationalise the Election Campaign Financing Act to enable the IEBC to cap campaign financing for forthcoming elections. The regulations should include provisions for the proactive disclosure of information on campaign financing.

Compliance with Guideline 22 (use of state resources)		
	Description	Status of compliance

a	Financial resources, covering the period starting one year before and ending six months after elections, including government or central bank contracts with currency printers, central bank or monetary policy committee reports, and central bank reports on government issued bonds	Not complied
b	Institutional resources, covering the period starting six months before and ending three months after elections, including advertising rates and the allocation of airtime and space to all political parties in state-supported media coverage, vehicle or flight logs and fuel allocations to government departments, and service agreements, contracts and tenders awarded, their amounts and budgets	Not complied
c	Regulatory resources, covering the period starting one year before and ending six months after elections, including documentary justification for requests for approval of supplementary budgets by Parliament, supplementary budgets passed by Parliament and political party finance legislation	Not complied
d	Enforcement resources, covering the period starting six months before and ending three months after elections, including details of records of the elections deployment strategy for the police, military, paramilitary and other law enforcement agents involved in ensuring security throughout the electoral process	Not complied

### Recommendation:

12. Parliament should enact legislation requiring political parties to proactively disclose information on their use of state resources.

Compliance with Guideline 23 (election observers and monitors)		
	Description	Status of compliance
a	Names and details of key office bearers in the observer or monitoring mission	Partly complied
b	Code of conduct for observers and monitors	Mostly complied

c	Financial or non-financial assistance received from donors, political parties or candidates, including the incumbent government	Not complied
d	The Election Observation Mission Report, specifying the methodology, deployment plan as well as the assessment of the conduct and outcome of the elections, published widely and timeously, with preliminary reports issued within 30 days and final reports issued within 90 days	Complied
e	Conflict of interest or political affiliations of local observers or monitors	Not complied
f	Sources of funding for organisations conducting opinion and exit polls and parallel voter tabulation	Not complied

### Recommendations:

13. Election observers and monitors should publish the names and details of key office bearers in their missions, and the financial or non-financial assistance received from donors, political parties or candidates.
14. Domestic election observers or monitors should publish any conflict of interests they may have or their political affiliations.
15. Organisations conducting opinion and exit polls and parallel voter tabulation should publish their sources of funding.

<b>Compliance with Guideline 24 (maintenance of law and order)</b>		
	<b>Description</b>	<b>Status of compliance</b>
a	Code of conduct and roles during the electoral period	Mostly complied
b	Training and operational plan and manuals for the electoral period	Complied
c	Deployment plans from pre-election through to post-election period	Partly complied
d	Budgetary allocations and actual expenditure for the electoral period	Partly complied
e	Details of any reported election related crimes, including the number of cases reported and steps taken to investigate, prosecute or withdraw such cases	Partly complied



f	Details of any arrangements whereby any other persons or groups are authorised by law enforcement agencies to perform specific law enforcement related tasks during the electoral period	Not complied.
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### Recommendations:

16. Law-enforcement agencies should proactively disclose:
  - a. Their deployment plans from the pre-election to the post-election period;
  - b. Their budgetary allocations and actual expenditure in adequate detail for the public's understanding;
  - c. Details of any reported election related crimes, including the number of cases reported and steps taken to investigate, prosecute or withdraw such cases; and
  - d. Details of any arrangements whereby any other persons or groups are authorised by law enforcement agencies to perform specific law enforcement related tasks during the electoral period.

<b>Compliance with Guideline 25 (regulations on media coverage during elections)</b>		
	<b>Description</b>	<b>Status of compliance</b>
a	The complaints procedure against media organisations that violate the regulations	Complied
B	The enforcement mechanism for ensuring compliance with the decisions taken and sanctions imposed	Partly complied
C	The code of conduct for online media	Complied
D	Details of all complaints or petitions received during the electoral period and how these were addressed	Not complied

### Recommendations:

17. Media and internet regulatory bodies should proactively:
  - a. Disclose the enforcement mechanisms for ensuring compliance with the decisions taken and sanctions imposed by the regulators; and
  - b. Provide details of all complaints or petitions received during the electoral period and how these were addressed.

**Compliance with Guidelines 26-28  
(Internet or other media shutdowns)**

	<b>Description</b>	<b>Status of compliance</b>
	Media regulators and public or private providers of telecommunication services should refrain from shutting down the internet or other media during the electoral process.	Complied

**Compliance with Guideline 29  
(Media and online media platform providers)**

	<b>Description</b>	<b>Status of compliance</b>
a	Editorial and/or ethical codes or guidelines utilised in undertaking election coverage, including provisions prohibiting incitement to discrimination, hostility or violence	Complied
b	Sanctions for transgressions of these codes or guidelines	Not complied
c	Complaints procedures for handling breaches of these codes or guidelines	Partly complied
d	Number of complaints received and how these were addressed	Not complied
e	Code of conduct for staff on procedural matters	Not complied
f	Criteria for the allocation of airtime or news coverage for political campaign advertisements and activities	Not complied
g	Polling methodologies and margins of error	Not assessed
h	Actual allocation of airtime or news coverage for political campaign advertisements and activities	Not complied
i	Plan for transparent repository of all political advertisements, including those targeted at individuals or specific groups on online media	Partly complied
j	Coverage plan for election day	Partly complied
k	Criteria for the selection of election commentators, political analysts or other experts	Not complied

L	Guidelines on responsible use of online media	Mostly complied
m	Conflict of interest media ownership information, political affiliations or party support arrangements	Not complied

### Recommendations:

18. Public or private print, broadcast and online media should proactively disclose:
  - a. Sanctions for transgressions of editorial and/or ethical codes or guidelines utilised in election coverage;
  - b. The number of complaints received and how these were addressed;
  - c. The criteria for and actual allocation of airtime or news coverage for political campaign advertisements and activities; and
  - d. Conflict of interest media ownership information, political affiliations or party support arrangements.

Compliance with Guideline 30 (civil society organisations)		
	Description	Status of compliance
a	Organisational aims and objective	Mostly complied
b	Membership and composition	Partly complied;
c	Details of key staff and office bearers	Complied
d	Sources of funding	Partly complied
E	Operational plans, methodology, manuals and their implementation for civic and voter education	Mostly complied
F	Possible conflict of interest, which may include the promotion of a particular religious, ethnic or political interest or bias or prejudice in cases where they participate in both voter education and election observation	Not complied
G	Campaign funders	Not assessed

### Recommendation:

19. CSOs involved in the electoral process should proactively disclose information on their membership and composition, sources of funding, and possible conflict of interest.



## CHAPTER 3





# CHAPTER 3

## 3. LEGAL FRAMEWORK FOR ACCESS TO INFORMATION IN KENYA

### 3.1 INTRODUCTION

Kenya is a multiparty democratic state whose people exercise their sovereign power either directly or through their democratically elected representatives.<sup>16</sup> Access to information is a necessary component for ensuring democratic elections. This has become particularly relevant since the promulgation of the 2010 Constitution which introduced specific provisions on access to information. This chapter explores the applicable policy and legislative framework for access to information which is established principally in the Constitution, regional and international human rights instruments, a host of statutes and regulations, and judicial precedents as well as institutional practice.

### 3.2 THE CONSTITUTION

The constitutional right to access information facilitates the exercise of sovereign power by the people. To this end, Article 35 of the Constitution makes a number of essential provisions on the right of access to information. First, it guarantees every citizen the right of access to information held by the state. Second, it establishes an obligation of the state which amounts to a proactive disclosure requirement when it provides that: 'The State shall publish and publicise any important information affecting the nation.'<sup>17</sup> While this provision is framed in less robust terms than classic proactive disclosure imperatives, the obligation it establishes on the state is significant particularly because the principle is embedded in the Constitution. Third, Article 35 guarantees every citizen the right of access to information held by another person and required for the exercise or protection of any right or fundamental freedom. Finally, Article 35 establishes that every person has the right to the correction or deletion of untrue or misleading information that affects the person.

The Constitution establishes other rights and obligations on access to information. It establishes:

1. That the right to privacy includes the right of a person not to have information relating to their family or private affairs unnecessarily required or revealed; or the privacy of their communications infringed;<sup>18</sup>
2. That every person has the right to freedom of expression, including the freedom to seek, receive or impart information or ideas;<sup>19</sup>
3. That consumers have the right to the information necessary for them to gain full

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16 Art 4 Constitution.

17 Art 35(3) Constitution.

18 Art 31(c) and (d) Constitution.

19 Art 33(1)(a) Constitution.



- benefit from goods and services;<sup>20</sup> and
4. That persons with disabilities have reasonable access to all places, public transport and information.<sup>21</sup>

As well, the Constitution obligates the state to promote national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.<sup>22</sup> It prohibits the state from exercising control over or interfering with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium.<sup>23</sup> It obligates relevant authorities to provide information required to ensure an accused person's right to a fair trial in a language the person understands.<sup>24</sup> Finally, the values and principles of public service established in Article 232(1)(f) include transparency and provision to the public of timely, accurate information.<sup>25</sup>

### 3.3 THE AFRICAN HUMAN RIGHTS NORMATIVE FRAMEWORK

Article 2(6) of the Constitution provides that a treaty or convention ratified by Kenya forms 'part of the law of Kenya under this Constitution'. This means Kenya is bound by its undertakings under the treaties and conventions to which it is a party,<sup>26</sup> and that Kenyan courts are required to apply these commitments, in the words of the Supreme Court, '... in resolving disputes before them, as long as the same are relevant, and not in conflict with, the Constitution, local statutes, or a final judicial pronouncement'.<sup>27</sup> Hence, Kenya is bound by Africa's normative human rights instruments to which it is party.

African human rights instruments have established a veritable basis for ensuring the right to access information. In particular, Article 9(2) of the African Charter on Human and Peoples' Rights (African Charter)<sup>28</sup> provides that: 'Every individual shall have the right to receive information'. A number of other continental human rights instruments to which Kenya is a party establish or affirm the right to access information. One of the objectives of the African Charter on Democracy, Elections and Governance, to which Kenya is a party,<sup>29</sup> is the promotion of '... the

20 Art 46(1)(b) Constitution.

21 Art 54(1)(c) Constitution.

22 Art 11(2)(a) Constitution.

23 Art 34(2)(a) Constitution.

24 Art 50(3) Constitution.

25 The values and principles of public service are themselves anchored in the national values and principles of governance, including participation, transparency and accountability (as above art 10).

26 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (Amicus Curiae) [2021] eKLR para 131 <http://kenyalaw.org/caselaw/cases/view/205900/> (accessed 12 September 2022).

27 *Mitu-Bell* (n 26) para 132.

28 ACHPR 'Organization of African Unity' ( 1981) <https://au.int/en/treaties/african-charter-human-and-peoples-rights> (accessed 15 September 2022).

29 Kenya signed the Charter on 28 June 2008, ratified/acceded to it on 7 January 2022, and deposited its instrument of ratification/accession on 4 February 2022 - AU 'List of Countries which have signed, ratified /acceded to the African Charter on Democracy, Elections and Governance' <https://au.int/sites/>

establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs'.<sup>30</sup>

Perhaps the continental instrument that provides the most detail yet on the right to access information is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa,<sup>31</sup> to which Kenya became a party in February 2022.<sup>32</sup> Article 24 of the Disability Rights Protocol affirms that every person with a disability has the right to access information.

It obligates states to take measures to ensure persons with disabilities access information, including by:

1. Providing information intended for the general public and information required for official interactions to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner, and without additional cost to persons with disabilities; and
2. Requiring private entities that provide services to the general public, including through print and electronic media, to provide information and services in accessible and usable formats for persons with disabilities.

The Supreme Court has clarified that soft-law instruments may be used to fill existing lacuna in the Constitution for purposes of fashioning appropriate reliefs for the violation of the Bill of Rights, and that soft-law instruments issued pursuant to a treaty provision should be understood as tools or aids for helping states to implement the treaty or for the better fulfilment of their obligations.<sup>33</sup> The Model Law on Access to Information for Africa (Model Law),<sup>34</sup> issued by the African Commission on Human and Peoples' Rights (ACHPR), provides detailed guidance on the content that should be included in national access to information laws. Under the guidance established in the Model Law, the right to access information is guaranteed to every individual and not just to a citizen. The Model Law introduces the principle of proactive disclosure under which those who hold information of public interest routinely provide such information to the public even without being requested to do so. The requirement to disclose information is applicable to a public body, a private body and an entity which would otherwise be a private

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[default/files/treaties/36384-sl-AFRICAN\\_CHARTER\\_ON\\_DEMOCRACY\\_ELECTIONS\\_AND\\_GOVERNANCE\\_0.pdf](#) (accessed 15 September 2022).

30 Article 2(10) African Charter on Democracy, Elections and Governance <https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf> (accessed 12 September 2022).

31 AU 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2018) [https://au.int/sites/default/files/treaties/36440-treaty-protocol\\_to\\_the\\_achpr\\_on\\_the\\_rights\\_of\\_persons\\_with\\_disabilities\\_in\\_africa\\_e.pdf](https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf) (accessed 15 September 2022).

32 AU 'List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' [https://au.int/sites/default/files/treaties/36440-sl-Protocol\\_to\\_the\\_African\\_Charter\\_on\\_Human\\_and\\_Peoples\\_Rights\\_on\\_the\\_Rights\\_of\\_Persons\\_with\\_Disabilities\\_in\\_Africa.pdf](https://au.int/sites/default/files/treaties/36440-sl-Protocol_to_the_African_Charter_on_Human_and_Peoples_Rights_on_the_Rights_of_Persons_with_Disabilities_in_Africa.pdf) (accessed 15 September 2022).

33 *Mitu-Bell* (n 26 above) paras 142 & 144.

34 ACHPR 'Model Law on Access to Information for Africa' (2013) [https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/model\\_law\\_on\\_ati\\_in\\_africa/model\\_law\\_on\\_access\\_to\\_information\\_en.pdf](https://www.chr.up.ac.za/images/researchunits/dgdr/documents/resources/model_law_on_ati_in_africa/model_law_on_access_to_information_en.pdf) (accessed 17 September 2022).

body but which is owned, controlled or financed through public funds or which is performing a public function or service. The Model Law suggests that information holders should be required to create, organise and keep records properly. Requests for information can be made in writing but also orally, in which case the information officer must assist the requester in reducing the request into writing. No fees are payable for accessing information. Where the information is requested by an indigent person, even the reproduction fee is waived. Where information requested is for the purpose of safeguarding the life or liberty of a person, it is provided within 48 hours.

The Guidelines on Access to Information and Elections in Africa were adopted by the ACHPR in 2017 in acknowledgement of the intersection of the right to receive information and the right of citizens to participate freely in the government of their countries. The Guidelines provide direction on ensuring access to information in the electoral process as a means of strengthening democratic governance. They elaborate on the information to be proactively disclosed by relevant stakeholders at all stages of the electoral process - prior, during and after elections.<sup>35</sup> The Guidelines obligate electoral stakeholders holding information of public interest to routinely provide such information to the public even without being requested to do so. The Guidelines provide direction to states on the categories of information on the electoral process that must, at the minimum, be proactively disclosed.

The Guidelines establish the following key principles:<sup>36</sup>

1. The right of every person to access information of public bodies and relevant private bodies expeditiously and inexpensively;
2. The right of every person to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively;
3. The duty to disclose any policy or practice creating a right of access to information, save in exceptionally justifiable circumstances when non-disclosure of information may be permitted; and
4. Prohibition of sanction on a person who releases information in good faith.

The Guidelines establish the following obligations:<sup>37</sup>

1. The obligation to proactively disclose all information held by relevant electoral stakeholders, including the publication of key information of public interest about their structure, functions, powers, decision-making processes, decisions, revenue and expenditure in relation to the electoral process;
2. The obligation of electoral stakeholders to create, keep, organise, maintain and manage information about the electoral process in machine-readable formats and in a manner that facilitates the right of access to information;
3. The obligation to ensure that the process for accessing information held by relevant electoral stakeholders is simple, quick and affordable;

35 ACHPR (n 15) Preface.

36 ACHPR (n 15) Guideline 2.

37 ACHPR (n 15) Guidelines 3-11.

4. The obligation for electoral stakeholders not to withhold information unless the harm to the interest exempted under the Guidelines clearly outweighs the public interest in disclosure of the information; and
5. The obligation to protect persons who, in good faith and in the public interest, disclose information about wrongdoing in the electoral process by a relevant electoral stakeholder or its employee(s), from administrative, social, legal and employment-related sanctions or other sanctions of a similar nature.

Finally, in 2019, the ACHPR adopted the Declaration on Principles of Freedom of Expression and Access to Information in Africa,<sup>38</sup> which clarifies and supplements Article 9 of the African Charter by elucidating on relevant individual ingredients of freedom of expression and access to information both offline and online. Apart from affirming the access to information norms framed in the earlier two soft-law instruments, the Declaration rearticulates the protection of whistle-blowers by obligating states to establish protected disclosure regimes to protect a person who releases information on wrongdoing or discloses a serious threat to health, safety or the environment, or makes a disclosure in the public interest. The relevant appropriate test is that such a person honestly believes that the disclosed information is substantially true.<sup>39</sup> As well, the Declaration affirms that universal, equitable, affordable and effective access to the internet is necessary for the realisation of access to information and the exercise of other human rights.<sup>40</sup>

The Guidelines on Access to Information and Elections in Africa require Kenya to adopt legislative, administrative, judicial and other measures to give effect to the Guidelines.<sup>41</sup> To what extent are the foregoing constitutional and international standards reflected in Kenyan statutes and regulations?

### 3.4 ACCESS TO INFORMATION ACT

The access to Information Act (AIA)<sup>42</sup> gives effect to Article 35 of the Constitution. Measured against international standards, the AIA is a comparatively strong statute, with one study giving the Act a score of 75% when assessed against the Model Law. The study, however, distinguished between legislation and practice, finding that in 2017 the country had a score of 4 out of 10 for its access to information environment.<sup>43</sup>

The AIA covers public entities. Such entities include a public office or an entity performing a

38 ACHPR 'Declaration on Principles of Freedom of Expression and Access to Information in Africa' ( 2019) [https://www.chr.up.ac.za/images/researchunits/dgdr/documents/ati/Declaration\\_of\\_Principles\\_on\\_Freedom\\_of\\_Expression\\_ENG\\_2019.pdf](https://www.chr.up.ac.za/images/researchunits/dgdr/documents/ati/Declaration_of_Principles_on_Freedom_of_Expression_ENG_2019.pdf) (accessed 19 September 2022).

39 ACHPR (n 38) principle 35.

40 ACHPR (n 38) principle 37.

41 ACHPR (n 15) Guideline 31.

42 Access to Information Act 31 of 2016 <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No.%2031%20of%202016> (accessed 19 September 2022).

43 Razzano (n 13).

function within a commission, office, agency or other body established under the Constitution.<sup>44</sup> It also covers private bodies, including a private body or non-state actor that receives public resources and benefits, utilises public funds, engages in public functions, provides public services or has exclusive contracts to exploit natural resources. It also covers private bodies in possession of information of significant public interest due to its relation to the protection of human rights, the environment or public health and safety, or to exposure of corruption or illegal actions or where release of the information may assist in exercising or protecting any right.<sup>45</sup> The AIA's objects and purposes are:

1. Giving effect to the right of access to information by citizens as provided under Article 35 of the Constitution;
2. Providing a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with constitutional principles;
3. Providing a framework to facilitate access to information held by private bodies in compliance with any right protected by the Constitution and any other law;
4. Promoting routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information;
5. Providing for the protection of persons who disclose information of public interest in good faith; and
6. Providing a framework to facilitate public education on the right to access information.<sup>46</sup>

The AIA restates the right to access information as framed in Article 35 of the Constitution. It also provides that a citizen's right to access information is not prejudiced by the reasons for seeking such information. Finally, it affirms that access to information held by a public entity or a private body be provided expeditiously at a reasonable cost.<sup>47</sup> Significantly, the Act clarifies that a citizen includes a Kenyan citizen as well as any private entity controlled by one or more Kenyan citizens.<sup>48</sup> This means that an information-holder may not deny information to a company in the guise that it is not a citizen.<sup>49</sup>

The AIA requires a public entity to facilitate access to the information it holds, including:

1. The particulars of its organization, functions and duties;
2. The powers and duties of its officers and employees;
3. The procedure followed in the decision-making process;
4. Salary scales of its officers by grade;
5. The norms set by it for the discharge of its functions;

44 Sec 2 Access to Information Act.

45 As above.

46 Sec 3 Access to Information Act.

47 Sec 4 Access to Information Act.

48 Sec 2 Access to Information Act.

49 *Katiba Institute v Presidents Delivery Unit & 3 Others* [2017] eKLR para 43 <http://kenyalaw.org/caselaw/cases/view/144012/> (accessed 19 September 2022).



6. Guidelines used by the entity in its dealings with the public or with corporate bodies; and
7. A guide sufficient to enable any person wishing to apply for information under the Act to identify the classes of information held by it, the subjects to which they relate, and the location of any indexes to be inspected by any person.<sup>50</sup>

The AIA also requires a public entity to update information for access by the public on an annual basis. The public entity publishes all relevant facts while formulating important policies or announcing the decisions which affect the public.<sup>51</sup> This information is, in the minimum, made available for inspection without charge; supplied on request through a copy in which case a reasonable charge to cover copying and dissemination costs may be made; and provided on the internet where the material is held in electronic form. The dissemination of information considers 'the need to reach persons with disabilities, the cost, local language, the most effective method of communication in that local area, and the information shall be easily accessible and available free or at cost taking into account the medium used'.<sup>52</sup>

Finally, the AIA requires a public entity to publish on its website or other suitable media the following information on the contracts it enters into:

1. The public works, goods acquired or rented, and the contracted service, including any sketches, scopes of service and terms of reference;
2. The contract sum;
3. The name of the service provider, contractor or individual to whom the contract has been granted; and
4. The periods within which the contract shall be completed.<sup>53</sup>

The AIA obligates a public entity or private body, at the request of an applicant, within reasonable time, and at the entity or body's expense, to correct, update or annotate any personal information held by it relating to the applicant, which is out of date, inaccurate or incomplete.<sup>54</sup>

The robust framing on access to information in the AIA is stymied somewhat by Section 6(1) which limits the right of access to information in respect of a number of situations. A limitation exists in regard to information whose disclosure is likely to undermine national security. Indeed, the National Intelligence Service Act limits the right of access to information in respect of classified information, i.e. information of a particular security classification, whose unauthorised disclosure would prejudice national security.<sup>55</sup> Limitations may also exist in relation to the disclosure of information likely to impede the due process of law; endanger

50 Sec 5 Access to Information Act.

51 As above.

52 Sec 5(2) Access to Information Act.

53 Sec 5(1) (e) Access to Information Act.

54 Sec 13 Access to Information Act.

55 Sec 37 National Intelligence Service Act 28 of 2012 <http://www.kenyalaw.org/lex//actview.xql?actid=No.%2028%20of%202012> (accessed 20 September 2022).

the safety, health or life of any person; involve the unwarranted invasion of the privacy of an individual other than the applicant or the person on whose behalf an application has been made; substantially prejudice the commercial interests of the entity or third party from whom information was obtained; cause substantial harm to the ability of the government to manage the economy; significantly undermine a public or private entity's ability to give adequate and judicious consideration to a matter concerning which no final decision has been taken and which remains the subject of active consideration; damage a public entity's position in any actual or contemplated legal proceedings; or infringe professional confidentiality.

Section 6(4) of the AIA anticipates judicial checks on limitations of access to information by providing that a court may require a public entity or private body to disclose information where the public interest in disclosure outweighs the harm to protected interests. The High Court has determined that where an information-holder pleads a limitation, it and not the information requester has the evidential burden of demonstrating that the sought information indeed falls under Section 6 limitations. As well, the information-holder must satisfy Article 24 of the Constitution by demonstrating that the limitation imposed on the constitutional right is 'fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom'.<sup>56</sup> In another petition,<sup>57</sup> the petitioners had gone to court after the government declined to accede to their requests regarding the disclosure of information on contracts between the government and third parties on the Standard Gauge Railway. The High Court determined that public institutions are bound to disclose information or provide justifications for non-disclosure. Where the state relies on the defence of national security for non-disclosure, it must provide evidence in tandem with the provisions of Article 24 of the Constitution which establishes the bases upon which rights may be limited.

The AIA establishes the institutional mechanisms to facilitate access to information. It designates chief executive officers of public entities as information access officers. Applications are written in English or Kiswahili detailing the requested information. A decision on an application is made within 21 days of the application; but a request for information pertaining to the life or liberty of a person is provided within 48 hours, although this period may be extended once exceptionally for not more than 14 days. Where an applicant's request for information is declined, the access to information officer explains to the requester how he or she may appeal the decision.<sup>58</sup> Perhaps the only bizarre provision in this regard is Section 9(5) of the AIA which provides that an application for information is deemed rejected where an applicant does not receive a response to an application within the statutory period. This in effect lifts the burden of explaining denials from public entities who instead simply need to wait out the statutory period.

56 *Zebedeo John Opore v The Independent Electoral and Boundaries Commission* [2017] eKLR <http://kenyalaw.org/caselaw/cases/view/140609> (accessed 21 September 2022).

57 *Khelef Khalifa & another v CS Transport & Others* (Petition E032 of 2021) <https://katibainstitute.org/judgment-khelef-khalifa-and-anor-v-cs-transport-and-others-petition-e032-of-2021-on-disclosure-of-information-upheld-by-the-high-court-of-kenya/> (accessed 21 September 2022).

58 Secs 7-9 Access to Information Act.

The AIA obligates public entities to keep and maintain accurate and authentic records that have integrity and are usable. Public entities are in this regard required to:

1. Create and preserve records documenting adequately its policies, decisions, procedures, transactions and other activities relating to its mandate;
2. Maintain such records in good order and condition; and
3. Computerise its records and information management systems to facilitate more efficient access to information.<sup>59</sup>

The AIA also protects persons commonly referred to as “whistle-blowers”. A person who discloses or proposes to disclose information obtained in confidence, where the disclosure is of public interest, is protected from being penalised with dismissal, being discriminated against or being denied any appointment, promotion or advantage that otherwise would have been provided. A whistle-blower may provide information on violations of the law, mismanagement of funds, conflict of interest, corruption, abuse of public office, and dangers of public health, safety and the environment.<sup>60</sup> This provision, however, does not establish fully-fledged protected disclosure regimes as urged by the Declaration on Principles of Freedom of Expression and Access to Information in Africa.<sup>61</sup>

The AIA confers the Commission on Administrative Justice (CAJ) with powers to oversee and enforce the Act. The CAJ is an independent commission established under Article 59 of the Constitution and the Commission on Administrative Justice Act.<sup>62</sup> The functions of the CAJ include to:

1. Investigate violation of the provisions of the AIA;
2. Request for and receive reports from public entities with respect to the implementation of the AIA and of the Data Protection Act and to assess and act on those reports;
3. Develop and facilitate public education awareness and develop programmes on the right to access information and the right to protection of personal data;
4. Work with public entities to promote the right to access information and work with other regulatory bodies on promotion and compliance with data protection measures;
5. Monitor state compliance with international treaty obligations relating to freedom of and right of access to information and protection of personal data;
6. Hear and determine complaints and review decisions arising from violations of the right to access to information; and
7. Promote protection of data.<sup>63</sup>

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59 Sec 17 Access to Information Act.

60 Sec 16 Access to Information Act.

61 ACHPR (n 38) principle 35.

62 Commission on Administrative Justice Act 23 of 2011 [http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2023%20of%202011#part\\_I](http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2023%20of%202011#part_I) (accessed 23 September 2022). .

63 Sec 21 Commission on Administrative Justice Act.

The AIA requires the CAJ to designate one of its members as the Access to Information Commissioner.<sup>64</sup> The fact that the Access to Information Commissioner is designated from the CAJ raises a peculiar jurisprudential question. In *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others*, the Supreme Court determined that whereas the CAJ possesses the mandate to make recommendations to a public officer or a public body, the recommendations do not bind the public officer or body. A recommendation can only be binding when it is specifically provided in the Constitution or the law; and no law states that the CAJ's decisions are binding.<sup>65</sup>

The CAJ reviews the decisions of a public entity or private body in relation to a request for access to information. The CAJ may review decisions:

1. Refusing to grant access to the information applied for;
2. Granting access to information in edited form;
3. Purporting to grant access, but not actually granting the access;
4. Deferring providing access to the information;
5. Imposing a fee or regarding the amount of the fee;
6. Granting access to information only to a specified person; or
7. Refusing to correct, update or annotate a record of personal information.<sup>66</sup>

The AIA obligates every public entity to submit to the CAJ an annual report covering:

1. The number of requests for information received by the entity and the number of requests processed;
2. The average number of days taken by the entity to process different types of requests;
3. The number of determinations made by the authority not to comply with the requests for information and the grounds for such determinations;
4. The number of full-time staff of the public entity devoted to processing requests for information and the total amount expended by the entity for processing such requests; and
5. The total amount of fees collected by the public entity while processing requests.<sup>67</sup>

The CAJ has prepared a number of instruments to operationalise the AIA fully. It has prepared training, capacity-building and awareness-raising material.<sup>68</sup> However, at the time of the 2022

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64 Sec 20(3) Commission on Administrative Justice Act.

65 *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 Others* [2021] eKLR <http://kenyalaw.org/caselaw/cases/view/209732/> (accessed 23 September 2022).

66 Sec 14(1) Access to Information Act.

67 Sec 27 Access to Information Act.

68 The Commission on Administrative Justice 'Guide on Proactive Disclosure for Public Entities at National and County Government Level in Kenya' (2018) <https://countytoolkit.devolution.go.ke/resource/guide-proactive-disclosure-public-entities-national-and-county-government-level-kenya> (accessed 23 September 2022)

election, Parliament had not adopted the Access to Information (General) Regulations, 2021, prepared by the Commission.<sup>69</sup>

### 3.5 DATA PROTECTION ACT

The Data Protection Act (DPA)<sup>70</sup> regulates the processing of personal data in accordance with the right to privacy established in Article 31 of the Constitution. It establishes the Office of the Data Protection Commissioner (ODPC) to oversee the implementation and enforcement of the Act. The DPA establishes principles on personal data which data controllers and processors must ensure. Under the Act, personal data is: processed in accordance with the right to privacy of the data subject; processed lawfully, fairly and in a transparent manner; collected for explicit, specified and legitimate purposes; accurate and updated as necessary; and identifies a data subject for no longer than necessary for the purpose it was collected.<sup>71</sup> These principles apply to the processing of the personal data of voters. The DPA is important for electoral purposes because it limits access to data through access to information requests by requiring relevant entities such as the IEBC and political parties to reveal only the information necessary to achieve the requested purpose, by applying the data protection principle of purpose limitation and data minimisation.<sup>72</sup> The ODPC indeed provided guidance to data controllers and data processors such as political parties handling the personal data of voters or potential voters.<sup>73</sup>

### 3.6 COMPUTER MISUSE AND CYBERCRIMES ACT

The Computer Misuse and Cybercrimes Act (CMCA)<sup>74</sup> seeks to protect the rights to privacy, freedom of expression and access to information.<sup>75</sup> Far from ensuring access to information, stakeholders contend that the government has weaponised the CMCA as a tool to combat dissent by arraigning recalcitrant bloggers and activists for speaking out on issues such as police brutality.<sup>76</sup> The CMCA criminalises the following acts which are liable to be exploited by the government to limit access to information:

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69 Interview with KI1, a senior official in the CAJ, on 2 August 2022.

70 Data Protection Act 24 of 2019 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202019> (accessed 23 September 2022).

71 Sec 25 Data Protection Act.

72 R Mosero 'In Kenya's 2022 elections, technology and data protection must go hand in hand' *Carnegie Endowment for International Peace* (8 August 2022) <https://carnegieendowment.org/2022/08/08/in-kenya-s-2022-elections-technology-and-data-protection-must-go-hand-in-hand-pub-87647> (accessed 24 September 2022).

73 ODPC 'Guidance Note on Processing Personal Data for Electoral Purposes' <https://www.odpc.go.ke/general-guidlines/> (accessed 24 September 2022).

74 Computer Misuse and Cybercrimes Act 5 of 2018 [http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%205%20of%202018#part\\_II](http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%205%20of%202018#part_II) (accessed 24 September 2022).

75 Sec 3(d) Computer Misuse and Cybercrimes Act.

76 KICTANET 'Disinformation in Kenya's Political Sphere: Actors, Pathways, and Effects' (2022) [https://cipesa.org/?dl\\_name=briefs/Disinformation-in-Kenyas-Political-Sphere-Actors-Pathways-and-Effects-compressed.pdf](https://cipesa.org/?dl_name=briefs/Disinformation-in-Kenyas-Political-Sphere-Actors-Pathways-and-Effects-compressed.pdf) (accessed 25 September 2022).



1. Publishing false, misleading or fictitious data with intent that the data be considered or acted upon as authentic, with or without any financial gain;<sup>77</sup>
2. Knowingly publishing false information in print, broadcast, data or over a computer system, that is calculated or results in panic, chaos, or violence among citizens, or which is likely to discredit the reputation of a person.<sup>78</sup>

### 3.7 LEADERSHIP AND INTEGRITY

The Leadership and Integrity Act (LEA)<sup>79</sup> and the Economic and Anti-Corruption Commission Act (EACCA)<sup>80</sup> seek to operationalise Chapter Six of the Constitution on leadership and integrity.

The LEA establishes the General Leadership and Integrity Code<sup>81</sup> which obligates state officers to carry out their duties in a transparent and accountable manner, and to keep accurate records and documents on the functions of their offices.<sup>82</sup> The LEA requires state officers, preceding their appointment, to submit a self-declaration form to the Economic and Anti-Corruption Commission (EACC) making ethical and moral declarations such as on their honest conduct of public affairs, and accurate and honest representation of information to the public.<sup>83</sup> The LEA requires every public entity to maintain an open register of conflicts of interest for use by state or public officers.<sup>84</sup> More specifically on access to information, Section 22 of the LEA provides that: 'A State officer shall not directly or indirectly use or allow any person under the officer's authority to use any information obtained through or in connection with the office, which is not available in the public domain, for the furthering of any private interest, whether financial or otherwise'. Section 23(1) of the LEA prohibits a state officer other than a cabinet secretary or member of a county executive committee in the performance of their duties from manifesting support for or opposition to any political party or candidate in an election. Subsection (2) provides that: 'An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections.' The LEA prohibits a state officer from knowingly giving false or misleading information to any person, or falsifying any records or misrepresenting information to the public.<sup>85</sup> Despite its impeccable provisions, the LEA holds limited consequence for politicians and other public figures who remain or are elected to office

77 Sec 22(1) Computer Misuse and Cybercrimes Act.

78 Sec 23(1) Computer Misuse and Cybercrimes Act.

A petition to declare many of the provisions in the CMCA as unconstitutional was dismissed by the High Court in *Bloggers Association of Kenya (BAKE) v Attorney General & 3 others; Article 19 East Africa & another (Interested Parties)* [2020] eKLR <http://kenyalaw.org/caselaw/cases/view/191276> (accessed 26 September 2022). The matter is pending determination at the Court of Appeal.

79 Leadership and Integrity Act 19 of 2012 [http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2019%20of%202012#part\\_I](http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2019%20of%202012#part_I) (accessed 25 September 2022).

80 Ethics and Anti-Corruption Commission Act 22 of 2011 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2022%20of%202011> (accessed 28 September 2022).

81 Sec 7 Leadership and Integrity Act.

82 Secs 10(b)-(c) Leadership and Integrity Act.

83 Sec 13(1) Leadership and Integrity Act.

84 Sec 16 Leadership and Integrity Act.

85 Secs 29-30 Leadership and Integrity Act.

despite bearing criminal or integrity questions.

The EACCA makes provisions whose strict implementation would limit the scope of proactive disclosure. The EACCA requires the EACC to publish and publicise ‘important information within its mandate affecting the nation’, and that it may decline to give information to an applicant if, among others: ‘the request is unreasonable in the circumstances ... (or if the applicant fails to) satisfy confidentiality requirements by the Commission’.<sup>86</sup>

### 3.8 OTHER STATUTES

More statutes whose intent is to encourage accountability and transparency in relation to access to information are not framed robustly enough to realise their objects. For example, the Public Officer Ethics Act (POEA),<sup>87</sup> which aims to promote ethics and performance standards of public officers, requires public officers to submit a declaration of income, assets and liabilities for themselves, their spouses and dependants who are minors. Yet, as one study points out,<sup>88</sup> Section 41 of the POEA seems to undermine the practice of whistleblowing when it criminalises the divulgence by a person without lawful excuse of information acquired under the Act.

The Witness Protection Act (WPA)<sup>89</sup> guarantees protection to witnesses in criminal proceedings. This means that the WPA does not protect whistle-blowers who may not be ready to testify in a judicial process as witnesses.<sup>90</sup> Section 21 of the Bribery Act<sup>91</sup> is also framed narrowly only to protect a whistle-blower in a complaint or case of bribery from intimidation or harassment for providing information to law-enforcement institutions or giving evidence in a court of law. It is an offense for a person to demote, admonish, dismiss from employment, transfer to unfavourable working areas or otherwise harass and intimidate a whistle-blower; and a whistle-blower is entitled to protection by the Witness Protection Agency.

The Election Offences Act (EOA)<sup>92</sup> protects the secrecy of the ballot by criminalising the disclosure of certain types of information. It, for example, makes it a crime for a person, without authority, to obtain or attempt to obtain, in a polling station, information as to the candidate for whom any voter in the station is about to vote or has voted; or to disclose the serial number of the ballot paper issued to any voter at the station.<sup>93</sup> The EOA also criminalises the publication of information with the intention of: disrupting or preventing the election; or creating hostility or

86 Secs 29(1) &(3) Leadership and Integrity Act.

87 Public Officer Ethics Act 4 of 2003 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%202003> (accessed 27 September 2022).

88 Transparency International Kenya ‘A Review of the State of Whistle-Blower Protection and Defamation Laws in Kenya’ (2021) [https://tikenya.org/wp-content/uploads/2021/07/A-Review-of-the-State-of-Whistleblower-Protection-and-Defamation-Laws-in-Kenya\\_TI-Kenya.pdf](https://tikenya.org/wp-content/uploads/2021/07/A-Review-of-the-State-of-Whistleblower-Protection-and-Defamation-Laws-in-Kenya_TI-Kenya.pdf) (accessed 24 September 2022).

89 Section 23 Witness Protection Act 16 of 2006 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2016%20of%202006> (accessed 28 September 2022)..

90 TIK (n 88) 44.

91 Bribery Act 47 of 2016 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2047%20of%202016> (accessed 23 September 2022).

92 Election Offences Act 37 of 2016 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2037%20of%202016>. (accessed 12 September 2022).

93 Secs 7(1) (a) & (c) Election Offences Act.

fear in order to influence the process or outcome of the election.<sup>94</sup>

The Fair Administrative Action Act,<sup>95</sup> which operationalises the right to administrative action, requires an administrator to give a person whose rights may be affected adversely by an administrative action information, materials and evidence to be relied upon in making the decision or taking the administrative action.<sup>96</sup>

### 3.9 CONCLUSION

The domestic legislative and regulatory framework on access to information is fairly robust, particularly in relation to access to information and data protection statutes. The effectiveness of laws that seek to enable Chapter Six of the Constitution on leadership and integrity is undermined by ambiguous framing and wayward interpretation. The key challenge which constrains access to information legislation and policy is the policy-practice gap where Kenya is not implementing its access to information legislation effectively. What was noted over half a decade ago remains true today: that common barriers to effective implementation of access to information legislation may be antiquated and inefficient information systems and archival practices; and the opaque bureaucratic culture pervasive in many public sectors.<sup>97</sup> Despite this, access to information laws and regulations form a veritable basis to enable Kenya's electoral stakeholders to provide the public with the information they require to make electoral choices from positions of knowledge.

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94 Sec 13(k) Election Offences Act.

95 Sec 4(3)(g) Fair Administrative Action Act 4 of 2015 [http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%202015#part\\_I](http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%202015#part_I) (accessed 25 September 2022).

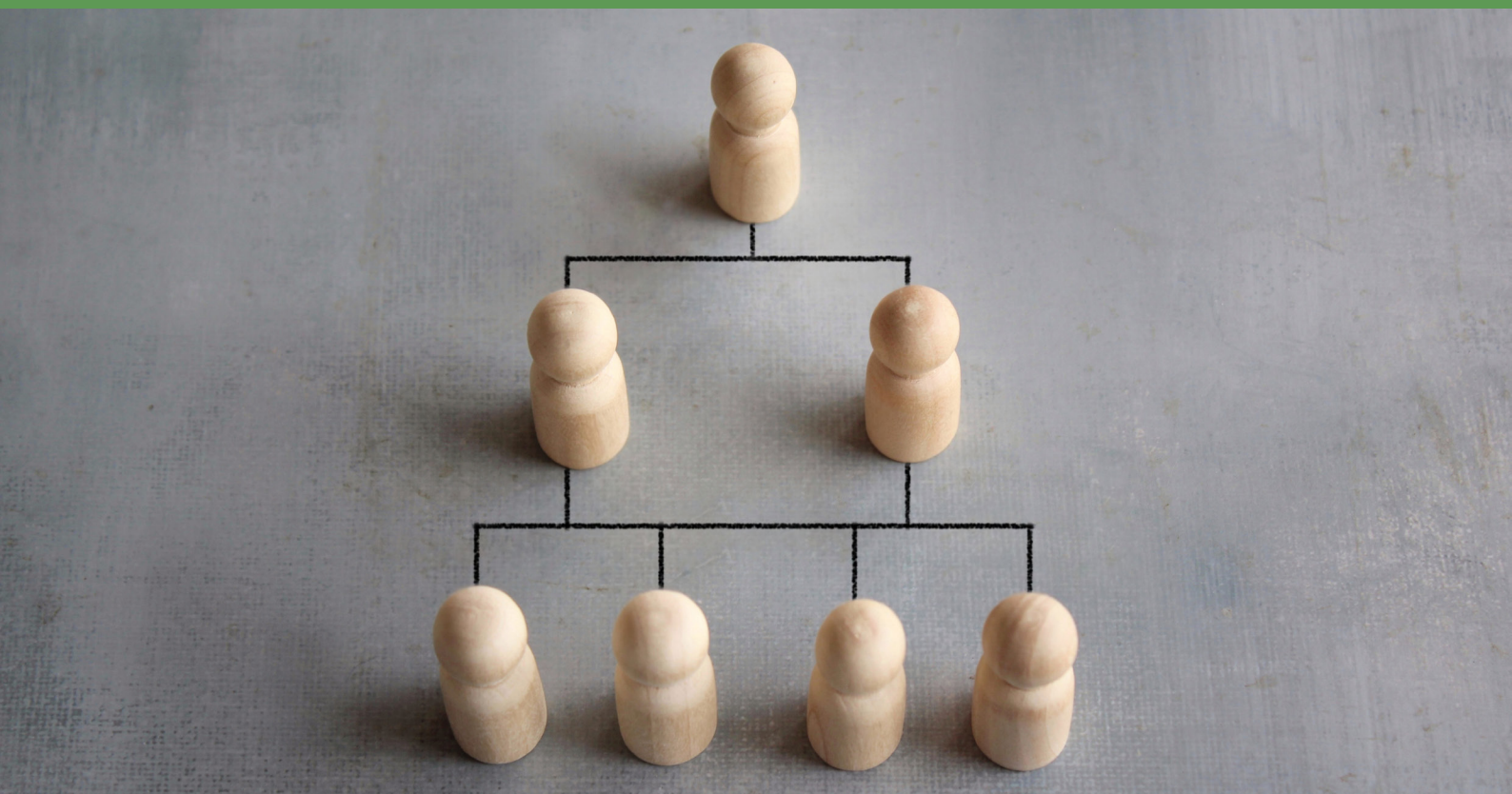
96 Sec 4(3)(g) Fair Administrative Action Act.

97 T Mendel 'Right to information: recent spread of RTI legislation' (2014) 6 <https://openknowledge.worldbank.org/handle/10986/22528> (accessed 26 September 2022).





## CHAPTER 4



# CHAPTER 4

## 4. ASSESSING COMPLIANCE OF THE APPOINTING AUTHORITY TO THE GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA

### a. COMPLIANCE WITH GUIDELINE 12 (APPOINTMENT)

Guideline 12 of the Guidelines on Access to Information and Elections in Africa obligates Kenya to ensure that the process for the selection and appointment of members of EMBs is clearly stipulated in law, and that it is transparent, widely publicised and allows for public participation.

Compliance with Guideline 12 (appointment)		
	Description	Status
a	That the process for the selection and appointment of members of EMBs is clearly stipulated in law, and that it is transparent, widely publicised and allows for public participation	Complied
B	It proactively discloses the following categories of information in relation to the EMBs:	
	• Mode, criteria and process of appointment of members, including any requisite considerations such as gender balance, qualifications and experience	Complied
	• Appointment process of members	Complied
	• Remuneration and conditions of service of members	Partly complied
	• Procedure for the termination of appointed members of the IEBC	Complied

Kenya's EMBs are the IEBC and the Office of the Registrar of Political Parties (ORPP).

### The IEBC

The IEBC is established under Article 88 of the Constitution, and it is constituted of a chairperson and six members.<sup>98</sup> The IEBC conducts or supervises elections to elective bodies, including

98 Constitution (n 1) chapter 15 read together with the Independent Electoral and Boundaries Commission



the National Assembly, the Senate and 47 county assemblies, and the offices of the national president and 47 county governors. It also supervises referenda.

The IEBC's specific responsibilities include:

1. The continuous registration of citizens as voters;
2. The regular revision of the voters' roll;
3. The delimitation of constituencies and wards;
4. The regulation of the process by which parties nominate candidates for elections;
5. The settlement of electoral disputes such as those on nominations but excluding election petitions and disputes subsequent to the declaration of election results;
6. The registration of candidates for election;
7. Voter education;
8. The facilitation of the observation, monitoring and evaluation of elections;
9. The regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
10. The development of a code of conduct for candidates and parties contesting elections; and
11. The use of appropriate technology and approaches in the performance of its functions.<sup>99</sup>

To be appointed as chairperson of the IEBC, a person must have at least 15 years' experience either or in the aggregate as a judge of a superior court or as a distinguished academic, judicial officer, legal practitioner or other relevant legal field.<sup>100</sup> For one to become a member of the IEBC, they should: hold a degree from a recognised university; have proven relevant experience in management, finance, governance, public administration or law; and meet the requirements of Chapter Six of the Constitution on leadership and integrity.<sup>101</sup> A person is ineligible for appointment as a member of the IEBC if they hold a state office, and a commissioner may not hold another public office. One is also ineligible if such person has held office or stood for election within the preceding five years as a member of Parliament or county assembly, or as a member of the governing body of a political party.<sup>102</sup>

Members of the IEBC are appointed for a single term of six years and serve on a fulltime basis.<sup>103</sup> The Commission is properly constituted notwithstanding a vacancy in its membership.<sup>104</sup> Following the 2017 general election, President Kenyatta as the appointing authority failed to institute the process of filling in vacancies which arose after the resignation of four members of the IEBC. This was despite the requirement in Section 7A(3) of the IEBCA that vacancies should

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Act <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%209%20of%202011> (accessed 27 September 2022).

99 Art 88(4) Constitution & Sec 4 Independent Electoral and Boundaries Commission Act.

100 Sec 6 Independent Electoral and Boundaries Commission Act & Art 166(3) Constitution.

101 As above.

102 Art 88(2)-(3) Constitution.

103 Sec 7 Independent Electoral and Boundaries Commission Act.

104 Sec 7(3) Independent Electoral and Boundaries Commission Act.

be filled in as soon as they arose. This meant that the IEBC operated for four years with four unfilled positions. In April 2022, the Supreme Court determined that despite Section 5 of the IEBCA which provides that the IEBC should comprise seven commissioners, the Commission remained legally competent to carry on its business even when it had only three commissioners, the minimum number stipulated in Article 251 of the Constitution.<sup>105</sup> The Court also construed that IEBC with three commissioners was quorate to undertake its functions.<sup>106</sup> This means that the actions the IEBC took while constituted of three commissioners to prepare for the 2022 general election were lawful.

The appointing authority of members of the IEBC is the President working in concert with the National Assembly. Under the procedure for appointing members of the IEBC,<sup>107</sup> the President appoints a Selection Panel at least six months before the end of a member's term or within 14 days of the declaration of a vacancy in the Commission. The Selection Panel comprises four persons nominated by the Parliamentary Service Commission (PSC), a nominee from the Law Society of Kenya and two nominees from the Inter-Religious Council of Kenya. The Selection Panel invites applications from qualified persons and publishes the names of all applicants and their qualifications in the Kenya Gazette, two newspapers of national circulation and on the website of the PSC. The Selection Panel shortlists the applicants and interviews them in public. It forwards to the President two persons qualified for appointment as chairperson and nine persons qualified for appointment as commissioners. The President in turn forwards a nominee as chairperson and nominees as commissioners for approval by the National Assembly. This approval is done in accordance with the Public Appointments (Parliamentary Approval) Act (PAPA).<sup>108</sup> Pursuant to the PAPA, the Departmental Committee on Justice and Legal Affairs holds an approval hearing to which the public are notified. The PAPA requires that the Departmental Committee's proceedings on public appointments should be open and transparent, although the Committee may decide to hold some or all of the proceedings in private. Section 6(7) of the PAPA provides that: 'An approval hearing shall focus on a candidate's academic credentials, professional training and experience, personal integrity and background'. The PAPA details the issues which the National Assembly should consider in relation to a nomination. These are: the procedure used to arrive at the nominee; any constitutional or statutory requirements relating to the office in question; and the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made.<sup>109</sup> Subsequent to approval by the National Assembly, the President appoints the chairperson and members of the Commission. The law enjoins the Selection Panel, the President and the National Assembly to ensure that not more than two-

105 *Attorney-General et al v David Ndii et al* (Supreme Court Petition No. 12 of 2021 consolidated with Petition Nos 11 and 13 of 2021) para 328 <https://www.judiciary.go.ke/?wpdmpo=petition-no-12-of-2021-consolidated-with-petitions-11-13-of-2021-building-bridges-initiative-bbi-full-supreme-court-judgement> (accessed 27 September 2022) (*David Ndii* Case).

106 *David Ndii* (n 105) para 338.

107 First Schedule Independent Electoral and Boundaries Commission Act.

108 Public Appointments (Parliamentary Approval) Act of 2011 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2033%20of%202011> (accessed 25 September 2022).

109 Sec 7 Public Appointments (Parliamentary Approval) Act.

thirds of the IEBC's members are of the same gender and that there is regional balance.

On 14 April 2021, President Kenyatta declared four vacancies in the IEBC, following which he chose the Selection Panel for the Appointment of Members of the IEBC on 28 April 2021. The Selection Panel published an advertisement in the Kenya Gazette<sup>110</sup> and two daily newspapers inviting applications for the four vacancies, and subsequently received 669 applications which it whittled down to a shortlist of 36 candidates. The Selection Panel interviewed those candidates on live national television.<sup>111</sup> The Panel then made its recommendations to the President. The President subsequently sought and received parliamentary approval for his nominees.<sup>112</sup>

The 2022 general election was, therefore, run by a cohort comprising seven commissioners, being three veteran commissioners (including the Chairperson) who had run the 2017 annulled presidential election and four rookies with no experience of running an election and with fairly limited time within which to become oriented with the demands of their responsibilities. The Departmental Committee which interviewed the four nominees did not raise any significant concerns on their qualifications or suitability.<sup>113</sup> This in fact turned out not to be the case on two scores. First, the High Court determined that the Selection Panel that processed the appointed commissioners was itself unconstitutional to the extent that a majority of its seven members was appointed by the PSC, and hence the four new commissioners were deemed fruits of a poisonous tree. Yet the Court declined to nullify their appointments using procedural considerations as well as the reasoning that in light of tight timelines the Court could not undermine the IEBC's election preparations.<sup>114</sup> Second, in another case, the High Court determined that the appointment of one member of the IEBC, Commissioner Irene Masit, was unconstitutional since she was not eligible for the position as five years had not lapsed from the time she contested for a parliamentary seat in 2017. Again, the Court declined to revoke her appointment, reasoning that it was in the public interest to maintain the status quo to avert a constitutional crisis while the IEBC was preparing for the general election.<sup>115</sup>

110 Kenya Gazette Vol. CXXIII NOTICE NO. 4198 of 1 May 2021 [http://kenyalaw.org/kenya\\_gazette/gazette/volume/MjM2OA--/Vol.CXXIII-No.92/](http://kenyalaw.org/kenya_gazette/gazette/volume/MjM2OA--/Vol.CXXIII-No.92/) (accessed 28 September 2022).

111 E Mutai '700 eye four high-paying IEBC commissioner jobs' *Business Daily* 19 May 2021 <https://www.businessdailyafrica.com/bd/economy/700-eye-four-high-paying-iebc-commissioner-posts-3405426> (accessed 15 September 2022).

112 Kenyan Parliament website 'President seeks House approval of nominees to the IEBC' <http://www.parliament.go.ke/index.php/president-seeks-house-approval-nominees-iebc> (accessed 30 September 2022).

113 Departmental Committee of Justice and Legal Affairs August 'Report on the approval hearing for appointment of Ms. Juliana Whonge Cherera, Mr. Francis Mathenge Wanderi, Ms. Irene Cherop Masit and Mr. Justus Obonyo Nyang'aya as members of the Independent Electoral and Boundaries Commission' (2021) [hearing%20for%20the%20appointment%20of%20Members%20of%20IEBC.pdf](#) (accessed 30 September 2022).

114 *Okiya Omtata Okiiti v Attorney General & 5 Others* [2021] KEHC 439 (KLR) <http://kenyalaw.org/caselaw/cases/view/235725/> (accessed 30 September 2022).

115 *G'Oganyo v Independent Electoral Commission Selection Panel & 2 others; Independent Electoral and Boundaries Commission & 6 others (Interested Party)* (Constitutional Petition E345 of 2022) [2022] KEHC 10184 (KLR) (Constitutional and Human Rights) (30 June 2022) (Judgment) <http://kenyalaw.org/caselaw/cases/view/235725/> (accessed 21 September 2022).

The office of a member of the IEBC becomes vacant when a holder dies or resigns from office. A holder may also be removed from office for contravening Chapter Six of the Constitution, gross misconduct in the performance of the functions of their office or for physical or mental incapacity to perform the functions of office, incompetence or bankruptcy.<sup>116</sup> For a member of the IEBC to be removed from office, a person must petition the National Assembly with reasons and, on the recommendation of the National Assembly, the President suspends the impugned member and appoints a tribunal which investigates and makes a binding recommendation to the President.<sup>117</sup>

## The ORPP

The ORPP is established pursuant to the Political Parties Act (PPA)<sup>118</sup> To serve as the main institution for regulating political parties.<sup>119</sup> Its functions include to:

1. Register, regulate, monitor, investigate and supervise political parties to ensure compliance with the PPA;
2. Administer the PPF;
3. Ensure publication of audited annual accounts of political parties;
4. Publish audited annual accounts of political parties;
5. Verify and make publicly available the list of all members of political parties;
6. Keep and maintain a register of members of registered political parties;
7. Maintain a register of political parties and their symbols;
8. Ensure and verify that no person is a member of more than one political party and accordingly notify the IEBC;
9. Certify that an independent candidate in an election is not a member of any registered political party;
10. Certify that the symbol intended to be used by an independent candidate in an election does not resemble the symbol of a registered political party;
11. Certify that the names appearing in a party list are the names of members of the political party presenting the party list;
12. Regulate political party nominations;
13. Train political party election agents on the request and financing of political party; and
14. Investigate complaints received under the PPA.<sup>120</sup>

To be appointed as the ORPP, a person holds a degree; has proven knowledge and experience in finance, management, political science, law, governance or public administration; has at least 15 years' relevant post-qualification experience; and satisfies the requirements of Chapter Six

<sup>116</sup> Sec 7A(1) Independent Electoral and Boundaries Commission Act & Art 251(1) Constitution.

<sup>117</sup> Art 251((4)-(6) Constitution.

<sup>118</sup> Political Parties Act 11 of 2011 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2011%20of%202011> (accessed 28 September 2022).

<sup>119</sup> Sec 33 Political Parties Act.

<sup>120</sup> Sec 34 Political Parties Act.

of the Constitution. The RPP serves for a non-renewable term of six years, and is prohibited from contesting for national or county elections or becoming a member of a governing body of a political party for five years.<sup>121</sup>

The Registrar of Political Parties is appointed by the President with the approval of the National Assembly from nominees forwarded by the Public Service Commission which advertises and shortlists candidates.<sup>122</sup> The PPA establishes procedures for removal of the RPP from office which with slightly different details are analogous to those for the removal of members of the IEBC.<sup>123</sup>

The Registrar of Political Parties who oversaw the 2022 general election, Ann Nderitu, was appointed initially in an acting capacity in 2018, before being appointed substantively in September 2020.<sup>124</sup>

### **Recommendation:**

Relevant authorities, including Parliament, the Salaries and Remuneration Commission, the IEBC and ORPP, should ensure the proactive disclosure of the actual remuneration and conditions of service of each member of the IEBC and the ORPP.

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121 Sec 33 (9) & (10) Political Parties Act.

122 Sec 34A Political Parties Act.

123 Sec 37 Political Parties Act.

124 ORPP ' National Assembly approves name of Registrar for substantive appointment' <https://orpp.or.ke/index.php/8-latest-news/159-national-assembly-approves-name-of-registrar-for-substantive-appointment> (accessed 01 October 2022) .





## CHAPTER 5



# Chapter 5

## 5. ASSESSING COMPLIANCE OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION TO THE GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA

### 5.1 COMPLIANCE WITH GUIDELINE 13 (OPERATIONS)

Guideline 13 of the Guidelines on Access to Information and Elections in Africa requires the IEBC and the ORPP to facilitate access to information on their operations.

Compliance with Guideline 13 (operations)		
	Description	Compliance status
a	Creating, keeping, organising and maintaining records in a manner that facilitates access to information, including for vulnerable and marginalised groups	Partly Complied
b	Adopting and implementing flexible proactive disclosure arrangements that enable access to information without the need for individual applications	Mostly complied
c	Establishing clear and effective processes and procedures to deal with requests for information	Mostly Complied
d	Formulating clear procedures for making requests for information (including the required format of requests, costs for reproduction, timeframes and formats for providing requested information)	Complied

The IEBCA establishes the IEBC's basis for proactive as well as reactive disclosure of information. The Act, however, arguably makes quite conservative provisions when read side by side with the AIA. First, the IEBCA requires the IEBC to '... publish and publicise all important information within its mandate affecting the nation'.<sup>125</sup> This implies that the IEBC may not publish information which it deems unimportant and indeed that it may not publish information affecting individuals too as distinct from the nation. This is unlike Section 5 of the AIA which as highlighted in chapter two establishes an expansive list of the information which public entities including the IEBC should disclose proactively. Second, the IEBCA provides that a citizen's request for

125 Sec 27(1) Independent Electoral and Boundaries Commission Act.

information should be ‘in the public interest’.<sup>126</sup> Again, this is a limiting understanding of the far more expansive guarantees on access to information detailed in the AIA, including its provision that a citizen’s right to access information is not affected by the reasons for seeking access or the public entity’s belief of the citizen’s reasons for seeking access.<sup>127</sup>

Information requests are addressed to the IEBC’s Secretary or a designated officer and the Commission may require a fee where it incurs an expense in providing the information. Such information may also be subject to confidentiality requirements.<sup>128</sup> The IEBC is empowered to decline to give information to an applicant, including where ‘the request is unreasonable in the circumstances’, and where ‘the information requested is at a deliberative stage by the Commission’.<sup>129</sup> Members and employees of the IEBC are required to sign confidentiality agreements.<sup>130</sup> At the same time, the IEBCA requires the IEBC to publish notices for public information on the locations of all its offices, and its addresses, telephone numbers and other means of communication or contact.<sup>131</sup>

The IEBC is obligated to ensure the management of personal data according to the principles of personal data protection established in the DPA.<sup>132</sup>

The PPA requires the ORPP to establish a political parties’ management information system for processing political parties’ data and records. This system is simple, accurate, verifiable, secure, accountable and transparent.<sup>133</sup> It is in this regard that the ORPP established the Integrated Political Parties Management System, a web-based system that contains varied features for managing political party records and self-service by authorised representatives of political parties.<sup>134</sup>

## **Recommendation:**

The IEBC and ORPP should:

1. Create, keep, organise and maintain their records in a manner that facilitates access to information. In particular, they should ensure that the platforms on which they disseminate information, including their websites and social media platforms, are accessible to vulnerable and marginalised groups including persons with disabilities.
2. Adopt and implement flexible proactive disclosure arrangements that enable access to information without the need for individual applications.

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126 Sec 7(2) Independent Electoral and Boundaries Commission Act.

127 Sec 42 4(2) Access to Information Act.

128 Sec 27(2) Independent Electoral and Boundaries Commission Act

129 Sec 27(3) Independent Electoral and Boundaries Commission Act.

130 Sec 27(5) Independent Electoral and Boundaries Commission Act.

131 Sec 28 Independent Electoral and Boundaries Commission Act.

132 Sec 27(7) Independent Electoral and Boundaries Commission Act.

133 Sec 34B Independent Electoral and Boundaries Commission Act.

134 ORPP ‘Political Party Membership’ <https://www.orpp.or.ke/index.php/en/services/compliance-regulation/12-general-information/89-websites-of-political-parties> (accessed 30 September 2022).



In particular, the IEBC should call on Parliament to align the IEBCA with Section 5 of the AIA which establishes an expansive list of the information which public entities should disclose proactively.

## 5.2 COMPLIANCE WITH GUIDELINE 14 (ANNUAL PUBLICATION)

Guideline 14 of the Guidelines on Access to Information and Elections in Africa requires the EMBs to publish every year accurate and updated information.

**b.**

Compliance with Guideline 14 (annual publication)		
	Description	Status of compliance
a	Organisational structure	Complied
b	Strategic plan	Complied
c	Decision-making process	Complied
d	Procedure for the recruitment of both permanent and temporary staff and their conditions of service	Complied
e	Training policies	Complied
f	Code of conduct for employees, including declaration of assets	Complied
g	Budget and sources of funding, including donor funding, which shall be disaggregated accordingly	Partly complied
h	Mechanisms for voter identification	Complied
i	Procurement policy, processes and award of contracts	Partly complied
j	Annual report, including audited accounts	Complied

The IEBCA requires the IEBC to present its annual report to the President and Parliament within three months after the end of each financial year. The Act also requires the IEBC to publish and publicise the annual report. The Commission's annual report contains operational as well as policy information.<sup>135</sup> The annual report includes the IEBC's financial statements, the activities it has undertaken, and any other information the Commission considers relevant.<sup>136</sup>

<sup>135</sup> Sec 24(1) Independent Electoral and Boundaries Commission Act.

<sup>136</sup> Sec 24(2), for example IEBC annual report 2021/2022 <http://www.parliament.go.ke/sites/default/files/2022-11/Annual%20Report%20and%20Financial%20Statements%20on%20Independent%20Electoral%20and%20Boundaries%20Commission%20for%20FY%202021-2022.pdf> (accessed 29 September 2022).

The IEBC set out the secretariat's organisational structure on its website.<sup>137</sup> When accessed before the 2022 general election, the website showed that the IEBC had a secretary/chief executive officer, two deputy secretaries, nine directors, 24 managers, 47 county election managers and 290 constituency election coordinators. The IEBCA enjoins the IEBC to ensure that not more than two-thirds of its employees are of the same gender, that the employees include persons with disabilities and that the employees are from Kenya's regional and other diversities;<sup>138</sup> but this disaggregated data was not on the Commission's website. While the website listed the names of the IEBC's core secretariat, clicking on the links for county election managers and constituency election coordinators two days before the 9 August polls resulted in a 'page not found' message.<sup>139</sup> The difficulty of finding this information may have encouraged disinformation or indeed made it onerous for the electorate who desired to reach out to particular officers.

The IEBC uploaded onto its website the strategic plan for the period 2020-2024.<sup>140</sup> The Commission then translated the strategic plan into an operational plan to guide its operations towards the 2022 general election.<sup>141</sup>

Regarding the procedure for the recruitment of permanent and temporary staff and their conditions of service, the IEBC established a portal where persons could apply for permanent jobs such as county election managers.<sup>142</sup> It is, however, not clear if all the Commission's jobs were advertised on the portal. The IEBC also published advertisements for temporary jobs such as polling clerks and counting clerks on its website.<sup>143</sup> The IEBC deployed a total of 465,660 temporary staff, including returning officers, presiding officers, deputy presiding officers and poll clerks to undertake the polls.<sup>144</sup>

The conditions of service of members and staff of the IEBC are regulated by law. The Salaries and Remuneration Commission (SRC) sets and reviews the remuneration and benefits of state officers including members of the IEBC. The SRC also advises the national and county governments on the remuneration and benefits of public officers including the Commission's staff.<sup>145</sup> The terms of service of the secretary and staff include benefits established and published

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137 IEBC 'IEBC Secretariat' <https://www.iebc.or.ke/iebc/?secretariat> (accessed 30 September 2022).

138 Sec 10(5) Independent Electoral And Boundaries Commission Act.

139 As stated by the author, this page is no longer accessible.

140 IEBC 'IEBC strategic plan 2020-2024' <https://www.iebc.or.ke/uploads/resources/TuqVmFrzOu.pdf> (accessed 08 October 2022).

141 IEBC 'Elections operations plan (IEBC)' <https://www.iebc.or.ke/uploads/resources/t3aLQUgYXv.pdf> (accessed 09 October 2022).

142 IEBC 'IEBC recruitment portal' <https://www.iebc.or.ke/internaljobs/#no-back-button> (accessed 09 October 2022).

143 IEBC 'IEBC jobs/vacancies application form 2022' <https://www.advance-africa.com/iebc-jobsvacancies-application-form-2022-for-polling-clerks-counting-clerks.html> (accessed 07 October 2022).

144 Remarks by the IEBC Chairman (n 3).

145 Art 230 Constitution, Sec 20(1) Independent Electoral And Boundaries Commission Act & Sec 20(1) & 11(f) Salaries and Remuneration Commission Act 10 of 2011 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2010%20of%202011> (accessed 03 October 2022).



by the IEBC. These include a car loan scheme and a mortgage scheme.<sup>146</sup>

The Fourth Schedule of the IEBCA established the Code of Conduct for Members and Employees of the IEBC which applies in addition to the provisions of the POEA. The Code regulates, in relation to members and staff of the IEBC, matters such as impartiality, independence, conflict of interest, professionalism, improper enrichment, integrity in private affairs, sexual harassment and nepotism. Under the heading 'privileged information and security of the state', the Code requires members and employees of the IEBC to 'safeguard privileged information that comes into their possession and protect it from improper or inadvertent disclosure'. Breach of the Code is deemed misbehaviour of a commissioner and misconduct for an employee.<sup>147</sup> The POEA requires both members and staff of the IEBC to make declarations on their assets regularly.<sup>148</sup>

The IEBC communicates its budget and disaggregated sources of funding in a number of ways. It prepares estimates of its annual revenue and expenditure which are approved by the National Assembly.<sup>149</sup> Specific to elections, the Independent Electoral and Boundaries Commission (Fund) Regulations<sup>150</sup> require that six months before a general election, the Commission Secretary publishes a pre-election status report of the IEBC Fund, specifying the total monies allocated for the general election, the sources of monies received into the Fund, the projected expenditure, and any other monies in the Fund. Two months after the election, the Secretary publishes a post-election status report of the Fund specifying each activity and the monies spent on it, the total monies spent on the elections, the variation between projected and actual expenditure, and any other expenditure incurred by the IEBC. The Regulations do not include an explicit requirement for the IEBC to publish the two status reports, rather providing that the reports should be submitted to the Treasury. The Regulations, however, require the Secretary to maintain records, including in electronic form, of information relating to the administration of the Fund. This Fund has, however, never been established, and the IEBC continues to call for its establishment. The budget for the 2022 general elections was ksh40.917 billion (around US\$ 410 million), including an initially budgeted ksh26.354 billion (around US\$270 million), with the balance being financed in the supplementary budget.<sup>151</sup>

146 IEBC (Staff Car Loan Scheme) Regulations, LN159/2016; Independent Electoral and Boundaries Commission (Staff Mortgage Scheme) Regulations LN160/2016) [http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=No.%209%20of%202011#KE/LEG/EN/AR/I/NO.%209%20OF%202011/SUBLEG/HC\\_1](http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=No.%209%20of%202011#KE/LEG/EN/AR/I/NO.%209%20OF%202011/SUBLEG/HC_1) (accessed 07 October 2022).

147 The IEBC indeed took disciplinary measures, including by dismissing electoral officials who flouted the Code of Conduct by fraternising with electoral candidates. – 'Remarks by the IEBC Chairman (n 3).

148 Sec 26 Public Officer Ethics Act.

149 Sec 21 Independent Electoral and Boundaries Commission Act.

150 IEBC (Fund) Regulations (LN74/2012 [http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=No.%209%20of%202011#KE/LEG/EN/AR/I/NO.%209%20OF%202011/SUBLEG/HC\\_1](http://kenyalaw.org:8181/exist/kenyalex/sublegview.xql?subleg=No.%209%20of%202011#KE/LEG/EN/AR/I/NO.%209%20OF%202011/SUBLEG/HC_1) (accessed 10 October 2022).

151 R Obong'o '2022 elections to cost Sh40.9 billion' *The Standard* 2022 <https://www.standardmedia.co.ke/national/article/2001420368/2022-general-election-to-cost-sh409-billion>  
D Mwere 'Inside IEBC's Sh44 bn bill for the August general elections' *Nation* 23 May 2022 <https://nation.africa/kenya/news/politics/inside-iebc-s-sh44bn-bill-for-the-august-general-election-3824110> (accessed 11 October 2022).

As a public body, the IEBC's procurement policies, processes and award of contracts are regulated by statutes. The Public Procurement and Asset Disposal Act<sup>152</sup> provides procedures for efficient public procurement and asset disposal by public entities. Some of the IEBC's procurement decisions during the 2022 elections cycle were in fact challenged using the established procedures. This was so when in November 2021 the IEBC awarded Smartmatic International Holdings BV to supply the Kenya Integrated Elections Management System (KIEMS) Kits. This award was challenged successfully at the Public Procurement Administrative Review Board, but the High Court allowed the IEBC to proceed with the award.<sup>153</sup>

The IEBC uploads tenders for works and services on its website.<sup>154</sup>

The ORPP has posted its core values on its website<sup>155</sup> and it has a strategic plan for the period 2020-2025.<sup>156</sup>

## Recommendations:

The IEBC and ORPP should publish on an annual basis:

1. Accurate and updated information on their budgets and sources of funding; and
2. Their procurement policies, processes and awards of contracts.

## 5.3 COMPLIANCE WITH GUIDELINE 15 (MEMBERSHIP)

Guideline 15 of the Guidelines on Access to Information and Elections in Africa requires the IEBC to proactively disclose information relating to its membership.

Compliance with Guideline 15 (Membership)		
	Description	Status of compliance
a	Details of the professional backgrounds of its members	Complied

152 Public Procurement and Asset Disposal Act 33 of 2015 <http://kenyalaw.org:8181/exist/kenyalex/actview.xq?actid=No.%2033%20of%202015> (accessed 11 October 2022).

153 W Menya 'Queries over bad record of digital voters' register firm Smartmatic' *Nation* 10 July 2022 <https://nation.africa/kenya/news/politics/the-shady-history-of-kiems-kits-firm-smartmatic-3874998> (accessed 13 October 2022).

154 IEBC 'Tenders' <https://www.iebc.or.ke/work/?tenders> (accessed 15 October 2022).

155 ORPP 'Our core values' <https://www.orpp.or.ke/images/PDFdocuments/OurCoreValues.pdf> (accessed 16 October 2022).

156 ORPP 'Strategic plan 2020-2025' (2021) [https://www.orpp.or.ke/images/UPLOADSpdf/ORPP\\_Strategic\\_Plan\\_2020\\_2025\\_Sept2021.pdf](https://www.orpp.or.ke/images/UPLOADSpdf/ORPP_Strategic_Plan_2020_2025_Sept2021.pdf) (accessed 08 October 2022).

b	Policy on declaration of assets and interests by its members	Complied
c	Its code of conduct and ethics	Complied

The IEBC website provided a list and the professional backgrounds of the seven commissioners who oversaw the 2022 elections: Wafula Chebukati (Chairperson), Juliana Cherera (Vice Chairperson), Francis Wanderi, Justus Nyang'aya, Irene Masit, Abdi Guliye and Boya Molu.<sup>157</sup> As already stated, the policy on declaration of the assets and interests of commissioners is regulated under the Fourth Schedule of the IEBCA and the POEA.

## 5.4 COMPLIANCE WITH GUIDELINE 17 (PRE-ELECTION PERIOD)

Guideline 17 of the Guidelines on Access to Information and Elections in Africa requires the IEBC to proactively disclose certain information during the pre-election period.

Compliance with Guideline 17 (pre-election period)		
	Description	Status of compliance
a	Detailed electoral calendar	Complied
b	Criteria, process and results for the delimitation of electoral boundaries in a simplified manner	Not applicable in 2022 election cycle
c	List of constituencies or voting districts	Complied
d	Full details of the voter registration process including criteria, qualifications, requirements and location of voter registration centres	Complied
e	Voters roll containing information allowing the unique identification of each voter, including the full name, identity number, photograph (where it exists), gender and age of each voter, and any subsequent amendments to this information	Complied
f	Information on arrangements for the inspection of the voters roll by the public to allow for any necessary corrections to be made	Complied

157 IEBC 'Commissioners' <https://www.iebc.or.ke/iebc/?commissioners> (accessed 11 October 2022).

g	Operational plan for diaspora voting relating to dates, time and method, including storage and security of ballot boxes until the general count	Mostly complied
h	Criteria for identification of the location of voting stations	Mostly complied
i	Location and number of voting stations	Complied
j	Criteria and requirements for registration of political parties	Complied
k	Details of applications made by political parties for registration as participants in the electoral process, specifying the number of applications made, the number of applications granted, the number denied and reason(s) for each denial	Partly complied
l	Details of political parties registered as participants in the electoral process, specifying their number and names	Complied
m	Qualification, rules and procedure for nomination of candidates by political parties	Complied
n	Code of conduct applicable to political parties and candidates during the electoral campaign period	Complied
o	Number and nature of complaints or petitions received by the IEBC and how they have been addressed	Mostly complied
p	Mediation and conflict resolution mechanisms in place for addressing election related complaints or petitions	Mostly complied
q	Policy on voter education	Complied
r	List of service providers, the criteria for their selection and the content of their service contracts and details of the procurement process	Not complied
s	The criteria for accreditation of election observers and monitors	Complied
t	Timelines for registration of international and domestic election observer missions	Complied
u	Details of applications for accreditation by election observers and monitors, including the number of applications rejected and reasons for the rejection	Partly complied
v	Criteria for accreditation of media during the electoral process	Partly complied

w	Details of application for accreditation by the media, including the number of applications received, number rejected and the reasons for the rejection	Partly complied
x	Code of conduct for media	Complied
y	Number of complaints or petitions received and how they were addressed	Partly complied
z	Categories of observers admitted	Partly complied
aa	Register of the different categories of observers and deployment areas	Not complied

The IEBC released a detailed electoral calendar<sup>158</sup> which it revised from time to time throughout the election period taking account of arising exigencies including concerns raised by stakeholders.<sup>159</sup> It also communicated regular updates on its status of preparedness for the elections.<sup>160</sup>

One of the responsibilities laid on the IEBC by the Constitution is the delimitation of constituencies and wards, which it is required to do at intervals of not less than eight years and not more than 12 years.<sup>161</sup> The last delimitation of constituency boundaries was undertaken by the Interim Independent Boundaries Review Commission in 2010,<sup>162</sup> and the next review will take place after the 2022 election. Most recently, this matter was ventilated in the Supreme Court in relation to a constitutional amendment bill empowering Parliament to directly allocate and apportion 70 newly proposed constituencies. The Court determined that the delimitation of constituency boundaries is a critical mandate of the IEBC which may be reassigned only where the constitutional threshold of reasonable public participation had been met, which in the instant case had not been realised.<sup>163</sup>

The IEBC published by order a list of the 290 electoral constituencies as well as the 1,450 county wards where the elections would be run. It provided the names of the constituencies, counties and wards, the delimited boundaries, as well as their geographical and demographical details.<sup>164</sup>

158 Gazette Notice Nos 430, 431, 432, 433, 434 and 435 <https://www.iebc.or.ke/uploads/resources/AHxYKqSUn0.pdf> (accessed 12 October 2022).

159 IEBC 'Commission engages political parties on roadmap to 2022 general elections' [https://www.iebc.or.ke/news/?Commission\\_engages\\_Political\\_Parties\\_on\\_roadmap\\_to\\_2022\\_General\\_Elections](https://www.iebc.or.ke/news/?Commission_engages_Political_Parties_on_roadmap_to_2022_General_Elections) (accessed 14 October 2022).

160 IEBC 'Status update of general election preparedness' 7 July 2022 <https://www.iebc.or.ke/uploads/resources/VNfdouQVS4.pdf> (accessed 16 October 2022).

161 Art 89 Constitution.

162 IEBC 'The Report of the Interim Independent Boundaries Review Commission' (2010) <https://www.iebc.or.ke/uploads/resources/oep20PEuYn.pdf> (accessed 15 October 2022).

163 *David Ndii* (n105) para 270.

164 National Assembly Constituencies and County Assembly Wards Order (LN14/2012) [http://kenyalaw.org/8181/exist/kenyalex/sublegview.xql?subleg=No.%209%20of%202011#KE/LEG/EN/AR/I/NO.%209%20OF%202011/SUBLEG/HC\\_1](http://kenyalaw.org/8181/exist/kenyalex/sublegview.xql?subleg=No.%209%20of%202011#KE/LEG/EN/AR/I/NO.%209%20OF%202011/SUBLEG/HC_1) (accessed 27 October 2022).



The IEBC also communicated the number and location of voting stations.<sup>165</sup> It also published the locations of all its 290 constituency offices.<sup>166</sup>

The IEBC also provided details of the voter registration process including criteria, qualifications, requirements and location of voter registration centres. The Commission provided information including on:

1. How to register as a voter;<sup>167</sup>
2. The end of voter registration;<sup>168</sup> and
3. Voter registration information in the diaspora.<sup>169</sup>

The IEBC posted lists of the numbers of registered voters disaggregated by county, constituency, county assembly ward, polling station, prison and voters residing outside Kenya.<sup>170</sup> It also provided voters with the procedure for inspecting the voters roll for purposes of verifying and correcting their information,<sup>171</sup> to which end it established a voter verification portal.<sup>172</sup>

The IEBC prepared an information brochure on diaspora voter registration explaining the perimeters it used to map registration centres. These centres were in Kenyan embassies and consulates in 12 countries: Uganda; Tanzania; Rwanda; Burundi; South Africa; South Sudan; United States of America; United Kingdom; United Arab Emirates; Qatar; Germany; and Canada. It explained the requirements for one to register as a diaspora voter, and communicated that registration would start on 21 January 2022 for 15 days. Voter registration would be conducted during the usual working hours for the embassies but arrangements would also be made to continue registration during weekends. It clarified that diaspora voters would participate only in the presidential election. The IEBC also advised that accredited persons could apply to observe diaspora voter registration.<sup>173</sup>

The IEBC communicated on its website that 82 political parties were certified as compliant for the 2022 general elections.<sup>174</sup> It also provided the names and numbers of political parties that participated in various stages of the elections, including:

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165 Gazette Notice No. 7996 Polling Stations for the 9th of August, 2022 General Election <https://www.iebc.or.ke/uploads/resources/6eYBKyk30d.pdf> (accessed 19 October 2022).

166 IEBC 'Constituency Offices' <https://www.iebc.or.ke/iebc/?constituency> (accessed 19 October 2022).

167 IEBC: 'How to Register' <https://www.iebc.or.ke/registration/?how> (accessed 20 October 2022).

168 <https://www.iebc.or.ke/uploads/resources/rPooywfkW9.pdf> (accessed 22 October 2022).

169 IEBC 'Voter Registration Information in Diaspora' <https://www.iebc.or.ke/uploads/resources/O7eG5l5L3H.pdf> (accessed 22 October 2022).

170 IEBC 'Statistics of Voters 2022' [https://www.iebc.or.ke/registration/?Statistics\\_of\\_Voter\\_2022](https://www.iebc.or.ke/registration/?Statistics_of_Voter_2022) (accessed 21 October 2022).

171 IEBC 'Pamphlet motivating people to register' <https://www.iebc.or.ke/uploads/resources/Hpm6XSPkZb.pdf> (accessed 24 October 2022).

172 IEBC 'Voter Verification' <https://verify.iebc.or.ke/index.php/Voterverification> (accessed 19 October 2022). This page is no longer accessible.

173 IEBC (n 169).

174 IEBC 'Status update of political parties certified as compliant for the 2022 general elections' <https://www.iebc.or.ke/uploads/resources/rwgm3myDPZ.pdf> (accessed 23 October 2022).

1. Parties that submitted candidates for list seats in Parliament and county assemblies;<sup>175</sup> and
2. Status of review of political party lists.<sup>176</sup>

For the 2022 electoral cycle, the RPP certified nomination rules for political parties for submission to the IEBC to enable political parties to submit their nomination rules to the IEBC at least six months before the nomination of candidates.<sup>177</sup> The RPP also posted the 2022 register of fully registered political parties with their particulars.<sup>178</sup>

The IEBC provided on its website details of political parties registered as participants in the electoral process, specifying their numbers and names.<sup>179</sup>

Regarding qualifications, rules and procedure for nomination of candidates by political parties, the IEBC endeavoured to enforce statutory and other requirements. In the instance of the two-thirds gender rule, it sought to comply with a determination where the High Court ordered it to reject any nomination list for members of the National Assembly and Senate that did not comply with the two-thirds gender principle.<sup>180</sup> The IEBC consequently declined to receive nominations from political parties whose lists had not met the two-thirds gender rule. The Commission exercised and communicated its flexibility, for example, by revising the deadline for submission of nomination lists on two occasions, initially from 28 April 2022 to 9 May and then to 12 May.<sup>181</sup>

The Second Schedule of the Elections Act (EA)<sup>182</sup> establishes the Electoral Code of Conduct to which political parties, candidates and other persons participating in elections subscribe. The Code seeks to: ‘... promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals.’<sup>183</sup> From time to time, the IEBC reminded political parties and other electoral stakeholders to adhere to the Electoral Code of Conduct. These calls were invariably,

175 IEBC ‘Submission of party lists by political parties’ <https://www.iebc.or.ke/uploads/resources/mFFLdlJ4WL.pdf> (accessed 23 October 2022).

176 IEBC ‘Status of Review of Political Party Lists Press Release’ <https://www.iebc.or.ke/uploads/resources/ua7ylhUEhG.pdf> (accessed 20 September 2022).

177 ORPP ‘Political Parties Election and Nomination Rules’ [https://www.orpp.or.ke/images/UPLOADSpdf/LIST\\_OF\\_PP\\_TO\\_IEBC\\_cleared\\_for\\_election\\_and\\_nomination\\_rules.pdf](https://www.orpp.or.ke/images/UPLOADSpdf/LIST_OF_PP_TO_IEBC_cleared_for_election_and_nomination_rules.pdf) (accessed 23 October 2022).

178 ORPPP ‘Fully Registered Political Parties List’ [https://www.orpp.or.ke/images/PDFdocuments/REGISTER-OF-PARTICULARS-FULLY-REGISTERED\\_PARTIES-2022.pdf](https://www.orpp.or.ke/images/PDFdocuments/REGISTER-OF-PARTICULARS-FULLY-REGISTERED_PARTIES-2022.pdf) (accessed 25 October 2022).

179 IEBC ‘Party list’ [https://www.iebc.or.ke/resources/?Party\\_list](https://www.iebc.or.ke/resources/?Party_list) (accessed 25 October 2022) & IEBC ‘Status Update of Political Parties certified as compliant for the 2022 General Elections’ <https://www.iebc.or.ke/uploads/resources/rwgm3myDPZ.pdf> (accessed 25 October 2022).

180 *Katiba Institute v Independent Electoral & Boundaries Commission* [2017] eKLR <http://kenyalaw.org/caselaw/cases/view/144567/> (accessed 29 October 2022).

181 IEBC ‘Political parties must adhere to two-thirds gender rule, Commission warns’ [https://www.iebc.or.ke/news/?Political\\_Parties\\_Must\\_Adhere\\_to\\_TwoThirds\\_Gender\\_Rule%2C\\_Commission\\_Warns%28accessed](https://www.iebc.or.ke/news/?Political_Parties_Must_Adhere_to_TwoThirds_Gender_Rule%2C_Commission_Warns%28accessed) (accessed 27 October 2022).

182 Elections Act 24 of 2011 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2024%20of%202011> (accessed 25 October 2022).

183 IEBC ‘Electoral Code Conduct’ <https://gck.or.ke/wp-content/uploads/2020/08/ELECTORAL-CODE-OF-CONDUCT.pdf> (accessed 28 October 2022).

however, not followed up with sanctions for breaches. The IEBC, for example, condemned the campaign-related violence witnessed at Jakaranda Grounds on 19 June 2022;<sup>184</sup> but pointed out that it could not investigate the suspected perpetrators of the violence since the High Court had declared as unconstitutional the Electoral Code of Conduct Enforcement Committee established in the Electoral Code of Conduct, determining that the IEBC did not have jurisdiction to summon witnesses or conduct hearings on complaints of breaches to the Code. Only the Office of the Director of Public Prosecutions (DPP) could investigate and prosecute perpetrators of election-related violence.<sup>185</sup>

The IEBC prepared material to guide political parties on election dispute resolution. These included:

1. Election Dispute Resolution Booklet;<sup>186</sup> and
2. Guidelines on Addressing Violations of the Electoral Code of Conduct and Resolving Electoral Disputes and complaints.<sup>187</sup>

In similar fashion, the ORPP prepared and posted various resources to guide political parties in their work, including the Political Parties Leadership Training Sourcebook, the Popular Simplified Version of the Political Parties Act, the Political Parties Act in a Nutshell, Guide to Political Parties Registration, Guide to Political Parties Membership, Guide to Mergers, the Political Parties Manual, and Quick Guide for Party Candidates' Agents.<sup>188</sup>

Regarding its policy on voter education, the IEBC's priorities included: automating voter education providers; developing standard operating procedures for voter education; developing a framework for conducting voter education throughout the electoral cycle; increasing the reach of voter education across the country; and conducting voter education for special interest groups.<sup>189</sup> The Commission's Voter Education, Partnerships and Communications Programme develops voter information and education materials and undertakes voter education. For the 2022 elections cycle, the IEBC used a voter education curriculum, a voter education training manual, and a number of other education materials.<sup>190</sup> In the 2022 elections cycle, the IEBC finalised the development of voter education material at the end of January 2022, only seven months to the elections,<sup>191</sup> and stakeholders continually raised concerns that the Commission

184 IEBC 'Campaign related violence at Jakaranda Grounds' 20 June 2022 (accessed 27 October 2022).

185 *Sabina Wanjiru Chege v Independent Electoral and Boundaries Commission* [2022] eKLR <http://kenyalaw.org/caselaw/cases/view/231319/> (accessed 20 October 2022).

186 IEBC 'Election Dispute Resolution Booklet' (2022) <https://www.iebc.or.ke/uploads/resources/YFZ8tN8nyE.pdf> (accessed 12 September 2022).

187 IEBC 'Guidelines on Addressing Violations of the Electoral Code of Conduct and Resolving Electoral Disputes and Complaints' <https://www.iebc.or.ke/uploads/resources/iKwltPe1ST.pdf> (accessed 27 October 2022).

188 ORPP 'Regulatory Framework' <https://www.orpp.or.ke/index.php/regulatory-framework/acts> (accessed 28 October 2022).

189 IEBC (n 141).

190 IEBC 'Voter education curriculum' <https://www.iebc.or.ke/uploads/resources/oqwLzhwU42.pdf>  
IEBC 'Voter education training manual' <https://www.iebc.or.ke/uploads/resources/pdQMe3WKeV.pdf>  
IEBC 'Handbook on elective positions in Kenya' <https://www.iebc.or.ke/uploads/resources/wNa7w1TbBm.pdf> (accessed 29 October 2022).

191 IEBC 'Commission develops and validates voter education information and materials' <https://www.iebc>.

was not undertaking effective voter education. One state agency, the National Gender and Equality Commission, raised the concern that the IEBC had not trained persons with disabilities at the community level on how to participate in the polls including by availing voter education material in braille and by deploying sign language interpreters.<sup>192</sup> On a positive note, the IEBC partnered with AssistAll, a sign language interpreters' mobile platform, to disseminate voter education information to deaf persons.<sup>193</sup>

Section 42 of the EA provides that the IEBC may at any election accredit election observers, election agents or media representatives. The IEBC established the Accreditation Management System portal where election observers and monitors as well as media wishing to cover the elections applied for accreditation.<sup>194</sup> The IEBC also uploaded onto its website accreditation resources, including application forms for accreditation as election observers, voter education providers and media.<sup>195</sup> The Commission also prepared a handbook for election observers.<sup>196</sup> As we have already shown, the IEBC established and communicated elaborate procedures for seeking accreditation as election observers or monitors. The Chairperson of the IEBC indicated that the total number of election observers and monitors for the 2022 general election was 120,731.<sup>197</sup> The IEBC, however, did not indicate how many and why some applications may have been rejected.

The IEBC established an accreditation framework for media in conjunction with the Media Council of Kenya (MCK). The IEBC uploaded onto its website the form for applying for accreditation.<sup>198</sup> The IEBC accredited 4,850 journalists to cover the elections.<sup>199</sup> The IEBC also set up a media centre at the national tallying centre.<sup>200</sup>

The Electoral Code of Conduct included provisions covering media houses and their representatives. These include: adhering to media professional ethics in covering the campaigns; and not

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[or.ke/news/?Commission\\_Develops\\_and\\_Validates\\_Voter\\_Education\\_Information\\_and\\_Materials](https://www.iebc.or.ke/news/?Commission_Develops_and_Validates_Voter_Education_Information_and_Materials) (accessed 29 October 2022).

192 J Murimi 'IEBC faulted over failure to hold voter education for special-interest groups' *Nation* 29 July 2022 <https://nation.africa/kenya/news/politics/iebc-faulted-over-failure-to-hold-voter-education-for-special-interest-groups-3896008> (accessed 26 October 2022).

193 IEBC 'IEBC partners with assistALL' <https://www.youtube.com/watch?v=aLQS0ePhzi0> (accessed 28 October 2022).

194 IEBC 'Accreditation Management System' <https://ams.iebc.or.ke/> (accessed 30 October 2022).

195 IEBC 'Application for Accreditation as Election Observers, Voter Education Providers and Media for General Election activities (2022) General Elections' <https://www.iebc.or.ke/uploads/resources/CHe78R6CCf.pdf> (accessed 30 October 2022).

196 IEBC 'General elections handbook for observers' <https://www.iebc.or.ke/uploads/resources/UETwRPuWGo.pdf> (accessed 01 November 2022).

197 Remarks by the IEBC Chairman (n 3).

198 IEBC 'Media application for accreditation to observe /report elections' <https://www.iebc.or.ke/uploads/accreditations/7EJY2Y6X2o.pdf> (accessed 01 November 2022).

199 Remarks by the IEBC Chairman (n 3).

200 Media Council of Kenya 'Hits and Misses: Media Performance and Press Freedom Violations Pre, During & Post the August 9 General Elections in Kenya' 2022 <https://mediacouncil.or.ke/sites/default/files/downloads/REPORT%20ON%20MEDIA%20PERFORMANCE%20DURING%20THE%202022%20GENERAL%20ELECTION.pdf> (accessed 02 November 2022).

publishing or distributing exit polls of the elections during the prescribed hours of elections.<sup>201</sup>

One area where the IEBC repeatedly dithered on providing full information related to publication of the voter register audit report undertaken for it by KPMG. The IEBC provided a truncated 47-page report,<sup>202</sup> rather than the full 156 report. It also provided the report only three days before the elections.<sup>203</sup> The Commission had argued it had, as required by law, submitted the report to Parliament, which had already adjourned for the elections and therefore could not process it.<sup>204</sup> The Chairperson of the Commission had explained that anomalies revealed by the audit included 246,465 dead voters, 481,711 voters registered more than once and 226,143 voters registered with identity cards that did not validly belong to them.<sup>205</sup>

Another controversy related to the publication of ballot material. The IEBC had contracted a Greece-based company to print election material including ballots. The IEBC made arrangements for representatives of political parties to visit the printers alongside members of the Commission. Some political parties queried the integrity of the printing process, protesting the fact that the IEBC had printed two sets of form 34A booklets; but this matter seemed to have been resolved when the IEBC's Chairperson agreed that only booklet 1 of 34A forms would be used at the polling stations to transmit results while booklet 2 would stay sealed as part of the electoral material.<sup>206</sup> Concerns were also raised that the IEBC had printed the election ballots before candidates' names were published in the Kenya Gazette, in contravention of the law. Some members of the IEBC also complained that the printed electoral material arrived into the country without due notice.<sup>207</sup> Although these matters were ventilated vigorously in the petition that challenged Ruto's election as president, the Supreme Court did not find merit in the contentions.<sup>208</sup>

The IEBC is required to settle electoral disputes such as those relating to or arising from nominations but excluding election petitions. The Commission appointed its Disputes Resolution Committee on 6 June 2022. The Chairperson of the IEBC explained that the IEBC's

201 IEBC 'Electoral Code of Conduct' <https://gck.or.ke/wp-content/uploads/2020/08/ELECTORAL-CODE-OF-CONDUCT.pdf> (accessed 06 November 2022).

202 KPMG 'Independent audit of the register of voters' (2022) <https://www.iebc.or.ke/uploads/resources/0CpUTC8Q5a.pdf> (accessed 09 November 2022).

203 M Nyamori 'Audit exposes major loopholes in IEBC voter register' *Nation* 4 August 2022 (accessed 07 November 2022).

204 W Menya 'Queries mount as IEBC prepares for August the 9<sup>th</sup> elections' *Nation* 3 July 2022 <https://nation.africa/kenya/news/politics/queries-mount-as-iebc-prepares-for-august-9-elections-3867328> (accessed 07 November 2022).

205 C Omulo 'Kenya electoral body to blot out 1.18 million voters from register' *The East Africa* 9 June 2022 <https://www.theeastafrican.co.ke/tea/news/east-africa/kenya-elections-blot-out-1-18-million-voters-from-register-3843094> 28 (accessed 07 November 2022).

206 M Nyamori 'Only one booklet of form 34A to be used, Chebukati clarifies amidst concerns' *Nation* 29 July 2022 <https://nation.africa/kenya/news/politics/only-one-booklet-of-form-34a-to-be-used-chebukati-clarifies-amidst-concerns-3896358> (accessed 07 November 2022).

207 S Owino 'Eyes on IEBC as first batch of ballot papers makes surprise arrival' *Nation* 8 July 2022 <https://nation.africa/kenya/news/politics/the-chaos-at-iebc-3872790> (accessed 07 November 2022).

208 *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) <http://kenyalaw.org/caselaw/cases/view/235768> (accessed 06 November 2022).



Disputes Resolution Committee would hear 262 complaints and that determinations would be made within 48 hours since the Committee had three parallel panels.<sup>209</sup>

It should be noted that Kenyans sought to use the courts to ensure that the IEBC delivered credible elections. The IEBC's treatment of independent presidential candidates received particular judicial scrutiny. The High Court quashed the Commission's requirement for presidential candidates to submit copies of identity cards of their supporters (at least 2,000 people in at least 24 counties), finding that the requirement contravened the Constitution and the DPA.<sup>210</sup> Then, an independent aspiring presidential candidate got orders from the High Court requiring the IEBC to include his name on the ballot as an independent candidate.<sup>211</sup> The IEBC, however, appealed this determination,<sup>212</sup> and the aspirant was not included on the presidential ballot.

Finally, on 4 August, in a petition filed by KHRC, the High Court quashed the IEBC's decision not to use the manual register of voters in the polls alongside the KIEMS electronic voter register.<sup>213</sup> This late adjustment to the Commission's poll strategy resulted in some confusion during election day.<sup>214</sup>

## Recommendations:

1. The ORPP should provide details of applications made by political parties for registration as participants in the electoral process. In particular, it should provide information on the number of applications made, the number of applications granted, the number denied and reason(s) for each denial.
2. The IEBC should provide information on:
  - a. The storage and security of the ballot boxes of diaspora voters until the general count;
  - b. The criteria for identification of the location of voting stations;
  - c. How it has addressed all complaints or petitions throughout an electoral cycle;
  - d. Its service providers, the criteria for their selection and the content of their

209 E Nyarangi 'IEBC to hear complaints by all aspirants at Milimani Lawcourts' *The Standard* <https://www.standardmedia.co.ke/article/2001447752/iebc-to-hear-complaints-by-all-aspirants-at-milimani-law-courts> (accessed 08 November 2022).

210 *Free Kenya Initiative & 17 others v Independent Electoral & Boundaries Commission & 5 others; Kenya National Commission on Human Rights & another (Interested Party)* [2022] KEHC 10217 (KLR) <http://kenyalaw.org/caselaw/cases/view/235768> (accessed 10 November 2022).

211 *Lichete v Independent Electoral and Boundaries Commission & another; Attorney General (Interested Party)* [2022] KEHC 13244 (KLR) <http://kenyalaw.org/caselaw/cases/view/235315> (accessed 10 November 2022).

212 E Wanjala 'IEBC appeals court ruling on Reuben Kigame's clearance' *The Star* 20 July 2022 <https://www.the-star.co.ke/news/2022-07-20-iebc-appeals-court-ruling-on-reuben-kigames-clearance/> (accessed 06 November 2022).

213 *Kenya Human Rights Commission & 6 others v Independent Electoral and Boundaries Commission & 2 others; Communication Authority Of Kenya & 3 others* [2022] KEHC 10579 (KLR) <http://kenyalaw.org/caselaw/cases/view/236467/> (accessed 06 November 2022).

214 Angaza Movement 'Angaza statement on the 2022 general elections' 10 August 2022 <https://s3-eu-west-1.amazonaws.com/s3.sourceafrica.net/documents/121146/Angaza-Movement-Press-Statement-on-Kenya-s-9th.pdf>. (accessed 09 November 2022).

- service contracts and details of the procurement process;
- e. Details of applications for accreditation by election observers and monitors, including the number of applications rejected and reasons for the rejection;
- f. Details of the number of applications for accreditation by the media received, and the number rejected and the reasons for the rejection; and
- g. The register of the different categories of observers and deployment areas.

## 5.5 COMPLIANCE WITH GUIDELINE 18 (ELECTION DAY)

Guideline 18 of the Guidelines on Access to Information and Elections in Africa requires the IEBC to proactively disclose certain information during election day.

Compliance with Guideline 18 (Election Day)		
	Description	Status of compliance
a	Location, as well as opening and closing times of voting stations	Complied
B	Support mechanisms for voters and election officials through the provision of episodic and periodic reports of election day activities	Complied
C	Information on the closing of voting and vote reconciliation, counting and results management system starting from vote counts at the voting station up to the announcement of final results	Mostly Complied
D	Information on the occurrence of any technical glitches and how these have been addressed	Mostly complied
E	Information on all complaints or petitions received and how these have been addressed	Partly complied
F	Election results by polling station, which shall be conspicuously posted at each voting station and in publicly accessible electronic and online formats	Partly complied

As already explained, the IEBC published the locations where polling would be undertaken. It encouraged voters to confirm their polling stations, and it established a voter verification portal where voters could independently verify their details.<sup>215</sup> Voters could also send their identification number to SMS code 70000 to verify registration and other particulars including their polling stations and voting streams.<sup>216</sup> The IEBC also communicated in both legacy and

<sup>215</sup> IEBC 'Check your voting particulars today' <https://verify.iebc.or.ke/> (accessed 03 November 2022).

<sup>216</sup> IEBC 'How to Check Voter Registration Details through SMS Code 70000' <https://kenyayote.com/iebc->

social media that the polls would open at 6am and close at 5pm on 9 August, that time lost at the beginning of polling would be compensated at the end of the day, and that voters on the queues at the end of the day would be able to vote.

On election day, the IEBC provided regular updates on the status of the polls on different legacy media, including radio and television, and on social media platforms, including Twitter, Facebook and Instagram. It communicated information such as the number of persons who had voted; warning against violations of the law; and explaining how it was responding to various electoral glitches around the country. The IEBC had established a call centre where the public could use a toll-free number to make inquiries or report incidents.<sup>217</sup> Complaints were raised in social media that the toll-free numbers were not attended.

The IEBC had the obligation to provide information on the closing of voting and vote reconciliation, counting and results management system starting from vote counts at the voting station up to the announcement of final results. Election observers and monitors made notable findings in this regard. Field monitors deployed by the Kenya National Commission on Human Rights reported that in a majority of sampled polling stations, presiding officers failed to pin appropriately the results of the polls as reflected in form 34A. The Election (General) Regulations Require presiding officers to affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station. Yet they had apparently been directed by returning officers to instead provide photographic evidence of carbon prints of the forms which often were quite invisible.<sup>218</sup> The monitors also found notable instances of disruption of the electoral process at vote tallying centres, manifested by instances of violence against IEBC officials and disruption of vote tallying in places such as Kirinyaga, Vihiga, Kwale, Wajir and West Pokot.<sup>219</sup>

An observation mission focusing on technology aspects of the elections in a 21 county sample, among others, found that while the IEBC officials were fairly competent in using the supplied KIEMS kits, some difficulties were encountered such as where electoral officials could not recall the initialisation process or they had forgotten their passwords; and some KIEMS tablets could not connect to any network, set the correct time or they were generally slow, overheated, did not function as expected or completely failed to start. Replacement of failed KIEMS kits either did not happen or took long. The KIEMS devices had difficulties biometrically identifying the fingerprints of voters with backgrounds such as casual labour, farming and elderly people. The mission also found that information on how to access the SMS short code or the voter registration verification portal was not displayed at the polling stations, making it difficult for voters to verify their polling stations or streams. Most presidential results (forms 34As)

[confirm-check-voter-registration-details-sms-code-70000/](#) (accessed 03 November 2022).

217 Remarks by the IEBC Chairman (n 3).

218 D Kabiru 'Human rights update on the votes counting, tallying and transmission of results' *Kenya National Commission on Human Rights* (12 August 2022) <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1141/Press-Statement-HUMAN-RIGHTS-UPDATE-ON-THE-VOTES-COUNTING-TALLYING-AND-TRANSMISSION-OF-RESULTS> (accessed 06 November 2022).

219 As above.

were transmitted electronically and made accessible on the IEBC's public portal. The mission, however, noted that disinformation and misinformation on social media focusing on election results was widespread, with allegations such as that the IEBC servers had been hacked. The mission highlighted the fact that Kenyans remained greatly suspicious over the susceptibility of election technology to manipulation.<sup>220</sup>

## Recommendations:

1. The IEBC should ensure that it continues to provide information on vote counts at the voting stations until the final results are announced, and that it provides full information on all complaints or petitions received and how these have been addressed.
2. The IEBC should also ensure that results are posted conspicuously at each voting station and in publicly accessible electronic and online formats.

## 5.6 COMPLIANCE WITH GUIDELINE 19 (POST-ELECTION DAY)

Guideline 19 of the Guidelines on Access to Information and Elections in Africa requires the IEBC to proactively disclose certain information after election day.

Compliance with Guideline 19 (post-election day)		
	Description	Status of compliance
a	Progress in achieving timelines for the declaration of collated results which shall be within a reasonable time or as stipulated by law	Complied
b	Declaration and publication of final election results, down to the polling station level	Complied
c	Details of all objections, complaints or petitions received and how they were addressed	Partly complied
d	Calculations or allocations of seats and timeframes and processes for the adjustment of political party lists, where applicable	Complied
e	Evaluation reports on the elections produced by the IEBC	Complied

The EA and other relevant statutes and regulations require a presiding officer to enter the presidential election results in Form 34A, take a duly signed image of the form, send it both to the

220 KICTANET 'Preliminary observation report: KICTANET technology observer mission during Kenya's 2022 general election' (2022) <https://www.kictanet.or.ke/mdocs-posts/2022-kictanet-preliminary-election-observation-report/> (accessed 08 November 2022).

constituency tallying centre and the National Tallying Centre, and deliver the form physically to the constituency returning officer. The constituency returning officer subsequently aggregates results from the constituency in Form 34B which is similarly posted electronically and then delivered physically to the National Tallying Centre, where in turn this information is verified by matching the transmitted Form 34As and Form 34Bs with the physical forms, after which the presidential results are aggregated into Form 34C where the results of all presidential candidates are entered. The Chairperson of the IEBC then prepares Form 34D which is the certificate declaring the winner of the presidential elections.<sup>221</sup>

Following the close of the polls, the IEBC published regular updates on the presidential results as captured in Form 34A and Form 34B as transmitted to it electronically by presiding officers and returning officers across the country. These forms were uploaded on the IEBC Live Portal. The IEBC also started to post verified updates of the presidential results after matching the electronic forms with physical copies delivered by the officials. One of the contentions prior to the declaration of Ruto as the president elect was that the IEBC stopped updates on the tallied and verified results and that it did not announce the results of 27 constituencies at the National Tallying Centre.

The IEBC performed the task of calculating and allocating list seats timeously. A number of controversies, however, reared their heads. In one instance, an aggrieved nominee from the Wiper Democratic Movement successfully sought orders from the High Court requiring the IEBC to gazette him as Wiper's nominated MP to the National Assembly despite the fact that the Party had purportedly replaced his name as its first nominee on the National Assembly nomination list.<sup>222</sup>

The IEBC prepared a post-election evaluation report.<sup>223</sup>

## **Recommendation:**

The IEBC should proactively provide information on details of all objections, complaints or petitions received and how they were addressed.

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221 D Mwere 'Chebukati: we'll start posting results after verifying forms 34A' *Nation* 10 August 2022 <https://nation.africa/kenya/news/politics/chebukati-we-ll-post-results-after-verifying-forms-34a-3909260> (accessed 08 November 2022).

222 E Nyarangi 'High Court orders IEBC to gazette Talib as Wiper nominated MP' *The Star* <https://www.standardmedia.co.ke/article/2001455501/high-court-orders-iebc-to-gazette-talib-as-wiper-nominated-mp> (accessed 10 November 2022).

223 IEBC 'Post-Election Evaluation Report For The 9 August 2022 General Election'( 2022) <https://www.iebc.or.ke/uploads/resources/pabjKTV6Xa.pdf> (accessed 10 November 2022).





## CHAPTER 6



# CHAPTER 6

## 6. ASSESSING COMPLIANCE OF POLITICAL PARTIES TO THE GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA

### 6.1 COMPLIANCE WITH GUIDELINE 20 (INTERNAL INFORMATION)

Guideline 20 of the Guidelines on Access to Information and Elections in Africa requires political parties and candidates to proactively disclose certain internal information.

Compliance with Guideline 20 (internal information)		
	Description	Status of compliance
a	Constitution, names of office bearers as well as the policies of the political party	Mostly complied
b	Symbols, logos or trademarks associated with the political party	Complied
c	Number of registered members	Not complied
d	Criteria and procedure for nomination and election of candidates for internal and external office	Mostly complied
e	Process for dispute resolution and the relevant appeal mechanisms	Complied
f	Mechanisms for public participation, including any special mechanisms for persons with disabilities	Partly complied
g	Mechanisms for monitoring of the nomination process and proceedings	Mostly complied
h	Names of party agents or representatives responsible for or on duty at various stages of the electoral process	Not complied
i	Assets, investments, membership subscriptions, subventions and donations	Not complied

The PPA is the primary statute that provides for the registration, regulation and funding of political parties. The PPA articulates high ideals and establishes impeccable standards which, unfortunately, are respected in default rather than in adherence. Parties are established,

refashioned or abandoned essentially as special purpose vehicles for peddling transactional politics. Yet, the PPA establishes noble roles and functions of political parties, including:

1. Promoting the representation in Parliament and county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities;
2. Sensitising the public on the functioning of the political and electoral system;
3. Promoting and enhancing national unity;
4. Mobilising citizens to participate in political decisions;
5. Soliciting and articulating public policy priorities; and
6. Shaping and influencing public policy.<sup>224</sup>

The Uhuru-Odinga 2018 ‘handshake’ axis mentioned in chapter one, which eventually became the spearhead for Azimio, used legal instruments including the PPA in machinations to tilt the electoral playing field in their favour. Notably, when Kenyatta and Odinga’s coalition of legislators succeeded in enacting the Political Parties (Amendment) Bill (2022), it was thought this would advantage Odinga’s, and become a bane for Ruto’s, candidacy since as of that time the latter was not minded to create a coalition party; that the new law would confirm Azimio as a formidable cross-party coalition by protecting the interests of smaller political parties which became part of the coalition.<sup>225</sup> In the event, Ruto called Azimio’s bluff by forming his own not insignificant coalition, Kenya Kwanza.

The PPA articulates the basic requirements on the internal structure and organisation of political parties. An entity becomes a political party in law only when it is registered under the Act. The PPA requires that for an entity to be registered fully as a political party, it must have a name, have a constitution and have a statement of ideology.<sup>226</sup> As well, the entity must have recruited at least 1,000 registered voters from more than half the counties (24). Those members as well as the entity’s governing body must reflect regional and ethnic diversity, gender balance and representation of special interest groups. Not more than two-thirds of the governing body of the entity must be of the same gender. The entity must demonstrate that members of its governing body meet the requirements of Chapter Six of the Constitution and the laws relating to ethics; and it must undertake to be bound by the PPA and the Code of Conduct in the First Schedule of the PPA.

Finally, the entity must submit the following information to the ORPP:

1. A list of the names, addresses and identification particulars of all its members;
2. The location of its head office and a postal address;
3. The location and addresses of its branch offices;
4. The disaggregated data of its membership based on each of the components of

224 Sec 4A Political Party Act.

225 T Collins ‘Kenya reshapes elections with Political Parties Bill’ *African Business* 28 January 2022 <https://african.business/2022/01/technology-information/kenya-reshapes-election-with-political-parties-bill/> (accessed 10 November 2022).

226 Sec 6(2) Political Party Act.

- the special interest groups; and
5. The address of the official website of the political party.<sup>227</sup> For the 2022 electoral cycle, the ORPP published the list of registered political parties on its website, including their abbreviations, symbols, colours, postal addresses and locations.<sup>228</sup>

The PPA elaborates on the contents which a political party's constitution must, in the minimum cover. These include: its objects; clearly defined vision, mission, guiding principles and values; membership eligibility criteria, and criteria for resignation or ceasing membership; the rights and duties of members; membership details to be captured on the register including identification details, region, ethnicity, disability, gender and county; the procedure for conducting meetings such as the annual general meeting; requirements for governing bodies including the procedures for their election and quorum; the management system of the party such as the terms of employment of their employees; the party's financial structure; disciplinary measures against members and officials; the right of a party member or member of the public to inspect the books or list of members of the party; procedures for policy development and implementation; asset management policies and procedures; rules for mergers and rules for entering into coalitions; provisions for party dissolution; internal party dispute resolution; and policies on gender and affirmative action for minorities and marginalised groups.<sup>229</sup>

Different political parties had various levels of proactive disclosure on their internal governance and organisation. In line with the above-referred requirements under the PPA, every registered political party had a constitution,<sup>230</sup> office bearers, mission statement,<sup>231</sup> and symbols or logos.<sup>232</sup> While the relatively more dominant political parties had a semblance of recognisable internal policies on a variety of issues, these were invariably not disclosed proactively.

In line with statutory electoral milestones, political parties submitted their party membership lists to the ORPP by 31 March 2022, which subsequently verified and certified the lists for submission to the IEBC.<sup>233</sup> Despite these legal dictates, it should be noted that far too often, political parties did not know the exact number of their registered members let alone disclose

227 Sec 7 Political Party Act.

228 ORPP (n 178).

229 Second Schedule of the Political Party Act.

230 For example, see ODM Constitution <https://odm.co.ke/wpcontent/uploads/2021/05/ODM-Party-Constitution-2015-Final.pdf> (accessed 13 November 2022); JP Constitution [https://globaluploads.webflow.com/61fa0db307d4e6dbea95b2ec/62750a46fcd2a7e4db161b84\\_Jubilee%20Party%20Constitution%20final.pdf](https://globaluploads.webflow.com/61fa0db307d4e6dbea95b2ec/62750a46fcd2a7e4db161b84_Jubilee%20Party%20Constitution%20final.pdf) (accessed 13 November 2022) & Wiper Constitution <https://wiper.co.ke/wp-content/uploads/2022/04/Final-WDM-Wiper-Democratic-Movement-Constitution.pdf> (accessed 13 November 2022).

231 JP 'Story, vision, mission' [https://lm.co.ke/projects\\_and\\_webelements/jp/our-story/](https://lm.co.ke/projects_and_webelements/jp/our-story/) (accessed 12 November 2022).

232 For example see 'Party officials, change of symbol and colours' [https://global-uploads.webflow.com/61fa0db307d4e6dbea95b2ec/624839964278001917bba8b0\\_Jubilee%20Party%20Officials\\_page-0001.jpg](https://global-uploads.webflow.com/61fa0db307d4e6dbea95b2ec/624839964278001917bba8b0_Jubilee%20Party%20Officials_page-0001.jpg) (accessed 12 November 2022) & Official Logo- [https://global-uploads.webflow.com/61fa0db307d4e6dbea95b2ec/624ca6c62105596de10837aa\\_jubilee%20official%20logo.pdf](https://global-uploads.webflow.com/61fa0db307d4e6dbea95b2ec/624ca6c62105596de10837aa_jubilee%20official%20logo.pdf) (accessed 12 November 2022).

233 ORPP 'Salient legal timelines' <https://www.orpp.or.ke/images/downloads/SalientLegalTimelines.pdf> (accessed 15 November 2022).



that information proactively. Membership of political parties remained quite fluid, and members could move or be induced to move from one party to another party on a whim to position themselves or their patrons for ephemeral advantage. In the words of a key informant,<sup>234</sup> a party may have registered 100 members in a week only to find that they had evaporated overnight. New entrants into the political parties' sphere drew their members from existing parties. As well, the assumption that political parties would be constantly engaged with their members was based on a misunderstanding of Kenya's political landscape since people did not care for political parties as such during the interregnum between elections. The requirement for registration of members was unsustainable and onerous.<sup>235</sup>

At the same time, Kenyans quite often found themselves registered as members of political parties without their knowledge or consent. In June 2021, Kenyans raised concerns when it turned out that some had been registered as members of political parties without their consent.<sup>236</sup> This came to pass after Kenyans used an online platform established by the ORRP, the Integrated Political Parties Management System, to confirm their membership status. In the meantime, Kenyans expressed scepticism with the way the ODPC had responded to the data breaches. The ODPC stated that it had received over 200 complaints and was engaging with the ORPP, political parties and other data controllers and processors to ensure compliance with the DPA.<sup>237</sup> The DPC, however, did not take any action against the involved political parties.<sup>238</sup>

Political parties establish the criteria and procedure for nomination and election of candidates for internal and external office.<sup>239</sup> However, again, this criteria and process was honoured more in breach than in respect. This was illustrated by the suspect composition of the lists submitted by political parties for nominated seats in Parliament and county assemblies. As one editorial noted, 'Whereas nominations to the county and national assemblies and the Senate are meant to enhance inclusion by bringing in members of marginalised groups, they are, instead, being used to reward cronies and party charlatans.'<sup>240</sup> The political parties were to submit lists for 12 nominees to the National Assembly, 16 female nominees to the Senate, two youth nominees to the Senate and two nominees with disabilities to the Senate. They were also to submit 47 lists, each representing a county and separately consisting of eight marginalised group nominees;

234 KI2, the CEO of a small political party participating in the election, interviewed on 29 July 2022.

235 As above.

236 J Otieno 'Kenyans protest registration as party members without consent' *The Star* 19 June 2021 <https://www.the-star.co.ke/news/2021-06-19-kenyans-protest-registration-as-party-members-without-consent/> (accessed 16 October 2022).

237 Office of the Data Protection Commissioner, 'Statement on alleged use of personal data in registration to political parties without consent' 25 June 2021 [https://twitter.com/ODPC\\_KE/status/1408353948239597570](https://twitter.com/ODPC_KE/status/1408353948239597570) (accessed 21 October 2022). (accessed 21 October 2022).

238 'Amnesty Kenya *Missed opportunities: a scorecard on the Jubilee Administration* July 2022 <https://www.amnestykenya.org/portfolio/missed-opportunities-a-human-rights-scorecard-on-the-jubilee-administration-and-lessons-for-the-next-government/> (accessed 23 October 2022).

239 For example, see Jubilee Party Nomination Rules 2016 <https://www.iebc.or.ke/uploads/resources/n4Chm2B1sF.pdf> (accessed 12 November 2022) & Wiper Democratic Movement Election and Nomination Rules 2021 <https://wiper.co.ke/wp-content/uploads/2022/04/Nomination-Rules-1.pdf> (accessed 13 November 2022).

240 'Political parties must fix wrong nomination lists' *Nation* 17 July 2022 <https://nation.africa/kenya/blogs-opinion/editorials/political-parties-must-fix-wrong-nomination-lists--3882492>.



and 47 lists, each representing a county and separately consisting of a number of women nominees equal to the number of wards in the respective county. The initial proposals of 79 political parties were rejected by IEBC when it determined that their slates of candidates for nomination to Parliament after the general election did not conform to the law or indeed their touted aspirations of promoting equality. Both party formations proposed the names of their allies and party primary losers for nomination to Parliament after the general election.<sup>241</sup> At the same time, special interest groups continued to raise concerns that political parties put some of their nominees onto the wrong party lists. One ODM nominee for a county assembly seat from minority groups was apparently placed under the disability category although he was not a person with disability.<sup>242</sup>

Political parties generally had an approach for enabling the participation of their members. Political parties, including small parties,<sup>243</sup> had websites which they used as platforms for disseminating statutory announcements and for other general communications. But, as one interviewee for the study noted, political parties discounted the communicative value of websites in preference to social media platforms which possessed far greater reach and sway with the electorate.<sup>244</sup>

Political parties also had an approach for the participation of persons with disabilities since this was a statutory requirement under the PPA. Some political parties indeed had departments tasked to work with persons with disabilities.<sup>245</sup> Candidates with disabilities, however, continued to fare badly in electoral contests. Women Challenge to Challenge, a disabled persons' organisation, reported that women candidates with disabilities in primary party elections faced monumental challenges, and only two of the 20 candidates they had targeted to be picked to contest the general election had succeeded.<sup>246</sup>

The PPA establishes the Code of Conduct for Political Parties to which political parties are required to subscribe and observe. Its aim is to regulate the behaviour of members and office holders of political parties, aspiring candidates, candidates and their supporters, promote good governance and eradicate political malpractices.<sup>247</sup> Some political parties also prepared their

241 W Menya & M Nyamori 'Raila, DP allies dominate lists of National Assembly, Senate nominees' *Nation* 10 July 2022 <https://nation.africa/kenya/news/politics/raila-dp-allies-dominate-lists-of-national-assembly-senate-nominees-3874932> (accessed 14 November 2022).

242 R Kiplagat 'Narok minority group protests after nominee was listed as disabled' *Nation* 18 July 2022 <https://nation.africa/kenya/counties/narok/narok-minority-group-protests-after-nominee-was-listed-as-disabled-3883654> (accessed 14 November 2022).

243 For example, see the website of The Service Party of Kenya <https://tsp.co.ke/> (accessed 14 November 2022).

244 ORPP (n 233).

245 The ODM, for example, established the ODM Party's Disability League <https://odm.co.ke/odm-disability-league/> (accessed 14 November 2022). This page is no longer accessible.

246 I Byron 'Women with disabilities deplore rough political terrain' *Nation* 15 June 2022 <https://nation.africa/kenya/news/gender/women-with-disability-deplore-rough-political-terrain-3849670> (accessed 13 November 2022).

247 First Schedule Political Party Act.

own bespoke codes of conduct.<sup>248</sup> These codes of conduct were, however, as we have already noted, far too often not enforced.

These exacting rules and regulations did not turn political parties into effective vehicles for purveying democracy. Political parties indeed remained reticent to share the basis upon which they determined who should be on their party lists. A candidate who challenged the exclusion of her name on the ODM party at the Election Disputes Resolution Tribunal was not allowed to access and scrutinise the files of the 16 candidates who ODM had shortlisted for the Senate.<sup>249</sup> As well, party members were impervious to the law, rules and regulations as they defected from one party to another. Even days before the 2022 general election, politicians were still moving to and fro different parties jockeying for personal advantage. For example, a Jubilee Party governor candidate stood down in favour of his erstwhile opponent of UDA.<sup>250</sup> Following the declaration of Ruto as president-elect, some politicians in the losing Azimio formation immediately began to swear their political allegiance to the incoming president.<sup>251</sup>

Most political parties contesting the 2022 general election prepared party manifestos announcing their campaign platforms.<sup>252</sup> They also prepared other contingent rules, including party primaries and nomination rules.<sup>253</sup>

While some parties were vigilant regarding their agents or representatives responsible for or on duty at various stages of the electoral process, other parties were not. It was, for example, reported that UDA deployed at least 277,374 agents in 46,229 polling stations.<sup>254</sup> On the contrary, Azimio did not deploy agents in polling stations across many areas critical to their presidential campaign.<sup>255</sup> But it should be pointed out that political parties would be reticent to

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248 For example see ODM 'Code of Conduct' <https://odm.co.ke/wp-content/uploads/2022/03/Form-1-The-ODM-Code-of-Conduct.pdf> (accessed 16 November 2022) & JP 'Code of Conduct form' [https://global-uploads.webflow.com/61fa0db307d4e6d6bea95b2ec/6217828bed640950cdba5b1b\\_Jubilee%20Party%20Code%20of%20Conduct.pdf](https://global-uploads.webflow.com/61fa0db307d4e6d6bea95b2ec/6217828bed640950cdba5b1b_Jubilee%20Party%20Code%20of%20Conduct.pdf) (accessed 16 November 2022).

249 J Wangui 'Tribunal rejects Kwamboka's request to inspect ODM nomination list' *Nation* 2 August 2022 <https://nation.africa/kenya/news/politics/kwamboka-request-to-inspect-odm-nomination-list-rejected-3900772> (accessed 16 November 2022).

250 G Munene 'Blow to Azimio as Jubilee Embu gubernatorial candidate decamps to UDA' *Nation* 5 August 2022 <https://nation.africa/kenya/counties/embu/jubilee-embu-gubernatorial-candidate-decamps-to-uda-3904238> (accessed 14 October 2022).

251 I Mwangi 'Azimio titters as UDM moves to Kenya Kwanza' *All Africa* 18 August 2022 <https://allafrica.com/stories/202208190039.html> (accessed 13 October 2022).

252 See, for example: Kenya Kwanza 'The plan: the bottom up economic transformation agenda (2022-2027)', (2022) <https://uda.ke/downloads/manifesto.pdf> (accessed 16 November 2022) & 'Azimio la Umoja One Kenya Coalition inawezekana agenda 2022-2027' <https://venasnews.co.ke/wp-content/uploads/2022/06/AZIMIO-MANIFESTO.pdf> (accessed 12 October 2022).

253 For example, see ODM 'Party Primaries and Nomination Rules' (2021) <https://odm.co.ke/downloads/> (accessed 14 October 2022).

254 O K'Onyango 'DP Ruto's UDA to deploy nearly 280,000 poll agents' *Nation* 27 July 2022 <https://nation.africa/kenya/news/politics/dp-ruto-s-uda-to-deploy-nearly-280-000-poll-agents-3893494> (accessed 17 November 2022).

255 For example see account of an insider of the Azimio campaign: B Mwangi 'Why Azimio candidate Raila Odinga lost the presidency' *The Standard* <https://www.standardmedia.co.ke/article/2001455563/opinion-why-azimio-candidate-raila-odinga-lost-the-presidency> (accessed 17 November 2022).

publicise the details of their agents since this information could be abused by their competitor political parties.<sup>256</sup>

The PPA requires a political party to ensure that the register of members used in party nominations is accessible to its registered members.<sup>257</sup> A political party is obligated to publish on its official website the dates and venues of the nominations, and the ORPP too is required to publish on its website the dates and venues of a political party's nominations.<sup>258</sup> A political party is required to post in a conspicuous place within each nomination venue the list of members eligible to participate in the nomination.<sup>259</sup> A political party using the direct nomination method is required to publish on its official website the body conducting the nominations and its nomination procedure.<sup>260</sup> No information was available on the extent to which political parties complied with these requirements during the 2022 election cycle.

## Recommendations:

1. Political parties should proactively provide information on the number of their registered members.
2. They should also provide information on the names of party agents or representatives responsible for or on duty at various stages of the electoral process.

## 6.2 COMPLIANCE WITH GUIDELINE 21 (LEGAL FRAMEWORK)

Guideline 21 of the Guidelines on Access to Information and Elections in Africa requires Kenya to establish a legal framework to provide for the proactive disclosure by political parties of certain information.

Compliance with Guideline 21 (legal framework)		
	Description	Status of compliance
a	Receipt of campaign funding from both public and private sources	Partly complied
b	Campaign expenditure broken down into distinct line items and specifying the sources of funding and actual amounts	Not complied
c	Annual audited financial reports	Partly complied

<sup>256</sup> Interview with KI2 ( n 234).

<sup>257</sup> Sec 38D Political Party Act.

<sup>258</sup> Sec 38E(2) Political Party Act.

<sup>259</sup> Sec 38F(1) Political Party Act.

<sup>260</sup> Sec 38F(2) Political Party Act.

The Election Campaign Financing Act (ECFA)<sup>261</sup> provides for the regulation, management, expenditure and accountability of election campaign funds during elections and referenda. The IEBC regulates and administers campaign financing, including by:

1. Setting spending limits and enforcing compliance;
2. Setting contribution limits and verifying sources of contributions to candidates or political parties;
3. Monitoring and regulating campaign expenses; and
4. Providing a framework for the reporting of campaign expenses.<sup>262</sup>

The ECFA requires the IEBC to make rules regulating election campaign financing.<sup>263</sup> In compliance with this obligation, in July 2021, the IEBC sought to require political parties and candidates contesting the 2022 election to open campaign financing accounts, establish financing-expenditure committees and appoint persons to manage campaign funds, at least two months before elections. Expenditure reports would be submitted to the IEBC within 21 days of nominations by political parties and within three months after elections.<sup>264</sup>

The issue of election campaign financing became contentious when the National Assembly's Departmental Committee on Delegated Legislation rejected the Campaign Financing Limits (Election Campaign Financing) Regulations (2020). These Regulations proposed to cap presidential campaign spending for the 2022 election at ksh4.4 billion (around US\$44 million); and to limit campaign spending for governorship, senatorial and woman representative positions on a county-to-county basis at between ksh21.9 million (around US\$219,000) to ksh117.3 million (around US\$1,173,000). The Committee's position was that the IEBC had published the legal notice without parliamentary approval as required by Section 29(1) of the EFCA. Following litigation, the High Court determined that Section 29(1) of the EFCA was unconstitutional since it shifted the responsibility of regulating the amount of money that could be spent by or on behalf of a candidate or party in an election from the IEBC to the National Assembly. The Court, however, declined to set aside the decision of the National Assembly on the basis that the IEBC had not subjected the Regulations to public participation.<sup>265</sup> Consequently, election campaign financing remained unregulated for the 2022 election cycle, and the contending political alliances did not proactively disclose their financing. It was, for example, reported that Odinga had raised hundreds of millions of shillings for his campaign during one dinner event graced by rich politicians and private sector tycoons mostly drawn from the Mt Kenya Foundation, a billionaire's club patronised by businessmen from Central Kenya. One official was quoted as saying: "I'm not authorised to talk about the total money raised but let me ask you, if one

261 Election Campaign Financing Act 42 of 2013 [http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2042%20of%202013#part\\_I](http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2042%20of%202013#part_I) (accessed 10 November 2022).

262 Sec 3(1) Election Campaign Financing Act.

263 Sec 5 Election Campaign Financing Act.

264 B Njeru 'IEBC sets tough financing rules for parties, candidates in 2022 general elections; *The Standard* 2 July 2021 <https://www.standardmedia.co.ke/national/article/2001417252/iebc-sets-tough-financing-rules-for-parties-candidates-in-2022-general-election> (accessed 13 November 2022).

265 *Katiba Institute & 3 others v Independent Electoral Boundaries Commission & 3 others; Law Society of Kenya & another (Interested parties)* [2022] eKLR (Katiba Institute Case) <http://kenyalaw.org/caselaw/cases/view/233076/> (accessed 12 October 2022).

person could bring Sh10 million, what would 500 people bring?<sup>266</sup>

The ECFA prohibits an election candidate or political party from receiving any cash or in-kind contribution from the state or a state institution or agency. It also prohibits a state, state institution or public officer from using any public resource to support or to campaign in support of a candidate or political party; and to support an organisation similarly campaigning for a candidate or political party.<sup>267</sup> It obligates candidates or political parties to disclose the amount and source of contributions received for a campaign for a nomination or an election. Such disclosure is confidential, and details may be disclosed only in the context of addressing a complaint, during an investigation or in relation to court proceedings.<sup>268</sup> The EFCA insists on these confidentiality requirements when it provides that the IEBC shall on request avail for inspection information submitted by a candidate or a political party under the Act; but that this is subject to confidentiality requirements.<sup>269</sup>

The accounts of political parties in receipt of public resources are audited by the Auditor-General.<sup>270</sup>

### **Recommendation:**

The IEBC and Parliament should establish and implement regulations to operationalise the Election Campaign Financing Act to enable the IEBC to cap campaign financing for forthcoming elections. The regulations should include provisions for the proactive disclosure of information on campaign financing.

## **6.3 COMPLIANCE WITH GUIDELINE 22 (USE OF STATE RESOURCES)**

Guideline 22 of the Guidelines on Access to Information and Elections in Africa requires Kenya to adopt laws requiring the proactive disclosure of information on the use by all political parties of all state resources.

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266 M Nyamori and W Menya 'Raila Odinga's Sh1m per plate dinner raises millions for campaign' *Nation* 17 July 2022 <https://nation.africa/kenya/news/politics/raila-odinga-sh1-million-per-plate-dinner-3882474> (accessed 12 October 2022).

267 Sec 14 Election Campaign Financing Act.

268 Sec 16 Election Campaign Financing Act.

269 Sec 26 Election Campaign Financing Act.

270 Parliament of Kenya 'Report of the Auditor on Jubilee Party for the year ended 30 June 2020' <http://www.parliament.go.ke/sites/default/files/202108/Report%20of%20the%20Auditor%20on%20Jubilee%20Party%20for%20the%20year%20ended%2030%20June%202020.pdf> (accessed 13 October 2022).



**Compliance with Guideline 22  
(use of state resources)**

	<b>Description</b>	<b>Status of compliance</b>
a	Financial resources, covering the period starting one year before and ending six months after elections, including government or central bank contracts with currency printers, central bank or monetary policy committee reports, and central bank reports on government issued bonds	Not complied
b	Institutional resources, covering the period starting six months before and ending three months after elections, including advertising rates and the allocation of airtime and space to all political parties in state-supported media coverage, vehicle or flight logs and fuel allocations to government departments, and service agreements, contracts and tenders awarded, their amounts and budgets	Not complied
c	Regulatory resources, covering the period starting one year before and ending six months after elections, including documentary justification for requests for approval of supplementary budgets by Parliament, supplementary budgets passed by Parliament and political party finance legislation	Not complied
d	Enforcement resources, covering the period starting six months before and ending three months after elections, including details of records of the elections deployment strategy for the police, military, paramilitary and other law enforcement agents involved in ensuring security throughout the electoral process	Not complied

A political party funds its activities through a number of ways: membership fees; voluntary contributions; proceeds of its investments; and donations, bequests and grants which, however, may not be made by non-citizens, foreign governments, inter-governmental or non-governmental organisations (NGOs). A political party is obligated to disclose to the ORPP full particulars of all funds or other resources obtained by it from any source.<sup>271</sup> The PPA establishes the Political Parties Fund (PPF) which also provides funds to some political parties.<sup>272</sup> The PPF is constituted of at least 0.3% of the national government's share of revenue; and contributions

<sup>271</sup> Sec 27 Political Party Act.

<sup>272</sup> Sec 23 Political Party Act.

and donations.<sup>273</sup> 70% of the PPF is distributed proportionately with reference to the total number of votes secured by each political party; 15% distributed proportionately on the basis of the number of candidates of the political party from special interest groups elected in the preceding general election; 10% distributed proportionately based on the total number of representatives from the political party elected in the preceding general election; and 5% of the Fund is for its administrative expenses.<sup>274</sup> Following the 2017 general election, only the two then main parties, the Jubilee Party and the Orange Democratic Movement, were eligible to receive monies from the PPF.<sup>275</sup> Recent amendments to the PPA through the Political Parties (Amendments) Act of 2022 now mean that even smaller political parties may qualify to receive funding from the PPF.<sup>276</sup>

The aims of the PPF are to:

1. Promote the representation in Parliament and in the county assemblies of women, persons with disabilities, youth, ethnic and other minorities and marginalised communities, to which at least 30% of the funds allocated to a political party must be used;
2. Promote active participation by individual citizens in political life;
3. Cover the election expenses of the political party and the broadcasting of the policies of the political party;
4. Organise civic education in democracy and other electoral processes;
5. Bring the political party's influence to bear on the shaping of public opinion; and
6. Cover staff expenses of the political party which shall not be more than 30% of the moneys allocated to the political party.<sup>277</sup>

The PPA requires each political party, within 90 days of the end of its financial year, to publish information on the sources of its funds in at least one newspaper with national circulation and on its website. The information to be published includes the sources of its funds (amounts from the PPF, receipts from members and supporters, and amounts and sources of donations); its income and expenditure; and its assets and liabilities. Failure to comply with these provisions attracts criminal sanctions and disqualification from receiving monies from the PPF.<sup>278</sup> More specific to elections, the PPA requires a political party, at least 90 days before a general election, to submit to the ORPP a register of members and a statement of assets and liabilities.<sup>279</sup> The consequences of non-compliance are framed quite starkly, as follows: 'Notwithstanding any other penalty provided in this Act or in any other written law, the Registrar shall deregister a

<sup>273</sup> Sec 24 Political Party Act..

<sup>274</sup> Sec 25(1) Political Party Act.

<sup>275</sup> B Gikandi & M Nyamori 'Treasury releases sh519 million to Jubilee and ODM' *The Standard* <https://www.standardmedia.co.ke/politics/article/2001418051/treasury-releases-sh519-million-to-jubilee-and-odm> (accessed 20 November 2022).

<sup>276</sup> ORPP 'Administration of the Political Parties Fund' <https://www.orpp.or.ke/index.php/services/funding-and-political-parties> (accessed 25 November 2022).

<sup>277</sup> Sec 26 Political Party Act.

<sup>278</sup> Sec 29 Political Party Act.

<sup>279</sup> Sec 30 Political Party Act.

political party which— (a) fails to comply with this section; or (b) submits a statement which is false in any material particulars'.<sup>280</sup> The ORPP has never applied this sanction. The PPA requires a political party to keep proper books and records of accounts of its income, expenditure, assets and liabilities; and to submit its accounts for the previous year to the auditor-General Within three months of the end of the financial year.<sup>281</sup> Political parties have been audited in terms of this provision.<sup>282</sup> A notable challenge in this regard is that the Auditor-General usually has a huge backlog of reports awaiting auditing, making it difficult for stakeholders to make timely decisions on the basis of audits.<sup>283</sup> It is, however, illuminating that the Kenyatta administration attempted to delete this provision (s31(3) through the Political Parties (Amendment) Bill, 2022, before the High Court determined that the deletion was unconstitutional.<sup>284</sup>

The PPA also entitles any person to inspect the audited accounts filed by a political party. Section 31(5) of the PPA provides as follows: 'Any person shall be entitled, to inspect the audited accounts filed by a political party and, upon payment of a fee prescribed by the Registrar be issued copies of the audited accounts'.

A study undertaken by the Centre for Multiparty Democracy sought to find out the extent to which political parties had conformed with statutory requirements on support for special interest groups, i.e. women, youth, persons with disabilities and minorities and marginalised groups. As we have already shown, the PPA requires political parties to utilise 15% of monies allocated to them from the PPF on special interest groups. The study found that the Jubilee Party and the ODM Party, which received monies from the PPF in the 2017-2022 electoral cycle, had budgets with ambiguous titles such as 'next generation leaders programme' and 'women and youth league activities'. Improper planning was also evidenced by the budgeting for the special interest groups which in both parties was way higher than the actual received monies. Finally, the study also found that the parties' financial audits could not make explicit determinations on how funding for special interest groups was utilised.<sup>285</sup>

## Recommendation:

Parliament should enact legislation requiring political parties to proactively disclose information on their use of state resources.

280 Sec 16(5) Political Party Act.

281 Sec 31 Political Party Act.

282 Wiper Democratic 'Report of the Auditor-General on the financial statements of Wiper Democratic Movement-Kenya for the year ended 30 June 2018' (2018 ) <https://www.oagkenya.go.ke/wp-content/uploads/2021/08/Wiper-Democratic.pdf> (accessed 23 November 2022) .

283 W Wambu 'Hope for state firms as Auditor-General promises to clear backlog' *The Standard* <https://www.standardmedia.co.ke/article/2001379162/hope-for-state-firms-as-auditor-general-promises-to-clear-backlog> (accessed 21 November 2022).

284 *Salesio Mutuma Thurairira & 4 others v Attorney General & 2 others; Registrar of Political Parties & 4 other (Interested Parties)* [2022] eKLR <http://kenyalaw.org/caselaw/cases/view/231884/> (accessed 21 November 2022).

285 At the time of publication, this article was no longer available online- Centre for Multiparty Democracy 'Political parties' utilisation of the Political Parties' Fund (PPF) to promote political participation'.



## CHAPTER 7





# CHAPTER 7

## 7. ASSESSING COMPLIANCE BY ELECTION OBSERVERS AND MONITORS TO THE GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA

### c. COMPLIANCE WITH GUIDELINE 23 (ELECTION OBSERVERS AND MONITORS)

Guideline 23 of the Guidelines on Access to Information and Elections in Africa requires election observers and monitors to proactively disclose certain categories of information.

Compliance with Guideline 23 (election observers and monitors)		
	Description	Status of compliance
a	Names and details of key office bearers in the observer or monitoring mission	Partly complied
b	Code of conduct for observers and monitors	Mostly complied
c	Financial or non-financial assistance received from donors, political parties or candidates, including the incumbent government	Not complied
f	The Election Observation Mission Report, specifying the methodology, deployment plan as well as the assessment of the conduct and outcome of the elections, published widely and timeously, with preliminary reports issued within 30 days and final reports issued within 90 days	Complied
e	Conflict of interest or political affiliations of local observers or monitors	Not complied
f	Sources of funding for organisations conducting opinion and exit polls and parallel voter tabulation	Not complied

An election observer gathers information and makes an informed judgement without interfering in the election process. An election monitor observes the electoral process and intervenes if laws are being violated.<sup>286</sup> For purposes of this chapter, reference to election monitoring

<sup>286</sup> Ace Project 'Election observation, monitoring and supervision' (2006) <https://aceproject.org/electoral-advice/archive/questions/replies/234934798> (accessed 20 November 2022).



includes election observation, unless otherwise stated.

Domestic monitoring of elections started to become part of Kenya's electoral milieu when the country held its first multiparty elections in 1992 following the repeal of Section 2A of the then Constitution which had made Kenya a one-party state. A coalition of civil society and faith-based organisations (FBOs) monitored the 1992 general election under the aegis of the National Election Monitoring Unit.<sup>287</sup> In time, domestic election monitoring coalesced around multi-organisation consortia constituted of civil society and FBOs.

The IEBC accredited a total of 120,731 domestic and international monitors and observers, including 50,231 observers and 70,500 monitors, drawn from 795 domestic and 77 international organisations.<sup>288</sup>

The approaches taken by election monitors for the 2022 general election were informed by lessons from previous electoral cycles. Kenyan stakeholders had in the past expressed scepticism about the credibility of international election observation missions which tended to issue template reports accepting status quo results while making recommendations on technical minutiae of little immediate consequence for apparent electoral winners and losers.<sup>289</sup> For example, virtually all the preliminary statements of the international election observation groups effectively gave the 2017 general elections a clean bill of health; yet the presidential election was eventually annulled by the Supreme Court. This indeed was the Supreme Court's pithy remark in this regard:

*302] In passing only, we must also state that whereas the role of observers and their interim reports were heavily relied upon by the respondents as evidence that the electoral process was free and fair, the evidence before us points to the fact that hardly any of the observers interrogated the process beyond counting and tallying at the polling stations. The interim reports cannot therefore be used to authenticate the transmission and eventual declaration of results.<sup>290</sup>*

That indeed is the reason why domestic missions focus far more on their potential roles as election monitors rather than polls observers, with the former concept driven by the imperative of advocating for electoral changes before the polls using information collected on the electoral process rather than simply issuing post-mortem reports on the polls.

287 The Multiparty General Elections in Kenya: 29 December, 1992 National Election Monitoring Unit (Kenya) 1993.

288 Remarks by the IEBC Chairman (n 3).

289 M Odhiambo 'The future of election observation after Kenya's Supreme Court judgement' *Freedom House* 13 September 2017 <https://freedomhouse.org/article/future-election-observation-after-kenyas-supreme-court-judgement> (accessed 21 November 2022).

290 Odinga (n 9).

Domestic monitoring missions tended to focus more on providing information on the organisations/entities constituting the initiatives and far less on the actual persons bearing responsibilities in the missions. Kenya's main domestic monitoring effort was undertaken under the aegis of the Elections Observation Group (ELOG), initiated by civil society and faith-based groups in 2010. Its members included the Catholic Justice and Peace Department, the National Council of Churches of Kenya, the Supreme Council of Kenya Muslims, and a broad range of CSOs, including the Constitution and Reform Education Consortium (CRECO), the Institute of Education in Democracy, the Federation of Women Lawyers (FIDA) Kenya, the United Disabled Persons of Kenya (UDPK) and the Youth Agenda.<sup>291</sup> ELOG used the electoral cycle approach to observe the performance of key electoral actors and continuously monitor electoral processes, on the basis of which it proposed remedies. It used long-term election observation that focused on consistent, structured and multidimensional assessments issued during various stages of the electoral cycle with findings and recommendations that impact the electoral process in real time.<sup>292</sup>

The Angaza Movement was another network that was formed by CSOs to mobilise Kenyans to oversee the elections from the party primaries to the polls. Members of the Angaza Movement included Kenya Human Rights Commission (KHRC), InformAction and Inuka Kenya.<sup>293</sup> The Angaza Movement issued pre-election press briefings raising concerns on the readiness of the IEBC to conduct elections<sup>294</sup> and post-election briefings highlighting their observations of the polls.<sup>295</sup>

Other CSOs undertook theme-specific election monitoring, including the Independent Medico-Legal Unit (IMLU)<sup>296</sup> and the Kenya ICT Action Network (KICTANET).<sup>297</sup>

In February 2022, ELOG recruited, trained and deployed 297 long-term observers in the country's 290 constituencies to monitor the pre-electoral environment. The mission assessed the IEBC's preparedness, political parties' processes, election campaigns, voter education activities, the use of state resources, the use of electoral technology, the participation of special interest groups, the extent to which the legal framework was complied with, and instances of hate speech, incitement and insecurity. Using these long-term election observers, ELOG intended

291 ELOG 'Membership' <https://elog.or.ke/membership/> (accessed 24 November 2022).

292 ELOG 'Report on the long-term observation mission May 2022' (2022) <https://elog.or.ke/observation-reports/> (accessed 26 November 2022).

293 E Muchiri 'Civil society forms movement to monitor election process' *The Star* 28 February 2022 <https://www.the-star.co.ke/counties/central/2022-02-28-civil-society-forms-movement-to-monitor-election-process/> (accessed 24 October 2022).

294 For example, see Angaza Movement 'Protecting integrity and accountability in Kenya's elections' (27 January 2022) <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/759-protecting-integrity-and-accountability-in-kenya-s-elections.html> (accessed 27 October 2022).

295 KHRC 'The Angaza Movement preliminary observations on the 2022 elections' <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/769-the-angaza-movement-preliminary-observations-on-the-2022-elections.html> (accessed 27 November 2022).

296 IMLU 'Interim Elections Monitoring Report July 2022' (2022) <https://www.imlu.org/wp-content/uploads/2022/07/IMLU-Interim-Elections-2022-Monitoring-Report.pdf> (accessed 25 November 2022).

297 KICTANET (n 220).

to assist in detecting, delaying, deterring and documenting instances of electoral fraud in order to ensure credible, peaceful, free and fair elections.<sup>298</sup> ELOG issued monthly pre-election monitoring reports.<sup>299</sup>

ELOG undertook advocacy for the general election on the following:

1. Called on the IEBC to make public the final report of the audit of the register of voters for stakeholders to engage with the report;
2. Called on the IEBC to reconsider its decision to use the electronic voter register exclusive of a manual register of voters;
3. Called on the government to enhance resourcing of voter education and for the IEBC to liaise with the over 1,000 voter education providers across the country to undertake voter education;
4. Cautioned that elite polarization and open differences among political leaders remained the biggest threat to peace and stability during the campaign period, and urged political leaders to lower temperatures during the campaigns and commit to accept the outcome of the elections;
5. Raised concerns about the lack of appreciation of values and principles of Chapter Six of the Constitution by key institutions in the election process, and implored the electorate to reject individuals implicated in corruption and criminal cases;
6. Noted that some social media platforms were being weaponised by various players to spread disinformation campaigns and derail constructive debate, and that influencers were being paid to spread misinformation on Twitter and Tiktok where content that violated the National Cohesion and Integration Act and TikTok's own community guidelines were being shared;
7. Called on Kenyans to desist from propagating and sharing unverified information, and called on tech companies such as Facebook, Twitter, Instagram and Tiktok to delete the accounts of users who did not comply with their community guidelines.<sup>300</sup>

For polling day, ELOG deployed parallel vote tabulation observers to a nationally-representative random sample of polling stations to observe polling day and tabulation processes. After the polls, ELOG released A preliminary statement on its findings,<sup>301</sup> and as well it released its final report.<sup>302</sup>

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298 ELOG (n 292).

299 ELOG 'Long-Term observation mission monitoring report June 2022' (2022) [https://elog.or.ke/election\\_reports/voter-bribery-id-buying-among-issues-recorded-in-long-term-observation-mission-may-report-by-elog/](https://elog.or.ke/election_reports/voter-bribery-id-buying-among-issues-recorded-in-long-term-observation-mission-may-report-by-elog/) (accessed 26 November 2022).

300 ELOG 'Joint civil society statement on election preparedness and other obtaining issues in Kenya' 12 June 2022 <https://elog.or.ke/joint-civil-society-statement-on-election-preparedness-and-other-obtaining-electoral-issues-in-kenya/> (accessed 01 September 2022).

301 ELOG 'ELOG statement on the official 2022 presidential results' 16 August 2022 <https://elog.or.ke/elogs-statement-on-the-official-2022-presidential-results/> (accessed 24 November 2022).

302 ELOG 'From the ballot to the portal: ELOG Observation Report for the 2022 General Elections in Kenya' (2022) <https://elog.or.ke/from-the-ballot-to-the-portal/> (accessed 24 November 2022).

*ELOG undertook other election-related activities, including a study on the inclusion of special interest groups (women, youth, persons with disabilities, ethnic minorities and marginalised communities) in the electoral process.*<sup>303</sup>

International election observers or monitoring missions invariably made official announcements where they communicated their composition and objectives. During the 2022 electoral cycle, international election monitoring included missions established by regional or inter-state formations, including the African Union (AU), the Commonwealth and the European Union (EU).

The AU announced on its website that it had deployed an election expert mission, which also included the Common Market for Eastern and Southern Africa (COMESA), to monitor the elections. The mission's mandate was to follow up on the electoral preparations, assess the political dynamics and genuine competitiveness and fairness of the electoral campaign, and maintain regular contact with national and international stakeholders before, during and after the election. The mission comprised technical staff, long-term observers and short-term observers. The AU's website included information on a contact person if one needed more information.<sup>304</sup> The AU-COMESA mission issued a preliminary election observation report whose finding on access to information was that there was notable improvement in the IEBC's strategic communication with stakeholders through periodic briefings and social media updates, but that these came late in the process.<sup>305</sup>

The European Union Election Observation Mission (EUEOM) included a core team of 12 election experts, 48 long-term observers deployed in 39 counties, and 48 short-term observers. The website of the EUEOM provided detailed information with the names of key officials, partnerships, schedules and areas of assessment.<sup>306</sup> The EUEOM released its preliminary observation statement on 11 August 2022.<sup>307</sup>

303 ELOG 'The unaccounted voice: report on public attitudes on inclusion of special interest Groups in electoral processes' (2022) [https://elog.or.ke/election\\_reports/the-unaccounted-voice/](https://elog.or.ke/election_reports/the-unaccounted-voice/) (accessed 28 November 2022).

304 AU 'The African Union deploys election expert mission to Kenya' (28 June 2022) [https://au.int/en/pressreleases/20220628/african-union-deploys-election-expert-mission-kenya\\_](https://au.int/en/pressreleases/20220628/african-union-deploys-election-expert-mission-kenya_) (accessed 28 November 2022).

305 M Gakunga 'African Union and COMESA Election Observation Mission to the 9 August 2022 general elections in the Republic of Kenya: statement of preliminary findings' COMESA 11 August 2022 <https://www.comesa.int/au-comesa-election-observer-mission-to-kenya-issues-preliminary-statement/> (accessed 28 November 2022).

306 EEAS 'About the EOM Election Observation Mission to Kenya' [https://www.eeas.europa.eu/eom-kenya-2022/about-eom-election-observation-mission-kenya-2022\\_en?s=410199](https://www.eeas.europa.eu/eom-kenya-2022/about-eom-election-observation-mission-kenya-2022_en?s=410199); also see M Chelangat 'EU deploys observers in Kenya ahead of August polls' *Nation* 17 July 2022 <https://nation.africa/kenya/news/politics/eu-deploys-observers-in-kenya-ahead-of-august-polls-3882876> (accessed 28 November 2022).

307 EEAS Preliminary Statement 'Fundamental freedoms respected in Kenya's general elections, but procedural shortcomings demonstrate the need for improvements' (11 August 2022) <https://www.eeas.europa.eu/sites/default/files/documents/EU%20EOM%20Kenya%202022%20Preliminary%20Statement%2011%20August%202022.pdf> (accessed 28 November 2022).

Other international election observation groups included the Commonwealth Observer Group,<sup>308</sup> the East African Community Election Observer Mission,<sup>309</sup> and United States'-based institutes, including the Carter Centre<sup>310</sup> and a joint mission of the National Democratic Institute and the International Republican Institute.<sup>311</sup>

The election observation and monitoring missions released their preliminary reports for the 9 August polls, and some released their final reports too.<sup>312</sup> Others, however, have at the time of writing not released their final reports.<sup>313</sup>

The IEBC developed the Code of Conduct for Election Observers.<sup>314</sup> The Code of Conduct, among others, requires election observers to: respect the sovereignty of the host country (for international observers); respect the law; respect the authority of the IEBC; maintain strict political impartiality; maintain accuracy of observations and professionalism in drawing conclusions; and refrain from making any personal comments about their observations or conclusions to the news media or members of the public before the election observation mission makes its statement.<sup>315</sup>

It is probable that members of observer or monitoring missions had personal electoral preferences. The Code of Conduct for Election Observers requires election observers to be impartial.

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308 Commonwealth 'Interim statement of the Commonwealth Observer Group by the Chair, the Hon Bruce Golding Kenya General Elections 2022' <https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/s3fs-public/202208/Kenya%20COG%202022%20%20Interim%20Statement%20Final.pdf?VersionId=61mkKleb3aoZdKYICEZzXU1A4oQGgNqO> (accessed 29 November 2022).

309 EAC 'Preliminary report of the East African Community Election Observer Mission to the 9<sup>th</sup> August 2022 General Elections in the Republic of Kenya' (2022) <https://www.eac.int/statements/2560-preliminary-report-of-the-observation-mission-eac-election-observer-mission-to-the-9th-august-2022-general-elections-in-the-republic-of-kenya> (accessed 29 November 2022).

310 The Carter Centre 'Carter Centre deploys team of election experts to Kenya' 2 August 2022 <https://www.cartercenter.org/news/pr/2022/kenya-080222.html> (accessed 30 November 2022).

311 NDI 'NDI-IRI joint international election observer mission presents initial findings and recommendations following the August 9<sup>th</sup> general elections in Kenya' (11 August 2022) <https://www.ndi.org/publications/ndi-iri-joint-international-election-observer-mission-presents-initial-findings-and> (accessed 27 November 2022).

312 IRI 'Election observation mission to Kenya final report of the 2022 general election' <https://www.iri.org/resources/iri-ndi-international-election-observation-mission-to-kenya/> (accessed 30 October 2022) & ELOG (n 302).

313 The websites of the AU, the Carter Centre and KICTANET, for example, only have their missions' preliminary reports.

314 IEBC 'General elections handbook for observers' <https://www.iebc.or.ke/uploads/resources/UETwRPUwGo.pdf> (accessed 30 October 2022).

315 As above.



## **Recommendations:**

1. Election observers and monitors should publish the names and details of key office bearers in their missions, and the financial or non-financial assistance received from donors, political parties or candidates.
2. Domestic election observers or monitors should publish any conflict of interests they may have or their political affiliations.
3. Organisations conducting opinion and exit polls and parallel voter tabulation should publish their sources of funding.



## CHAPTER 8



# CHAPTER 8

## 8. ASSESSING COMPLIANCE BY LAW-ENFORCEMENT AGENCIES TO THE GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA

### d. COMPLIANCE WITH GUIDELINE 24 (MAINTENANCE OF LAW AND ORDER)

Guideline 24 of the Guidelines on Access to Information and Elections in Africa requires law-enforcement agencies to proactively disclose certain information in the course of ensuring law and order during the electoral cycle.

Compliance with Guideline 24 (maintenance of law and order)		
	Description	Status of compliance
a	Code of conduct and roles during the electoral period	Mostly complied
B	Training and operational plan and manuals for the electoral period	Complied
C	Deployment plans from pre-election through to post-election period	Partly complied
D	Budgetary allocations and actual expenditure for the electoral period	Partly complied
E	Details of any reported election related crimes, including the number of cases reported and steps taken to investigate, prosecute or withdraw such cases	Partly complied
f	Details of any arrangements whereby any other persons or groups are authorised by law enforcement agencies to perform specific law enforcement related tasks during the electoral period	Not complied.

The multiple law-enforcement agencies operating in the 2022 general election cycle included the National Police Service (NPS), the Director of Public Prosecutions (DPP), the Independent Policing Oversight Authority, the National Cohesion and Integration Commission (NCIC), the Economic and Anti-Corruption Commission (EACC) and the Ministry of the Interior.

The functions of the NPS include law-enforcement and the investigation of offences. No person may direct the Inspector-General of the NPS with respect to the investigation of an offence or on the enforcement of the law against a particular person.<sup>316</sup> However, the EA obligates police officers to take all necessary measures for the maintenance of law and order and stability necessary for the conduct of an election and to protect and uphold the rights of all persons under any written law relating to elections. A police officer assigned duties during the conduct of an election or referendum is subject to the IEBC's direction and instruction.<sup>317</sup> As well, the DPP is empowered to direct the Inspector-General of the NPS to investigate information or allegations of criminal misconduct.<sup>318</sup>

In January 2022, the NPS updated a reference manual to support police commanders in ensuring a secure electoral environment. The manual explained the electoral roles of the different elements of the NPS: the Kenya Police Service maintains a secure and peaceful environment and preserves law and order, including by apprehending anyone acting/planning to disrupt the electoral process; the Administration Police Service preserves peace, protects life and property, provides border patrol and border security, and protects government property, vital installations and strategic points; the Directorate of Criminal Investigations investigates hate speech, political incitement and content, and sexual violence related to elections; and the Internal Affairs Unit receives and investigates complaints against the police. The manual explains that police commanders are authorised to give a general situation report or supplementary information verbally (but not in writing) to the media when this is requested and only when such occurrence has already been reported to headquarters and been subsequently released to the media on behalf of the government.<sup>319</sup> CSOs pointed out that the NPS had instituted the electoral security management manual and the training of regional, county and sub-county police commanders quite late, and that despite public pledges to the contrary, senior police officers were being transferred barely a month to the polls leaving those transferred with little time to familiarise themselves with their new electoral terrain. They, however, commended the recruitment of 5,000 police officers to bridge the police-civilian ratio.<sup>320</sup>

## REGULATORY AGENCIES SOUGHT TO ENFORCE THE LAW

The NCIC was established pursuant to the National Cohesion and Integration Act<sup>321</sup> which was enacted in the aftermath of Kenya's lowest moment in recent years following the 2007 post-election violence. The NCIC facilitates and promotes interethnic and interracial equality of

316 Art 245(4) Constitution.

317 Sec 95 Elections Act.

318 Art 157(4) Constitution.

319 National Police Service 'Election security management manual for police commanders 2002-2022' (2022) <https://www.nationalpolice.go.ke/election-security-management-manual-for-police-commanders.html> (accessed 30 November 2022).

320 S Otieno 'Police ill-prepared for elections, says civil society' *Nation* 14 July 2022 <https://nation.africa/kenya/news/politics/police-ill-prepared-for-elections-says-civil-society-3879942> (accessed 03 November 2022).

321 National Cohesion and Integration Act 12 of 2008 <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2012%20of%202008> (accessed 06 November 2022)



opportunity, good relations, harmony and peaceful co-existence.<sup>322</sup> During the 2022 election cycle, the NCIC sought to take steps to ensure a conducive electoral environment. It developed an election roadmap to provide direction for stakeholders to prepare for a peaceful electoral process. The roadmap identified the factors that contribute to electoral violence, and proposed six counter-strategies, including conflict disruption, citizen empowerment, trust building, long-term transformation, selfless leadership and elimination of hate speech.<sup>323</sup> In another measure, the NCIC established what it referred to as the Kenya Electoral Violence Index County, detailing each county's level of vulnerability to election related violence. It classified the vulnerabilities as high risk (for Nairobi, Nakuru, Kericho, Kisumu, Uasin Gishu and Mombasa); medium high risk (for Narok, Marsabit, Laikipia, Lamu, Baringo, Isiolo, Meru, Nandi, Samburu and Bomet); and medium low to low risk for the other 21 counties.<sup>324</sup> The NCIC also established and communicated to the public words and phrases which it said were likely to spread hate during the electioneering period.<sup>325</sup> The NCIC's initiatives to stop the use of hate speech were, however, pegged back when the High Court quashed the NCIC's decision to ban some of the terms it had listed, finding that the terms did not constitute hate speech since evidence had not been adduced showing that the terms caused discontent amongst communities in the country. NCIC had not notified the general public of the intended ban as required under Section 7 of the Fair Administration Act.<sup>326</sup>

Significantly, though, public agencies on occasion seemed to be reading from different scripts in their endeavours to enforce the law in support of the elections. The IEBC, for example, declined to heed the advice of the EACC to bar 241 aspiring election candidates with outstanding criminal cases or with integrity questions. The IEBC's comeback was that it could not penalise candidates without due process.<sup>327</sup> The High Court validated this position when it also declined to bar aspirants with active criminal and corruption cases, impeached public officials and officials with questionable integrity from contesting elective positions.<sup>328</sup> Only in one instance was a candidate stopped from contesting a gubernatorial election, with the Supreme Court determining that Mike Sonko had violated Chapter Six of the Constitution. In the Court's words:

322 Sec 25(1) National Cohesion and Integration Act.

323 NCIC 'A violence free 2022: roadmap to peaceful 2022 general Elections' (2020) <https://cohesion.or.ke/images/docs/downloads/NCIC%20Roadmap%20to%20Violent%20Free%20Elections.pdf> (accessed 28 April 2022).

324 NCIC 'Conflict hotspot mapping for Kenya' (2022) [https://cohesion.or.ke/images/docs/downloads/hotspot\\_mapping\\_ncic.pdf](https://cohesion.or.ke/images/docs/downloads/hotspot_mapping_ncic.pdf) (accessed 15 November 2022).

325 S Otieno 'NCIC blacklists 'sipangwingwi' in war on hate speech' *Nation* 8 April 2022 <https://nation.africa/kenya/news/ncic-blacklists-sipangwingwi-in-war-on-hate-speech-3775900> (accessed 29 November 2022).

326 *Republic v National Cohesion and Integration Commission; Chama Cha Mawakili Limited (Exparte)* [2022] KEHC 10206 (KLR) (Judicial Review) <http://kenyalaw.org/caselaw/cases/view/235758> (accessed 23 November 2022).

327 D Muchunguh 'How feuding agencies gave "tainted" leaders a free pass' *Nation*, 27 June 2022 <https://nation.africa/kenya/news/politics/how-war-between-agencies-gave-bad-leaders-free-pass-3860768> (accessed 17 November 2022).

328 *Okoiti & 15 others v Attorney General & 7 others; Commission on Administrative Justice & 15 others (Interested Party)* [2022] KEHC 3209 (KLR) <http://kenyalaw.org/caselaw/cases/view/234357/> (accessed 17 November 2022).



*It bears mentioning in conclusion that Chapter Six of the Constitution was not enacted in vain or for cosmetic reasons. The authority assigned to a State officer is a public trust to be exercised in a manner that demonstrates respect for the people; brings honour to the nation and dignity to the office; and promotes public confidence in the integrity of the office. It vests in the State officer the responsibility to serve the people, rather than the power to rule them.*<sup>329</sup>

Unfortunately, this sort of statement and action was the exception rather than the rule, and the EACC was left to rue inadequate legal practice, with its Chief Executive, Twalib Mbarak, urging the clergy to 'go and talk to the people and ask them to use their common sense and raise critical questions on the intention of politicians who give them handouts and elect good leaders'.<sup>330</sup>

Other interagency wrangles were apparent between the IEBC and the NPS when the latter arrested three foreigners and seized identification labels for electronic voter identification and data transmission kits.<sup>331</sup>

The actions of some law-enforcement agencies raised queries on their impartiality. The role of the Commission for University Education (CUE) came under close scrutiny when it issued bizarre directions in relation to the qualifications of an aspirant governor for Nairobi County, in apparent execution of one of its functions - to recognise and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions.<sup>332</sup> At one moment CUE equated the degree certificate of Johnson Sakaja, then in the next moment withdrew the equation, then again stated it was investigating the degree, then eventually revoked the degree certificate. The evidence CUE demanded bordered on the trivial, and included Sakaja's admission letter to Team University, student ID, transcripts, proof of coursework, receipts of tuition fees, graduation photos and list of lecturers who taught him.<sup>333</sup> In the event, the IEBC decided it did not have jurisdiction to investigate and determine the validity of the degree certificate so long as it was prima facie valid, and only a court order could set aside the decision of the Disputes Resolution Tribunal which had made that determination.<sup>334</sup>

329 *Michael Mbuvi Sonko v Clerk, County Assembly of Nairobi City & 11 others* [2022] KESC 26 (KLR), para 25 <http://kenyalaw.org/caselaw/cases/view/237050/> (accessed 20 November 2022).

330 S Otieno 'EACC turns to clergy in fight against corruption, tainted leaders' *Nation* 27 June 2022 <https://nation.africa/kenya/news/politics/eacc-turns-to-clergy-in-fight-against-corruption-tainted-leaders-3861822> (accessed 20 November 2022).

331 'Election stickers raise storm as politicians allege rigging plot' *Nation* 23 July 2022 <https://nation.africa/kenya/news/politics/election-stickers-raise-storm-as-politicians-allege-rigging-plot-3889150> (accessed 18 November 2022).

332 Sec 5(1)(g) Universities Act 42 of 2012 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2042%20of%202012> (accessed 18 November 2022).

333 D Muchunguh 'We have been waiting since 10am, CUE says as Sakaja fails to honour summon' *Nation* 20 June 2022 <https://nation.africa/kenya/news/politics/we-have-been-waiting-since-10am-cue-says-as-sakaja-fails-to-honour-summon-3854332> (accessed 30 November 2022).

334 M Nyamori 'IEBC dismisses CUE letter revoking Johnson Sakaja's degree' *Nation* 1 July 2022 <https://nation.africa/kenya/news/politics/iebc-dismisses-cue-letter-revoking-johnson-sakaja-s-degree-3844332> (accessed 18 November 2022).

The Ministry of the Interior used regional coordinators, county commissioners and chiefs to address insecurity. The county commissioner of Kisii intervened when demonstrations against IEBC officials resulted in injuries to six police officers, with the county commissioner calling for the demonstrations to end.<sup>335</sup> Politicians raised concerns on the impartiality of public administrators such as chiefs, with allegations being made that they were campaigning for government-preferred parties and candidates, or that they were being used to suppress the vote. Kenya Kwanza in particular alleged that chiefs had been ordered to campaign for Azimio.<sup>336</sup>

Detailed plans for the deployment of law-enforcement personnel from the pre-election to the post-election period were not publicised. More information was, however, communicated on the deployment of law-enforcement formations during the actual polls. The Inspector-General of the NPS explained that the elections would be secured by over 150,000 security officers drawn from the NPS, the Kenya Prisons Service, the National Youth Service, the Kenya Forest Service and the Critical Infrastructure Unit. Five logistical air support teams were deployed strategically to address any arising incidents. The Inspector-General said that the NPS had put in place a National Police Service Election Security Plan to provide critical input into Operation Orders and deployment plans by respective commands for the polls. He also gave a free toll number which one could call to reach the National Election Security Command Centre which would be manned on 24-hour basis and equipped to handle situations related to election security.<sup>337</sup> These hubs were replicated in all regions across the country and included hotlines which individuals could call to report incidents.<sup>338</sup> The DPP established toll-free numbers and 24-hour election call centres to ensure accessibility and timely handling of complaints and reports from members of the public during the electioneering period.<sup>339</sup>

Information on budgetary allocations and actual expenditure by law-enforcement agencies for the electoral period remained fairly obscure. In its 2022 budget, the government allocated the security sector ksh317.8 billion (around US\$3,170,000,000). The detail on this ballpark figure

[africa/kenya/news/politics/iebc-dismisses-cue-letter-revoking-johnson-sakaja-s-degree-3866406](https://nation.africa/kenya/news/politics/iebc-dismisses-cue-letter-revoking-johnson-sakaja-s-degree-3866406) (accessed 29 November 2022).

335 R Mbula 'Kisii governor hopeful focus of fury after chaos tied to IEBC sit-down' *Nation* 21 July 2022 <https://nation.africa/kenya/counties/kisii/kisii-governor-hopeful-focus-of-fury-after-chaos-tied-to-iebc-sit-down-3887848> (accessed 29 November 2022).

336 S Makokha 'Kenya Kwanza leaders caution chiefs against campaigning' *Nation* 29 July 2022 <https://nation.africa/kenya/counties/kakamega/kenyan-kwanza-leaders-caution-chiefs-against-campaigning-389624> (accessed 18 November 2022) & E Matara 'Matiang'I rejects Ruto claims that chiefs are being used to suppress voting' *Nation* 2 August 2022 <https://nation.africa/kenya/counties/nakuru/our-chiefs-are-neutral-matiangi-tells-ruto-3900526> (accessed 01 December 2022).

337 B Makong 'Govt to deploy 150,000 security personnel across the country during polls' *Capital News* 22 July 2022 <https://www.capitalfm.co.ke/news/2022/07/govt-to-deploy-150000-security-personnel-across-the-country-during-polls/> (accessed 01 December 2022).

338 One such multiagency command centre was launched in Nakuru to serve 14 counties. – J Rotich 'State launches emergency hotline numbers for Kuresoi, Molo residents' *Nation* 3 August 2022 <https://nation.africa/kenya/counties/nakuru/state-launches-emergency-hotline-numbers-for-kuresoi-molo-residents-3901994> (accessed 01 December 2022).

339 ODPP 'DPP launches ODPP election call centre, toll free numbers and training of election preparedness' <https://www.odpp.go.ke/dpp-launches-odpp-election-call-centre-toll-free-numbers-and-training-on-election-preparedness/> (accessed 04 December 2022).

was quite general and unhelpful for the public wishing to interrogate the figures more.<sup>340</sup> Information on how security sector funds are utilised is traditionally fairly opaque.

Law-enforcement agencies did not provide comprehensive disaggregated information of reported election related crimes, including the number of cases reported and steps taken to investigate, prosecute or withdraw such cases.

Violations of electoral laws were common during the pre-polls period. Alleged violations included politicians campaigning outside official campaign hours at night,<sup>341</sup> a number of shooting incidents involving contending candidates,<sup>342</sup> and individuals buying identity cards (in one instance with three women found with 16 identity cards which it was thought were to be used to commit electoral malpractices).<sup>343</sup> A fatality was confirmed on polling day when a candidate, Didmus Barasa, allegedly shot dead an aid of his opponent, before fleeing for a couple of days following which he handed himself to the police where he was arrested and arraigned in court on a count of murder.<sup>344</sup> One IEBC official was killed while at least one other official sustained injuries in the course of their duties.<sup>345</sup>

Agencies did not communicate global data on the extent and success of law-enforcement measures regarding the investigation and prosecution of electoral offences. Some alleged offenders were arraigned before court; but the state also withdrew charges filed against some alleged violators of the law.<sup>346</sup> The IEBC also ordered the seizure of government vehicles and other state resources illegally used by politicians in campaigning, but it is not clear that this was done. It also asked governors, deputy governors and legislators to provide it with inventories of resources at their disposal by virtue of their offices.<sup>347</sup> This was in line with the EOA which prohibits a candidate or other person from using public resources to campaign

340 The National Treasury and Planning 'Budget statement FY 2022/23 Theme: accelerating economic recovery for improved livelihood' para123-125 [https://www.treasury.go.ke/wp-content/uploads/2021/06/Budget-Statement-for-the-FY-2022-23\\_F.pdf](https://www.treasury.go.ke/wp-content/uploads/2021/06/Budget-Statement-for-the-FY-2022-23_F.pdf) (accessed 02 December 2022).

341 'Candidates breaking election rules by seeking votes in bars' *Nation* 20 July 2022 <https://nation.africa/kenya/counties/meru/candidates-breaking-election-rules-by-seeking-votes-in-bars-3886022> (accessed 02 December 2022).

342 B Bii 'Buzeki, Koti Moja trade blame overnight shootout' *Nation* 9 August 2022 <https://nation.africa/kenya/counties/uasin-gishu/buzeki-koti-moja-trade-blame-over-shootout-3909114> (accessed 02 December 2022).

343 R Kiplagat 'Three women arrested for "buying" identity cards in Narok' *Nation* 5 August 2022 <https://nation.africa/kenya/counties/narok/three-women-arrested-for-buying-identity-cards-in-narok-3904342> (accessed 02 December 2022).

344 B Ojama 'Kimilili MP Didmus Barasa on the run after rival's aide shot dead' *Nation* 9 August 2022 <https://nation.africa/kenya/counties/bungoma/kimilili-mp-didmus-barasa-on-the-run-rival-s-aide-shot-dead-3909138> (accessed 03 December 2022).

345 KHRC 'The Angaza Movement preliminary observations on the 2022 elections' <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/769-the-angaza-movement-preliminary-observations-on-the-2022-elections.html> (accessed 01 December 2022).

346 For example, see C Wanyoro 'Rigathi rally disruption case against 15 youth withdrawn' *Nation* 22 July 2022 <https://nation.africa/kenya/counties/meru/rigathi-rally-disruption-case-against-15-youth-withdrawn-3888526> (accessed 02 December 2022).

347 M Nyamori 'Seize state vehicles used for campaigns, orders IEBC' *Nation* <https://nation.africa/kenya/news/politics/iebc-orders-impounding-state-resources-deployed-campaigns-3829340> (accessed 02 December 2022).

during an election. The IEBC is enjoined to require a candidate, who is a member of Parliament, a county governor, a deputy county governor or a member of a county assembly, within 14 days, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office. The IEBC and other law-enforcement agencies are empowered to order the impoundment of or impound any state resources that are unlawfully used in an election campaign.<sup>348</sup>

## **Recommendations:**

Law-enforcement agencies should proactively disclose:

1. Their deployment plans from the pre-election to the post-election period;
2. Their budgetary allocations and actual expenditure in adequate detail for the public's understanding;
3. Details of any reported election related crimes, including the number of cases reported and steps taken to investigate, prosecute or withdraw such cases; and
4. Details of any arrangements whereby any other persons or groups are authorised by law enforcement agencies to perform specific law enforcement related tasks during the electoral period.

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348 Sec 14 Election Offenses Act.





## CHAPTER 9





# CHAPTER 9

## 9. ASSESSING COMPLIANCE BY MEDIA AND INTERNET REGULATORY BODIES TO THE GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA

### 9.1 COMPLIANCE WITH GUIDELINE 25 (REGULATIONS ON MEDIA COVERAGE DURING ELECTIONS)

Guideline 25 of the Guidelines on Access to Information and Elections in Africa requires media and internet regulatory bodies to adopt regulations on media coverage during elections that ensure fair and balanced coverage of the electoral process and transparency about political advertising policy on media and online media platforms.

Compliance with Guideline 25 (regulations on media coverage during elections)		
	Description	Status of compliance
a	The complaints procedure against media organisations that violate the regulations	Complied
b	The enforcement mechanism for ensuring compliance with the decisions taken and sanctions imposed	Partly complied
c	The code of conduct for online media	Complied
d	Details of all complaints or petitions received during the electoral period and how these were addressed	Not complied

### 9.2 COMPLIANCE WITH GUIDELINES 26-28 (INTERNET OR OTHER MEDIA SHUTDOWNS)

Guidelines 26-28 of the Guidelines on Access to Information and Elections in Africa require media regulators and public or private providers of telecommunication services to refrain from shutting down the internet or other media during the electoral process.

**Compliance with Guidelines 26-28  
(internet or other media shutdowns)**

	Description	Status of compliance
	Media regulators and public or private providers of telecommunication services should refrain from shutting down the internet or other media during the electoral process.	Complied

The main media and regulatory bodies in Kenya are the Media Council of Kenya (MCK) and the Communications Authority of Kenya (CAK).

The Media Council Act (MCA) establishes the MCK whose functions include:<sup>349</sup>

1. Promoting and protecting the freedom and independence of the media;
2. Prescribing standards of journalists, media practitioners and media enterprises;
3. Ensuring the protection of the rights and privileges of journalists;
4. Promoting and enhancing ethical and professional standards amongst journalists and media enterprises;
5. Developing and regulating ethical and disciplinary standards for journalist, media practitioners and media enterprises;
6. Accrediting journalists;
7. Conducting and publishing annual reviews of the performance and the general public opinion of the media;
8. Establishing media standards and regulating and monitoring compliance with the media standards; and
9. Facilitating resolution of disputes.<sup>350</sup>

The MCA establishes a hybrid model of statutory regulation and self-regulation that is made operational through the Code of Conduct for the Practice of Journalism and the Media Complaints Commission (MCC).

The Code of Conduct, which is established by statute and not by the profession,<sup>351</sup> obliges journalists and media enterprises to keep professional and ethical media standards covering a broad range of issues. These include: writing public interest stories accurately and fairly; defending the independence of journalists from seekers of influence or control over news-content; presenting news with integrity and common decency; giving individuals or organisations

349 Media Council Act 46 of 2013 <http://www.kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No.%2046%20of%202013> (accessed 03 December 2022).

350 Sec 6(1) Media Council Act.

351 Second Schedule Media Council Act.

a fair opportunity of reply to inaccuracies; protecting confidential sources of information; not obtaining information by false representation or subterfuge; not publishing obscene or vulgar material; and not receiving money as an incentive to publish a story. The editor assumes responsibility for published content, unless explicit disclaimer is issued beforehand.<sup>352</sup>

The MCK has issued guidelines specifically for the coverage of elections by editors, journalists, media practitioners, media owners and managers.<sup>353</sup> Guideline 10 sets out the following as the responsibilities of the MCK and the CAK in the context of elections:

1. Judiciously enforce compliance with the Code of Conduct for the Practice of Journalism in Kenya and the Programming Code for Broadcasters in Kenya;
2. Ensure journalists and media outlets are accorded space and autonomy to cover all the stages of electioneering;
3. Defend media freedom at all times; and
4. Invest in capacity building to ensure media practitioners have the knowledge and tools to report effectively.<sup>354</sup>

Guideline 25 establishes the complaints procedure against media organisations. Complaints should be resolved quickly and fairly during electioneering through the established internal complaints handling procedures of media houses and through the MCC which should prioritise election-related complaints from the public. The outcomes of complaints should be communicated to parties immediately and also made public. Guideline 25 also sets out the procedure for lodging a complaint. An aggrieved person may lodge a complaint orally (in-person or by electronic communication) or in writing to the Registrar of the MCC setting out the grounds for the complaint, nature of the injury or damage suffered, and the remedy sought. The Guidelines, however, do not provide significant directions on enforcement mechanisms for ensuring compliance with the decisions taken and sanctions imposed. Guideline 26 requires media outlets to have their own internal mechanisms for monitoring their performance on election coverage. Television and radio stations should keep recordings of broadcasts aired during the elections for 90 days. Online publishers should keep records of their text-based election content for 60 days after the polls. The Guideline requires the MCK to monitor the adherence of media enterprises to the Guidelines, and to issue monthly reports with major findings. Guideline 26 finally requires that 'The media should be prepared to rectify negative trends of performance identified after analysis of the monitoring and evaluation process'.

Guideline 19 establishes what in effect is a code of conduct for election coverage by online media. It affirms that the core principles of journalism practised in traditional media should govern the conduct of journalists and media practitioners on social media during elections. The Guideline requires journalists and media practitioners on social media:

1. Not to compromise professional integrity;

352 As above.

353 MCK 'Guidelines for election coverage 2022' (2021) <https://mediacouncil.or.ke/node/518> (accessed 25 November 2022).

354 As above.

2. To verify sources of information always;
3. To publish accurate information;
4. To think carefully about what they publish since while they may act online in their own private capacity, anyone seeing the post(s) is likely to identify them with their media organisations;
5. Not to state their political preferences as this may compromise objectivity in their official reporting capacities; and
6. To be clear on the policy of the media organisation before breaking news online ahead of their media organisation.

The MCC's functions include mediating or adjudicating disputes with the media.<sup>355</sup> The MCC has established an elaborate complaints procedure which it has posted on its website with multiple informational documents.<sup>356</sup> The MCC has determined complaints on matters such as misleading, inaccurate and false reporting.<sup>357</sup>

Details of all complaints or petitions received during the electoral period and how these were addressed were not readily available.

The MCK played its regulatory role in a number of ways:

1. It intervened when journalists covering elections were in danger, such as in its call for the police to arrest suspects who had attacked two journalists covering a public rally at Orange House in March 2022, reportedly after stories published under their by-lines made some ODM adherents unhappy.<sup>358</sup> ODM subsequently apologised for the attacks.<sup>359</sup>
2. The MCK also spearheaded the formation of an intermedia team to coordinate the development of practical working modalities and protocols to ensure the protection of journalists and media workers in the field during the electioneering period.<sup>360</sup>
3. The MCK also entered into a memorandum of understanding with the IEBC under which the two institutions would partner on the training of journalists on elections

355 Sec 31 Media Council Act.

356 See MCK 'Complaints procedure' <https://www.complaintscommission.or.ke/make-a-complaint/complaints-procedure> (accessed 04 December 2022).  
MCK 'Media Complaints Commission FAQ' <https://www.complaintscommission.or.ke/sites/default/files/downloads/Complaints%20FAQ.pdf> (accessed 05 December 2022).

357 Media Council of Kenya 'Decisions' <https://www.complaintscommission.or.ke/decisions> (accessed 04 December 2022).

358 MCK 'Arrest goons who attacked journalists at ODM headquarters' 24 March 2022 <https://mediacouncil.or.ke/sites/default/files/advisory-press-releases/Press%20Statement-%20MCK%20Calls%20for%20Arrest%20of%20Goon%20who%20Attacked%20Journalists%20at%20ODM%20Party%20Headquarters.pdf> (accessed 06 December 2022)

359 K Cheruiyot 'ODM apologises after goons attacked journalists at Chungwa House' *The Star* <https://www.the-star.co.ke/news/2022-03-24-odm-apologises-after-goons-attacked-journalists-at-chungwa-house/> (accessed 06 December 2022).

360 C Wanja 'Kenyan media houses form team to ensure safety of journalists during elections' 26 February 2022 <https://www.kbc.co.ke/kenyan-media-houses-form-team-to-ensure-safety-of-journalists-during-elections/> (accessed 06 December 2022).

reporting and use of election reporting guidelines.<sup>361</sup> A journalist seeking accreditation to cover the elections had to bear a press card issued by the MCK.<sup>362</sup>

4. The MCK was also part of the triumvirate that oversaw the presidential debates, which also involved the Media Owners Association and the Kenya Editors' Guild.<sup>363</sup>
5. The MCK released reports on media performance on election campaign reporting. In its report covering April-June 2022, the MCK found that radio was the biggest dispenser of political news with 62% coverage, with television at 27% and print at 11%. Social media platforms were mostly used to spread disinformation and misinformation.<sup>364</sup>
6. Finally, the MCK alongside the United Nations Development Programme established IVerify, a fact-checking platform to address electoral misinformation and propaganda, as part of which fact-checkers were trained, tooled and deployed to verify information and monitor editorial content against the spread of hate speech, misinformation and propaganda. The Council monitored aspects such as tonality, political parties' performance against set rules and guidelines, conduct of selected candidates, issues covered, airtime given to various candidates, bias, sensitivity to issues covered and advertisements.<sup>365</sup>

The CAK is one of quite few public institutions which have provided fairly detailed information on specific procedures on how to make requests for information in its custody. The CAK explains the basis and process for a requester to file a request from the Authority, and the steps staff should take to expedite such requests.<sup>366</sup>

The objects of the CAK, which is established by the Kenya Information and Communications Act (KICA),<sup>367</sup> include licencing and regulating information and communication services.<sup>368</sup> The CAK's functions in relation to broadcasting include:

1. Promoting and facilitating the development of a diverse range of broadcasting services;
2. Promoting the observance of public interest obligations in all broadcasting;
3. Promoting diversity and plurality of views for a competitive marketplace of ideas;

361 MCK 'MCK partners with IEBC towards media support during elections' 20 April 2022 <https://mediacouncil.or.ke/sites/default/files/advisory-press-releases/Press%20Release-%20MCK%20Partners%20With%20IEBC%20Towards%20Media%20Support%20During%20Elections.pdf> (accessed 08 December 2022).

362 MCK 'Accreditation of journalists to cover the August 9 2022 general election' 22 June 2022 <https://mediacouncil.or.ke/media-center/mck-newsroom/news/media-council-kenya-train-journalists-elections-reporting> (accessed 08 December 2022).

363 'Presidential Debates Secretariat statement on the Presidential Debates 2022' <https://twitter.com/ntvkenya/status/1532756324362117120> (accessed 09 December 2022).

364 MCK 'MCK report shows improved media performance on election campaign reporting' 24 June 2022 <https://mediacouncil.or.ke/media-center/mck-newsroom/news/mck-report-shows-improved-media-performance-election-campaign> (accessed 07 December 2022).

365 KICTANET (n 220).

366 CAJ 'Guidelines on access to information requests' (2019) <https://www.ca.go.ke/wp-content/uploads/2019/04/Guidelines-on-Access-to-Information-Requests.pdf> (accessed 07 December 2022).

367 Kenya Information and Communications Act 2 of 1998 <http://www.kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=No.%202%20of%201998> (accessed 07 December 2022).

368 Sec 5(1) Kenya Information and Communications Act.



4. Ensuring the provision of appropriate internal mechanisms by broadcasters for disposing of complaints in relation to broadcasting services; and
5. Protecting the right to privacy of all persons.<sup>369</sup>

The CAK has not published data on the proactive or reactive measures it may have taken against election-related breaches of the Act. Significantly, the KICA prohibits the CAK from issuing broadcast licences to political parties.<sup>370</sup> Arguably, some broadcasting stations have effectively been proxies for political parties, and the CAK may have needed to take remedial actions to conform to the spirit of KICA that political parties should not own broadcasting stations.

The CAK prescribes programme codes setting standards for the time and manner of programmes to be broadcast by licensees.<sup>371</sup> Quite progressively, the KICA anticipates the option of self-regulation under which a body of licensees prepare and enforce a programming code approved by the Authority.<sup>372</sup>

Section 46I of the KICA obligates licenced broadcasters to:

1. Provide responsible and responsive programming catering for the varied needs and susceptibilities of different sections of the community;
2. Observe standards of good taste and decency;
3. Gather and present news and information accurately and impartially;
4. When controversial or contentious issues of public interest are discussed, make reasonable efforts to present alternative points of view either in the same programme or in other programmes within the period of current interest;
5. Respect the right to privacy of individuals;
6. Keep a program log or machine readable record of its programming for a period of one year after the date of broadcasting;
7. Ensure that advertisements are not deceptive or are not repugnant to good taste; and
8. Ensure that derogatory remarks based on ethnicity, race, creed, colour and sex are not broadcast.

The KICA requires broadcasters to establish and maintain a complaints procedure for use by persons aggrieved by any broadcasts, and complainants may appeal to the CAK and to the Communications and Multimedia Appeals Tribunal.<sup>373</sup>

The CAK issued and regularly updated the Programming Code for Broadcasting Services in Kenya. The Programming Code obligates broadcasters to serve the public interest at all times, including by: 'providing equitable coverage and opportunities to registered political parties/

369 Sec 46A Kenya Information and Communications Act.

370 Sec 46D(1)(a) Kenya Information and Communications Act.

371 Sec 46H Kenya Information and Communications Act.

372 Sec 46H(2)(d) Kenya Information and Communications Act.

373 Sec 46L Kenya Information and Communications Act.

candidates participating in an election and in particular to presidential candidates'.<sup>374</sup> The Code sets out the obligations of the media during the election period. These include that:

1. Equitable opportunities in the access of unpaid airtime is given to candidates and political parties;
2. No programme or sponsor is allowed to manifestly favour or oppose any candidate or political party;
3. The amount of airtime allotted to political propaganda and the rates to be charged for it is consistent to all parties and candidates;
4. All broadcasts of election propaganda are identified through the words 'paid for by' followed by the name of the candidate or political party for whom the election propaganda is being broadcast;
5. No broadcasters use news during the election period to deliberately give some candidates undue advantage over their rivals;
6. Broadcasters do not employ technological gimmicks like doctoring pictures of political rallies to enlarge the crowds;
7. Broadcasters ensure that political messages do not contain attacks on individuals, their families, ethnic background, race, religion or their associations; and
8. Broadcasters ensure that political messages do not contain offensive, threatening, abusive, obscene or profane language.<sup>375</sup>

The Programming Code requires broadcasters to establish a complaint handling procedure and to inform their audience regularly on its availability. The turnaround time for complaints handling should be 30 days or 45 days exceptionally. A written record of complaints must be retained by the broadcaster for one year and extracted in the prescribed form for submission to the CAK.<sup>376</sup>

Regarding compliance, the Code requires all broadcasting stations to provide copies of that instrument to personnel who go on air or produce materials for airing.<sup>377</sup> The CAK handles complaints about violations of the Programming Code, and sanctions may include fines and bans.<sup>378</sup>

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374 Communications Authority of Kenya 'Programming code for broadcasting services in Kenya' (2019) para 2.3.2 (h) [Programming-Code-for-broadcasting-Services-in-Kenya-March-2019.pdf](#) (accessed 10 December 2022).

375 CAK (n 374) para 7.2.

376 CAK(n 374) para 11.

377 CAK (n 374) para 12.4.

378 CAK (n 374) para 12.5. The CAK, for example, fined Homeboys Radio ksh1 million and suspended one of its shows for six months after its hosts made statements on air shaming a victim of sexual violence. – N Agutu 'CA fines Homeboys Radio Sh1m, suspends show for six months' The Star 28 March 2021 <https://www.the-star.co.ke/news/2021-03-28-ca-fines-homeboyz-radio-sh1m-suspends-show-for-six-months/> (accessed 12 December 2022).

## **Recommendations:**

Media and internet regulatory bodies should proactively:

1. Disclose the enforcement mechanisms for ensuring compliance with the decisions taken and sanctions imposed by the regulators; and
2. Provide details of all complaints or petitions received during the electoral period and how these were addressed.



## CHAPTER 10



# CHAPTER 10

## 10. ASSESSING COMPLIANCE BY MEDIA AND ONLINE MEDIA PLATFORM PROVIDERS TO THE GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA

### e. COMPLIANCE WITH GUIDELINE 29 (MEDIA AND ONLINE MEDIA PLATFORM PROVIDERS)

Guideline 29 of the Guidelines on Access to Information and Elections in Africa requires public or private print, broadcast and online media to proactively disclose certain information.

Compliance with Guideline 29 (media and online media platform providers)		
	Description	Status of compliance
a	Editorial and/or ethical codes or guidelines utilised in undertaking election coverage, including provisions prohibiting incitement to discrimination, hostility or violence	Complied
b	Sanctions for transgressions of these codes or guidelines	Not complied
c	Complaints procedures for handling breaches of these codes or guidelines	Partly complied
d	Number of complaints received and how these were addressed	Not complied
e	Code of conduct for staff on procedural matters	Not complied
f	Criteria for the allocation of airtime or news coverage for political campaign advertisements and activities	Not complied
g	Polling methodologies and margins of error	Not assessed
h	Actual allocation of airtime or news coverage for political campaign advertisements and activities	Not complied
i	Plan for transparent repository of all political advertisements, including those targeted at individuals or specific groups on online media	Partly complied
j	Coverage plan for election day	Partly complied



k	Criteria for the selection of election commentators, political analysts or other experts	Not complied
l	Guidelines on responsible use of online media	Mostly complied
m	Conflict of interest media ownership information, political affiliations or party support arrangements	Not complied

## STATUTORY REGULATION

A number of statutes regulate the criteria for allocating airtime or news coverage for political campaign activities and advertisements. The Kenya Broadcasting Act<sup>379</sup> requires the Kenya Broadcasting Corporation (KBC), as the state broadcaster, to provide independent and impartial broadcasting services in English, Kiswahili and other languages as the Corporation may decide. KBC is obligated to keep a fair balance in the allocation of broadcasting hours between different political viewpoints. Specific to elections, the Act requires KBC, in consultation with the IEBC, during the campaign period preceding any presidential, parliamentary or local government election, to allocate free air time to registered political parties participating in the election to expound their policies.<sup>380</sup>

The EA requires that all candidates and political parties participating in an election are allocated reasonable airtime on all broadcasting media during the campaign period.<sup>381</sup> Section 41 of the EA makes the following further specific provisions on the media and elections:

1. Political parties participating in an election have access to state owned media services during the campaign period;
2. The IEBC monitors the equitable allocation of air-time during the campaign, following consultations with state media services and political parties and candidates;
3. State owned print or electronic media which publish information relating to the electoral process are guided by the principle of total impartiality and refrain from discrimination in relation to any candidate;
4. Media houses and persons reporting on the elections subscribe to the Code of Conduct for the Practice of Journalism prescribed under the Media Act;
5. The IEBC may prohibit a media house that contravenes the Code of Conduct prescribed under the Media Act from transmitting information related to an election.

379 Kenya Broadcasting Corporation Act Revised Edition 2009 (1998) <http://kenyalaw.org/8181/exist/kenyalex/actview.xql?actid=CAP.%20221> (accessed 11 December 2022).

380 Sec 8(1) Kenya Broadcasting Corporation Act.

381 Sec 109 Elections Act.

Credible concerns remained to the very end about the impartiality of key legacy media in their electoral coverage. The MCK's April-June 2022 monitoring report found that Azimio's presidential candidate, Odinga, received 61.2% media coverage (allotted print space and airtime) as compared with Kenya Kwanza's candidate, Ruto, who received 38.2% coverage.<sup>382</sup> More balanced coverage was reported in the MCK's next monitoring report, with Ruto's coverage being 46% while Odinga's was at 45%. The other two presidential candidates had far more limited coverage, with the Roots Party presidential candidate, George Wajackoyah, having 6% while David Mwaure, the candidate of Agano Party, had 3% coverage.<sup>383</sup> Even greater concerns were raised when legacy media, which initially started tallying the votes after the polls, suddenly stopped doing so.<sup>384</sup> It should, however, be recalled that the Chairperson of the IEBC specifically reminded the media that it could tally the results but not declare the winners,<sup>385</sup> and that interpreting this edict may have constrained the media's actions.

Some legacy media have either generic editorial and/or ethical codes or guidelines on coverage, including provisions prohibiting incitement to discrimination, hostility or violence. The Code of Journalism of Royal Media Services is fairly generic.<sup>386</sup> The Nation Media Group (NMG) guidelines are generic and not specific to elections. They set out NMG's Code of Conduct covering matters such as accuracy and fairness, opportunity to reply, unnamed sources, confidentiality, and discrimination. In this last regard, the Code provides that:

*In general, the media should avoid prejudicial or pejorative references to a person's race, tribe, clan, religion, sex or sexual orientation or to any physical or mental illness, handicap or political orientation. These details should be eschewed unless they are germane to the story. Everyone should be accorded equal treatment as news subjects or sources and journalists should not deliberately deny the right of any group to exposure in the media.*<sup>387</sup>

The Guidelines also establish NMG's core values, including: independence of vested interests or external influences; veracity and accuracy in reporting 'publishing that which editors believe to be true, fair and accurate'; selection of editorial content for its inherent news value and not to appease, augment or respond to political, commercial or any other interests; clear

382 MCK 'Media monitoring research report' (2022) <https://mediacouncil.or.ke/node/837> (accessed 14 December 2022).

383 B Khaduli 'MCK releases media coverage report' *Kenya News Agency* 14 July 2022 <https://www.kenyanews.go.ke/mck-releases-media-coverage-report/> (accessed 15 December 2022).

384 D Walsh & AL Dahir 'Kenya on edge as media's election tally suddenly stops' *New York Times* <https://www.nytimes.com/2022/08/12/world/africa/kenya-election-results.html> (accessed 14 December 2022).

385 Remarks by the IEBC Chairman (n 3).

386 Royal Media 'Code of Journalism Ethics' <https://royalmedia.com/code/> (accessed 17 December 2022).

387 Nation Media Group 'Editorial policy guidelines and objectives' <http://www.nationmedia.com/wp-content/uploads/2018/02/Editorial-policy-online.pdf> (accessed 13 December 2022).

differentiation between views and opinion on the one hand and news and reportage on the other; standing for racial, ethnic, religious and communal harmony and political/party tolerance as well as other forms of pluralism; supporting the principles of democracy, 'good governance, transparency and accountability, regular, free and fair elections as well as social equity'; supporting the role of 'responsible and credible CSOs' in the promotion of democracy and good governance; supporting and promoting the protection and promotion of human rights and civil liberties; supporting and promoting public debate on matters of national importance; supporting and promoting the protection and conservation of the environment whilst promoting sustainable development; and supporting the most economically vulnerable members of the society.<sup>388</sup> NMG has other important policies, including on whistleblowing<sup>389</sup> and privacy.<sup>390</sup>

These codes of conduct are inexact on sanctions for transgressions. Complaints procedures for handling breaches of these codes or guidelines are also imprecise. Significantly, codes of conduct have conventionally seemed inadequate as tools for regulating the actions of media owners, some of who were not reticent to express their partisan views and work in support of particular presidential candidates.<sup>391</sup>

Owners also sought to use subtler approaches to push partisan interests, such as by pressuring certain editorial lines. In one instance, the host of the political show Punchline on K24 TV resigned after Mediamax management cancelled her planned interview with an MP opposed to President Kenyatta who is associated with the station.<sup>392</sup>

## SOCIAL MEDIA

Activities on social media platforms were a double-edged sword for democracy in the 2022 electoral cycle. The electorate, on one hand, debated and ventilated about their preferences perhaps more than ever before using social media platforms such as Facebook, Twitter and YouTube. Social media in this sense was '... a potent tool for grassroots organising, one-to-many communication, and broad engagement'.<sup>393</sup> Yet, social media platforms also bore

388 As above.

389 Nation Media Group 'The whistleblowing policy and procedures' (2021) <http://www.nationmedia.com/wp-content/uploads/2021/03/NMG-Whistleblowing-Policy-2021.pdf> (accessed 16 December 2022).

390 Nation Media Group 'The privacy policy' (2020) <https://www.nationmedia.com/privacy-policy/> (accessed 19 December 2022)

391 It was, for example, quite clear that the owner of Royal Media Services, SK Macharia, supported the presidential candidacy of Odinga. For example, see Citizen TV Kenya 'RMS Chairman Dr.SK Macharia says Raila endorsement is personal' [https://www.youtube.com/watch?v=wwY14Em6gXM\\_](https://www.youtube.com/watch?v=wwY14Em6gXM_) (accessed 19 December 2022).

392 K Ndirangu 'Kenya: Anne Kiguta quits K24 over "fundamental disagreement" with her bosses' *All Africa* 6 December 2020 <https://allafrica.com/stories/202012070058.html> (accessed 19 December 2022).

393 A Sugow & I Rutenberg 'Securing Kenya's electoral integrity in the digital age' *The Elephant* 17 September 2021 <https://www.theelephant.info/op-eds/2021/09/17/securing-kenyas-electoral-integrity-in-the-digital-age/> (accessed 18 December 2022). Also see discussion on how social media has portended greater civic empowerment for Kenyans in Kofi Annan Foundation 'Report on the Digital Ecosystem in Kenya' (2021) [https://www.kofiannanfoundation.org/app/uploads/2021/12/Digital-Ecosystem-Kenya\\_Kofi-Annan-Foundation-1.pdf](https://www.kofiannanfoundation.org/app/uploads/2021/12/Digital-Ecosystem-Kenya_Kofi-Annan-Foundation-1.pdf) (accessed 18 December 2022).

negative electoral messages packaged as disinformation, misinformation or mal-information.<sup>394</sup>

The power of social media to shape or sway public opinion during the 2022 election cycle could not be understated. Outside the electoral realm, one study found that activities on social media platforms like Twitter propagated malicious, coordinated, inauthentic attacks that sought to silence members of civil society, muddy their reputations and stifle the reach of their messaging. Disinformation campaigns driven by influencers and supported by bots was notably mobilised around the contentious Building Bridges Initiative (BBI), a government-supported initiative which sought to review the Constitution. Opponents of the BBI were attacked and vilified. Attacks were incubated in WhatsApp groups before being launched into the Twittersphere.<sup>395</sup> Another study noted that instant and widespread reach of election-related disinformation could act as a threat multiplier, as indeed happened in the 2017 general election when online media platforms were weaponised by the Jubilee Party to run negative social media campaigns against the opposition party ODM through data mining companies like Cambridge Analytica. The study noted that social media spread disinformation quite often amplified through misinformation and mal-information.<sup>396</sup>

Fears that social media platforms would similarly be mobilised to create dissension around the general election were soon realised. Social media played controversial roles in the period leading up to the polls, on polling day itself and afterwards,<sup>397</sup> spreading disinformation, misinformation and mal-information alike. Illustratively, a 10-second video clip of a Kikuyu language interview of Kenya Kwanza's deputy presidential candidate was disseminated on social media platforms, including Twitter and Facebook, using deceptive English sub-titles to spread the false narrative that a Kenya Kwanza government would shut down large corporations and distribute arising proceeds as hand-outs. Social media impersonation of politicians increased, with accounts being created in politicians' names to spread fake news. Disinformation and misinformation was also peddled through Photoshop and fake opinion polls.<sup>398</sup> Both sides of the political divide paid social influencers to sway the electorate by amplifying the views of politicians, creating false narratives, deflecting criticism and promoting viral conspiracies. The use of social influencers

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394 Disinformation is false or misleading information created deliberately to harm a person, social group or indeed country, primarily for political or financial gain. Mal-information is information based on reality shared with the deliberate intent of inflicting harm on a person, social group or country, such as hate speech. Misinformation is false or misleading information shared inadvertently without intent to cause harm. – M Kujawski 'Misinformation, vs. disinformation vs. mal-information' <https://medium.com/@mikekujawski/misinformation-vs-disinformation-vs-mal-information-a2b741410736> (accessed 18 December 2022) & G McKay "Disinformation and democratic transition: a Kenyan case study" *Stimson Centre* (22 June 2022) <https://www.stimson.org/2022/disinformation-and-democratic-transition-a-kenyan-case-study/> (accessed 19 December 2022).

395 O Madung 'How Twitter's negligence is harming Kenyan democracy' *The Elephant* 1 July 2022 <https://www.theelephant.info/op-eds/2022/07/01/how-twitters-negligence-is-harming-kenyas-democracy/> (accessed 20 December 2022).

396 G McKay (n 394).

397 MCK (n 200).

398 M Chelangat & H Shikanda 'Exposed: names behind Kenya's August polls lies' *Nation* 7 July 2022 <https://nation.africa/kenya/news/politics/exposed-names-behind-poll-lies-3871518> (accessed 21 December 2022).

provided politicians with plausible deniability in instances where the law or social mores were broken. The two contending presidential candidates were targeted through Twitter hashtags such as #RailaStateProject, #RailaHatesMtKenya, #HungryRuto and #RutosViolencePlan.<sup>399</sup> On at least one occasion, Twitter suspended over 100 Twitter accounts operating in Kenya which it ‘... found had engaged in violations of our Platform Manipulation and Spam Policy’.<sup>400</sup> Even election pollsters fell for misinformation campaigns. In some instances, social media users edited the results of pollsters such as TIFA in favour of their preferred candidates.<sup>401</sup>

Concerns of note related to TikTok which was increasingly being used particularly by younger Kenyans. One study<sup>402</sup> found that the influence of TikTok was under-scrutinised and yet it was used to undertake dramatic disinformation campaigns, including hate speech, incitement against communities and synthetic and manipulated content. For example, videos shared on the platform contained explicit threats of violence specifically targeting members of ethnic communities based in the Rift Valley region. The study cited a video of a detergent infomercial with the narration that ‘UDA can be used to remove madoadoo (spots) such as Kikuyus, Luhyas, Luos, and even Kambas’. The study concluded that TikTok had not put in place an effective and properly-resourced framework for moderating election disinformation. The study recommended that TikTok should put a more effective framework for moderating political content taking account of Kenya’s full cultural context, including by partnering with fact checkers and civil society, more clear policies and guidelines, and algorithmic transparency.<sup>403</sup>

Meta, the parent company of media platforms such as Facebook, Instagram and WhatsApp, reported it had taken multiple steps to prepare for the 2022 general election. Notably, it had:

1. Identified and removed content that violated its community standards, including standards against hate speech, voter suppression, harassment and inciting violence;
2. Hired more content reviewers to review content across its apps including in Kiswahili;
3. Taken action, in the six months to the end of April 2022, on more than 37,000 pieces of content on Facebook and Instagram in Kenya for violating its hate speech policies, and over 42,000 pieces of content that violated its violence and incitement policies;
4. Formed a working group for the protection of female public figures during the elections;

399 Agence France-Presse ‘Election influencers for hire: Kenya’s disinformation factories’ *Nation* 5 May 2022 <https://nation.africa/kenya/news/election-influencers-for-hire-kenya-s-disinformation-factories-3805330> (accessed 21 December 2022).

400 V Ochuka ‘Twitter suspends shadowy Kenyan influencers’ *Nation* 11 September 2021 <https://nation.africa/kenya/news/twitter-suspends-shadowy-kenyan-influencers-3546214> (accessed 22 December 2022).

401 M Chelangat ‘pollsters fall prey to misinformation campaigns too’ *Nation* 7 July 2022 <https://nation.africa/kenya/news/politics/pollsters-fall-prey-to-misinformation-too-3871510> (accessed 22 December 2022).

402 O Madung ‘From dance app to political mercenary: how disinformation on TikTok gaslights political tensions in Kenya’ *Mozilla Foundation* 7 June 2022 <https://foundation.mozilla.org/en/campaigns/kenya-tiktok/> (accessed 20 December 2022).

403 As above.



5. Temporarily reduced the distribution of content from persons who had repeatedly or severely violated its policies;
6. Partnered with independent third-party fact-checkers in Kenya to review content in English and Kiswahili, and to reduce the distribution of content rated as false;
7. Improved digital and media literacy, including by raising awareness amongst youth, teachers, parents and guardians on topics such as online safety, privacy, digital citizenship, news and media literacy; and
8. Made political advertising more transparent on Facebook and Instagram, including by requiring advertisers to verify their identities, to live in Kenya and to label their adverts with a 'paid for by' disclaimer.<sup>404</sup>

An investigation conducted by Global Witness, however, found that these interventions may have been overstated, and that Facebook's systems were ill-able to detect hate-speech and ethnic-based calls to violence submitted in advertisements both in English and Kiswahili.<sup>405</sup>

## SAFETY OF JOURNALISTS

Throughout the electoral period, politicians and activists alike expressed their disapproval of journalists through verbal and even physical attacks. Ruto ejected the media from a political meeting at which he was speaking, stating: "These media houses...why do we have media houses here? Nani aliwaleta hapa (Who allowed them in?). Tokeni kwanza bwana ndio tuongee mambo ya maana (... leave so we can discuss important issues)".<sup>406</sup> On another occasion, Kenya Kwanza's deputy presidential candidate inflamed the public against journalists covering his campaign rally, accusing them of partisan reporting, saying: "Haven't you gotten enough of what you need, you people? ... Do you know these people alter the facts? When we say this, they go ahead and change it. We want to tell them that we will win this election without them".<sup>407</sup>

## PRESIDENTIAL DEBATES

The question of whether it was strategic to skip a presidential debate was brought into sharp focus when Odinga decided he would not participate in the planned debate with Ruto. Whether or not this act lost Odinga votes, the boycott denied the electorate an important opportunity to access information on the views of a contending candidate for the presidency. Indeed, even

404 M Ndegwa 'How Meta is preparing for Kenya's 2022 general election' Meta 20 July 2022 <https://about.fb.com/news/2022/07/how-metas-preparing-for-kenyas-2022-general-election/> (accessed 22 December 2022).

405 Global Witness 'Facebook unable to detect hate speech weeks away from Kenyan elections' July 2022 <https://www.globalwitness.org/en/campaigns/digital-threats/hate-speech-kenyan-election/> (accessed 22 December 2022).

406 E Matara 'DP Ruto kicks out journalists from Njoro meeting' *Nation* 20 June 2022 <https://nation.africa/kenya/news/politics/dp-ruto-kicks-out-journalists-from-njoro-meeting-to-discuss-important-matters--3854192> (accessed 25 December 2022).

407 N Moturi 'Gachagua rebukes journalists covering his Nyeri rally' *Nation* 26 July 2022 <https://nation.africa/kenya/news/politics/gachagua-rebukes-journalists-covering-his-nyeri-rally-3892450> (accessed 22 December 2022).

the tone of the debate was compromised since the moderators had to turn themselves into inquisitors in order to illuminate the responses provided by Ruto.<sup>408</sup> Access to information concerns itself too with the quality of availed information. In this regard, stakeholders have begun contemplating how to make future presidential debates more effective. It was, for example, suggested that:

1. Instead of splitting the debate into two sessions each featuring two candidates determined on the basis of their apparent electoral strengths, the organisers should have held one presidential debate involving all the candidates;
2. The general tone and build-up to the debates should not be presented as adversarial; and the moderators should ensure the candidates do not obfuscate in their responses to questions and that their responses are substantive and clear.<sup>409</sup>

## Recommendations:

Public or private print, broadcast and online media should proactively disclose:

1. Sanctions for transgressions of editorial and/or ethical codes or guidelines utilised in election coverage;
2. The number of complaints received and how these were addressed;
3. The criteria for and actual allocation of airtime or news coverage for political campaign advertisements and activities; and
4. Conflict of interest media ownership information, political affiliations or party support arrangements.

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408 J Ochieng' 'Ruto's moment in the sun as Raila dithers' *Nation* 27 July 2022 <https://nation.africa/kenya/news/politics/ruto-s-moment-in-the-sun-as-raila-dithers--3893394> (accessed 24 December 2022).

409 M Gichunge 'We need better preparations for future debates' *Nation* 28 July 2022 <https://nation.africa/kenya/blogs-opinion/letters/we-need-better-preparations-for-future-debates-3894184> (accessed 24 December 2022).



## CHAPTER 11



# CHAPTER 11

## 11. ASSESSING COMPLIANCE BY CIVIL SOCIETY ORGANISATIONS TO THE GUIDELINES ON ACCESS TO INFORMATION AND ELECTIONS IN AFRICA

### f. COMPLIANCE WITH GUIDELINE 30 (CIVIL SOCIETY ORGANISATIONS)

Guideline 30 of the Guidelines on Access to Information and Elections in Africa requires CSOs involved in the electoral process to proactively disclose certain information.

Compliance with Guideline 30 (Civil Society Organisations)		
	Description	Status of compliance
a	Organisational aims and objective	Mostly complied
b	Membership and composition	Partly complied;
c	Details of key staff and office bearers	Complied
d	Sources of funding	Partly complied
e	Operational plans, methodology, manuals and their implementation for civic and voter education	Mostly complied
f	Possible conflict of interest, which may include the promotion of a particular religious, ethnic or political interest or bias or prejudice in cases where they participate in both voter education and election observation	Not complied
g	Campaign funders	Not assessed

At the time of the 2022 election, the legal framework regulating NGOs remained quite archaic since the government had not gazetted a commencement date for the Public Benefits Organisations Act (PBOA)<sup>410</sup> which was enacted in 2013 to replace its 1990 predecessor statute, the Non-Governmental Organisations Co-ordination Act (NGOCA).<sup>411</sup> The PBOA contains explicit provisions excluding political parties from the purview of public benefit organisations, which are

410 Public Benefits Organisations Act 18 of 2013 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2018%20of%202013> (accessed 12 December 2022).

411 Non-Governmental Co-ordination Act 19 of 1990 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2019%20of%201990> (accessed 12 December 2022).



autonomous, non-partisan and non-profit making voluntary membership or non-membership groupings of individuals or organisations that undertake public benefit activities.<sup>412</sup> The PBOA contains more robust proactive disclosure requirements than the NGOCA.<sup>413</sup>

CSOs provided integral and necessary support to the realisation of the 2022 general election. CSOs indeed have played eminent roles in the election process particularly from the 1992 general election following the repeal of Section 2A of the then Constitution reverting Kenya into a multiparty state. CSOs, including FBOs, undertook general civic education and specific voter education and they spearheaded or participated in election monitoring of elections. During the 2022 electoral cycle, they played similarly diverse roles. They undertook voter education by preparing and disseminating voter education material and by facilitating community voter education meetings. CSOs prepared material focusing on particular segments of the electorate, including women, youth, persons with disabilities and the general electorate.<sup>414</sup>

CSOs spearheaded a number of campaigns to support the 2022 election. As already discussed, a number of civil society networks, including ELOG and the Angaza Movement, participated in election monitoring activities.

The National Integrity Alliance (NIA) Red Card Campaign was an integrity and anti-corruption coalition comprising Transparency International Kenya (TI-Kenya), Inuka Kenya Ni Sisi!, Mzalendo Trust, The Institute for Social Accountability (TISA) and KHRC. The NIA Red Card Campaign advocated that individuals with questionable integrity should be barred from being elected to public office in the 9 August polls. The Alliance gave red cards to politicians named adversely by statutory bodies or under prosecution for economic crimes from across the political divide, including a deputy presidential aspirant, 10 gubernatorial aspirants and one deputy gubernatorial aspirant, three senatorial aspirants and 10 aspirants to Parliament.<sup>415</sup>

It is significant that following the enactment and operationalisation of the AIA, CSOs started to make access to information requests on government and other institutions. The KI sought information on issues such as the Nairobi ExpressWay Project; Kenyatta National Hospital and Chiromo Mortuary seeking information on the number of deaths recorded between February – May 2020; and the transfer of functions from Nairobi County to the national government. Specific to elections, the KI sought information from the IEBC on the implementation of the High Court judgment in petition No. 19 of 2017. The information sought included the measures the IEBC had taken to implement the constitutional requirement that not more than two-thirds of the members of elective or appointive bodies are of the same gender.<sup>416</sup> The KI also

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412 Section 5 of Public Benefits Organisations Act .

413 As above.

414 Twaweza East Africa 'Ready to vote? Kenyan citizens' experiences and opinions' *Sauti za Wananchi* (2022) <https://twaweza.org/wp-content/uploads/2022/03/SzW-KE-Elections-Brief41-FINAL-print.pdf> (accessed 12 December 2022).

415 B Makong 'Kenya: Ruto, Odinga allies "red carded" in renewed integrity alliance campaign' *Capital FM* 22 May 2022 <https://allafrica.com/stories/202205230026.html> (accessed 20 December 2022).

416 Katiba Institute 'Handbook on the Access to Information Act' <https://katibainstitute.org/access-to->



prepared access to information request templates which the electorate could use to apply for information.<sup>417</sup>

FBOs, including the National Council of Churches of Kenya, the Supreme Council of Kenyan Muslims and the Kenya Episcopal Conference of Catholic Bishops also played key roles in the election process. FBOs showed their support to different candidates and called on the electorate to vote for leaders who supported their faiths' particular priorities.<sup>418</sup> Before the release of the presidential election results, the Kenya Conference of Catholic Bishops called on politicians to stop using incendiary language; and urged winners to maintain humility and losers to concede graciously. The Bishops stressed the importance of effective communication and information sharing, stating: 'IEBC ought to come out openly to clarify any allegations or misrepresentations... we must not lose sight of our dark history with vote count. We must conclude the election exercise without delays'.<sup>419</sup>

CSOs that participated in the 2022 election had different levels of proactive disclosure on the profiles on their websites, as illustrated below in a sample of eight organisations - Amnesty Kenya,<sup>420</sup> Angaza Movement,<sup>421</sup> CRECO,<sup>422</sup> IMLU,<sup>423</sup> KHRC,<sup>424</sup> KI,<sup>425</sup> KICTANET<sup>426</sup> and UDPK.<sup>427</sup>

1. The eight organisations specified their organisational aims and objectives.
2. Three proactively disclosed their membership (Amnesty Kenya, Angaza Movement, CRECO).
3. Five disclosed their board members (Amnesty Kenya, IMLU, KHRC, KI, KICTANET) and SIX disclosed key staff (Amnesty Kenya, CRECO, IMLU, KHRC, KI, KICTANET).
4. FIVE organisations made albeit limited disclosures of their funders (Angaza Movement, IMLU, KI, KICTANET, UDPK).
5. None declared conflicts of interest.
6. Three had operational plans, manuals and strategies (Amnesty Kenya, CRECO, IMLU).

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information/ (accessed 20 December 2022). Also see *Katiba Institute* (n 265).

417 Katiba Institute 'Access to information request application template' <https://katibainstitute.org/download/access-to-information-request-application-template/> (accessed 20 December 2022).

418 O K'onyango 'Vote for politicians with integrity, religious leaders advise faithful' *Nation* 26 June 2022 <https://nation.africa/kenya/news/politics/elections-what-the-kenyan-clergy-want-3860012> (accessed 22 December 2022).

419 I Mugo 'Catholics bishops call for civility among politicians' *Nation* 31 July 2022 <https://nation.africa/kenya/news/catholic-bishops-call-for-civility-among-politicians-3898100> (accessed 26 December 2022).

420 <https://www.amnestykenya.org/> (accessed 22 December 2022).

421 <https://www.cso-network.org/angaza> (accessed 22 December 2022) & <https://www.cso-network.org/angaza> (accessed 22 December 2022).

422 <https://crecokenya.org/> (accessed 22 December 2022).

423 <https://www.imlu.org/> (accessed 22 December 2022).

424 <https://www.khrc.or.ke/> (accessed 22 December 2022).

425 <https://katibainstitute.org/> (accessed 22 December 2022).

426 <https://www.kictanet.or.ke/about-kictanet/> (accessed 22 December 2022).

427 <https://www.udpkenya.or.ke/> (accessed 22 December 2022).

The question of conflict-of-interest is as much about reality as about appearance. Illustratively, the impartiality of KHRC was challenged despite the fact that it is a historically eminent CSO. Its then long-standing Chairperson, Makau Mutua, was also quite clearly involved in partisan politics as the spokesperson of the Raila Odinga 2022 Presidential Campaign and head of its think tank.<sup>428</sup> KHRC as such was or would have been perceived as partisan. This may indeed have been the reason which caused the KHRC to replace Mutua with an acting chairperson.<sup>429</sup>

### **Recommendation:**

CSOs involved in the electoral process should proactively disclose information on their membership and composition, sources of funding, and possible conflict of interest.

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428 Citizen Reporter 'Prof. Makau Mutua appointed spokesperson of Raila Odinga Presidential Campaign' *Citizen Digital* 1 March 2022 <https://www.citizen.digital/news/prof-makau-mutua-n293583> (accessed 26 December 2022).

429 S Otieno 'KHRC gets new boss as Makau Mutua exits' *Nation* 30 June 2022 <https://nation.africa/kenya/news/khrc-gets-new-boss-as-prof-makau-mutua-exits-3864832> (accessed 26 December 2022).



## CHAPTER 12



# CHAPTER 12

## 12. CONCLUSION

During the 2022 general election, the electorate benefited from communication of information and exchange of ideas on legacy and social media platforms. At the same time, electoral stakeholders including the IEBC, the ORPP and the ODPC provided significant amounts of information proactively to the benefit of electors and candidates. It is indeed a reasonable conclusion that by publicly streaming the presidential results and by placing the raw data from polling stations on a public portal, the media and the IEBC struck on a panacea against civil conflict during the days preceding declaration of the presidential results and indeed even upon the declaration of results. It may be surmised that if the information environment was even more conducive, the electors would have had ampler opportunities for interrogating and abandoning politicians who it would have been shown did not live by the mantra of ethics and leadership established in Chapter Six of the Constitution

The aim of this study was to evaluate the performance of electoral stakeholders in proactively disclosing election-related information as envisaged under the Guidelines on Access to Information and Elections in Africa. All stakeholders should work to implement the recommendations set out in this study in order to ensure that Kenyans access even more electoral information during the 2027 general elections and in forthcoming by-elections.







GOVERNANCE

FREEDOM

INDEPENDENCE

DEMOCRACY

CREDIBILITY

TRANSPARENCY

MEDIA

INFORMATION

CITIZENS

VOTE

ELECTIONS

BALLOT

RIGHTS

