REPORT OF THE BENCHMARKING VISITS TO GHANA, SOUTH AFRICA, INDIA AND MEXICO

JUDICIARY COMMITTEE ON ELECTIONS

2017
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PREFACE

Elections under the Constitution of Kenya are expected to be free, fair and credible. Delivering on this constitutional requirement should be an effort by all citizens, with specific institutions charged with spearheading the processes. The Judiciary is one such institution. Its crucial role in hearing and determining electoral disputes comes at the tail end of the electoral process. Alive to the confidence crisis that befell the Judiciary in the past, the Judiciary, through the former Chief Justice Dr. Willy Mutunga, established a permanent Committee, Judiciary Committee on Elections. Its role is to advise the Judiciary on legal and administrative arrangements for efficient election dispute resolution; capacity building of Judges, Judicial Officers and Judicial Staff; monitoring and evaluation of election petitions and election related disputes and offences; stakeholder engagement and advising the Judiciary on avenues for public information on electoral dispute resolution.

The Judiciary through JCE, cognizant of Kenyan’s electoral history, and ahead of the preparations of the 2017 election petitions, organized a comparative study visit to Ghana, South Africa, Mexico and India. The object of the visit was to learn and gain insights from the four countries and implement the best practices gained to Kenya, for purposes of refining the Kenyan electoral dispute resolution mechanism.

The choice of the four countries was informed by a number of factors including but not limited to: robust electoral dispute resolution mechanisms of those countries; the closely contested elections just like the Kenyan 2017 elections; the runoff elections experience; rich Commonwealth shared tradition and history in electoral dispute resolution; Judicial heritage and the presence of a permanent tribunal set aside to handle election disputes in the four countries. The Committee organized the visits in two delegations, with the first delegation visiting Ghana and Mexico, while the other visited South Africa and India. It is my sincere trust that the experience gained and the lessons learned in the course of the visits have and will continue to propel the Kenyan electoral dispute resolution mechanism to greater heights, where fairness and justice would be its hallmark.

I commend the Chief Justice, Deputy Chief Justice and members of the delegation for working tirelessly during the visits, which were thoughtfully put together and packed with little time for rest. I greatly appreciate Ford Foundation for the support they accorded the JCE, through International Law organization, without which the visits would have been difficult to organize. Lastly, I laud the joint JCE-IDLO Secretariat for working seamlessly to ensure that all the details of the visits ensured optimum utilization and an enjoyable stay.

HON. JUSTICE MBOGHOLI MSAGHA
CHAIRPERSON JUDICIARY COMMITTEE ON ELECTIONS
ACKNOWLEDGEMENTS

The Judiciary Committee on Elections is grateful to the Hon. Chief Justice and the President of the Supreme Court, Justice David K. Maraga, for the continued support he has accorded the Committee in all its activities and for heading the delegation to Mexico. Special thanks go to the Hon Deputy Chief Justice, also Deputy President of the Supreme Court, Justice Philomena M. Mwilu, head of delegation to Ghana. Their leadership and guidance during the visits were exemplary. We wish to thank the Chief Registrar of the Judiciary, Mrs. Anne Amadi, and the officers under her leadership, for the great support they offered to the delegations.

To all members of the four delegations, congratulations for your commendable participation that made the benchmarking visits a resounding success. It was a heavy work programme with little time to rest, and you all rose to the calling and ensured all aspects of the programme were covered. To the members of the Secretariat who captured the deliberations that led to this report, you are highly appreciated.

The visits would not have been a success without the support of the JCE Secretariat, and IDLO staff, who worked selflessly to ensure that all aspects of the logistical arrangements went smoothly.

Special thanks go to the heads of various institutions in Mexico, Ghana, South Africa and India. We are grateful for the hospitality and diligence. The lessons learnt will greatly enrich the Kenyan Judiciary in electoral dispute resolution. Heartfelt gratitude to the members of the secretariats at the host countries who were with us right from arrival to departure and ensured that our stay, movements and visits were well synchronized.

Our gratitude also goes to Ford Foundation for supporting the visits, through International Development Law Organization (IDLO), and the publication of this report.

HON. LILLIAN ARIKA
SECRETARY JUDICIARY COMMITTEE ON ELECTIONS
# LIST OF ACRONYMS AND ABBREVIATIONS

<table>
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<th>Description</th>
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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<tr>
<td>BVR</td>
<td>Biometric Voter Registration</td>
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<tr>
<td>CB</td>
<td>Capacity Building</td>
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<td>CI</td>
<td>Constitutional Instruments</td>
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<tr>
<td>CJ</td>
<td>Chief Justice</td>
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<td>CM</td>
<td>Chief Magistrate</td>
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<tr>
<td>COA</td>
<td>Court of Appeal</td>
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<tr>
<td>CRJ</td>
<td>Chief Registrar of the Judiciary</td>
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<td>CSO</td>
<td>Civil Society Organization</td>
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<td>DCJ</td>
<td>Deputy Chief Justice</td>
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<td>DRRC</td>
<td>District Registration Review Committee</td>
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<td>EATC</td>
<td>Election Adjudication Taskforce Committee</td>
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<td>EC</td>
<td>Electoral Commission</td>
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<td>ECI</td>
<td>Election Commission of India</td>
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<td>EDR</td>
<td>Electoral Disputes Resolution</td>
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<td>EP</td>
<td>Election Petition</td>
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<td>EU</td>
<td>European Union</td>
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<td>F&amp;A</td>
<td>Finance &amp; Administration</td>
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<td>GBA</td>
<td>Ghana Bar Association</td>
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<td>HC</td>
<td>High Court</td>
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<td>Hon.</td>
<td>Honourable</td>
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<td>IDLO</td>
<td>International Development Law Organisation</td>
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<td>IEBC</td>
<td>Independent Electoral and Boundaries Commission</td>
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<td>IEC</td>
<td>Independent Electoral Commission</td>
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<td>IPAC</td>
<td>Inter-Party Advisory Committee</td>
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<td>IT</td>
<td>Information Technology</td>
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<td>JCE</td>
<td>Judiciary Committee on Elections</td>
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<td>JTI</td>
<td>Judiciary Training Institute</td>
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<td>LRSE</td>
<td>Law Reform and Stakeholder Engagement</td>
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<td>NCAJ</td>
<td>National Council on the Administration of Justice</td>
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<td>NGO</td>
<td>Non-Governmental Organization</td>
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<tr>
<td>PP</td>
<td>Political Parties</td>
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<tr>
<td>PPDT</td>
<td>Political Parties Disputes Tribunal</td>
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<td>PVT</td>
<td>Parallel Voter Tabulation</td>
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<td>RPP</td>
<td>Registrar of Political Parties</td>
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<td>SC</td>
<td>Supreme Court</td>
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<tr>
<td>Sec.</td>
<td>Secretary</td>
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<td>SPM</td>
<td>Senior Principal Magistrate</td>
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<tr>
<td>TOTs</td>
<td>Training of Trainers</td>
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<td>USAID</td>
<td>United States Agency for International Development</td>
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CHAPTER 1

1.0 INTRODUCTION AND CONTEXT

1.1 INTRODUCTION

One of the key principles of a democracy is free, fair and regular elections. In most democracies, however, elections while held regularly are heavily contested hence raising the stakes and sometimes putting democracy under strain. Large stakes around elections raises disputes around both the conduct of elections and declaration of results. The Judiciary, as a result of these grievances, becomes a critical player in the electoral process through its role in resolution of election disputes. While traditionally this is largely through hearing and determining election petitions following the outcome of elections, there is in recent times an increase in resort to courts during the electioneering period with pre-election disputes.

Determined to play its role in ensuring a smooth electoral process, and against the backdrop of criticisms relating to its credibility following the 2007 elections and the resultant violence and deaths, Kenya’s Judiciary established an in-house committee, the Judiciary Working Committee on Elections Preparations (JWCEP) on 10th May 2012, in the run up to the first elections under the country’s new Constitution that was promulgated on 27th August 2010. The Committee had the mandate of advising the Judiciary on measures to take for efficient electoral dispute resolution (EDR); training of Judges, judicial officers and Judiciary staff on effective electoral dispute management; monitoring and evaluating EDR in the courts, liaising with stakeholders and advising the Judiciary on public engagement. This committee was the first of its kind in the Judiciary. The preparatory work put in by the Committee led to the Judiciary’s being ranked by local and international election observers as the institution that was best prepared for the general elections in 2013.

Following this, on 17th August, 2015 the then Chief Justice (Justice Dr. Willy Mutunga) launched the Judiciary Committee on Elections (JCE) as a permanent committee of the Judiciary. JCE was to build on the work of the JWCEP and provide a sustainable mechanism to assist the Judiciary to continuously prepare for and discharge its mandate on EDR. The Committee comprises of Judges of the Supreme Court, Court of Appeal, High Court and the Magistracy.

The Committee’s overarching priority is to ensure the judiciary’s preparedness for effective and efficient electoral dispute resolution. To ably execute its mandate, the Committee undertook benchmarking visits to Ghana, Mexico, South Africa and India with the financial support of Ford Foundation through IDLO. These countries were selected on the basis of their strong constitutional democracy as well as a long history of dealing with election disputes.

The visits presented members of the delegation with an opportunity for learning from other countries’ experiences in resolution of electoral disputes for purposes of improving the Judiciary’s performance in handling election disputes. The visits were also an opportunity
to study the countries’ constitutional and legal framework on elections as well as electoral jurisprudence that has emerged over time.

The benchmarking visits focused on the experiences of the host countries’ Judiciary, Electoral Tribunals, Training and Research Institutions, and other EDR organisations preparations in the run up to General Elections, their composition and mode of operation, administrative measures undertaken, successes and challenges.

The Committee is confident that the interactions with legal systems of foreign jurisdictions on EDR, will aid it in structuring effective administrative measures for facilitating EDR, inform the development of rules to guide hearing of electoral disputes and designing appropriate training programs for judges, judicial officers and staff on EDR. Furthermore, best practices gained from the visits will assist in identifying areas needing improvement. Further, the best practices gained from the visited high performing institutions will assist the JCE to continually identify areas which need improvement and advancement.

1.2 OBJECTIVES OF THE VISITS

The general objective of the benchmarking visits was to enhance knowledge on electoral justice systems especially considering that Kenya is amidst an electoral process and is looking to learn from other experiences and incorporate the best practices into the electoral dispute resolution mechanism. The benchmarking visits sought to realize the following specific objectives:

i. To identify the best practices, lessons learnt, and challenges on effective and efficient election dispute resolution.

ii. To gather information on design and implementation of training programs for judges and judicial officers on EDR.

iii. To appreciate the contribution of academia and comparative methods of research in developing jurisprudence.

iv. To learn about effective case management processes particularly managing of electoral disputes and other cases.

v. To explore law reform initiatives and development of election petition rules and regulations.

vi. To interrogate the systems in place for monitoring of election petitions and case management systems on EDR.

vii. To learn how technology is used in judicial processes with focus on EDR, for efficient delivery of justice.

viii. To learn the administrative measures on EDR in respect of human resources, equipment, infrastructure and finances.

ix. To learn how a permanent elections court operates throughout an electoral cycle.

x. To appreciate appropriate mechanisms for stakeholder engagements on EDR.

xi. To discuss the perception of how the Supreme Court (apex court) is viewed by the public in relation to various decisions it has issued, and the Court’s public relations initiatives

xii. To share experiences in handling election disputes and experiences on exercising caution when balancing judicial functions bearing in mind the doctrine of separation of powers.
1.3 ORGANIZATION AND LOGISTICS

The logistics for the benchmarking visits were undertaken by Judiciary with support from the and funding from the FORD Foundation through IDLO. The visits were undertaken on the following days:

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<th>COUNTRY</th>
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<tr>
<td>South Africa</td>
<td>28th – 4th June 2017</td>
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<tr>
<td>India</td>
<td>24th – 1st July 2017</td>
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<tr>
<td>Mexico</td>
<td>24th – 1st July 2017</td>
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A total of 22 delegates took part in the benchmarking visits. See annexure on the list of delegates who participated.
CHAPTER 2

2.0 GHANA

2.1 LEGAL AND INSTITUTIONAL CONTEXT

The legal framework in Ghana is governed by the Constitution of Ghana (1992, as amended by Act 527 of 1996)
- Representation of the People Act (1992, as amended)
- Public Elections Registration of Voters Regulations (CI 91 of 2016)
- Public Elections Regulations (CI 94 of 2016)
- Presidential Elections Act (1992, as amended)
- Electoral Commission Act (1993, as amended)
- Political Parties Act (2000)
- Representation of the People (Constituencies) Instrument (2004)

Elections are managed by the Electoral Commission (EC). The Commission is established by the Constitution and governed by the Electoral Commission Act.

The choice of Ghana was informed by the shared history that Ghana and Kenya have as part of the Commonwealth. This includes a similar judicial system as well as a long history of learning from each other with regard to judicial reforms and development. In addition, electoral reforms in Ghana are undertaken on a continuous basis, especially before or after major activities like voter registration, voting and post-election evaluation, where the effectiveness of certain administrative and legal provisions are assessed and reforms are initiated. This has resulted to different electoral laws being enacted over the years. Ghana also has robust electoral dispute resolution mechanisms that have successfully handled presidential elections petitions.

2.2 MEETINGS HELD

The delegation had engagements with officials from the following institutions:

i) **Supreme Court of Ghana**
   The Supreme Court of Ghana is the highest judicial body in Ghana. It consists of the Chief Justice and at least nine other Judges. It is the final appellate court and has jurisdiction over matters relating to the enforcement or interpretation of the Constitution of Ghana. Whenever the Chief Justice is present, she is expected to preside over all sittings of the Supreme Court. The Supreme Court currently consists of thirteen Judges.

ii) **Court of Appeal & the High Court of Ghana**
    The Court of Appeal of Ghana has no original jurisdiction. It hears appeals from the High Court and the circuit Courts, unless otherwise provided by law. Any three Justices duly constitute
the Court. Currently, there are twenty-seven (27) Justices of the Court of Appeal of Ghana. The High Court of Justice has jurisdiction in all matters, civil and criminal, other than those involving treason.

iii) Ghana Bar Association (GBA)
It is a professional association of lawyers in Ghana, including legal practitioners and magistrates. All lawyers admitted to practice law in Ghana become automatic members of the association by convention. The purpose of the association is to promote legal professionalism.

iv) Electoral Commission (EC) of Ghana
It is an official, independent body in Ghana responsible for all public elections. It comprises of seven members. One of the EC achievements is the establishment of a biometric system of registration for the electoral register prior to the 2012 Presidential and Parliamentary elections to prevent double registration and to eliminate ghost names in the old register.

v) Political Parties of Ghana
Ghana has a multi-party system of government. However, they are two dominant political parties being the National Democratic Congress (NDC) and the New Patriotic Party (NPP). Studies of the political system of Ghana have shown that it is extremely difficult for anybody to achieve electoral success under the banner of any other party, other than the two named dominant party. They are 30 registered political parties on the list of the Electoral Commission of Ghana. These includes among others; All People’s Congress (APC), Convention People’s Party (CPP), National Convention Party (NCP), National Independence Party (NIP), Progressive People’s Party (PPP), People’s National Convention (PNC).

vi) Civil Society Organizations (CSOS)
There are four levels of civil society in Ghana: Communal groups; Community based Organizations (CBOs); National CSOs and Networks and coalitions. Communal groups and community-based organizations are believed to be the fast growing CSOs in Ghana. Most of those organizations are communal associations, which tend to be easily formed by community members are informal and loosely organized. They have membership accession criteria, and exist to enhance the socio—economic well-being of members. Most CSOs in Ghana are found engaging in either public sensitization and education, advocacy, or capacity building and professional development.

vii) Election Observers – Coalition of Domestic Election Observers (CODEO)
Coalition of Domestic Election Observers (CODEO) is an independent and non-partisan organization made up of civil society groups, faith-based organizations and professional organizations which observe elections in Ghana. It was established in 2000 by the Ghana Centre for Democratic Development (CDD-Ghana) to assist Ghanaians to engage in the country’s electoral processes and to facilitate the Electoral Commission of Ghana in carrying out its mandate.
2.3 ISSUES FROM DISCUSSIONS

i) Role of the Election Adjudication Taskforce Committee (EATC)- in EDR legal reforms

The Taskforce was established in 2008 and has lean membership of seven, comprising of the Chief Justice (CJ), Supreme Court and Court of Appeal (COA) Judges and two technical experts. It has outsourced technical experts who provide technical support in its activities.

It was noted that the Taskforce engages indirectly with Parliament through the Judicial Council with a collaborative approach adopted that has helped to realise EDR reforms especially on EDR Rules.

The Task Force Committee focuses majorly on the preparedness on the Judiciary to handle election petitions, special attention being paid to the pre-election preparedness; including the registration of voters and the nomination process. The Taskforce Committee is also responsible for capacity building of the Judges and Judicial Officers ahead of the expected election petitions. Capacity building was enhanced through training and sensitizing of all the Judges and Judicial Officers ahead of the elections, bringing to their attention all the relevant laws to equip them to handle the election petitions. The public and other stakeholders were also sensitized through disseminating of the Election Adjudication Manual, a publication of the Ghana Judiciary on the EDR process. The Publication is prepared with support from consultants and has been updated three times.
The Taskforce has not been able to influence Parliament to amend the Ghanaian Constitution. They however, carry out stakeholder consultations out of which they develop and submit, through the CJ, legislative reform proposals to enable expeditious disposal of election petitions. The reforms are initiated by Task Force making proposals to amend the Constitutional Instruments (CI), which it presents before the Judicial Council, which would in turn forward the proposals to Parliament, Parliament would then discuss and adopt the CI.

ii) **The jurisdiction of the courts in dealing with election disputes**

The Ghanaian Lower Courts, composed of Circuit Courts and the District Magistrates Court do not handle election petitions but only hear appeals on voter registration including eligibility of voters with appeals from this going to the High Court. With regard to EDR appellate jurisdiction, the Court of Appeal of Ghana held that there be a one tier appeal from parliamentary election petitions due to strict timelines. This position was also adopted by the Supreme Court which held that it does not have jurisdiction to hear appeals and hence such disputes end at the COA.

It emerged that the Ghana law does not fetter interlocutory applications. However, it was indicated that the taskforce had advised the CJ to designate special High Courts whose Judges were subsequently trained to expeditiously determine petitions as courts of first instance and also subsequently trained COA Judges in anticipation of appeals. Judges have been trained to expedite EDR cases.

iii) **Supervisory Jurisdiction of Supreme Court**

It was noted that the Ghana Supreme Court has supervisory jurisdiction over all the other courts. In one particular case, the SC exercised its jurisdiction to quash one High Court decision and subsequently providing the roadmap/timelines to elections and stayed all other decisions by other courts that were pending on the same issue.

In the Ghanaian context, the Electoral Commission filed a suit in the Supreme Court, in which case the Supreme Court exercised its supervisory jurisdiction, framed and decided all the issues that were likely to arise from an election petition. The decision set out guidelines and road map that governed the High Court and the Court of Appeal in handling election petitions and appeal. The High Court was bound by the precedence set out by the Supreme Court in handling the Parliamentary election.

iv) **Development of the Elections Adjudication Manuals**

Ghana has developed a compendium on electoral laws, bringing together all election laws, so as to simplify the electoral disputes adjudication process. The manual details; the hierarchy of the courts in Ghana, Jurisdiction of the various courts in election matters, election offences and sanctions, provisions of the law and summary of decided cases.
Moreover, the development of the electoral adjudication manual is done in-house with no public participation. This could be an area of possible consideration by JCE on how to balance between quick turn-around of critical processes while also benefitting from feedback from key stakeholders.

It is also important to note that Ghana engages on elections and EDR legal reforms after every election cycle to address key challenges faced.

v) Election Disputes
With regard to EDR petitions, it was noted that out of the 275 Parliamentary seats in Ghana, only 7 Parliamentary petitions were filed in 2016, which could be evidence of the maturity of the Ghanaian democracy. The significantly low number of petitions that were filed after the 2016 general election, was attributed to the ground work done by the Task Force at the pre-election stage and hence minimal disputes arising at the post-election stage. Due to high sensitization of Judges and the few election petitions filed, interlocutory applications were amicably resolved, as part of case management. Further, it was noted that the EC allowed party agents to be involved at all stages of the elections process including the preparatory stages and also engagement with all political parties through the Inter-Parties Advisory Committee (IPAC). This also reduced the number of disputes.

vi) Handling of Election Petitions
In terms of time allocation in handling election disputes, emphasis was placed on shifting focus from procedural technicalities to the substantive law. It was noted that the Supreme Court of Ghana has an extensive jurisdiction as compared to the Kenyan Supreme Court, including the jurisdiction to extend election timelines were necessary, as well as supervisory role over the COA and the HC.

![Photo of voters using Biometric Voters Register (BVR) machines to participate in the General Election](image)
It was also noted that the Chief Justice of the Republic of Ghana taking cognizance of the fact that the High Court carried the bulk of the judicial work, advocated for minimal disruption of court sessions by: minimizing the number of trainings by the Ghanaian JTI and exempting the High Court Judges from being members of the Task Force. However, it was noted that upon gazettement of the EDR Judges, the policy is that these Judges are freed from all other court cases outside of EDR. Ghanaian Judiciary gives priority to election petitions matters over the other ordinary court cases.

Storage of election materials relating to the election petitions is the constitutional mandate of the Electoral Commission, which are produced when needed. Security seals are put on the materials to ensure no tampering can be done. The materials can only be destroyed after 12 months if there is no pending dispute otherwise they remain sealed until the dispute is concluded.

vii) Registration of Voters and Credibility of Voters Register

Emphasis was given on the critical role that the voters’ register plays in credibility of elections and subsequent EDR. It is critical that the same be fully updated in good time and also proofed against unauthorized alterations. It was also highlighted that the issue of the registration of voters was very sensitive in Ghana, and many election complaints emanated from equivocal laws on registration of voters. Ghana uses multiplicity of identification documents to register voters, including two party members vouching for an eligible voter, a situation which has caused a number of disputes challenging the eligibility of voters and the registration process in the different constituencies. Disputes arising from voter registration at the district level are examined by the District Registration Review Committee (DRRC) with appeals arising from the Committee being filed at the region before Chief Registration Review Office, a position held by a High Court Judge.

Outstanding was the fact that the Electoral Commission of Ghana delivers the voters register to the political parties two days before the voting day; this promotes transparency and accountability in the entire election process.

viii) Votes Cast Exceeding the Number of Registered Voters

On the jurisprudence on the number of voters cast exceeding the registered voters, the position of one of the Supreme Court Justices of Ghana was that the excess votes should be taken off from the winning candidate, if the same would not affect the outcome of the entire election; but if it did, then the election should be nullified. On the other hand, if the voting process was marred by violence and intimidation, the election would be nullified as that went to the root of the credibility of the election.

ix) Election Offences and Sanctions

On electoral offences and sanctions, it was noted that Ghana has not fully developed distinctive jurisprudence on electoral offenses. Where such criminal offenses are identified, the matter is referred to a relevant criminal court and the criminal case, with the consent of the Attorney General, can go on simultaneously with the electoral petition. It was also
noted that where the matter in question in the criminal case goes to the root of the electoral petition and the election crime is proved, then the election result is nullified. The similarity in both jurisdictions is that the magistracy plays an exclusive role in handling election offences and not the election court.

x) Technological Challenges

Technological complementary mechanism was a live issue for both countries. The BVR flopped in the 2016 Ghanaian election and therefore the EC resorted to the traditional method of using physical register. This raised the debate on the question of whether a voter who failed to be identified under the BVR system but can be otherwise identified should be allowed to vote. The lawyers were split on this but most felt allowing such a voter to vote would open room for fraud.

Based on the interactions with the political parties, it was clear that use of technology in elections was not failure-proof. To ensure effective interrogation of proposed systems, adequate testing before roll-out and putting in place mechanisms for addressing any failures that might occur in the use of these systems was important.

It was unanimously agreed that there was need to establish an appropriate balance between use of technology and manual in the election process, stressing that technology should not act as an end in itself but as means to an end in election matters.

xi) Electronic Evidence

On electronic evidence, Ghanaian system though having an Electronic Evidence Act, was still grappling with the issues on the admissibility of electronic evidence.

xii) The last Ghana Presidential Election Petition

Following the discussion on the Ghana presidential election petition the following issues emerged; the Electoral Management Body (EMB) should be a mandatory respondent in every election petition, since it is charged with running the affairs of the elections; the Judges should be trained on emotional control and communication skills both to the litigants and their advocates since election petitions are highly emotive; efficient case management mechanisms should be employed presidential election petition are categorized as public interest matters thus each party bore their own costs, the role of amicus curiae and interested persons involvement in EDR leading to the lawyers suggesting development of rules to ensure interested persons are different from the parties to the case.

It was also observed that the Supreme Court played an important role in pioneering some of the electoral reforms through the decisions from the Ghanaian 2012 presidential election. This included; opening of additional polling stations; management of the conduct of political parties in the election process; the voters’ registers to be provided to the parties early in time, which reforms were attributed to the reason of there not being a Presidential Election in the Ghanaian 2016 general election.
JUDICIARY COMMITTEE ON ELECTIONS

Meeting with Electoral Commission of Ghana

xiii) The Role of the Electoral Commission of Ghana

The discussions focused on the different areas of potential learning and replication and included: Regional and trainer of trainers (ToT)-based mode trainings for election officials; Funding of elections preparations work of the Commission which draws its budget from the contingency fund and hence had to compete with other state institutions for funds; staff motivation whereby staff are remunerated relatively well and those working outside of their home areas are provided for accommodation; Early voting of certain category of voters: namely the EC officials and staff, security officers and the media, so that they can subsequently play their respective roles in the election process; creation of the Directorate of Research, Monitoring & Evaluation in the elections management process. This demonstrated the priority that EC gave to continuous learning and improvement of its systems and processes.

xiv) Tallying and Declaration of Results

In Ghana, just like in Kenya, results of the Parliamentary elections were tallied and declared by the Returning Officer at the Polling Station, whereas the ones for the Presidential election, though tallied at the polling station, were transmitted to the national headquarters for compilation and declaration by the Chair of the EC. It was noted that at the polling centres and constituency collation centres, errors on the results can be rectified and also recount done, where so requested by agents. At the national tallying centre, no verification of the results is done with the role of the EC Chair as the Returning Officer being merely to add up (tally) the results as received. The EC was clear that this went to the core of the integrity of the election results.
xv) Registration and Voting of Prisoners and Citizens Living and Working in the Diaspora.
It was reported that Ghana is required to register all prisoners who were eligible for voting (this is irrespective of the sentence a prisoner was serving unlike in Kenya). They admitted that Ghana was still grappling with the issues of diaspora voting and a dispute on this was pending in court and EC was in the process of developing guidelines for diaspora voting, dead voters, e-transmission of results hence opportunities for continued sharing and learning from the experiences of the two countries.

xvi) Part-time vs Full-time Engagement of Election Officials
In Ghana, the EC commissions were permanently employed, with the retirement age of the Chair being at 70 years and the other Commissioners at 65 years. For purposes of retaining institutional memory, some of the commissioners and Directors were drawn from and had risen on the ranks within the Commission.

xvii) Role of Civil Society in Pre-Election and Post-Election Dispute Resolution Process
This role was summarized as being to educate the electorate on how the elections were to be conducted and engagement with key stakeholders towards ensuring acceptance of the outcome of the election results, and/or resolution of any disputes that arise therefrom in an amicable way. It was noted that the major concern of the Ghanaian Civil Society was the pre-election and elections environment, the aim being, to minimize on post-election disputes. This is done by holding discussions and workshops with different cadres in the election process; Parallel voter tabulation (PVT), after which the election observers present a report of their tabulation; Ensuring that all groups of persons, including persons with disability, participate in the voting exercise; Circulating to all other stakeholders the schedule of the mandatory activities required to be carried ahead of the elections; Engagement in elections legal reforms; Media monitoring to ensure balanced coverage; Encouraging issue-based political campaigning; Playing the watch-dog role on the political parties primaries to ensure that no one particular party gets an upper hand over the other; Encouraging key candidates to commit to accept electoral outcome or pursue through the courts resolution of their grievances with the declared results; Engagement with Judiciary in EDR; and to participate in the Chief Justice Public Forums convened in every election year.

xviii) The Electoral Commission Post-Election IPAC Dialogue
This was an open forum, which allowed Inter-Party Advisory Committee (IPAC) members and specifically the political parties to critique the performance of the EC in the 2016 elections, by highlighting the flaws of the Commission in carry out elections, without fear of victimization. This would then help the Commission to improve on their delivery, in the next election cycle. Minutes of each dialogue forum are kept and shared with all participants.

xix) Political Parties Funding
It emerged that the Ghanaian political parties were not funded by the government but instead rely on their own means of resources mobilization hence creating an advantage for the parties with better resources. This is an area for potential consideration by Ghana
towards evening out the playing field and they are keen to learn from Kenya’s experience in the implementation of the framework for public financing of political parties and on diaspora voting.

**xx) Party Hopping and Independent Candidates**

On the issue of party hopping, it was stated that there were no restrictions on the same, although if a member of parliament hops to another party after winning elections, he/she loses his seat. The Political Parties within themselves, precluded a member from re-registration after hopping to other parties. It was reported that there were very few independent candidates in the 2016 Ghanaian election and none of them won the elections.

**xxi) Role of Academia in the EDR Process**

From the discussions, it emerged that just like in Kenya, the academia in Ghana played an active role in the EDR process. They did so through offering research services as well as monitoring and evaluating the entire election process. Their main involvement was in pre-election preparations; preparing and publishing of the Manual on Election Adjudication in Ghana; compilation of statutes and landmark cases in EDR; conducting pre and post-election analysis; monitoring the election atmosphere and providing feedback to both the EC and the Judiciary; conducting a comprehensive post-election review; and they encouraged the use of ADR in EDR. However, there was no party that opted for ADR in the 2016 elections. Their objective in all this was to deepen democracy. The academia were of the view that they should not engage as amicus curiae in election petitions, but should instead focus on technical and research work.

### 2.4 CHALLENGES IN EDR

Some of the challenges identified in the EDR processes include:

i. Enforcement of its legal framework that deal with Election Offenses: For instance, Ghana faces the challenge of addressing such offenses as treating and role of vigilante groups in elections.

ii. The Ghanaian Electoral Commission faced challenges on registration and voting of prisoners and persons living in the diaspora, the use of BVR kits and technology at large and role of security agencies in elections. The Commission reported that they were required to register all the prisoners who were eligible for voting (this is irrespective of the sentence a prisoner was serving unlike in Kenya).

iii. It was pointed out that it was a challenge authenticating the final voters register and also on use of multiple voter identification documents in registration of voters.

iv. Regulation of media content during elections to avoid misleading news (‘fake news’).
CHAPTER 3

3.0 SOUTH AFRICA

3.1 LEGAL AND INSTITUTIONAL CONTEXT

The legal framework in South Africa is governed by the Constitution of the South Africa of 1996; the Electoral Act No. 73 of 1998; the Electoral Commission Act of 1996; Public Funding of Represented Political Parties Act of 1996; Municipal Structures Act of 1998; Municipal Demarcation Act of 1998 and Municipal Electoral Act of 2000. The Electoral system permits the proportional representation electoral system where by the President is elected by the members of the National Assembly and the members of the National Assembly are elected by the voters.

Elections are managed by the Independent Electoral Commission (IEC) which manages elections at all levels of government. The Commission is established by the Constitution of South Africa, and governed by the Electoral Commission Act. It is comprised of 5 members, appointed by the President upon recommendation by the National Assembly. With regard to dispute resolution, the IEC commission members and its officers are empowered to resolve objections, appeals and code of conduct disputes through conciliation. Notably in the previous electoral cycle, the Commission handled 223 objections.

Election petitions are heard by the election courts which are of the same status with the Supreme Court. Members of the Election Court are appointed by the President on the recommendation of the Judicial Services Commission. The Electoral Court acts as the final court of appeal against IEC decisions. As a requirement an aggrieved party is required to submit complaints within 48 hours of the announcement of results.

It is worth pointing out that the Constitution of Kenya, borrowed heavily core constitutional principles, especially the Bill of Rights, from the South African Constitution. As a result, the JCE tremendously benefited by learning from some of the key institutions in that country.

3.2 MEETINGS HELD

The delegation visited the following institutions:

i) Constitutional Court of South Africa

The Constitutional Court of South Africa is the highest court of South Africa. The court is comprised of 11 Judges. The quorum of the Court is eight Judges. The Court is mandated to hear and determine the following matters: constitutional matters concerning interpretation, protection or enforcement of the Constitution; any other matter allowed by the court which raises an arguable point of law of general public importance; disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of those organs; the constitutionality of any parliamentary or provincial Bill; applications by
Members of the National Assembly and provincial legislature regarding constitutionality of an Act of Parliament; constitutionality of any amendment to the Constitution; the question of whether Parliament or the President has failed to fulfil a constitutional obligation; certifying a provincial constitution; final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and confirming an order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status.

ii) Law Society of South Africa
The Law Society of South Africa (LSSA) has represented the attorneys’ profession by bringing together its six constituent members in a national, non-statutory body. Some of its mandate includes inter alia; undertaking advocacy initiatives and comments on legislation in the interests of the profession and the public; and is the premier provider of relevant and affordable continuing professional development for attorneys and candidate attorneys;

The control of the Law Society of South Africa vests in the Council. The Council determines the policy of the LSSA in accordance with its aims and objectives as set out in its constitution.

iii) Centre for Human Rights, Faculty of Law, University of Pretoria
The Centre for Human Right was established in 1986, as part of domestic efforts against the apartheid system of the time. It operates as both an academic department and a non-governmental organisation. The Centre works towards promoting human rights education in Africa, a greater awareness of human rights, the wide dissemination of publications on human rights in Africa, and the improvement of the rights of women, people living with HIV, indigenous peoples, sexual minorities and other disadvantaged or marginalized persons or groups across the continent. The Centre's distinct achievements have been recognised in a number of awards.

Meeting with the Chief Justice South Africa
iv) University of Pretoria
The University of Pretoria is a multi-faculty research-intensive higher education institution based in South Africa. The University has its roots in 1908 as the Pretoria branch of the Transvaal University College. It was commissioned on 10th October 1930 by an Act of Parliament as a fully-fledged university, as the University of Pretoria.

v) Electoral Court of South Africa
The Electoral Court is a specialist court bearing the highest authority on matters relating to elections, has the same status as the Supreme Court of Appeal and is subordinate only to the Constitutional Court. It replaced the Special Electoral Court that was created to oversee the 1994 elections.

The Electoral Court is comprised of five members who are appointed by the President on the recommendation of the Judicial Service Commission. The Electoral Court may review any decisions of the Independent Electoral Commission (IEC) relating to an electoral matter and such a review must be administered and disposed of as quickly as possible.

vi) Independent Electoral Commission of South Africa (IEC)
The Independent Electoral Commission (IEC) is established by the Constitution as an independent and autonomous body to; manage elections at all levels of government, to ensure elections are free and fair, and to declare the results in as short time as possible.

vii) South African Human Rights Commission
The Commission was established on 2nd October 1995 under the Human Rights Commission Act 54 of 1994, pursuant to the Constitution of the Republic of South Africa. It is mandated by the Constitution to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in the Republic.

The Commission has powers to investigate and report on observance of human rights. It is also empowered to require the relevant state organs to report on measures they have taken towards the realization of the right to housing, healthcare, food, water, social security, education and the environment.

3.3 ISSUES FROM DISCUSSIONS

i) The Electoral Court
The Election Court consists of three (3) Judges who convene on a need basis. The Election Court is operated on an ad hoc basis and is administratively managed by a Registrar of the Court. The current Presiding Judge is drawn from the Supreme Court of Appeal. The Electoral Court has two (2) other members from the legal profession appointed by the Judicial Service Commission of South Africa.
Disputes arising out of the Electoral processes are resolved at the grassroots level where they occur by the Electoral Commission together with the Political Parties Liaison Committee as and when they arise, within very short timelines. Political parties are also tasked with responsibilities and are held responsible for failure to comply with their obligations.

South African Courts do not handle political party disputes. Such disputes are resolved on a personal basis in an ordinary court process and neither the Electoral Court nor the Independent Electoral Commission is involved. In addition, the jurisprudence developed by the Electoral Court of South Africa was one of strict compliance with the rules and regulations. It was demonstrated that non-compliance of rules is sanctioned by meting severe penalties which includes a party being denied candidature in an election. Such measures contributed to the elimination of tremendous number of disputes.

It was noted that disputes were a common factor in politics. However, signing of the code of conduct and adhering to it by political party leadership assisted in minimizing the number of petitions filed. The code of conduct which is undefined in legislation and administered by the Commission was also greatly adhered to by parties. It is an extremely important instrument that guides elections in South Africa and binds those who signed it, therefore, as a strategy; the signing of the Code of Conduct is a highly publicized event in South Africa.

**ii) The Role of The Judiciary In Solving Political Disputes; Why The Judiciary?**

From the discussions held, nullification of election results is a matter for determination by the electoral court. The Commission does not have power to do so. It was explained that in South Africa, disputes normally arise in very closely contested cases. It was observed however, that the caseload was on the rise and this was partly attributed to the entrance of new political parties and increased stratification of power in the major party, the ANC. It was also noted that in South Africa, the nature of disputes varies between the national and provincial elections on one hand and municipal elections on the other hand. Municipal elections are anchored upon the first past the post system thus they end up having more disputes. On the other hand, at the provincial and national elections, which use the proportional method, the disputes are few because of the materiality factor is higher (whether the elections were free and fair), and not just about the numbers of the votes. In addition, elections at the local level also involve more and smaller parties, and disputes arise where the margin of votes is small. The increased litigation in electoral matters could also be an acknowledgement that South Africa is a maturing democracy, with challenges bound to arise, while there was also an increasing awareness of rights by political parties which would impact on electoral disputes arising.

It was noted that although the electoral system in South Africa has its challenges, its legal framework had contributed to having minimal disputes. The importance of being seen as fair during hearing of disputes, and conducting the pre-trial conference prior to the hearing to distil issues and diffuse emotions was emphasized.
iii) Determination of Election Disputes

An observation made was that the electoral legislation was a great determinant in determining the scope of what is considered in an electoral dispute. In South Africa, electoral disputes are determined on the basis of the materiality test, that is, whether the elections were free and fair, and not just about the numbers, and irrespective of whether or not the results would have changed. The main focus is whether or not there was compliance with the law e.g. case on voters’ roll. Thus, there is no clear-cut definition of what amounts to free and fair elections. The basis of determination is within the constitutional context of what is expected to be free and fair elections. The Commission is measured accordingly, on the standard of reasonable compliance with the law and not its perfection.

Regarding handling of election results, the Commission sets up a results’ centre, open to the political parties and the media, thus transparent. The transmission of results is open and anomalies raised can be dealt with before it becomes a dispute. The Commission has up to 7 days to announce the results but usually completes the process within 3 days. It was also noted that since political parties have agents across all levels, some of the objections are dealt with by the presiding officers. The Commission deals with objections raised at various levels, in respect of the election process in accordance with the Electoral Act, which include:

- Objections on candidates’ lists (section 30), made to the Commission appealable to the electoral court.
- Objections related to voting at the voting station which is made to the presiding officer whose decision is appealable to the Commission (section 41)
- Objections concerning sorting of votes made before the counting officer (section 48) whose decision can be noted to the Commission.
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- Objections concerning sorting of votes made before the counting officer (section 48) whose decision can be noted to the Commission.
- Objections surrounding counting of votes and tallying of provisional results (section 49) also to the counting officer and challengeable before the Commission.
- Objections arising from the verification procedure also made to the counting officer (section 53)
- Objections that are material to the outcome of the final results (section 55) made to the Commission whose decision is appealable to the electoral court. An appeal to the court does not affect the election results being challenged.

iv) The Jurisdiction of the Constitutional Court in Dealing With Public Interest Litigation

The Constitutional Court of South Africa placed great reliance on the jurisprudence of the Kenyan Supreme Court in arriving at its decision on what constitutes a matter of general public importance.

v) How Do We Inculcate Confidence? What Is It That We Can Do To Enhance Public Confidence?

The need to communicate constitutionalism through judgments was underscored. It was stated that explaining constitutionalism in respect of specific issues that come before the court was paramount. Judges were urged to, in addition, communicate with the public when delivering speeches and lectures as and when called upon. It was noted that this would however, expose them to criticism. The Constitutional Court admitted that issues of public confidence were not a challenge for the court. This, it was observed, was attributable to the system of appointing of Judges of the Court which is very independent and which then boosts the confidence of the public in the Judiciary.

vi) The Law Clerk – Judge Relationship

The discussions focused on the role of the law clerks which included; the extent of the law clerk interaction with the judgments of the Court; undertaking of research, preparing of bench memorandum by looking at the background of the cases in order to guide the Judges in the determination of the cases; reviewing judgments which include the internal cite checking and double checking before the judgement is handed down. Undertaking any other duty assigned to them by a Judge.

vii) Role Of Other Stakeholders In Electoral Processes

Stakeholders namely the Law Society, the Academia, and Human Right Organisation undertake social responsibility by partnering with other organizations and sensitizes the youth and the general public on the electoral system by easily explaining to them what was expected of them such as their right to vote, the electoral processes and the effect of the election results. They provide education on the electoral process and elections. It engages the youth to help them understand the tenets of democracy, why election processes worked, and why they should vote. Besides, they are involved in observing elections and electoral democracy training. The youth were not paid to observe elections. They did it on pro bono basis.
viii) **Political Parties Liaison Committee**

Another notable feature is the Political Parties Liaison Committees established by the Commission under the Act at both the national, provincial and municipal level, whose membership comprises of representatives of political parties. The committee acts as a platform for engagement between the Commission and political parties, allowing for transparency in the electoral processes. They also serve as conflict resolution platforms even though they are not legislated for such functions.

ix) **Electoral process and disputes**

The nature of disputes ranges from disputes between parties, disputes within parties, disputes between contestants and disputes against the Commission e.g. nominations, voters’ roll. Disputes within parties are dealt internally without the Commissions’ involvement, while other disputes are treated as ordinary disputes in which the Commission does not participate unless cited.

3.4 **CHALLENGES IN EDR**

i) Lack of an enforcement mechanism which prevents political leaders from violating the constitution. For instance, the Constitutional Court of South Africa ruled that president Jacob Zuma failed to uphold, defend, and respect the Constitution as supreme law of land.

ii) Conflict between the Executive and the Judiciary in enactment of laws that uphold the constitution.

iii) The Independent Electoral Commission was experiencing a major challenge in harvesting data on the contacts of all legible voters so as to have a comprehensive voters register/roll.

iv) There is no clear-cut definition of what amounts to free and fair elections as the basis of determination is within the constitutional context of what is expected of free and fair elections; this is premised on the standard of reasonable compliance with the law.
CHAPTER 4

4.0 INDIA

4.1 LEGAL AND INSTITUTIONAL CONTEXT

The legal framework governing elections in India is governed by the Constitution, India Representative of People Act 1959 and the Election Code Of Conduct. India is a federal parliamentary democratic republic and considered the world's largest democracy. The President is chosen by an electoral college consisting of elected members of both Houses of Parliament and elected members of the State Legislative Assemblies.

The Prime Minister is appointed by the President of India from the party which won the majority seats in Lok Sabha (Lower House). Members of the Lok Sabha are elected by adult universal suffrage and a first past-the-post-system to represent their respective constituencies.

Elections disputes in India are filed in the High Court of the particular state in which the election was conducted. Only the High Court has original jurisdiction on election petitions. Such jurisdiction is exercised ordinarily by a single Judge of the High Court. However, the Chief Justice can from time to time assign one or more judges for that purpose. An election petition can be filed by any candidate, or an elector relating to the election personally, to the authorized officer of the High Court. A petition challenging an election shall be filed within a period of forty-five days from the date of declaration of results.

The Constitution bars courts from interfering with the election processes until after elections. After nominations are concluded no party can challenge the process until after the declaration of results. This position has been affirmed by the Supreme Court in its holding that an election is a process and all grievances during that period should come to court after the declaration of results.

However, any aggrieved party is allowed to raise an objection with the District Returning Officer who is required to solve the dispute. A party that is dissatisfied with the finding of the District Returning Officer, can file an appeal to the Chief Electoral Officer.

Kenya, like India, is a commonwealth country with a shared history. India has judicial heritage, especially in EDR matters that the JCE benefited from. India has had to grapple with delays in determination of election petitions. JCE learnt best practices on how courts deal with delay including measures to address backlog, and handling of other cases to avoid complaints by stakeholders in the justice system against the obvious preference given to the election petitions at the cost of other rights.
4.2 MEETINGS HELD

The delegation visited the following institutions:

(i) **The Supreme Court of India**

The Indian Judicial structure is divided into a three-tier system; the Supreme Court, the High Court and the lower Courts. The Supreme Court of India is established by the Constitution of India as the apex Court. The Court consists of the Chief Justice and 30 other Judges. It has original, appellate and advisory jurisdiction. The largest bench of the Supreme Court of India is called the Constitution Bench and comprises of 5 or 7 judges, depending on the importance attached to the matter before it. Add sentence on quorum for presiding over disputes especially electoral disputes

Under the Constitution of India, all disputes relating to the elections to the office of President and Vice-President are dealt with by the Supreme Court whose decision is final, whereas the initial jurisdiction to deal with all disputes relating to the elections to Parliament and State Legislatures vests in the High Court of the particular State, with a right of appeal to the Supreme Court. The disputed matters relating to elections to municipalities are decided by the lower courts in accordance with the laws made by the respective State Governments.

(ii) **The Election Commission of India**

The Election Commission of India is established under the Constitution as an independent constitutional body responsible for administering election processes in India. The Commission is headed by the Chief Election Commissioner.

The Election Commission operates under the authority of Constitution and the Representation of the People Act. The Commission has powers, to act in an appropriate...
manner when the enacted laws make insufficient provisions to deal with a given situation in the conduct of an election.

iii) Bar Council of India
The Bar Council of India is a statutory body established under the Advocates Act of India to regulate the legal practice and education in India. It consists of the Attorney General of India and the Solicitor General of India who are ex officio members together with one member elected by each State Bar Council from amongst its members.

iv) India International Institute of Democracy and Election Management (IIIDEM)
The Institute was established in 2011, by the Election Commission of India as an advanced resource centre for learning, research, training and extension on participatory democracy and election management in the Afro-Asia Region.

The Mission of IIIDEM is to fully sensitize, motivate, prepare and mobilize the machinery as well as the stakeholders of elections and democracy, synergistically connecting them to the ideals and values of these themes, helping them overcome shortcomings and challenges and achieve their goals in these domains by getting properly oriented and amply inspired, energized and equipped.

Its goal is to train the electoral machinery in the delivery of free, fair and flawless elections; to orient stakeholders of the democratic and electoral systems toward possibilities of better and more productive delivery therein; and to explore and expand the horizons of intellectual know-how in these fields.

v) Law Commission of India
Law Commission of India is established by an Order of Central Government as an ad hoc and advisory body. The Commission’s work is to do research and make recommendations for law reforms through among others amendments and updating of laws. It works in close co-ordination and under the general instruction of Ministry of Law and Justice. It generally acts as the initiation point for law reform in the country.

The Commission of India also plays an advisory role and has been instrumental in key law reform processes in India such as in the process of law reform in India. The work of the commission has been of importance to the formulation of government policies and recognized by the Supreme Court of India and also the academia as pioneering and prospective.

4.3 ISSUES FROM DISCUSSIONS

i) India’s Elections Management System
Elections are managed by an independent body called the Election Commission established under the Constitution. Once an election notice is issued under section 326(4)(vi) of the Constitution, elections must be held. The Commission has power to control all the processes and where the law is silent it has the mandate to make a determination on the issue.
The high respect for the Commission has been fortified by the Supreme Court which has simplified this autonomy and respected the decisions of the Commission. Moreover, the Commission is also guided by the election manual undertaking its functions. It does not provide for discretionary powers and as a result it reduces the possibility of disputes arising.

The Electoral Commission is comprised of three members, a Chief Election Commissioner and two commissioners from the initial composition of one commissioner. Though initially it was a one-member commission. The commissioners are appointed from top civil servants with long experience. Commissioners enjoy security of tenure and can only be removed from office in a manner similar to that of a Supreme Court Judge.

India holds periodic elections which are staggered, as opposed to holding elections for all posts on the same day. This approach has been blamed for complicating the process of relaying of results which in some instances would be delayed up to 2 months before release. Further, local elections are conducted by the State Election Commissions (SECs) which were independent of the Election Commission of India. The advantage they had was that India was a stable economy. Comparatively, Kenya had the advantage of conducting all the six elections in one day and having results announced immediately and not staggered as it was done in India.

ii) Challenging an Election
An aggrieved person can challenge the elections on the following grounds;

a) On the date of his election a returned candidate was not qualified or was disqualified to be chosen to fill the seat.

b) Any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent.

c) Where there is an improper acceptance of any nomination.

d) By any improper reception, refusal or rejection of any vote or the reception of any vote which is void.

e) By any non-compliance with the provisions of the Constitution or Representation of the People Act or any rules or orders made under the Act.

f) Relating to conduct - e.g. inciting communication, monetary malpractice, exceeding the monetary ceiling.

g) Wrong order of names of an agrieved person can invalidate an election but this can only be done after the election has been completed. The courts will not disturb the election process and rather facilitate to ensure that the election takes place.

h) Declaration of wealth and assets – is very important and if there is fault at this point the elections shall be nullified.

iii) Resolution Of Electoral Disputes - Addresses Other Issues Besides Timelines
It was mentioned that while the law provides for six months period within which to hear and determine an election dispute, this was theoretical as the reality was that no single election petition met the timelines. Reference was made to the 110 election petitions filed in 2009 whereby none of the petitions was heard within the prescribed period, with 25 of the
petitions having remained pending until. It was stated that as a matter of fact 25 petitions remained pending until the end of the term. One of the notable challenges observed is that the resolution of election disputes in India takes unacceptably long periods in most cases, which "reduces the adjudicatory process into a mockery of justice". Rarely does an election dispute gets resolved during the tenure of the declared candidate.

It was also noted that election petitions were not considered a very serious matter because the systems in place and process of elections are trusted and there have been no serious grounds for nullifying the elections. Any election petition may be withdrawn only by leave of the High Court upon application. A petition can abate only on the death of the sole petitioner or of several petitioners.

iv) Campaign Funding
India has legislation that places a ceiling on campaign expenditure which is reviewed periodically. It was stated that the reality is 99% of the expenditure exceed the recommended limits by 50% to 100% yet so far no candidate has ever been disqualified based on this.

v) Violence During Elections
Generally, elections in India are free from violence. Authorities are usually alert hence incidences are uncommon and do not usually affect is alert and incidences of violence are not common hence it does not affect the outcome of the results. In the event occurrence of violence, the party involved is punished by the Electoral Commission by paying hefty fines while perpetrators of violence can be disqualified from participating in the election. The Electoral Commission endeavours to ensure that each and every citizen participates in the election by providing for some of the basics like water. Security is adequately provided for during elections, so much so that crime rates are known to go down during the electioneering period to the point that it has been observed that crime rates go down and are lower during the election period.
vi) Gender Representation
Issues of gender representation are still a challenge. Women are marginalized and the percentage at the national level stands at 10-20%. Most of these women tend to be daughters of the who’s and who in India and only come in as proxies. Political parties are also hesitant to nominate women candidates.

vii) Party Primaries
Intra party’s disputes are rare because parties do not conduct party primaries but if such a dispute arises, it is handled by the election commission.

viii) Technology
India has adopted technology in elections. Electronic Voting Machines are used to facilitate electronic voting which has replaced paper ballots. Technology is also used as a one stop shop where one can apply for voter registration and the same time change the voter registration details. As a cautionary measure to guard against tampering and ensure verifiability of the voting process, a voter-verified paper audit trail was introduced. It emerged that India has never experienced technological failures. Further, technology has played an important role in ensuring minimal electoral disputes regarding the outcome of elections since the system is accurate, reliable and verifiable. Another advantage is that India has a vibrant constitutional democratic society and for the last 65 years, it has been continuously improving on the universal suffrage by adopting the principle that every vote counts and that no voter should be threatened or intimidated from casting the vote. This continuous engagement has contributed to improvements in enhancing efficiency of the election technology applied.

In addition, the Commission takes time to test the system which is key to ensuring free, fair and credible elections. Stakeholders including election observers are involved in the testing process. This, in turn, increases the level of confidence in the system and the Commission. It was explained that due to such involvement, the authenticity of the results which are released in one day is not called into question.

ix) Media Engagement
It was stated that all media coverage is monitored by the Electoral Commission-comprehensive committee at the district level, the state level and the national level. All instructions relating to elections are communicated to the media by the Commission’s comprehensive committee such that if a candidate is found bribing or compromising the media, the candidate is disqualified for a period of three years.

x) Other Emerging Issues
It emerged that India has thrived in its deep rooted cultural diversity whereby the society is divided into a caste system, clanism, and along religious lines. Most elections take place without a single incidence. They are conducted by the best officers in the civil service. Election is considered the biggest festival of democracy. It is very participatory, transparent and inclusive. The Electoral Commission conducts voter education to encourage everybody
Gender representation

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4.4 CHALLENGES IN EDR

Some of the challenges identified as facing India’s electoral system includes:

a) Bribery and delay in concluding election petitions in court. Delay was attributed to lack of capacity of judges and delay tactics used by advocates.

b) Ensuring participation of all eligible voters is yet to be achieved.

c) The capacity of the Electoral Commission to manage the anticipated huge database of about 100 million registered voters not assured.

d) Difficulties of enforcing the election code of conduct which lacks statutory backing.

e) Control and management of campaign funding: The concept of monitoring of election expenditure helps in creating a level playing ground for all persons participating in the elections. The ECI has set up different levels of supervising and monitoring. The ceilings on the limits are fixed. Exceeding the set limit can lead to gross misconduct.

f) The greatest challenge faced is that parliament is not bound by the recommendations of the Law Commission when enacting legislation. However, the Supreme Court at times considers the findings of the Law Commission in arriving at some of its decisions.

g) There are ambiguities in the electoral laws - which politicians take advantage of. If an attempt is made to cure the ambiguity through public interest legislation, a legislation is passed to undo it.
h) The number of people interested in politics, yet they have pending criminal cases continues to be on the rise. This has resulted in limitation of the voters’ choice. Further, there are weak internal party systems leading to undemocratic processes within the parties. There is need to not only empower and set up internal systems to promote democracy, but also to have proper regulation of parties.

4.5 LEGISLATIVE GAPS

Following the discussions, the following areas were identified as lacking in legislation.

a) Issue of candidates with pending criminal cases.
   This remains a big challenge since candidates with pending criminal cases can still vie for elective posts. Both the High Court and the Supreme Court have held that the voters have a right to know whether a candidate has a criminal record. This move was circumvented by the legislature unanimously passing legislation got into action and unanimously passed a legislation so as not to implement the Supreme Court decision.

b) Laws governing elections – Election laws are not codified into one law. Article 324 of the Constitution governs the elections. The law relating to election is codified in the India Representative of People’s Act 1959 under which the Election Code of Conduct was developed. In addition, law making process is the preserve of the legislature comprising of those who at the same time will be running the Political parties which are not adequately regulated. The likelihood is that they will pass laws to ensure their self-preservation. For comparative analysis, it was recommended that JCE should look at the German Law on Political parties.

b) There is no process for deregistering a political party once it is registered. So far in India there are approximately 290 registered political parties and approximately 150 parties contested the elections.
CHAPTER 5

5.0 MEXICO

5.1 LEGAL AND INSTITUTIONAL FRAMEWORK

Mexico is a federal system of 32 autonomous states. It applies the presidential system of government. The Executive is headed by the President and Governors (heads of states) at the federal level. Legislature is bicameral Senate (upper house) with 128 Senators and a Chamber of Deputies (lower house) of 500 deputies. The Judiciary comprises of the Supreme Court of Justice, Electoral Tribunal, specialized circuit courts, unitary circuit courts, district courts.


Mexico’s electoral process has gone through a series of reforms over the years, and the most notable is the introduction of political parties’ pluralism that is a two-chamber system of representation recognition of political parties as public interest entities, judicial control over resolution of electoral disputes, and strengthening of the electoral tribunal as the highest
authority on electoral disputes. Trial of electoral crimes is also specialised, under the office of Special Prosecutor on Electoral Crimes.

Mexico has a permanent Tribunal that handles Election Petitions, consequently the delegation would benefit by learning on the operations of the Tribunal and what they do the rest of the time, given the different phases of the electoral cycle.

5.2 MEETINGS HELD

The delegation visited the following institutions:

i) Supreme Court of Justices of the Nation

The Supreme Court of Justices of the Nation, which is the highest constitutional court of Mexico and the head of the Judiciary of the Mexican Federal government. It consists of 11 judges, one of whom is appointed by the president. Its responsibility is to advocate for the rule of law of the political constitution of the United States of Mexico, maintain the equilibrium between the branches of the government following the promulgated judicial resolution, and issue the final ruling on issues of great importance for the society.

ii) The Electoral Tribunal of the Federal Judiciary (High chamber, the Mexico City Regional Chamber and the Specialised Chamber)

It is the highest authority on electoral matters and is a specialized organ of the Federal Judiciary. It is composed of the High Chamber, the Mexico City Regional Chamber and the Specialised Chamber and within their jurisdiction, they have the responsibility to hear and resolve cases related to federal election of representatives to senate, elections for local deputies, public officers in city councils and for several local public servants, acts and ruling issued by the decentralized bodies of the National Electoral Institute, and lastly claims about infringement of political-electoral rights by decision made by the political parties while choosing their candidates.

iii) Local Electoral Tribunal of Mexico City

It is a permanent organ that resolves cases against all local electoral acts and resolution in terms of local laws. Their mandate is to address and resolve claims against the local elections of deputies, head of government and holders of political-administrative organs of the territorial demarcations against acts and resolution that violate political-electoral rights of citizens, against the mechanisms of citizen participation, addresses conflict or labor disputes between the Local Electoral Tribunal of Mexico City and its staff.

iv) National Institute of Elections (INE)

It is a public autonomous and independent body bestowed by the state with the authority for organizing all federal elections, elections for President, Senate and Chamber of Deputies. It works alongside the local electoral bodies in organizing the local elections. In addition, it is authorized to carry out the actions related to preparation, organization, conduction and surveillance of federal elections, including the revision and adjustment of electoral geography, the accomplishment and updating the electoral roll, the attention to the rights and prerogatives of parties and political groups as well as the formulation and implementation of permanent civic education programs.
v) Specialized Prosecutor’s Office for Electoral Offences (FEPADE)
FEPADE is in charge of preventing, investigating and prosecuting federal electoral crimes. It is an agency of the Attorney General Office authorized to integrate and resolve pre-trial investigations on federal electoral crimes independently.

5.3 ISSUES FROM DISCUSSIONS
i) Functioning of the Electoral Institutions
The electoral authorities exercise both administrative and judicial powers. Administrative functions involve management of elections while jurisdictional authorities are concerned with review of decisions of electoral authorities and resolution of electoral disputes. The institutions comprise of the following:

a) Federal Electoral Institute: a federal authority with national characters and powers, which is charged with organizing elections and also plays some jurisdictional roles, an element which distinguishes the electoral body from other country models.

b) Special Prosecutor’s Office for Electoral Crimes: at the executive level, charged with prosecution of electoral crimes.

c) Supreme Court of Justice: which with respect to elections exercises some abstract control in the sense that it handles unconstitutionality actions that deals with the constitutionality of the electoral laws when enacted. Its decisions are binding, or have jurisprudential binding authority if there is a concurrence by 8 of the 11 Judges of the court.

d) Local Electoral Bodies: which are charged with organizing and management of local elections in the electoral districts.

e) Local Electoral Tribunals: which deal with and resolve first instance conflicts, arising from decisions of local electoral authorities. Its decisions can be reviewed.

f) Electoral Tribunal of the Federal Judicial Branch, its High Chamber is the highest authority in electoral disputes.
ii) Electoral Tribunal

This is the highest authority in electoral matters and is a permanent specialized branch of the Federal Judicial Branch. It is comprised of:

a) The High Chamber - comprises of seven electoral justices, headed by a Chief Justice. The Justices are nominated by the Supreme Court and confirmed by a two-thirds majority vote of the Senate to serve a term of nine years. The Chamber operates from its headquarters in Mexico City. The decisions of the superior court binds the Regional Tribunals. It is the highest and final court on the following: challenges to the election of President, representatives and Senators, appeals against decisions of the national electoral body, constitutional review of all acts of electoral bodies which would have an impact on the outcome of elections, trials for the protection of citizens’ political-electoral rights, labour disputes between the Tribunal and its employees, power to order non-enforcement of electoral laws that violate the Constitution of Mexico, and certifying the presidential elections upon finding the elections valid by issuing the certificate to the president elect.

b) Regional courtrooms – these are also permanent bodies. There are five regional courtrooms. Each regional courtroom is comprised of 3 Justices. The 5 regional chambers are based in Mexico City, Guadalajara, Toluca, Monterrey and Xalapa. Regional chambers have jurisdiction on the following: Declaration of unconstitutional electoral laws in specific cases; challenge to federal elections of representatives and senators elected by direct majority; challenge to election of local deputies, members of the Mexico City assembly of representative; challenge to election of public officers in city councils, heads of political-administrative bodies in Mexico City and local public servants and challenge to decisions of decentralized bodies of the electoral institute.
c) Specialized Regional Chamber which hears disputes in relation to official propaganda, access to and use of media time slots, and freedom of expressions during the election campaigns. The Chamber can give a private warning, public or disciplinary warning, economic and other sanctions prescribed in the law for non-compliance of its orders.

d) The role of the Electoral Tribunal cuts across from the pre-election period up to the election date and post-election period. Pre-election disputes include resolution of political parties’ disputes which are done through internal party processes. In Mexico, the internal party mechanisms are required to adhere to basic democratic principles. The regional electoral tribunal will only directly intervene in exceptional cases e.g. in cases of emergencies when there is no time to resolve the case in the hierarchy to avoid risk to the political rights where the right cannot be restituted since a complaint first goes to the local tribunal.

iii) Distinction of Functions of The Electoral Tribunal and The Supreme Court
It was observed that both the Tribunal and the Supreme Court have functions of interpreting the Constitution. However, the distinction lies in the scope of cases, with the Supreme Court dealing with cases challenging the constitutionality of electoral laws in the abstract (not attached to a specific electoral process), following the enactment of a particular statute. The Electoral Tribunal’s constitutional intervention is specific to particular case as opposed to making a general constitutionality declaration. To set a precedent, the Supreme Court majority decision must be supported by eight out of the eleven Judges. The decision of the Supreme Court is binding on the Tribunal.

Electoral disputes are first raised at the jurisdictional level on which they arise, commencing with the local tribunal at the first instance before seeking the federal process while the Tribunal issues a final resolution. They are however exceptions to this rule, for instance where there are extra-ordinary circumstances.

iv) Jurisdiction to Deal With Electoral Offences
The Mexican system entails separate approaches in handling electoral offences. The jurisdiction of the Mexican Supreme Court is very limited. The electoral body, INE deals with administrative electoral responsibility for certain aspects such as exceeding campaign financing ceiling. Its decision can be challenged before the federal tribunal. A finding can lead to annulment of an election by the federal tribunal. FEPADE can take action against the person who receives illegal financing; the distinction being that FEPADE is concerned with pursuing sanction of criminally liable individuals but it is not concerned with the effect on the election outcome. Nevertheless, FEPADE takes lead in handling of election offences. It enjoys a high conviction rate. In most cases, persons are tried while out on bail, except in the cases involving use of violence and explosive devices.

Common offences include campaigning during the prohibited period, exceeding campaign funding ceiling, supporting a political party by a body and failure to provide information on electoral offence and coercion of voters. Some of the sanctions include suspension of candidates elect who are disallowed to take up position upon swearing, being barred from
standing as a candidate during elections, while others such as corruption are punishable with a fine, while cases of illegal financing attract 5 to 15 years’ imprisonment. A challenge arises where it is difficult to classify a type of an offence, where the classification of offences is not clear, for instance, a case involving an electoral officer who rated an election, later deciding to become a candidate of the political party that he rated.

v) EDR Within the National Electoral Institute

The delegation was also taken through the EDR process within the institute. This involved two types of procedures firstly, the special sanctioning procedure, an expedited process to remedy vices that could directly affect the electoral process in the short term before end of electoral process. It is a hybrid procedure whereby the electoral institute investigates and files its report while the final resolution is made by the special regional chamber. It deals with such violations as violation of rules on propaganda and campaign outside the period allowed by the law such as early campaigning. The Institute finalizes its findings by writing a report. The second procedure is the ordinary sanctioning which takes three months to be completed. This too is resolved by the Institute. The Institute also has powers to commence liability procedure for non-cooperation by anyone in providing information needed to deal with a complaint. Resolutions by the Institute can be contested before the tribunal. Notably, 90% of decisions challenged before the electoral tribunal are confirmed.

vi) Independent Candidates

Mexico has a mixed model incorporating independent candidates as well as proportional representation whereby the political party with majority votes earns a representation in the senate under proportional representation.

The place of independent candidates was a recent development which was largely influenced by an advisory of the Inter-American Court of Human Rights which urged for alternatives to allow for greater participation. In parliament, independent candidates must join parliamentary groups which are the only recognizable representative groups. There is no clarity on how to deal with the possible scenario if independent candidates were to have more votes over candidates from a political party. It was pointed out that election of independent candidates had declined.

vii) Election Irregularities

The discussions revealed that Mexico had dealt with challenges similar to Kenya such as electoral fraud measures had been adopted to safeguard the electoral process including introduction of tamper-proof voters’ ID card which is issued exclusively by the National Electoral Institute. The card must be presented on the election date. The card is replaceable upon loss, and only the recently issued card is legitimate for one to vote. Indelible ink is also applied upon one’s casting of a vote. Furthermore, ballots are printed using secure paper similar to that used in the currency notes to prevent falsification of ballots. All political parties can be represented in the voting stations and are entitled to a copy of the forms containing results. As a result, electoral fraud had reduced and irregularities that currently subsist are largely related to other factors. The EDR process in Mexico was similarly
vii) Election Irregularities

The discussions revealed that Mexico had dealt with challenges similar to Kenya such as election irregularities. Mexico has a mixed model incorporating independent candidates as well as proportional representation whereby the political party with majority votes earns a representation in the voting stations and are entitled to a copy of the forms similar to that used in the currency notes to prevent falsification of ballots. All political parties can be represented in the voting stations and are entitled to a copy of the forms upon loss, and only the recently issued card is legitimate for one to vote. Indelible ink is also applied upon one’s casting of a vote. Furthermore, ballots are printed using secure paper similar to that used in the currency notes to prevent falsification of ballots. All political parties enjoy state funding, which is a huge expenditure for Mexico, of about 350 million dollars, 70 percent of which is allocated to parties dependent on the number of votes obtained in the last elections, while 30 percent is allocated on equal basis for every political representation. A party must be registered as a political party and the registration of political parties opens every 6 years. Where it is found that the campaign expenditure is beyond 5% of the limit allowed, and the difference of votes between the 1st and 2nd candidate is less than 5 percent, it can lead to a report. The second procedure is the ordinary sanctioning which takes three months to be completed. This too is resolved by the Institute. The Institute also has powers to commence liability procedure for non-cooperation by anyone in providing information needed to deal with such violations as violation of rules on propaganda and campaign outside the period allowed by the law such as early campaigning. The Institute finalizes its findings by writing a report. The special sanctioning procedure, an expedited process to remedy vices that could directly affect the electoral process in the short term before end of the difference of votes between the 1st and 2nd candidate is less than 5 percent, it can lead to a report. The second procedure is the ordinary sanctioning which takes three months to be completed. This too is resolved by the Institute. The Institute also has powers to commence liability procedure for non-cooperation by anyone in providing information needed to deal with such violations as violation of rules on propaganda and campaign outside the period allowed by the law such as early campaigning. The Institute finalizes its findings by writing a report. The special sanctioning procedure, an expedited process to remedy vices that could directly affect the electoral process in the short term before end of
to the annulment of an election. Other sanctions that can be issued include administrative action against a party, incarceration of an individual following prosecution by the special prosecutor, reduction of financing, fines, and loss of registration. INE is the principal body that receives and investigates complaints on financing. Its decisions can be reviewed by the Tribunal. Discussions also revealed that the introduction of re-election of persons to elected positions in Mexico pose new challenges in the use of public resources in campaigns for those seeking to be re-elected.

x) Inclusion of Political Parties in the Electoral Body
To curb mistrust, political parties representatives are part of the electoral management body. It was explained that while political parties officials are allowed to participate, they are the minority in terms of numbers and they do not have voting rights, the aim being to guarantee plurality and not advance party interests. Furthermore, members of the Institute are not members of political parties. This promoted inclusion of political parties in the electoral body without undermining its independence and processes.

xi) Internal Complaints Handling Process
The investigations are done by a unit within the electoral body supported by authorities. It can also seek information from authorities such as the revenue authority, local and district officers and corporations. Matters involving commission of crimes are however dealt with by the specialized prosecutor’s office while the Institute deals with administrative infringements. The Institute investigates and gives a solution which is reviewed by the electoral tribunal. The prosecutor deals with criminal liability of persons accused of committing election offences. A wide range of sanctions are available depending on the severity of the infringements e.g. public warning, cancellation of registration of candidate/party, graduated fines, restitution of damage, training of party, and public apologies among others.

x) Timelines for Dispute Resolution
Resolutions of pre-election disputes are time-bound, and are resolved before the election date; noting that the evidence produced in the courtroom proves useful in contesting the elections.

xi) Evidentiary Challenges in Prosecutions
Mexico faces similar challenges like Kenya for example on how to deal with social media and proving cases of slander since it involves a subjective test, while taking into consideration the delicate balance against curtailing freedom of speech.

xii) Limitation of Media Space
Mexico has developed a system to ensure equitable free access to media spaces involving use of state-allocated time slots which are managed by the electoral Institute. However, the number of time slots to be allocated is dependent on many factors including the previous performance of the political party in the elections. The Institute has in this regard a dedicated program where time allocation is shared amongst the parties and the electoral
authority which has a duty to give information to citizens. Financial resources of the parties are also investigated since parties must give an account of expenditure of money allocated.

xiii) Elections Preparedness Through Training
The EDR process in Mexico is a specialized area, the staff of the tribunal comes from the judicial career and need to be trained in the discipline of election. Furthermore, since not all staff especially at the local level are drawn from the judicial career, specialized training is undertaken.

xiv) Public Confidence in the EDR Process
It was reported that in Mexico public trust was mainly based on perceptions as informed by various surveys done on electoral institutions. Furthermore, perceptions towards politics generally consequently impact on institutions involved in electoral regulation. However, it was noted that the preference of filing cases and not street riots to filing of cases before the tribunals was indicative of increasing trust in the judicial process, while there was increased compliance with sentences issued by tribunal a manifestation of acceptance of decisions of the tribunals by political parties. It was further emphasized that it was critical to ensure that sanctions are well understood by the citizens thus need for clarity and building of trust with the citizenry.

xv) Women's Representation
Statistics on Mexico revealed that only 33.8 per cent in women parliament, with 28 women in senates out of 128; and 81 in the municipality, while no commission in legislative
assembly was headed by women despite an almost 50:50 ratio. It was acknowledged that lack of resources was a challenge facing women in Mexico as well. To address these limitations, interventions sought include seeking that the electoral tribunals to order parties to make equal allocations for both men and women. In extreme cases, there have been assassination of women candidates. The media concentration on males has also contributed to low appreciation of women’s contribution. Further, customs and traditions especially among indigenous communities posed unique challenges. However, the authorities are now working with the men to be the champions of women’s rights. Though there have been legislative proposals to promote gender equality they are still awaiting legislative approval due to political interests.

A comparison with Kenya presented similar challenges as Kenya is struggling to achieve equality and has not met the constitutional threshold of at least 1/3 gender representation in elective and appointive positions. The legislation required to implement this rule has not yet been passed. It is clear that Parliament failed to comply with the Supreme Court's directive which may pose a constitutional challenge following elections if the representation of women fails to meet the constitutional threshold.

xvi) Proportional Representation

There was interest in how Kenya ensures that the seats reserved for special interests actually represent special interests. It was explained that political parties are required to submit a list of nominees which is reviewed by the IEBC to ensure compliance with the Constitution. The list must alternate in terms of gender and should be submitted before elections. This process, it was noted, was a source of election disputes mostly against the IEBC. The list should show representation of special interests such as gender, disability, youth and minority ethnic groups.

xvii) Judiciary TV Channel

The team also visited the Judiciary TV stations that broadcasts programs about the courts, including programs on decisions of the court. The channel is a well-resourced production station that produces its own programs including news, analysis of the Court's decisions, documentaries, citizen education programs, programs on operations of the courts, human rights focused programs, cinema debates, interviews of legal experts on various fields of the law, and programs hosting legal professionals among others. The station also facilitates broadcasting live plenary proceedings. It is hosted in 8 televisions that broadcast throughout the country under the ‘must-carry’ rule. The station is now tracking the viewership ratings with 2016 attracting 4.4 million viewers, while 2017 has already in the first four months attracted 3.8 million viewers.

xviii) Place of Amicus Briefs

It was revealed that the Court receives amicus briefs though there is no legal procedure governing their participation.
xix) Procedure for Determination of Cases

It was observed that the Mexican system also makes use of law clerks who work alongside the Judges and have a more involved function, unlike the Kenyan system. In the Mexican Supreme Court, each Judge has 10 clerks under his supervision. The clerks receive and review the entire documentation in a case and develop the resolution proposal. The Judge reviews the proposals on a weekly basis and once approved, they are listed to proceed to the plenary session. The plenary first considers the proposal in a private session and delivers the final resolution in an open plenary session in proceedings. A clerk is required to deliver at least two proposals per week. Ordinary court room sessions are public but are usually not aired. The Supreme Court handles an average of ordinary 15,000 cases per year most of which are resolved at the court room level. In 2016, the court handled 235 constitutionality actions. Like Kenya, the courts also face challenges of case backlog.

xx) Use of Electronic Evidence

It was observed that Mexico has successfully used electronic evidence in prosecution of cases and facilitating trials for example, video conferencing, use of cell phone in recording and transmission of evidence which had been successfully used as evidence in trials. Use of experts was also cited as a useful means of enhancing use of technology in prosecution, as was demonstrated by the FEPADE expert’s division of specialists. However, challenges were still persisting particularly in instances where certain conduct had not been recognised as an electoral offence such as identity theft involving voters ID.
5.4 CHALLENGES IN EDR

a. The greatest challenge for Mexico is mistrust of the electoral process which results in many complaints. Thus, the importance of facilitating access to justice and continuing need to build trust and ensure clear and accessible sentences are issued could not be gainsaid. Managing expectations was also emphasized and this could be done through maintaining independence, quality and professionalism at work and transparency in delivery of its decisions.

b. A challenge was also noted in respect of oversight of INE when the local tribunal does not review every act by a local body thus posing challenges. On financing matters, oversight may also be weak where INE does not question every aspect of the expenditure by political parties which fail to report on expenses.

c. Another challenge noted was the different criteria for similar cases which could generate suspicions or perceptions of bias. There was also increased judicialisation of political issues, thus, need for building trust through the sentences with a caution that increase in conflicts should not be celebrated as it could be indicative of a failing electoral system. The tribunal was also at a disadvantage where some of the issues are dependent to a great extent on the political players.

d. The poor internal party dispute resolution mechanisms in Mexico, which had led to calls legislation to enforce higher standards for internal mechanisms, thus this remained an area needing gradual improvement.

e. One of the biggest challenge experienced in Mexico concerns use of social programs by public officers to influence the society to vote in favour of a political party since it entailed improper use of public resources to influence the public under the guise of performance of public duties.
CHAPTER 6

6.0 LESSONS LEARNT

The following were the key reflections and lessons learnt from the engagements with the various delegations:

6.1 INSTITUTIONAL AND ADMINISTRATIVE LESSONS

i) Strong Institutional Framework
Deliberate efforts needed to invest in the institutions involved in electoral processes in terms of infrastructure, budgetary allocations, non-political interference.

ii) Administrative Coordination Within The Judiciary
Many lessons learnt on effective hosting and coordination. There are dedicated and well-coordinated communications and protocol teams including external relations departments. The Kenya Judiciary can invest in such designated departments with specific personnel. For instance, there is need for empowering the Judiciary’s Directorate of Public Affairs and Communication.

iii) Institutional Branding
There is need for the Kenya Judiciary to engage more in strategic branding particularly with a view to raising its profile in engagement with its peers and other stakeholders.

iv) JCE Mandate
As other jurisdictions do, JCE should implement its proposal to analyze all key judicial decisions arising from the 2017 EDR process in order to identify possible areas for reform that would improve the subsequent election cycle. Documentation, dissemination of information on case outcomes and debrief on lessons learnt is important.

JCE also needs to consider intervening in the area of media and the law of contempt. It is also critical to prepare Judges and Judicial Officers not only on technical handling of EDR cases but also to on their ability to manage the emotional nature of the proceedings.

v) Case Management
As part of lessons learnt on effective case management strategies, there is need to develop robust case management strategies. There is need to ensure that Kenya courts prioritise effective case management as a key tool for effective and expeditious EDR.

vi) Need for Strategic Communication and Transparency by Judiciary on EDR
The Judiciary as a primary actor in electoral matters needs to be take a more proactive role in engagement with other stakeholders on election matters including sensitization. In addition, alive to the critical impact on public perception on the Judiciary in promoting
peaceful elections, courts need to conduct their affairs in a credible and transparent manner, as well as manage their emotions in adjudicating elections cases. The Judiciary, through JCE and DPAC, needs to develop a well-structured communication strategy on election-related matters. This would also include developing user-friendly versions of key EDR publications and other materials. In addition, the Chief Justice needs to explore expanding the NCAJ forums to broaden public participation or institute other forums for enhanced direct engagement with the public on the Judiciary’s performance and delivery on its mandate.

vii) JCE Led Law Reform Initiatives Through Multi-Sectoral Engagement
It would be useful for Kenya to establish an electoral reform committee that would draw its membership from all the key stakeholders including the Judiciary, key state agencies working on elections, political parties, civil society, media, the Bar, academia and development partners, to spearhead elections-related reforms to avoid last-minute and piecemeal reforms.

6.2 LEGISLATIVE LESSONS

i) Timelines
JCE should consider recommending reforms to allow flexibility on extension of time for certain EDR processes. For example, whilst the constitutional timelines for determination of Presidential election petitions is 14 days from date of filing, all stakeholders are in agreement that 14 days is not adequate.

ii) Need for Timelines on EDR legal reforms
The Judiciary through the JCE needs to identify legislative proposals drawn from judicial decisions and experiences from the EDR cycle in order to note that the reforms should be raised at a reasonable time, and not too close to the elections, as has happened in the last two electoral cycles in Kenya.

iii) Review of the Legislative Framework on Electoral Offences
There is need for reviewing the policy and legislative framework on electoral offences including the sentencing policy guidelines to reflect electoral offences as well as the legislative framework following the 2017 EDR cycle in order to take stock of the growing jurisprudence.

iv) Reviewing the system of voter registration
Kenya needs to consider adopting a uniform system of registration of all citizens at birth with provisions for one to automatically become a registered voter, upon attaining the age of majority.

v) Role of the Judiciary in Promoting Electoral Reforms
From the lessons learnt during the visits, the Judiciary can take an active role in supporting initiatives to enhance electoral management, since often, court decisions in
resolving pre-election disputes and election petitions may impact on the operations of the electoral management body and socio-political issues.

vi) Legislative Amendments to Empower Political Parties Resolve Internal Disputes
It is important to empower the political parties through both amendments to the Political Parties Act and the IEBC regulations and empowerment of the political parties to resolve their internal disputes unless in specific instances where disputes may call for court’s interventions e.g. cases that would likely impact on the outcome of the elections. This would help reduce the case burden currently faced by the courts, while enhancing appreciation among political parties of the own benefits of resolving their own disputes internally and in the process, reduce the perception of judicialisation of the political disputes.

vii) Decentralisation of the Political Parties Dispute Tribunal
The Political Parties Dispute Tribunal should be strengthened through amendments to the Political Parties Act and the JSC Act to introduce decentralization of the Tribunal as it currently only sits in Nairobi.

viii) Regulation of Media Space for Political Campaigns
Another marked feature is the regulation of media slots for political campaigns to ensure equity among political parties and candidates. Thus, economically empowered parties do not have an unfair edge over other parties.

ix) Prosecution of Electoral Crimes
Need for the ODPP to set up a specialised department that is well-resourced to deal with prosecution of election offences.
CHAPTER 7

7.0 CONCLUSION

The engagement with the various countries institutions provided an opportunity not only for the delegation to learn from the various institutions, but also, the various countries equally learnt from Kenya’s experiences. It was notable that Kenya has made progress in some areas that still pose challenges in some jurisdictions and is yet to implement fully in others. This included areas such as voting by prisoners, use of technology, and use of adversarial system of adjudication. In some areas, the countries should utilize future engagement to continuously learn from each other, e.g. the growth of the concept of independent candidates. Some of the lessons learnt also go beyond facilitating the EDR process and can be applicable by the Judiciary to enhance administration of justice as a whole. Legislative measures may also be needed to realise some of the recommendations such as the institutional arrangement of the electoral body, and introduction of specialized institutions to deal with electoral disputes.

As alluded to earlier, the benchmarking visit was an important visit for both the JCE and the Judiciary at large, and could not have come at a better time. It was acknowledged that the Judiciary plays a very important role in the EDR process. It entails the process of learning and comparing from the practices of other organizations. Many lessons were learnt and the benchmarking objectives met. It is now imperative that the best practices gained from the benchmarking should be disseminated and used to assist the Judiciary to continually identify areas which need improvement and advancement. Legislative and administrative reforms should be proposed where appropriate.
CHAPTER 7

7.0  cONclUSiON

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PHOTO GALLERY: GHANA

Meeting with the Election Adjudication Task Force Committee (EATFC) and the Ghanaian Supreme Court (SC) Judges

JCE delegation with the then outgoing Chief Justice, Ghana

Meeting with Select Ghana Civil Society leaders and Domestic Election Observers

Deputy CJ Kenya, Lady Justice Philomena Mwilu, presents a gift to the outgoing CJ Ghana, Lady Justice Theodore Wood
PHOTO GALLERY: SOUTH AFRICA

JCE delegation at the Court where Nelson Mandela was tried

Visit to Union Building in Pretoria

Visit to Union Building in Pretoria

Visit to Apartheid Museum
Meeting with the Specialised Prosecutor’s Office for Electoral Offences (FEPADE)

Meeting with the High Chamber of Electoral Tribunal

Meeting with the High Chamber of Electoral Tribunal

Meeting with Chief Justice of the Supreme Court
# GHANA DELEGATION

1. Head of Delegation: Lady Justice Philomena Mwilu (DCJ)
2. Justice Mr. Mbogholi Msagha (Chairperson JCE)
3. Justice Prof. Otieno Odek-DJTI
4. Justice Mr. Kathurima M’Inoti JA
5. Lady Justice Stella Mutuku
6. Ms. Anne Amadi CRJ
7. Dr. Collins Odote
8. Hon. Peter Gesora
9. Hon. Lillian Arika
10. Felix Kyalo
11. Faith Namunyu

# SOUTH AFRICA DELEGATION

1. Head of Delegation: Justice Mr. P. K. Kariuki (PCOA)
2. Justice Mr. David Majanja (Vice-Chairperson JCE)
3. Justice Dr. Smokin Wanjala SCJ
4. Justice Mr. Richard Mwongo PJ
5. Mr. Duncan Okello (Chief of Staff)
6. Hon. Rosslyn Oganyo
7. Mrs. Tryphaena Estambale
8. Benard Moseti
9. Rhoda Rutto
10. Lydia Mwangi
11. Patriciah Joseph
12. Judith Kibuye

# MEXICO DELEGATION

2. Justice Mr. Mbogholi Msagha (Chairperson JCE)
3. Justice Prof. J. B. Ojwang SCJ
4. Justice Mr. Kathurima M’Inoti JA
5. Lady Justice Stella Mutuku
6. Dr. Collins Odote
7. Hon. Peter Gesora
8. Hon. Lillian Arika
9. Felix Kyalo
10. Patriciah Joseph
11. Faith Namunyu

# INDIA DELEGATION

1. Head of Delegation: Justice Mr. P. K. Kariuki (PCOA)
2. Justice Mr. David Majanja (Vice-Chairperson JCE)
3. Justice Dr. Smokin Wanjala SCJ
4. Justice Hannah Okwengu JA
5. Justice Mr. Richard Mwongo PJ
6. Mr. Duncan Okello (Chief of Staff)
7. Hon. Rosslyn Oganyo
8. Mrs. Tryphaena Estambale
9. Isaack Okero
10. Judith Kibuye
11. Rhoda Rutto
12. Lydia Mwangi