

4 Legal Framework

4.1 Context and clamour for a credible RoV

The audit of the register provides an opportunity for the commission to build public trust and inspire public confidence in the RoV and electoral process.

This is against a backdrop of a series of negative historical events and public perception of the commission leading up to the amendment of the elections law to include the requirement of an audit of the register. The history of mistrust of the commission and perceived mischief in the RoV combined with the suspicion of the register as the primary instrument of mischief sets the expectation for the need to have an accurate voters register. Past electoral events in Kenya such as the 2007/2008 post-election violence, the subsequent Kriegler report, the 2013 contested elections followed by the report on the joint parliamentary select committee on the Commission as adopted by parliament in 2016 underscore the importance of having a voter's list that inspires confidence.

Our approach is firmly anchored on the constitutional provisions of the Republic of Kenya and applicable laws including the Elections Act of 2011 and its amendment of 2016 and 2017 whose objectives are the verification of the accuracy of the register, provision of recommendations for mechanisms for enhancing accuracy of the register and updating it. The ultimate purpose of the exercise is to "secure the sovereign power of the people of Kenya as provided in Article 1(2) of the constitution of Kenya".

4.2 Legal basis for the audit of the RoV

Following the clamour for credible, free and fair elections, the National Assembly and the Senate resolved to establish a Joint Parliamentary Select Committee on matters relating to the Independent Electoral and Boundaries Commission (The Committee). The mandate of the Committee was to among other things, "Recommend legal, policy, and institutional reforms to strengthen the Independent Electoral and Boundaries Commission and improve the electoral systems and processes so as to ensure the August 2017 are free and fair, and administered in an impartial, efficient, simple, accurate, verifiable, secure, accountable and transparent manner²¹". In its report to Parliament, the Committee recommended "That for purposes of the 2017 General Elections - The Independent Electoral and Boundaries Commission engages a professional reputable firm to conduct an audit of the RoV for the purpose of verifying the accuracy of the Register, updating the Register and recommending mechanisms to enhance the accuracy of the Register."²²

As a result of the Committee's recommendations, the audit of the RoV was made a statutory obligation under the Elections (Amendment) Act, No. 36 of 2016.²³ This amended the Elections Act, 2011 to introduce a new Section 8A which provides that:

"The Commission may, at least six months before a general election, engage a professional reputable firm to conduct an audit of the Register of Voters for the purpose of -

²¹ Motion on the Establishment of a Joint Parliamentary Select Committee on matters relating to the IEBC, 5 July 2016.

²² Republic of Kenya, Report of the Joint Parliamentary Select Committee on Matters Relating to the Independent Electoral and Boundaries Commission (Parliament of Kenya, 11th Parliament, 4th Session, 16th August, 2016)

²³ Elections Amendment Act, Act Number 36 of 2016 (commenced on 4th October, 2016)



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- a) verifying the accuracy of the Register;
- b) recommending mechanisms for enhancing the accuracy of the Register; and
- c) updating the register."²⁴

The law further provided for the early engagement of a professional reputable firm to conduct the audit for the purposes of the general election constitutionally scheduled for 8 August 2017.

Whilst this provision in the law is the principle basis for the conduct of the audit of the RoV, as part of audit, KPMG has also carried out a broader review of the entire legal framework governing the process of registration of voters. This has been reviewed for comprehensiveness and effectiveness and areas requiring reform identified and captured in this report.

4.3 Overview of the legal framework

In undertaking the Audit of the RoV, KPMG have been guided by the Constitution of Kenya and legislations passed by Parliament relating to elections. The key laws KPMG have relied on include:

- The Constitution of Kenya, and in particular Articles 1, 10, 12, 38, 81, 83, 86, 88 and 260
- The Elections Act, 2011 as amended in 2012, 2016 and 2017
- The Elections (General Regulations), 2012 and the Elections(General) (Amendment) Regulations, 2017
- The Elections (Registration of Voters) 2012; and the Elections (Registration of Voters) (Amendment) Regulations, 2017
- The Elections(Technology) Regulations, 2017
- The Kenya Citizenship and Foreign Nationals Management Service Act
- Births and Deaths Registration Act
- Kenya Citizenship and Immigration Act
- Registration of Persons Act
- The Independent Electoral and Boundaries Commission Act

The Constitution of Kenya

The need for a credible, verified RoV is anchored in the sovereignty of the people of Kenya on which the entire Constitution is founded. In particular, Article 1(2) of the Constitution provides that: "The people may exercise their sovereign power either directly or through their democratically elected representatives." Democratic elections and referenda are established in the Constitution as the primary avenues for the free expression of the sovereign power of the people. Both require a RoV that accords with the general principles for the electoral system set out in Articles 81 and 86 of the Constitution. Amongst those principles is the freedom of citizens to exercise their political rights under Article 38, universal suffrage based on the aspirations for fair representation and equality of the vote, free and fair elections which are by secret ballot, are transparent, administered in an impartial, neutral, efficient, accurate and

²⁴ Section 8A, Elections Act, 2011.

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accountable manner, and a voting method that is simple, accurate, verifiable, secure, accountable and transparent.

Article 38(3), links the right to register as a voter with that of participation in free and fair elections as follows:

“3) Every adult citizen has the right, without unreasonable restrictions

- a) to be registered as a voter;
- b) to vote by secret ballot in any election or referendum; and
- c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

The Constitution also establishes the Commission under Article 88(1) and secures its independence under Article 249(2). The commission is then mandated with the responsibility of conducting or supervising referenda and elections, including the continuous registration of voters and the regular revision of the voters’ roll²⁵. In accordance with this constitutional stipulation, voter registration in Kenya is expected to be conducted on a continuous basis. In addition, in exercise of its constitutional mandate to register voters, the commission organizes periodic mass voter registration drives so as to ensure that all eligible voters get the opportunity to register.

In Articles 83, the Constitution sets out clear and unambiguous criteria for qualifying to be registered as a voter. Article 83 requires one to be an adult citizen who has not been declared to be of unsound mind or been convicted of an electoral offence for the previous five years. These are the Constitutional prerequisites for one to be registered as a voter. Article 12 deals with the entitlements of citizens and provides that every citizen is entitled to a Kenyan Passport and any document of registration or identification issued by the State to Citizens. Article 260 then defines an adult as one who has attained the age of 18 years also known as the age of majority.

Those who meet the constitutional requirements set out in Article 83 of the Constitution are expected to present themselves to the Commission registration officials, present the documents envisaged in Article 12, and apply to be registered. The process results in one being included in the RoV, thus qualifying to exercise their constitutional right to vote. Based on the principle of universal suffrage and equality of the vote, the Constitution provides that one who is qualified to register will only apply to be registered in one registration center. In essence, a citizen is entitled to be registered at only one place and thus to have only one vote in an election or referendum. This is the essence of the principle of universal suffrage and equality of the vote set out in Article 81 of the Constitution.

In conducting the registration process, the Commission is under obligation to ensure that whatever administrative measures it puts in place, these are aimed to be facilitative and do “not deny, an eligible citizen the right to vote or stand for election.”²⁶

With these clear constitutional provisions, there is no doubt the responsibility for maintaining an accurate RoV rests with the Commission. The audit of the RoV broadly sought to assess the extent to which the Commission has discharged this responsibility and delivered a RoV that complies with these constitutional provisions. With these constitutional provisions, the audit of the RoV is firmly anchored in the Constitution and the Commission could have asserted its

²⁵ Article 88(4), Constitution of Kenya.

²⁶ Article 83(3), Constitution of Kenya.

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independence and invoked Article 88 and 35 to conduct audits of the register. The support provided by Parliament under Section 8(A) of the Elections Act would appear to be supplementary to the constitutional mandate already available to the Commission. This accords with the determination of R.E Aburili, Judge, in High Court Petition no 129 of 2017 which states: *“It must be understood quite clearly that the work of auditing the Register of Voters is the function of IEBC²⁷.”*

4.3.1 The Elections Laws

Subsidiary to the Constitution, the Elections Act (the Act) is the primary legislation defining provisions for registration of voters. In addition to aiding the Commission’s Constitutional mandate for conducting an audit of the RoV, the Elections Act broadly governs the conduct of all electoral processes. It has detailed provisions on the registration process, which are supplemented by the Elections (Registration of Voters) Regulations, 2012, as amended in April 2017.

As part of the reforms that also provided for the audit, there were other changes to the legal framework governing the registration of voters. Among those changes is the clear provision that there is one RoV. This is the register that every citizen must be included in as a pre-condition to exercising their Constitutional right to vote. The Act defines the RoV as “a current register of persons entitled to vote at an election prepared in accordance with section 3 and includes a register that is compiled electronically.”

The Commission has the responsibility of compiling and maintaining the RoV, with details to be contained in such Register being prescribed by the Commission. The Elections (Voter Registration) Regulations has provided that these details shall include alphanumeric and biometric details. The audit process sought to assess the accuracy and completeness of both alphanumeric and biometric details.

Under the Act and Regulations and subject to Article 83 of the Constitution, every adult Kenyan citizen is entitled to apply and be registered as a voter. The application and registration process is to be undertaken by a Registration Officer or such other officer as the Commission may authorise. The law contemplates that the registration, while vested in a Registration Officer, is a function that is shared by other officers in the Commission.

To qualify to be registered as a voter, one has to demonstrate that they meet requirements of Article 83 by presenting a Kenyan Passport or Identity Card. In addition, the applicant must not have been registered as a voter in any other centre. On confirmation of qualification, the applicant is registered and their details forwarded to the Commission headquarters by the Registration Officer. It is from these details that the RoV is maintained and subsequently subdivided by Wards and Polling Stations for inspection and verification.

Section 8 of The Elections Act addresses the update of the Register, mandating the Commission, as part of the update process, to:

- Regularly revise the RoV
- Delete the names of deceased voters
- Rectify particulars in the RoV

²⁷ High Court of Kenya, Constitutional and Human Rights Division, Petition No.129 of 2017, Okiya Omtatah Okoiti vs IEBC & others, Para 314 of the Judgement delivered on 27 April 2017 by R.E. Aburiri, Judge.

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- If necessary, conduct a fresh voter registration, at intervals of not less than eight years, and not more than twelve years, immediately after the Commission reviews the names and boundaries of the constituencies in accordance with Article 89(2) of the Constitution;
- Review the number, names and boundaries of wards whenever a review of the names and boundaries of counties necessitates a review; and
- Revise the RoV whenever county boundaries are altered in accordance with Article 94(3) of the Constitution.

In Section 6A of the Elections Act, the law provides for inspection and verification of the Register of Voters to enable voters to confirm their details as captured in the Register. If a voter finds that their details have been incorrectly captured, the Commission provides a mechanisms for correcting the details. This is facilitated by completing Form D provided for under the Regulations. If voters were to take full advantage of the inspection and verification process, this would provide an additional safeguard to update and enhance the accuracy of the RoV. However, according to the Commission, voter participation in the inspection and verification is abysmally low.

In Section 12 of the Act, the law safeguards the sovereign power of the people by providing an avenue to seek legal redress relating to the registration process and their inclusion in the RoV. While the Constitution disqualifies one who is declared to be of unsound mind or convicted of an electoral offence within the preceding five years, the Act provides such person a grace period of thirty days or such period as the Commission shall determine before being disqualified. This grace period is intended to provide the voter an opportunity to appeal against the decision to declare them disqualified from being registered. For other questions relating to registration, a voter who feels aggrieved may also file a claim with the Registration Officer for determination and thereafter appeal to a Magistrates court.

Through the reforms enacted under the auspices of the Joint Parliamentary on matters relating to the Commission, the Elections Act now puts a premium on the place of technology in the electoral process. The Act provides for an integrated electronic electoral system for biometric voter registration, electronic voter identification and electronic transmission of results. The Elections (Technology) Regulations, 2017 was also adopted in April, 2017 governing application of technology in electoral process, including voter registration and identification in the voting process. These provisions of the law are expected to address concerns around the eligibility of the voter and validity of the Register of Voters, and to limit opportunities for mischief in the voting process in a manner inconsistent with the principles set out in the Constitution.

Section 44A of the Elections Act, makes provision for complementary mechanism for identification of voters. It deals with situations where those who have applied for and been registered are not capable of being identified using technology on Election Day. The Elections (Registration of Voters) Regulations provide detailed procedures for how to use complementary mechanism for identifying voters. This provides for the use of a printed copy of the Register, and where a voter is identified through this complementary mechanism, the Presiding Officer is required to complete a form and have the same signed in the presence of agents. The role of Party Agents and Independent Election Observers will therefore be critical in ensuring that this complementary mechanism is only used for bona fide voters.

The amendments to the Elections Act enacted in 2016 also provided for regular review and reporting on the accuracy and currency of the RoV. The Commission is now required to include in its annual report, the progress made in continuous registration of citizens as voters and the

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progressive realization of the right of citizens residing outside Kenya and prisoners to register as voters. This annual report is expected to be presented to the President and also submitted to Parliament. In order to meet this reporting requirement and scrutiny by Parliament, the Commission will need to put in place mechanisms for updating the register and ensuring its accuracy, including regular audit of the Register. This will reduce the level of effort and uncertainty unnecessarily generated when this process is left too close to the election.

In order to meet the requirements of Article 83 of the Constitution, the other relevant laws are the *Election Offences Act*²⁸ and the *Mental Health Act*²⁹. The Election Offences Act details election offences and their penalties while the Mental Health Act provides for the treatment and reporting of cases of mental health. The Mental Health Act is due for revision as provided for under the Mental Health Policy currently under review³⁰. The Commission is yet to establish policies and procedures for obtaining information under these two legislations for the purposes of updating the Register.

The Election Offences Act is useful for providing evidence of those who have been convicted of an election offence while the Mental Health Act would deal with those declared to be of unsound mind, both categories being disqualified from being registered as voters.

4.3.2 Citizenship and Related Legislations

Under Article 83 of the Constitution, the primary qualification for registration as a voter is to be an adult citizen of Kenya. Article 12 of the Constitution provides that citizens shall be entitled to a Kenyan Passport and any document of registration or identification issued by the State to citizens. Section 8A of the Elections Act notes that the Kenya Citizens and Foreign Nationals Management Service (KCFNMS) Act³¹ is the legislation that enables the Commission to give effect to Articles 83 and 12 of the Constitution on citizenship qualification by requiring KCFNMS to make available to the Commission for the purposes of the audit, the information it holds in the national population register. KCFNMS is mandated to administer the following legislation:

- The Births and Deaths Registration Act³²
- Registration of Persons Act³³
- Kenya Citizenship and Immigration Act³⁴
- The Refugees Act³⁵.

The integrated use and interdependencies in the implementation of this legislation would enable the State to identify persons who are citizens eligible to receive a Kenyan Passport, those who have attained the age of 18 and therefore eligible for issue with a national identification card, those who have died to inform the expunging from the Register as part of the regular updating of the RoV. For the RoV to be accurate, this reference information has to be complete, accurate and provided to the Commission on a regular basis. While the law is

²⁸ Election offences Act Number 37 of 2016.

²⁹ Mental Health Act Cap 248, Number 10 of 1989

³⁰ The Kenya Mental Health Policy of 2016

³¹ KCFNMS Act Number 31 of 2011

³² Births and Deaths Registration Act Chapter 149, Laws of Kenya

³³ Registration of Persons Act Chapter 107, Laws of Kenya

³⁴ Kenya Citizenship and Immigration Act Number 12 of 2011

³⁵ The Refugees Act Number 13 of 206

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clear on the requirements for accuracy, completeness and regular reporting of this information, in relation to the Register of Deaths, the law is honoured more in the breach than compliance.

4.4 Key issues and recommendations from the legal review

4.4.1 The people of Kenya enjoy unfettered sovereign power under the Constitution

The people of Kenya enjoy unfettered sovereign power under the Constitution. Even where legal and administrative measures are being put in place, these are intended to facilitate the exercise of this sovereign power rather deny citizens that right. This sovereign power is the foundation of the Constitution under Article 1 and reinforced under Articles 10 with regard to participation of the people, Article 38 with regard to political rights, Articles 81 and 86 relating to principles for the electoral process and voting respectively, Article 83 on qualifications to register as a voter, and Article 249 on the protection of sovereign power by independent Commissions. In particular, Article 83(3) is clear in its letter and spirit that the IEBC is under obligation to ensure that whatever administrative measures it puts in place in conducting registration of voters, these are aimed to be facilitative and should “not deny, an eligible citizen the right to vote or stand for election.”

Whether the people embrace and exercise this sovereign power to realize their individual, family, community and national aspirations is another question altogether. According to the IEBC, the actual performance in the registration process against targets indicates that not all the people may be embracing this sovereign power and there is some degree of apathy and dilatory behaviour by qualified citizens.

We recommend that IEBC works with other stakeholders to provide civic and voter and education to equip citizens with the knowledge and understanding that they require to exercise the sovereign rights under the Constitution. In the absence of this active engagement by citizens, the process of registering voters becomes prohibitively expensive as the targeted numbers are not achieved. The importance of registering as a voter to the electoral and democratic process is such that failure by citizens to exercise this right ends up undermining their sovereignty.

The results of the inclusive analysis we have provided will enable the IEBC and other stakeholders to target specific groups with the civic and voter education.

4.4.2 The Commission’s constitutional mandate to maintain and audit RoV

As demonstrated in section 4.3 above, the Commission has a clear and unambiguous constitutional mandate to conduct voter registration, maintain and update the voters roll, and conduct an audit on the Register to ensure that it is updated, complete and accurate. The commission did not require the bidding of Parliament to conduct the audit of the Register.

It is recommended that the Commission asserts its independence and discharges its mandate in accordance with the Constitution. This will require the Commission to be more proactive in the process of registration and in particular, invoke Article 35 of the Constitution to require other departments of Government to provide the information they hold to enable the Commission to update the RoV.

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4.4.3 Operationalisation of KCFNMS

Section 8A (2) of the Elections Act requires the Kenya Citizens and Foreign National Management Service to provide to the Commission information held in the national population register for purposes of the audit. However, while this provision gives supplementary legal foundation to the Commission to access state agencies data, KCFNMS is yet to be operationalized to give effect to the law. As a result, the Commission had to unveil the KCFNMS Act and go directly to the departments under purview to obtain the state agencies reference data required for the audit. As indicated in the contracting and commencement section of this report, this data took considerable time to be provided and certified. In addition the legislations governing the third parties are in some instances, like the Births and Deaths Registration Act outdated and in need of amendment.

KPMG recommend that the operationalization of the KCFNMS be given priority to enable the Commission to obtain the information required to update the RoV on a regular basis. In addition, specific inter-agency mechanisms should be formally established to provide for the regular sharing and cross-referencing of data.

4.4.4 Rationalisation of the registration of deaths

While the Births and Deaths Registration Act made the registration of deaths mandatory with effect from September 1971, the Regulations remain weak and ineffective. In addition, the law still provides for the manual maintenance of records and indices which are cumbersome to extract. In addition, there is no unique identifier that can integrate a record of birth to an identity card, passport (PP) or RoV. Even where records are available it requires considerable effort and diligence to ensure that they relate to the same person. As result, the data for updating the register and expunging deceased persons has not been provided to the Commission, or where this has been provided, has been found to be inaccurate and risks disenfranchising eligible voters. This negatively impacts the accuracy of the register and has subjected the Commission to criticism and contributed to eroding trust and confidence in the Commission for no fault of their own. The Commission has also had to resort to self-help mechanisms by collecting records of deaths from villages and in the process assumed the legal burden and administrative responsibility that rightfully belongs to the CRS. By doing so, the Commission attracts to itself both additional financial obligations and attendant risks relating to errors in the data.

It is recommended that the legal framework for the registration of births and deaths be reviewed to:

- Establish a unique identifier for every person, from registration at birth, to the ID and PP, to registration of death
- Provide for the use of technology in maintaining up to date records
- Align the collection of data to electoral units, including revision of registration forms
- Provide for the maintenance of databases of births and deaths in usable form by other third parties, not just indices which do not provide details of the individuals
- Provide for inter-agency collaboration between the CRS on the one hand, and health practitioners and institutions, law enforcement agencies and officers, Regional and County Commissioners and National Government officers at the local level, as well as cooperation with County Governments to achieve higher levels of coverage

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- Provide for collation and reporting from Registration Centres to the Centre, and maintain a complete and accurate register of Births and Deaths that can be accessed for the purposes of verifying the accuracy of the RoV. Such accurate and complete records of births and deaths will have multiplier effects in policy, planning and health management.

4.4.5 Rationalisation of Election laws and regulations to enhance accuracy

The accuracy of the register is impacted by the initial data capture, as well as the updating at Constituency level, and compilation at Commission Headquarters. In order to ensure seamless updating of the register, there needs to be a thorough review and rationalization of the law and regulations to clearly provide for the quality of staff, the collaborative working between Commission staff and other agencies, and the coordination of the work done by Registration officers with that performed at Commission headquarters. There is need to tighten the relationship between Registration Officers and Commission Staff in the preparation and update of the Register. The Elections act clearly provides that the RoV shall be prepared centrally. However, the process of its compilation and update is largely undertaken by Registration Officers. It is necessary that the Regulations expressly stipulate actions that can be undertaken by the Commission at the Headquarters and those to be undertaken by Registration Officers so as to ensure that the shared roles are clarified and responsibility apportioned appropriately. In addition, this will enable responsibility to be appropriately assigned for all actions relating to the RoV.

The amendments to the Elections (Registration of Voters) Regulations requiring the Registration Officer to collaborate with the Registrar of Births and Deaths and the NRB, while important in capturing the required collaboration, does not deal with the manner in which the collaboration should be structured. The collaboration envisaged is at the level whereof Registration Officer, yet there is need for collaboration at the national and devolved levels.

4.4.6 Clarification on expired passports

While the law is currently unclear on the use in voter identification in the voting process of a previously valid PP which has since expired, the data provided by the DIS for the purposes of the audit did not include expired PPs. This risks either disenfranchising previously registered voters whose PPs have since expired or allowing some to vote with expired PPs.

KPMG recommends that the Elections Act and the Elections (Registration of Voters) Regulations be amended to expressly provide that one cannot vote using an expired PP. Such a provision should be couched in the same manner as Regulation 37 of the Elections (Voter Registration) Regulations which requires Kenyans residing outside Kenya wishing to register as voters to produce a valid Kenyan PP. The law should state that a valid PP is necessary both at the time of registration and at the time of voting.

4.4.7 Giving effect to the disqualification criteria under Article 83

Other than self-declaration, there is no formal process for identifying citizens who may be of unsound mind and therefore ineligible for registration as voter. Similarly, there is no formal process established for the declaration of those who may have been convicted of an election offence in the preceding five years.



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KPMG recommends that the Commission engages with the Ministry of Health, The Director of Public Prosecutions, the Kenya Police Service and the Judiciary to establish formal mechanisms, including the necessary legal changes, to enable the Commission to give effect to the requirements of Article 83.

4.4.8 Enhancing control over transfer of voters

Section 7 of the Elections Act provides for transfer of voters from their registration to another electoral area.

During MVR II, the Commission directed that such voter transfers could only be effected at the Constituency headquarters. This directive by the Commission was intended to deal with importation and also free the registration assistants to concentrate on registering new voters and not just processing transfers. The Amendments to the Regulations have introduced a new provision to the effect that *“A voter is not qualified to transfer his or her registration unless at the date of his or her application to be transferred, he or she was ordinarily resident in that constituency 6 months immediately preceding the date of his application for transfer.”* This provision seeks to reduce unwarranted applications for transfers. However, this is a substantive provision which should have been dealt with in the Elections Act and not in regulations. The Regulations would appear to be inconsistent with the Act as the latter has no limitation on registration as a voter save for citizenship and age.

KPMG recommends that consideration be given to amending the Elections Act to achieve the intended control over transfer of voters.