DYNAMICS OF DEMOCRACY: STRATEGIES FOR FUTURE ELECTIONS

AN AUDIT OF THE LEGAL, INSTITUTIONAL AND ADMINISTRATIVE FRAMEWORKS THAT GOVERNED THE 4TH MARCH 2013 GENERAL ELECTIONS
OUR VISION
A free, just and democratic society

OUR MISSION
To nurture democratic culture and principles that strengthen good governance in Kenya and Africa

OUR CORE VALUES
Integrity
Communication
Innovation
Diligence
Results Focused
Team-work
Respect
Diversity
TABLE OF CONTENTS

Abbreviations and Acronyms ................................................................. iv
Acknowledgements ............................................................................... 1
Foreword .............................................................................................. 2
Executive Summary ............................................................................... 3

CHAPTER ONE .......................................................................................... 5
A. Introduction and Background .............................................................. 5
B. Audit Methodology ............................................................................. 8

CHAPTER TWO ........................................................................................... 10
LEGAL, INSTITUTIONAL AND ADMINISTRATIVE FRAMEWORKS THAT
GOVERNED THE 4TH MARCH 2013 GENERAL ELECTIONS ......................... 10
A. Relevant International Legal Standards .............................................. 10
2. The Elections Act, 2011 ................................................................. 14
3. The Political Parties Act, 2011 ........................................................ 14
4. The Campaign Finance Act, 2014 .................................................... 15
C. The Institutional and Administrative Frameworks .............................. 16
IED’s Proposed Amendments to the Elections Act (Act No 24 of 2011) .... 17
1. The Independent Electoral and Boundaries Commission (IEBC) .... 18
2. Political Parties ............................................................................... 20
3. The Office of the Registrar of Political Parties (RPP) ....................... 21
4. The Judiciary ................................................................................... 21
5. The Parliament ............................................................................... 22
6. The Political Parties Dispute Tribunal (PPDT) ................................. 23
7. The Office of the Director of Public Prosecution (ODPP) ............... 23
8. The National Police Service ............................................................ 24

CHAPTER THREE ....................................................................................... 27
3. THE 4TH MARCH 2013 GENERAL ELECTIONS IN CONTEXT .................. 27
A. The Electoral System and Process ..................................................... 27
Institute for Education in Democracy (IED)

DYNAMICS OF DEMOCRACY

B. Voter Registration and Voter Registers .......................................................... 28
C. Political Parties Registration and Nomination Processes ............................ 29
D. IEBC and the Management of the 4th March 2013 Elections ...................... 30
i. Use of New Voting Technologies ................................................................. 30
ii. Voting Procedures and the Secrecy of the Ballot ......................................... 31
iii. Transparency in the Counting and Tabulation of Votes ............................. 32
iv. Protection of Personal Data and Information of Voters ............................... 32
v. Access for Election Observers .................................................................... 32
E. Participation of Women and Marginalised Groups in the 4th March 2013 General Elections ................................................................. 33
F. Campaign Finance and Expenditures .......................................................... 35
G. Electoral Dispute Resolution (EDR) ............................................................. 36

CHAPTER FOUR .................................................................................................. 37
Recommendations ......................................................................................... 37
A. Administrative Reforms ............................................................................. 37
B. Legal Reforms ............................................................................................ 39
C. Institutional Reforms .................................................................................. 40

BIBLIOGRAPHY .............................................................................................. 42
A. Reports ....................................................................................................... 42
B. Press Statements/Briefings ........................................................................ 42
<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BVR</td>
<td>Biometric Voter Registration</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of all forms of Discrimination Against Women</td>
</tr>
<tr>
<td>CoK</td>
<td>Constitution of Kenya 2010</td>
</tr>
<tr>
<td>CRPWD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
</tr>
<tr>
<td>CVR</td>
<td>Civil and Voter Registration</td>
</tr>
<tr>
<td>EDR</td>
<td>Electoral Dispute Resolution</td>
</tr>
<tr>
<td>ELOG</td>
<td>Elections Observation Group</td>
</tr>
<tr>
<td>EMB</td>
<td>Electoral Management Body</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>EUOEM</td>
<td>European Union Election Observation Mission</td>
</tr>
<tr>
<td>EVID</td>
<td>Electronic Voter Identification Device</td>
</tr>
<tr>
<td>ERT</td>
<td>Electronic Results Transmission</td>
</tr>
<tr>
<td>FIDA</td>
<td>Federation of Women Lawyers</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>IEBC</td>
<td>Independent Electoral and Boundaries Commission</td>
</tr>
<tr>
<td>IED</td>
<td>Institute for Education in Democracy</td>
</tr>
<tr>
<td>IIBRC</td>
<td>Interim Independent Boundaries Review Commission</td>
</tr>
<tr>
<td>IIIEC</td>
<td>Interim Independent Electoral Commission</td>
</tr>
<tr>
<td>JSC</td>
<td>Judicial Service Commission</td>
</tr>
<tr>
<td>KNCHR</td>
<td>Kenya National Commission on Human Rights</td>
</tr>
<tr>
<td>KNDR</td>
<td>Kenya National Dialogue and Reconciliation</td>
</tr>
<tr>
<td>NDI</td>
<td>National Democratic Institute for International Affairs</td>
</tr>
<tr>
<td>OAU</td>
<td>Organization of African Unity</td>
</tr>
<tr>
<td>ODM</td>
<td>Orange Democratic Movement</td>
</tr>
<tr>
<td>ODPP</td>
<td>Office of the Director of Public Prosecutions</td>
</tr>
<tr>
<td>ORPP</td>
<td>Office of the Registrar of Political Parties</td>
</tr>
<tr>
<td>PPDT</td>
<td>Political Parties Disputes Tribunal</td>
</tr>
<tr>
<td>TNA</td>
<td>The National Alliance</td>
</tr>
<tr>
<td>URP</td>
<td>United Republican Party</td>
</tr>
</tbody>
</table>
ACKNOWLEDGEMENTS

This Audit Report on the legal, institutional, and administrative frameworks that governed the March 4th 2013 General Elections, dubbed: “Dynamics of Democracy: Strategies for Future Elections”, is a team effort.

The Institute for Education in Democracy (IED) acknowledges and appreciates the financial support from the American people provided by the United States Agency for International Development’s (USAID) cooperative agreement with the National Democratic Institute (NDI). IED wishes to thank NDI for walking with IED and ultimately making it possible for the development of this report by offering valuable expertise and technical support under the able leadership of Ms. Lisa McLean, Senior Country Director.

We wish to thank NDI staff: Mr. Dickson Omondi, Deputy Country Director and Ms. Alice Njau, Programme Manager, for setting the tempo of this report and finding time to review the content thereof. Without the leadership of the IED Executive Director, Mr. Brian Weke, and dedication of staff members, Mr. Joshua Changwony, Mr. Kennedy Kimani, Ms. Carla Chianese and Mrs. Elizabeth Kirema, and the entire staff, this effort would not have borne such fruit. We applaud the technical support offered by Mr. Kennedy Kimani, who while working with the Consultant, Mr. Peter Kamau, ensured the technical soundness and clarity of this report. Thanks also goes to the IED Board of Directors for their valued leadership.

Special thanks goes to the team of elections experts who brainstormed on and validated the methodology of this audit and a group of Civil Society Organizations who reviewed the first draft of this report.
Since inception in 1993, IED’s mandate and core business has revolved around electoral processes, with a particular focus on election observation; strengthening institutions of governance and democracy, enhance civic engagement, research and documentation. The year 2013 was a very critical year for IED since this is the year which culminated the continuous efforts of civil society since the devastating aftermath of the previous election. The year 2013 general elections, under the constitution of Kenya 2010 and a reformed electoral institutional framework, would set the tone for future electoral event of the state of democracy in Kenya.

Dynamics of Democracy: Strategies for Future Elections, presents an assessment of the legal, institutional and administrative frameworks that governed the 4th March 2013 general elections in Kenya. An audit of the 2013 general elections was necessary so as to analyze the efficacy and effectiveness of these frameworks for informed decision making by relevant stakeholders and advancement in democratic elections.

This audit forms part of IED’s post election interventionstoensure that we continue to support the realization of free, fair, transparent, accountable and peaceful elections in Kenya. The recommendations made in this report are a culmination of consultations with election experts and representatives of various organizations working within the electoral process with a view to generate consensus on areas of interventionand strategies for electoral reforms.

The continuous improvement in democratic process in Kenya, is not the work of one entity alone, therefore, IED hopes for the adoption of the recommendations contained in the report and the collaborative efforts of the like-minded organizations to undertake targeted advocacy towards the National Assembly and Senate, the IEBC, Political parties, the Judiciary and other stakeholders in the electoral process, as we strive together, towards a free, just and democratic society.

Brian Weke
Executive Director
Institute for Education in Democracy
More often than not, electoral violence, rigging, irregularities, opaqueness and the exclusion of minorities and marginalized sections of the Kenyan society from political participation have been the hallmark of the Kenyan electoral process. These problems are the common strands definitively coursing through Kenyan election processes from the late 1980’s to the near-apocalyptic elections of 2007, with the elections of 2002 being an exception.

Against this backdrop, the Institute for Education in Democracy (IED) commissioned an audit of the legal, institutional and administrative frameworks guiding the electoral system in Kenya. The audit seeks to contextualize standards of the key electoral and democratic principles in the frameworks of universal suffrage, equal suffrage, free and fair elections, secret vote and direct suffrage.

The integrity of a national electoral process is undergirded by both national and international standards contained in various legal instruments. Key election elements of the standards include: periodic elections; genuine elections; the right to participate as a candidate; universal suffrage; voting on the basis of the right to vote; equal suffrage (the principle that each vote carries the same weight); secrecy of the vote and free expression of the will of voters.

The Kenyan laws that have relevance to elections include: the Constitution of Kenya 2010; the Elections Act 2011; the Political Parties Act 2011; and the Leadership and Integrity Act, 2012.

Within the constitutional and legislative frameworks, various institutions have been embedded to oversee the management and administration of electoral processes in Kenya. They include: the Independent Electoral and Boundaries Commission; the Judiciary; the Political Parties Disputes Tribunal; the Office of the Registrar of Political Parties; the Office of the Director of Public Prosecution; and the National Police Service.

As the Kenya experience illustrates, many factors contributed to the success of the 2013 elections. These include:

- Institutional reforms, including adoption of a new constitution and judicial advances that preceded the elections;
- A broad swath of Kenyans committing time and energy to avoid a replay of the 2007 post-election violence;
DYNAMICS OF DEMOCRACY

- Willingness of Kenyans to exercise their suffrage by registering and turning out to vote, notwithstanding delays and confusion associated with these processes;
- Credibility of the judiciary as an adjudicating body for electoral challenges; and
- Willingness of political protagonists to use established mechanisms to contest the announced results.

However, the electoral process in the year 2013 was not devoid of challenges. The voter registration process was fraught with allegations of disenfranchisement of eligible persons from marginalized communities, women and youth. The timeline for the perusal of voter registers to enable the preparation of the true final voter register were said to have been insufficient.

Election technology is transforming the election experience around the world, improving efficiency and effectiveness. However, the application of technology must be suited to the context of each country. In the Kenyan scenario, the use of technology was problematic from the outset when the procurement of devices and software drew claims of impropriety therefore forestalling their acquisition. When the technology dramatically flopped in all stages of the voting process—the culmination of which informed the switch to manual processes—the previous transparency exhibited by IEBC was dealt a near fatal blow. The existence of multiple voter registers fostered a widely held perception that it was a ploy by IEBC to inflate the numbers of voters in favor of one of the protagonists. Failure and refusal to enforce all aspects of legislations pertaining to the electoral process, including voter bribery and other forms of political corruption, portrayed concerned institutions as reactionary and, to an extent, incompetent. Despite the thresholds enshrining equitable representation contained in various legal texts, the under-representation of women, youth and persons living with disabilities is still a festering reality.

To ensure that subsequent elections in Kenya achieve the optimal bar of integrity and equitable representation, the country must undertake further constitutional, legislative and policy reforms immediately to remedy all the gaps, uncertainties, and ambiguities, in the legal framework, especially as they relate to timelines, deadlines, thresholds, procedures, and the mandates of dispute resolution entities. All electoral policies and procedures should be codified. There is further need to fortify the existing institutions with financial and technical resources to enable the seamless administration of electoral processes.
A. Introduction and Background

A meaningful review of a country’s legal, administrative and institutional frameworks requires more than an examination of the relevant instruments' texts. The Institute for Education in Democracy’s (IED’s) intention in conducting this audit is to review the basic components of the legal framework that governed the March 4th 2013 general elections, as well as the administrative and institutional frameworks. These frameworks are relevant to each component, and necessary to ensure democratic elections. This audit intends to identify electoral standards that contribute to uniformity, reliability, consistency, accuracy, and overall professionalism in elections.

The 4th March 2013 general elections were conducted following major reforms in Kenya’s legal, institutional and administrative frameworks and were the first general elections held under the 2010 Constitution of Kenya (CoK). More often than not, electoral violence, rigging, irregularities, opaqueness and socio-political exclusion have been the hallmark of Kenyan electoral processes. These challenges have been a common strand defining Kenyan elections from the late 1980s to the near-apocalyptic elections of 2007 with the elections of 2002 being an exception.

In response to the bungled 2007 general elections and the post-election violence that followed, which included the death of 1,113 people and internal displacement of more than 600,000 people,¹ a myriad of reforms were implemented to address the overt mismanagement of the election. These legal and institutional reforms included a new constitution that was approved by 67 percent of Kenyan voters during the 2010 referendum;² the creation of a new Independent Electoral and Boundaries Commission (IEBC) after the disbandment of the Interim Independent Electoral Commission (IIEC); the increase of geographic single-member constituencies from 210 to 290; the creation of new elected positions at the national and local levels including Governors, Members of County Assemblies, and Senate; and crucial judicial, security and media reforms. Additionally, there were a number of administrative electoral reforms initiated by the IEBC including the introduction of the Biometric Voter Registration (BVR) system, Electronic Voter

Identification Device (EVID), and the Electronic Results Transmission (ERT) system. During the period June 2010 to September 2012, the IEBC successfully tested and implemented an Electronic Vote Tally System. It was used in about 12 constituency by-elections and in 18 constituencies during the 2010 national referendum on the Constitution. As part of its mandate to manage elections and in a bid to improve the efficiency and transparency of the electoral process, the IEBC undertook to develop an electronic Results Transmission and Visualization System (“RTS”) that would be used for a general election that envisages multiple elections. The experience gained from the pilot test should have provided a near full-proof opportunity to create a framework for the comprehensive implementation and integration of the electronic results management system into the electoral process.

Contrary to the period preceding the 2007 general elections when Kenyans had reportedly lost confidence in key institutions, reforms in the electoral management institution following the promulgation of the Constitution of Kenya 2010 appeared to have rekindled public trust. Restoration of trust was transferred to the newly created IEBC when officials of the IIEC during the 2010 constitutional referendum also moved to the IEBC. According to surveys conducted ahead of the 2013 polls, the IEBC and the Judiciary were highly rated with most Kenyans opining that the electoral body was independent enough to conduct the elections and the Judiciary capable to effectively and efficiently adjudicating electoral disputes.

For the first time in Kenya, the application of technology was introduced to advance the Kenyan electoral process in the form of sophisticated data processing tools, such as the BVR system, the EVIDs, commonly referred to as poll books; and the ERT system, a system designed to transmit provisional vote results from the polling stations to the IEBC national tallying centre at the Bomas of Kenya, involving 32,000 specially configured cell phones to electronically send provisional vote results from polling stations to a dedicated IEBC server.

With the use of BVR kits and a special procedure for people without biometric
data, the IEBC successfully registered 68 percent (14,388,781 million voters) of the projected voting population within a constrained timeline of 30 days. Due to very short electoral timelines, a sufficient number of EVID handheld devices were not available prior to the Election Day and a number of the poll books were substituted with laptops attached to fingerprint readers. According to the Election Observation Group (ELOG): “in about 8.0% of the streams observed electronic poll books were either missing or malfunctioning as at 11.30 am; by 8.30 pm 55.1% of the polling streams observed that electronic poll books failed to function properly.”

The Constitution of Kenya 2010 and associated electoral legislation provided a strong legal framework for the conduct of free, fair and credible elections. However, there were a series of late changes and amendments to the electoral legislation by Parliament just before the elections that did not afford sufficient opportunity for discussion and debate which, adversely affected the electoral timelines and impacted on the effectiveness of the electoral process. In some cases, the administrative and institutional frameworks lacked instructions and directives for the Electoral Management Body (EMB) that are consistent with the provisions of the Constitution and other electoral laws. The twilight amendment of the Elections Act to reduce the voter registration period and the deletion of the party hopping clause from the Act are very instructive here.

The changes in electoral timelines resulted in constrained timeframe for voter registration which in turn led to the disfranchisement of eligible voters who could not register within the 30 day period. Parliament also revised the timelines for submission of party membership lists from three months to 45 days prior to the election and the period for party membership prior to nomination was reduced from a minimum of three months to only being required to be a member of a party on the day of nomination. This latter amendment was said to support party hopping which was prevalent during the political party primaries. The Parliament also failed to pass crucial legislation on campaign financing and expenditure which weakened transparency and accountability of due processes.

---

7. www.elog.or.ke
8. European Union Election Observation Mission (EUEOM) Press Release issued on 06/03/2013. “...while some Kenyan communities and marginalised groups remain disfranchised as a result of not having national ID cards. More than 3 million eligible voters were not registered during the biometric voter registration process and were therefore unable to vote in these elections...”
The level of women’s representation in national political leadership positions during the elections improved compared to previous elections. Therefore, the impact of the establishment of 47 National Assembly Women Representative seats and 18 gender-responsive Senatorial nomination slots in the Constitution of Kenya 2010 cannot be disputed. However, the number of elected women representatives declined to 16 in the National Assembly, down from 22 in the previous National Assembly. In fact, there were no women elected for the positions of Senator or Governor. In the National Assembly, the 16 elected women formed 5.5 percent of the total number of elected members.

The legislative framework for election dispute resolution in Kenya is extensive but complex and involves multiple bodies for complaints and appeals on electoral issues. The competence for settling particularly pre-election electoral disputes is shared between the IEBC, the Political Parties Disputes Tribunal (PPDT) and the Judiciary. The complexity resulting from the existence of these multiple bodies sometimes created confusion among complainants.

Despite the prevalence of peace during the elections, a number of important problems arose, including the failure of technology and questions about the presidential petition process. It is against this backdrop that IED commissioned an audit of the legal and constitutional frameworks guiding the electoral system in Kenya. The audit seeks to contextualize the management and administration of the 4th March 2013 general elections benchmarked against key electoral standards and democratic principles of universal suffrage, equal suffrage, free and fair elections, secret vote and direct suffrage, transparency and accountability.

A plethora of literature exists on the adequacy, or lack thereof, of the constitutional and legal provisions underpinning the 2013 elections in Kenya. This report therefore simply attempts to juxtapose the March 2013 experience against well elaborated international and national benchmarks for the conduct of free and fair elections in future.

B. Audit Methodology

IED’s assessment of the legal, institutional and administrative frameworks that governed the 4th March 2013 general elections was based on the country’s legal

---

framework and its obligations for democratic elections as contained in regional and international instruments ratified by Kenya.

The audit entailed the engagement of a consultant to undertake an analysis of the institutional, administrative and legal framework for elections in order to identify weaknesses and gaps and propose recommendations and areas for intervention. The consultant was required to utilize a number of methodologies to conduct this audit including desk top research, meeting with election experts, and forums with stakeholders including the IEBC, civil society organizations, government institutions and constitutional commissions and development partner organizations.


On 4th March 2014, IED convened an election experts’ breakfast meeting at the IED head quarter’s boardroom to deliberate on key issues that arose out of the general elections and generate recommendations. The election experts’ deliberated on key issues pertaining to the conduct of the 2013 general elections and gave recommendations to inform electoral reform processes in Kenya. Issues that were discussed included: the realisation of the two-thirds gender principle as enshrined in the Constitution of Kenya 2010; the Kenya electoral system; campaign finance; the election date quagmire; voter registration; application of technology; electoral dispute resolution and the role of the media and civil society.

In addition, IED convened an election stakeholders meeting on 5th April 2014 that brought together stakeholders in governance and electoral processes with the aim to generate consensus and consolidate recommendations and areas of intervention for future electoral reforms.
A. Relevant International Legal Standards

The universal standards relating to elections and electoral processes are found in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPWD).

The UDHR openly recognizes the right of the people to participate in government either directly or through their democratically elected representatives.\(^{10}\) The Declaration provides that everyone has the right to freedom of opinion and expression;\(^{11}\) the right to freedom of peaceful assembly and association;\(^{12}\) the right of everyone to take part in the government of his/her country, directly or through freely chosen representatives;\(^{13}\) and the expression of the will of the people through periodic and genuine elections, which shall be by universal and equal suffrage and held by secret vote or equivalent free voting procedures.\(^{14}\)

The ICCPR provides that every citizen shall have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives; to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; and to have access, on general terms of equality, to public service in his/her country.\(^{15}\)

Under Article 5, the ICERD provides that state parties to the convention have undertaken to prohibit and eliminate racial discrimination in all its forms and
to guarantee the rights of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of, amongst others, the political rights as captured in paragraph (c) of the article. Paragraph (c) of Article 5 grants political rights, in particular the right to participate in elections, to vote and to stand for election, on the basis of universal and equal suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service.

CEDAW was passed in 1979 seeking to integrate women at the center of decision-making processes and eradicate impediments women face in the course of effective participation in societal affairs. Of relevance to this audit is article 7 of the Convention, which provides that state parties shall take appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies.

There also exist regional instruments touching on political participation which have been adopted by the African Union and Kenya as a state party has ratified the same. These regional instruments include the African Charter on Human and People’s Rights (Banjul Charter), the Organization of African Unity (OAU – now the AU) Declaration on the Principles Governing Democratic Elections in Africa (2002), and most recently the African Charter on Democracy, Elections and Governance (2007).

The audit of the legal, institutional and administrative frameworks that governed the 4th March 2013 General Elections in Kenya is premised on key election elements and principles as contained in the plethora of instruments discussed above. These key elements and principles set the threshold for the audit of the Kenyan electoral system. They include:
1. Periodic elections: Elections should be conducted within a given interval on a continuous basis.
2. Genuine elections: For the realisation of the wishes of voters, the elections ought to be genuine and not marred by irregularities.
3. Right to stand for election: The people must be accorded the right to contest in an election without undue limitations and hindrances.
4. Universal suffrage: Every person who has attained the age of majority to
exercise the right to vote at elections and other prequalification requirements. Universal suffrage can only be restricted in known instances so identified by law, and such restrictions must be reasonable in the circumstances.

5. Voting in elections on the basis of the right to vote.

6. Equality of the vote: Votes cast in an election should be equal, and some votes should not carry more weight than others in the electoral process.

7. Secret ballot: The vote must be respected by ensuring that the voter exercises his/her franchise without fear or favour and that no one should be in a position to influence the voter’s choice of candidate.

8. Free expression of the will of the voter: The voter should be afforded an opportunity to exercise his/her franchise without fear or intimidation. The electoral process should be free from violence or intimidation of the voter.

In addition, the general guiding principles that a code of conduct for election administrators must conform to are:

- Election administration must demonstrate respect for the law.
- Election administration must be non-partisan and neutral.
- Election administration must be transparent.
- Election administration must be accurate, professional, and competent.
- Election administration must be designed to serve the voters.


The legal framework governing the conduct of elections in Kenya was completely overhauled with the promulgation of the Constitution of Kenya 2010. The Constitutional and legal reforms were informed by the desire to have an electoral system that accords to the fundamentals of democracy and as a result inspires people’s confidence in the ensuing government.

The Constitution made provisions that altered the institutional and legal underpinnings relating to the conduct of democratic elections in Kenya. The new transformed framework is in accord with international and regional obligations which Kenya ratified including ICCPR, the Banjul Charter, CEDAW, and the Convention on the Rights of Persons with Disabilities. Article 2(6) of the Constitution domesticates these treaty obligations, which cover electoral rights, and makes them applicable in Kenyan courts.
The Constitution of Kenya defined legislation that needed to be enacted to govern the electoral system and processes in the country. Some of this legislation has been enacted by Parliament to provide an elaborate electoral legal framework, including:

- Elections Act 2011
- Political Parties Act 2011
- Independent Electoral and Boundaries Commission Act, 2011 and
- Leadership and Integrity Act.

1. The Constitution of Kenya 2010

The Constitution of Kenya 2010 immensely impacted on the legal and institutional framework governing electoral processes in the country. The Constitution entrenches and guarantees the protection of fundamental rights and freedoms of Kenyans in chapter four. More particularly, it enshrines a body of political rights under Article 38 that includes the right to participate in political activities and elections. A number of these rights are associated with elections and they include the right to liberty, right to secure protection of the law, and the freedoms of conscience, expression, assembly and association and movement. Notably, special groups such as people living with disabilities, women and marginalized communities are protected from discrimination on the basis of race, tribe, place of origin or residence or other local connection, political opinion, colour, creed, or sex. The rights to vote and to participate in elections as a candidate are protected under Article 38 of the Constitution.

The Constitution furthers sets out the principles for the conduct of elections, including the holding of periodic regular elections; secrecy of the ballot; universal adult suffrage; upholding of the two-thirds gender principle in elective positions; establishment of an independent electoral body; and conduct of elections in a transparent, impartial, neutral, efficient, accurate and accountable manner. The Constitution introduced the following key changes to the Kenyan electoral landscape:

---

18. Article 81.
DYNAMICS OF DEMOCRACY

a) A reformed electoral system for the presidential election. In order for a presidential candidate to win outright, he or she must obtain a majority of votes in the country and at least 25 percent in over half of the counties. This provision was included in the constitution to ensure that a candidate has broad support throughout a number of geographical regions and ethnic groups. In addition, the Constitution made a provision for a presidential running-mate as pre-requisite for presidential candidature;
b) Establishment of a two-chamber Parliament comprised of the National Assembly and the Senate;
c) Introduction of a new system of government with devolved structures, known as the counties, and the creation of 47 counties in Kenya to be led by an elected Governor chosen in a popular vote;
d) Independence of the IEBC guaranteed by the Constitution;
e) Provision of a multi-levelled framework for electoral disputes resolution;
f) Provision for the recall of members of Parliament; and
g) A progressive gender requirement, which mandates all governmental bodies, whether appointed or elected, to be composed of no more than two-thirds of one gender.

2. The Elections Act, 2011
The Elections Act, 2011 serves as the primary law governing the conduct of elections in Kenya and regulates the right to vote, the registration of voters, the nomination of candidates, and the required qualifications for candidates aspiring to elective office. By making provision in the Act for voter education, the conduct of elections, procedures for the recall of members of Parliament and for electoral dispute resolution, a clear description of election-related offences, and codification of an electoral code of conduct, the Act served to provide citizens, political parties and political aspirants with the assurance that the institutionalisation of a proper electoral framework safeguarding the integrity of the electoral process was properly established.

3. The Political Parties Act, 2011
The Political Parties Act, 2011 established the basis for the institutionalisation and professionalism in managing the affairs of political parties. The Political Parties

---

19 A report of the African Union Observation Mission to the 4th March general elections in Kenya, pg. 7
Act 2011 was enacted pursuant to the provisions of Articles 91 and 92 in the Constitution. This Act intends to frustrate the culture of party hopping, political corruption, exclusionary politics, balkanization and other political malpractices that have plagued the governance of the Republic for decades. It introduces the phenomena of coalition-building, and funding regulations and creates a substantive office to oversee the implementation of its provisions.\(^{20}\)

The behaviour of political parties has not changed significantly despite new laws and efforts to institutionalize reforms. Parties are still associated with particular leaders, who are often ethnic kingpins. This dynamic has manifested itself in the formation of ethno-political alliances. Ethnic leaders enter into partnerships to politically secure themselves by invoking communal interests even though they do not consult party delegates.\(^{21}\) These forms of elite pacts tend to undermine democratic practices and the institutionalisation of political parties. The parties remain tied to individual leaders even though the new Constitution lays a firm foundation for them to develop as institutions.

The Political Parties Act also established a Political Parties Dispute Tribunal as conflict management mechanism to address disputes between and amongst political parties and the Political Parties Liaison Committee as an institution aimed at encouraging consensus-building and information-sharing between the IEBC, the Registrar of Political Parties, and political parties on important issues relating to the political and electoral processes. Through a code of conduct, the Act attempts to ensure that internal nominations are credible to guarantee democratic party functioning of parties and elections. To date, the code has not been fully enforced by the Registrar of Political Parties due to the failure of Government and Parliament to appoint a substantive Registrar of Political Parties as envisaged in the Political Parties Act of 2011.

4. The Campaign Finance Act, 2014

The March 4\(^{th}\) 2013 General Elections were conducted without a clear framework for the regulation of party and campaign financing. A Campaign Finance Bill intended to regulate the use of money during elections was presented to the 10th Parliament of Kenya for enactment. The law was going to enable the IEBC to fulfil the constitutional provision found in Section 88 (2) (i), which makes the

---

\(^{20}\) The Office of the Registrar of Political Parties (ORPP).

\(^{21}\) Classical examples can be gleaned from the primaries of nearly all the political parties in Kenya where decisions are made by politicians within the party to the exclusion of delegates.
commission responsible for, “the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election”. This Campaign Finance Bill was not passed into law and the elections were conducted without any campaign finance regulations in place.

Therefore the campaigns by the major political parties and coalitions witnessed very large financial expenditures on items such as political advertising and messaging; and logistics including motor vehicles, fixed wing aircrafts, helicopters. Smaller political parties were unable to match the scale of financial resources of the major parties, resulting a very uneven playing field as far as campaigning was concerned.22

The Campaign Finance Bill, 2012 would have forced parties to make public their finances and would have placed a ceiling on the amount spent on campaigns. However, Parliament did not reach an agreement on the draft Bill before its last session. The failure to pass the Bill is seen as another sign that Kenya’s politicians are obstructing implementation of the new constitution and failing to meet citizens’ expectations for reform.

C. The Institutional and Administrative Frameworks
There are various constitutional and statutory institutions whose functions are key to the conduct of free and fair elections. They include:

1. The Independent Electoral and Boundaries Commission (IEBC)
2. Political Parties
3. The Judiciary
4. The Parliament
5. The Political Parties Disputes Tribunal
6. The Office of the Registrar of Political Parties
7. The Office of the Director of Public Prosecution
8. The National Police Service

22 Supra note 10, pg. 9
## IED’s PROPOSED AMENDMENTS TO THE ELECTIONS ACT (Act No 24 of 2011)

<table>
<thead>
<tr>
<th>PROVISION</th>
<th>AMENDMENT</th>
</tr>
</thead>
</table>
| **22. (1)** A person may be nominated as a candidate for an election under this Act only if that person—

(a) is qualified to be elected to that office under the Constitution and this Act; and

(b) holds a certificate, diploma or other post secondary school qualification acquired after a period of at least three months study, recognized by the relevant Ministry and in such manner as may be prescribed by the Commission under this Act.

(2) Notwithstanding subsection (1)(b), a person may be nominated as a candidate for election as President, Deputy President, county Governor or deputy county Governor only if the person is a holder of a degree from a university recognized in Kenya.

(2A) For the purposes of the first elections under the Constitution, section 22(1)(b) and section 24 (1)(b), save for the position of the President, the Deputy President, the Governor and the Deputy Governor, shall not apply for the elections of the offices of Parliament and County Assembly representatives.

Section 22 of the Elections Act should be amended to delete sub-section 2A and to provide that any candidate shall only be eligible for nomination under this Act only if the person is a holder of a degree from a university recognized in Kenya.

This requirement shall apply for any person who wishes to be nominated for election as President, Deputy President, county Governor, deputy county Governor, member of Parliament and County Assembly Representatives.

**28.** A political party that nominates a person for any election under this Act shall submit to the Commission a party membership list of the party at least forty-five days before the date of the general elections.

This section should be amended to read as follows:

A political party that nominates a person for any election under this Act shall submit to the Commission a party membership list of the party at least ninety days before the date of the general elections.
Section 34 (8) A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who is a member of the political party on the date of submission of the party list by the political party.

Section 34 (8) should be amended to provide as follows:

A person who is nominated by a political party under subsection (2), (3) and (4) shall be a person who has been a member of the political party for at least three months preceding the date of submission of the party list by the political party.

Section 34 (9) The party list may contain a name of any Presidential or Deputy Presidential candidate nominated for an election under this Act.

Section 34 should be amended to provide:

The party list shall not contain the name of any presidential or deputy presidential candidate nominated under the Act.

1. The Independent Electoral and Boundaries Commission (IEBC)

The Constitution of Kenya 2010 establishes the Independent Electoral and Boundaries Commission (IEBC) to register voters and regularly revise the voters’ roll; draw constituency and ward boundaries, regulate nominations by political parties for elective positions; monitor compliance with laws relating to the nomination of candidates; register candidates for elections; facilitate the observation, monitoring, and evaluation of elections, regulate campaign spending, develop an electoral code of conduct; and settle disputes relating to nominations before the declaration of election results.

Following these provisions in the Constitution, Parliament enacted the Independent Electoral and Boundaries Commission Act, 2011. This law provides for the administrative and financial procedures, as well as the transition of some commissioners and staff from both IIEC and IIBRC to the new commission to ensure the retention of some institutional memory. The IEBC comprises a Chair and eight commissioners. All are appointed for a six-year term on a full-time basis and are not eligible for re-appointment. Appointment of commissioners follows a rigorous open application process, including public broadcasting of the vetting process.
The institutional framework for the management of the elections is primarily bestowed on the IEBC. The establishment of the IEBC internalised some of the lessons learned from its predecessors, the Electoral Commission of Kenya (ECK) and the Interim Independent Electoral Commission (IIEC) and, therefore, established an institution that was highly regarded and attracted significant public trust. Due to this historical background, public expectations of the IEBC were also high at the time of its establishment.

The task of the IEBC was extremely demanding and it is to its credit that many of the conditions preceding polling were satisfactorily met in a reasonably timely manner, enabling the elections to be held as scheduled. The IEBC was able to maintain a high level of public confidence in the pre-election period, which was critical to ensuring trust and peaceful participation.

*Chart showing levels of public trust in the IEBC before the 2013 general elections; Source: Kenya National Dialogue and Reconciliation (KNDR) General Election Monitoring Report – February 2013.*
While the IEBC generally managed the preparation of the process well it also faced a number of challenges due to delays in internal decision-making as well as delays and problems related to the voter registration process, late amendments of laws by the outgoing parliament and late passage of laws in some instances. These time pressures may have contributed to the IEBC’s relatively late launching of its voter education campaign. Civic and voter education presented extreme challenges in the lead-up to the 2013 elections. With a new constitution, the implementation of major changes in governance structures due to devolution and multiple changes to the electoral system, Kenyans needed to understand their rights to better exercise them.

Further, the IEBC’s handling of the problems over the transmission of results and initial presentation of results at the national tallying centre highlighted some considerable shortcomings.

2. Political Parties
The behaviour of political parties did not change significantly despite the enactment of new laws and efforts to institutionalise reform. Parties remained associated with particular leaders, who, in most cases were ethnic kingpins. This dynamic manifested itself in the formation of ethno-political alliances. Ethnic leaders entered into partnerships to politically secure themselves by invoking communal interests even though they did not consult party delegates. These forms of elite pacts undermined the institutionalisation of political parties. The parties remained tied to individual leaders even though the new Constitution lays a firm foundation for them to develop as institutions.

At the same time, political parties served as instruments for leaders to cause communal divisions and generally polarise society. The greatest concern is that such political parties are neither institutionalising nor defending the public interest. Coalition-building between political parties was driven by short-term interests such as winning elections or sharing posts therefore undermining efforts to institutionalise political parties. When these interests were not met, leaders decamped to another party to fulfil them. Non-institutionalised or poorly institutionalised political parties cannot be the vanguard of democratisation. Actually, these political parties lack requisite organisational abilities as evidenced in the nomination processes of Kenyan political parties in the run up to the 2013 elections.
3. The Office of the Registrar of Political Parties (RPP)

Part IV of the Political Parties Act 2011 establishes the Office of the Registrar of Political Parties as an office independent of the IEBC. The functions of the Registrar include the registration of political parties and the regulation, monitoring and investigation of their management to ensure compliance with the law. However, it is evident that the Office as currently constituted has not been effective in exercising oversight over the management of political parties in Kenya. As explained earlier, the failure of oversight largely stems from the failure to appoint an independent and substantive registrar in accordance with the provisions of the Political Parties Act.

4. The Judiciary

The Judiciary is anchored in Chapter 10 of the Constitution and imbued with the obligation to settle legal disputes. The Constitution distributes the power to hear elections petitions across the three levels of the Judiciary namely, the Magistracy, the High Court and the Supreme Court. The Judiciary has continued to set the pace of reforms. The manner in which the judiciary is evolving and transforming itself into a guarantor of justice for all is drawing wide public support, trust and confidence. Public confidence has been buoyed by transparent recruitment procedures. Further steps to strengthen the efficiency and independence of the Judiciary have been taken, including the vetting of judges and magistrates, the training of officers and outreach to state institutions to complement the work of the Judiciary. Bold judicial decisions have also increased public confidence in the institution.

The promulgation of the Constitution of Kenya 2010 with provisions for the transformation of the Judiciary and guarantee of its independence and that of its officials has seen people’s confidence begin to rise. However, Kenyans have expressed their wariness that the Judiciary is regressing to the old order of things where laziness, corruption and political patronage were the determinants of decisions.23

These challenges notwithstanding, efforts to build the capacity of the Judiciary have continued, in accordance with the four pillars outlined in its blueprint, the Judiciary Transformation Framework for 2011.
5. The Parliament

The elections were regulated by an entirely new legal framework, including the Constitution 2010 and the 2011 Elections Act, IEBC Act and Political Parties Act and overall the new legal framework provides the basis for credible, inclusive and competitive elections. However, the outgoing parliament, which passed the new electoral legislation, did so quite late, in some cases resulting in a contraction of the electoral calendar or the introduction of various amendments that were not helpful to the effective administration and management of the process.

Overall, Kenya fulfilled its obligations to ensure that a sound and comprehensive legal framework was in place for the 2013 elections. The period since the promulgation of the Constitution of Kenya 2010 saw numerous election-related laws passed in two waves to reform the country’s electoral process.

The first wave resulted in the Elections Act (No. 24 of 2011) and the Political Parties Act (No. 11 of 2011). This first wave was praised as a bold step to fix the legal problems that bedevilled the country’s electoral process and to instil discipline in the management of political party affairs. The second wave saw the passage of laws such as the Elections (Amendment) Act (No. 45 of 2012); the Leadership and Integrity Act (No. 33 of 2012); and the Statute Law (Miscellaneous Amendments) Act (No. 14 of 2012), among others.

Although Kenya’s constitutional and legislative reforms provided Kenyans with the basic framework for genuine democratic elections, some of the legislations enacted by the 10th Parliament, especially under the second wave, weakened the Elections Act, the Political Parties Act and the Leadership and Integrity Act. For instance, the Leadership and Integrity Act was criticised as lowering the standards established in Chapter Six of the Constitution.

In addition, Parliament failed to adopt a quota reserving one-third of elective positions for women. Although the Constitution reserves 47 seats in the National Assembly and 16 in the Senate for women, only 16 women were directly elected to the National Assembly, and none were directly elected to either the Senate or governorships. Therefore election results demonstrate that, while the system of reserved seats for women was enthusiastically adopted, women fared poorly in other directly elected offices.

---

Parliament also failed to introduce new political party funding regulations to govern the 2013 elections.

6. The Political Parties Dispute Tribunal (PPDT)
Part V of the Political Parties Act 2011 establishes a Political Parties Dispute Tribunal. The Tribunal is mandated to hear disputes between members of a political party, between a member and a political party, between and political parties, between coalition partners as well as to hear appeals on decisions rendered by the Registrar of Political Parties. The Tribunal also handles disputes arising from party nominations. The Tribunal must determine disputes within three months after a complaint has been lodged and appeal on the Tribunal’s decision lies with the High Court on matters of law only. Part V also provides for the appointment and removal of members of the Tribunal.

The Tribunal has been largely dormant against the backdrop of a litany of political disputes hobbling political parties today. One explanation for the inertia exhibited by the Tribunal is that the Tribunal lacks sufficient resources to fulfil its mandate. It has been pointed out that there is a multiplicity of dispute resolution mechanisms in the political arena. Therefore, the duplication of roles by the attendant organs has left aggrieved persons more confused compelling them to resort to the Judiciary and thereby clogging the judicial system.

7. The Office of the Director of Public Prosecution (ODPP)
One of the laudable milestones in the Constitution of Kenya 2010 is the establishment of the ODPP as an independent constitutional entity free from any interference. The Director of Public Prosecutions (DPP) is enjoined to prosecute criminal offences independent of the consent, direction and/or control of any person and/or authority in Article 157 of the Constitution. The Director of Public Prosecutions is empowered to direct the Inspector General of Police to undertake investigations.

The prosecution of persons suspected of committing electoral offences as laid out in the Elections Act 2011 therefore squarely falls within the ambit of the ODPP. The Kenya DPP, Mr. Keriako Tobiko, set up a special unit of 35 officers to deal with issues related to electoral offences just before the elections. The main purpose of the special unit was to deal expeditiously with those who engaged in electoral misconduct. The officers were given specialized training on electoral-
related issues so that they were well prepared. The training included guidelines on drafting charge sheets used to register proof of committed offences.

However, in terms of implementation, it was evident that the ODPP adopted a minimalistic and laid back approach to electoral offences. Despite reports of significant incidents of electoral malpractices committed during the 2013 political campaigns and actual voting, the ODPP demonstrated lethargy in bringing to justice persons accordingly accused.\(^\text{25}\) In fact, the only visible attempts to punish electoral offenders largely emanated from the Judiciary, which did not hesitate to summarily sentence and convict witnesses in election petitions who admitted to committing offences.

8. The National Police Service
The Police Service is vested with the mandate to maintain law and order. Therefore it follows that it has the powers to prevent the occurrence of crime and bring to justice perpetrators of crime. The crime prevention aspect of its mandate includes the requirement that the Police Service incorporates early warning mechanisms into its strategy.

In the 2007 election, the conduct of the police was questioned. Their role in the ethnic violence that rocked Kenya in 2007 and 2008 was criticized in various human rights reports. As the violence escalated during Kenya’s trying moment, the police were ordered to shoot to kill. As the violence came to a halt in April 2008 after the signing of the Peace Accord,\(^\text{26}\) as a result of the talks mediated by former U.N Secretary General Mr Koffi Anan, the Administration Police and the regular police had shot at least half of the total number of people who had lost their lives during the ethnic violence.\(^\text{27}\) The culpable officers were not arrested and the victims and relatives of those who had died as a result of the police brutality were denied justice. The most prominent case was that of a policeman who was filmed shooting an unarmed 15-year-old boy. The policeman walked away without punishment. This incident was impunity at its highest level.\(^\text{28}\)

Several technical, administrative, and institutional changes have been made in the Police Service since the signing of the National Accord, and with the promulgation of the Constitution of Kenya 2010. However, these changes have

\(^{24}\) Experts roundtable meeting on 4th March 2014 at IED.

not translated into better police services due to slow progress on institutional reform and lack of equipment and resources to carry out everyday policing work at the local level. Corruption in the police service, poor investigations, a persistent perception of ethnic bias in service delivery, and the characterisation of the Police Service as a regime force continue to evoke public resentment against the police. This combination of shortcomings offers a probable explanation for why police officers in attendance at political rallies where voters were bribed and treated in contravention to the provisions of the Elections Act 2011 made no arrests.

The 2013 General Election in Kenya put the police in the spotlight as a result of their actions in the 2007/8 ethnic violence. The Kenya police deployed 99,000 officers to staff polling centres and handle security issues during the 4th March 2013 General Elections in Kenya. This deployment was unprecedented and historic. Several days before election, the Government deployed General Service Unit (GSU) officers in hotspots areas that were seriously affected by the ethnic violence related to the post-election events of 2007. The security personnel for the Kenya Elections 2013 were drawn from the Kenya Police, Administration Police, Kenya Prisons Service, Kenya Wildlife Service, Kenya Forestry Service and National Youth Service.

The night before the 4th March General Elections in Kenya, at least 10 police officers were killed before the voting began. The brazen attacks on the police officers marred the start of elections in Mombasa City. The police laid blame on the outlawed Mombasa Republican Council (MRC). Though it was a dark day for the security forces, they went on with their work to make sure that the elections could be held without interference.

The Inspector General of Police directed his officers to use their firearms as provided for in law in such circumstances and ensure no further loss of lives of

26. The National Accord and Reconciliation Act of 2008 is an act of Parliament that temporarily re-established the offices of Prime Minister of Kenya, along with the creation of two deputy prime ministers. This act followed the February 28, 2008 power-sharing agreement between former President Mwai Kibaki and then opposition leader Raila Odinga, who became the first prime minister of Kenya since 1964, when the constitution of the newly created Republic abolished the office. The agreement was necessitated by the 2007/8 Kenyan crisis.


28. Ibid.

police officers or civilians. Some isolated events indicate the police were not well trained to handle their own weapons. One was in Murang’a region where a policeman accidentally shot dead an election official as they were transporting ballot boxes to Kangema tallying centre in the same region. In another incident in Masimba Social Hall in Kisii, an Administration Policeman manning the tallying centre shot himself dead while votes were being tallied on the day of the election.

The conduct of the police during the 2013 election period as compared to that in 2007 was commendable. Kisumu City was one of the hotspots in the country that the police had already identified and they deployed officers to avoid possible outbreaks of violence. When the unrest began on the afternoon of 9th March 2013, after the results were announced, the police force moved in swiftly before the crowd of youths could burn the city to cinders as they had done during the 2007/8 elections. The police conducted themselves in a manner worthy of recognition. The process was not perfect but the police did their best despite numerous challenges.

30 Several days before the elections, the Government deployed General Service Unit (an elite paramilitary police squad) officers in hotspots like Naivasha, where a family was burnt to death in the ethnic violence related to the post-election events of 2007. See, SHAKA, Jack (2013). “Conduct of the Police in Kenya’s 2013 General Elections” [online article]. Journal of Conflictology. Vol. 4, Iss. 1, pp. 53-56. Campus for Peace, UOC. [Consulted: 15/03/14].
3. THE 4TH MARCH 2013 GENERAL ELECTIONS IN CONTEXT

Significant efforts have been taken to streamline the management of elections in Kenya as recommended by the Independent Review Commission (IREC) of the 2007 Kenya elections and also informed by the reforms introduced by the Constitution of Kenya 2010. As has been discussed in the previous chapter, the Constitution established the new institutions to enable the conduct of credible and democratic elections in the country.

A. The Electoral System and Process

On a national level, Kenya elects a head of state (the president) and a legislature. The president is elected for a five-year term by the people. The Parliament has two houses: the National Assembly and the Senate. The National Assembly has 349 members, 290 members elected for a five-year term in single-seat constituencies, 47 elected Women Representatives (one per County, 12 members nominated to represent party strength in the lower chambers and an ex officio speaker. The Senate comprises 67 members: 47 elected senators from each of Kenya’s 47 Counties, 20 nominated senators (16 to represent women, two to represent youth and two to represent people with disabilities).

The electoral system in Kenya is underpinned by the following principles:

(a) freedom of citizens to exercise their political rights;
(b) gender equity and equality;
(c) fair representation of persons with disabilities;
(d) universal suffrage based on the aspiration for fair representation and equality of vote; and
(e) free and fair elections, which are (i) by secret ballot; (ii) free from violence, intimidation, improper influence or corruption; (iii) conducted by an independent body; (iv) transparent; and (v) administered in an impartial, neutral, efficient, accurate and accountable manner.
B. Voter Registration and Voter Registers

The right to vote is only of full value if the legal framework supports the ability for a person to register to vote, ensures accuracy in the voter register, includes sufficient safeguards against fraudulent voting, and guarantees honest counting of votes and tabulation of results. One of the standards for voter registration and maintenance of registers is complete transparency.

With regards to the 2013 General Elections, the IEBC was able to register over 14 million voters; the highest number ever registered in the history of Kenyan elections. The high level of registration can be attributed to the intensified awareness raising by the IEBC, political parties, the media and Civil Society Organizations (CSOs). However, about three to four million persons eligible to vote could not register because of lack of national identity cards. These unregistered voters comprised mainly persons from marginalized communities who were subjected to strident vetting measures largely for security reasons by the government before being furnished with national identity cards largely for security reasons.

It is also evident that the timeliness envisaged in the Elections Act 2011 for the registration of voters were too constraining. Patterns of this registration varied substantially with some areas recording over 90 percent registration compared with areas recording fewer than 70 percent registration.

The information provided by the IEBC related to the voter registers in use during the March 2013 Kenyan General Election differed. For instance, the Provisional Register as at December 18, 2012 contained 14,337,399 voters, while the Principal Register as of February 18, 2013 had 14,352,545 voters. Further, the Political Parties Register on March 4, 2013 had 14,336,842 voters, while the Results Register on March 9, 2013 had 14,352,536 voters. Moreover, the Special Register had 36,236 voters and the Green Book allegedly compiled during voter registration contained an unknown number of voters.

---

31. Statement of the National Democratic Institute Pre-Election Delegation to Kenya Nairobi, Kenya, May 5, 2012
33. Ibid
One of the primary allegations towards in the Presidential Election Petition of 2013 was that IEBC kept altering the Principal Register of Voters and that the Register was scattered across discrete lists. This haphazardness, the petitioners argued, opened the register to abuse through the inflation of numbers and tinkering with registered voters’ polling stations among other interferences.

C. Political Party Registration and Nomination Processes
A founding principle for democratic elections is that of genuine electoral competition among political parties and candidates. This principle can only be achieved if there is meaningful opportunity for political parties and candidates to secure their names on the ballot through a registration process that is predictable, fair, and reasonable. This issue is determined not only by the legislation regulating elections, but also by the legal provisions governing the formation of political parties. Where signatures are required for placement on the ballot paper, a credible process of signature verification would include the verification of all signatures submitted up to the point when the minimum number of verified signatures required for registration has been reached.

In the run up to the elections, the emergence of claims that voters found their information and signatures on lists they had not signed speaks to the lack of verification mechanisms and/or capacity. In fact, even today there continue to be persons who are fraudulently registered as political party members through information that was stolen from mobile money transfer outlets. The IEBC was also unable to shake off the recurring accusations of failing and/or neglecting to exclude names of persons who had successfully litigated decisions in court. It makes it futile to go to court to contest inclusion if the resultant court orders for specific performance are not enforced.

The political party primaries held in January 2013 were expected to demonstrate a major shift in electoral conduct given the significant strides that have been made in the recent past towards constitutional, legal and institutional reforms in various sectors. However, most primaries from the reported reaction and outrage of the majority of the citizens, were undemocratic and chaotic and literally were held on the eve of the deadlines for nominations in order to manipulatively prevent party hopping. In the end, the short timeframe dictated by the largest parties enabled the party leaders to have great influence in the distribution of

nominations and to prevent the use of internal dispute resolution mechanism. This process witnessed in the nominations of all the parties and coalitions including the leading political parties such as Orange Democratic Movement (ODM), The National Alliance (TNA), Wiper and United Republican Party (URP). As a result, the IEBC’s plans to print ballots in a timely manner were compromised, and the general public lost confidence in the leadership of their political parties which affected their participation in the general election.

Political parties were unable to run organized, efficient, free and transparent party nominations processes. The exercise was characterized by massive irregularities and utter lack of preparedness which resulted in confusion and frustration for voters who had turned out in unprecedented high numbers to participate in the nominations. The culture of cronyism and political patronage continued to manifest itself as some party leaders sought to manipulate the outcome of nominations by imposing candidates who had been rejected by the voters. There was very little participation of women and other vulnerable groups in the nominations exercise both as aspirants and political party members.

D. IEBC and the Management of the 4th March 2013 Elections
The IEBC was established by the Constitution of Kenya 2010 and was created in 2011. A majority of the legislations necessary for the conduct of the 2013 elections was passed only in the same year 2011. Therefore the IEBC was therefore a virtually new institution working within a new legal framework that had to prepare for six elections, including for three newly created elective positions. Additionally, the IEBC had to conduct nationwide constituency boundary delimitation and the national biometric voter registration exercise during the same period.

i. Use of New Voting Technologies
The IEBC employed the use of BVR Kits, EVID, and the ERTS for the first time in March 2013 elections in a bid to enhance the credibility of the elections. The procurement of the technology was riddled with allegations of corruption within IEBC causing the intervention of the Executive. The sourcing and delivery of the technology and relevant equipment were done so late that IEBC did not have the time neither to pre-test them nor to build the capacity of its employees on usage. During the actual elections, most of the technologies, especially the ERTS,
did not work more particularly the ERTS. Due to the failure, results transmission had to be done manually and creating the basis for an enduring narrative that the malfunction was choreographed to inflate the votes of one of the presidential candidates.

In the future, it is necessary for the legal framework to properly addresses the regulation of the procurement and use of new voting technologies. Procedures and requirements for the use of information technology during electronic voting, counting and tabulation must be accurately reflected in the electoral legislation.

ii. Voting Procedures and the Secrecy of the Ballot

All procedures regulating the voting process should ensure that voters are adequately identified and that other mechanisms are in place to prevent attempts at fraudulent voting. However, voting procedures should not be so cumbersome or complicated so as to hinder the voting process. Voting procedures should ensure that all ballots and voting materials are adequately safeguarded before, during, and after voting.

The IEBC is yet to put in place arrangements for special voting, such as voting abroad, early voting, voting by persons involved in the administration of elections on Election Day, mobile or homebound voting, and absentee voting by voters who are away from their place of residence on Election Day. In fact, quite a significant number of voters were disenfranchised by their inability to travel and vote at polling stations located in their ancestral areas where they had registered as voters.

The secrecy of the ballot is a standard for a democratic election. It is set out in the Constitution of Kenya 2010 and the Elections Act 2011 requiring that votes are cast in secret. Voters must have a guarantee that their voting choices will not be disclosed to other persons and that they will not be intimidated or face retribution as a result of how they chose to mark their ballots. These principles require the legal framework to provide mechanisms for control and security of the ballot, particularly as it relates to casting of votes at the polling station, while ensuring that no individual ballot can be identified as being marked by a specific voter.
iii. Transparency in the Counting and Tabulation of Votes

A fair and honest count of the votes is a cornerstone of democratic elections. It requires that votes be counted and tabulated in the presence of observers and that the entire process by which a winner is determined be completely transparent. The legal framework provides for the presence of observers — both domestic and foreign — and representatives of the media, political parties, and candidates during the counting and tabulation of votes. The forceful removal of some agents from the National Tallying Centre at Bomas in March 2013 and the refusal of IEBC officials to supply crucial information requested by observers at polling stations seriously challenged the application of this principle. 37

Though the issue of valid and invalid votes was settled by the Supreme Court in the Presidential Election Petition of 2013, the law must however clearly define which ballots are valid and which invalid. The paramount principle to be observed should be that if the will of the voter is clear, the ballot should be counted.

iv. Protection of Personal Data and Information of Voters

Remarkably, the Elections Act 2011 is loudly silent on how the collected personal data and information of voters should be handled. The only legal provision protecting voter information is the Constitution of Kenya in the Bill of Rights where there is a guarantee to the right to privacy.

In addition to requiring full transparency to protect the integrity of voter registers, the law should provide for the protection of personal data and information that have been collected during voter registration process.

v. Access for Election Observers

The Constitution requires the IEBC, among other functions, to facilitate the observation, monitoring and evaluation of elections. This express duty has been further elaborated on in the Elections Act, 2011. Like its predecessors the IEBC, like its predecessors, generally facilitated the participation of observers in the general elections and subsequent by-elections that arose from the 4th March 2013 General Elections.

37 EU Observers Report.
E. Participation of Women and Marginalised Groups in the 4th March 2013 General Elections

There has been forward movement to include groups that were previously not sufficiently represented in governance, particularly women, youth, marginalised communities and ethnic minorities. In various provisions, the Constitution in various provisions categorically proscribes discrimination and offers affirmative action mechanisms to enable the incorporation of these groups in public decision-making. The Political Parties Act of 2011 designates a fraction of the Political Parties’ Fund for the promotion of the participation of marginalised groups in politics.

Nonetheless, there is need for clarity in realizing full inclusion and participation as legislation without context is not helpful. Notably, the thresholds of inclusion set by the Constitution and various statutes are yet to be achieved mainly because of non-implementation of the existing laws. The possibility for all citizens to participate in the management of public affairs is at the very heart of democracy. Women’s political empowerment takes place in Kenya in a sometimes conservative cultural and difficult economic context. Tradition places women in a lower position than men in all areas of life, and the differences are particularly dramatic in education, health and politics. Even though illegal, practices such as early and forced marriage, wife-inheritance, polygamy and female genital mutilation remain widespread, especially among certain traditional, pastoralist communities.

Apart from the constitutional quota principle stating that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender, the legal framework aims at supporting women’s political participation and envisages a number of special measures such as: 47 special Women Representatives seats in the National Assembly, nominated seats for women at all legislative levels, and gender quotas in political parties. While the principles of affirmative action and equality are firmly entrenched in Kenya’s legal framework, implementation lags behind.

Despite affirmative action measures, women’s participation in 2013 General Elections remained very low. There were 19 women candidates for senatorial gubernatorial positions (out of 237 candidates). As a result, no women were

38. FIDA Kenya: Key Gains & Challenges: A Gender Audit of Kenya’s 2013 Election Process, Pg. 2
out of the elected 290 National Assembly members, 16 just 5.5 percent are women. For the 1,450 ward representatives positions only 88 (6 percent) of the elected candidates were women.

Political representation of Kenyan women now stands at 15 percent versus Rwanda’s 56 percent, South Africa’s 42 percent, Tanzania’s 36 percent and Uganda’s 35 percent. Kenya’s 15 percent is an improvement from the previous 9.8 percent representation in the 10th Parliament and the increased numbers can be greatly attributed to the reserved seats for the 47 Women Representatives. Although current representations is the highest level so far of women’s political leadership in Kenya, has ever had in the area of political leadership, it is still a rather poor showing in this day and age, where women’s political participation has generally improved around the world.

The poor performance of women in Kenya’s political arena can be attributed to two major factors: an incomplete legal framework and an imperfect candidate nomination process. Following the Attorney General’s request for an advisory opinion on the minimum one-third gender requirement in the National Assembly and the Senate, the Supreme Court on 11 December 2012 advised that the quota is not applicable to current elections and that it should be implemented progressively by 27 August 2015, in accordance with the Constitution’s transitional provisions.

While this decision helped avoid a for avoiding constitutional crisis, it removed the pressure from political parties to search for and nominate female candidates. The decision of the Supreme Court effectively postpone the implementation of the gender quota, as well as the failure of the outgoing Parliament to pass appropriate legislation before elections, demonstrate that political will to implement the principles of gender equality principles in Kenya is limited.

More efforts are needed in the National Assembly and by political parties to implement the Constitution not only in its letter, but also its spirit. With regards to the County Assembly level, provisions in the Constitution of Kenya 2010 and Election Act to nominate candidates of the less represented gender were not fulfilled properly. Lack of appropriate implementing regulations and clarity on the way to implement constitutional provisions resulted in delays in the nomination process which deprived women, as well as other marginalised groups, of the
possibility to pursue a number of decision-making positions in the assemblies, such as committee chairpersons.

The positions of Women’s Representative in the National Assembly were used as an argument to push women out of the regular race for the single-member constituency seats in the parliament. Male politicians perceived female contestants as having their seats “guaranteed” by the nomination procedures (for the Senate and county assemblies) and the creation of Women’s Representative seats. Therefore, their participation in the contest for constituency positions was regarded as not unnecessary and unwelcome. A similar trend of using reserved seats as an excuse to exclude women, youth and other minority groups was observed with regard to the local level elections. As a result, the quota system established to enhance gender equality actually worked against women as it was implemented in such a way as to limit women’s political participation to the minimum, legally constrained scope.

In campaigning, there were three major obstacles to women’s political participation: patriarchal culture, security issues, and lack of financial resources.

On a positive note, the representation of women in public administration is on the rise. The majority of constitutional and independent offices have a gender-balanced composition including the IEBC, where there are three women (out of ten members), including a Vice-Chair. Election observation results have shown that the electoral commission staff were gender-balanced: - 49 percent women and 51 percent men, with 39 percent of women appointed as presiding officers and 47 percent as deputy presiding officers.\(^\text{39}\)

**F. Campaign Finance and Expenditures**

During the conduct of the 4\(^{th}\) March 2013 General Elections, there was no legal framework to control the collection and expenditure of private campaign funds in Kenya. The Political Parties Act 2011 outlines minimal provisions for expenditure of public funds by political parties and subsequent book keeping. As a result, the IEBC was unable to regulate fundraising expenditures, producing a political landscape that was sharply tilted in the favour of candidates with deeper pockets. The lack of a level playing field in terms of finances is often identified as one of

---


the root causes inhibiting women and the youth from meaningful participation in political processes.\textsuperscript{40}

The abuse of state resources has also become a very problematic area during elections in Kenya and is contrary to the principle of equal treatment of candidates and political parties. Although there is a natural and unavoidable incumbency advantage, legislation must be careful not to perpetuate or enhance such advantages. Incumbent candidates and parties must not use state funds or resources (i.e., materials, work contracts, transportation, employees and similar assets of the state) to their own advantage.

The IEBC was unable to curtail abuse of public resources despite the Elections Act 2011 prescribing specific acts, such as initiating government funded development projects during the electioneering period. To allow for the effective regulation of the use of state resources, legislation should clearly define what is considered an abuse.

The Elections Campaign Financing Act was not passed by Parliament until 2014. It regulates both public and private funding for campaigns in Kenya. It enacts principles of equal and equitable distribution of funds, non-discrimination, reporting and disclosure requirements and sanctions for violations.

G. Equal Treatment and Access to Media

It is important that candidates and political parties “have an equal opportunity to inform voters about their policies and not face discrimination in getting media access”.\textsuperscript{41} The media have the right to inform the public about the election campaign and to express opinions. The media have the right to cover the candidates, political parties, campaign issues, the work of the election administration, problems and incidents arising during the campaign, events on Election Day and the announcement of election results. The rights of the media must be considered, as well as the rights of voters, candidates, and political parties during elections. Notably, the media include the internet and new media technologies.

The recommendations, that follow, are targeted towards various stakeholders as mentioned below;

A. Administrative Reforms
1. The IEBC should fine-tune its systems to improve its chances of success, ensure that it installs fail-safe mechanisms in the utilisation of technology and pilot-test technology prior to its application. The use of technology is supposed to provide back up to the manual checks and tallies and its failure should not result in unreasonable delays and subsequent suspicion by the public. The application of technology is not an absolute necessity and should only be adapted as an administrative aspect aimed at achieving efficiency and expediency and guaranteeing credibility. As the case of Ghana illustrates, using technology is not enough; human beings using the technology must not only be competent but people of integrity. Good staff selection procedures, training and simulation of events are key investments for success. Additionally, the IEBC should refrain from late procurement of hardware to avoid delays in testing and training of staff.

2. The IEBC should provide mechanisms to ensure registration and voting for all eligible citizens, such as prisoners and staff on duty on Election Day - who could be disenfranchised to exercise their right to vote. The IEBC should also revise policies with regard to citizen registration and voter registration in order to provide more inclusivity for marginalised communities.

3. Nation-wide voter registration exercises are normally very expensive and are in a majority of cases a failure. The IEBC should consider utilising the civil registration system to ensure timely updating of the register based on demographic changes of the population. Typical examples where voter lists are generated successfully from civil registrations systems include Norway, Sweden, Albania, and Spain, among others. Combining both civil and voter registration (CVR) systems has the following advantages. First, it significantly reduces the cost of the two processes. Second, combining CVR processes allows data sharing among government departments and partners. Third,
continuous civil registration reduces voter fatigue as most registered voters need not report to registration offices to update their particulars. Lastly, a combined CVR reduces the burden of voter registration on the election administrators giving them time to concentrate on other electoral activities, like planning and procedures, production of ballot papers, coordination and management of Election Day activities and tabulation and announcement of results.

4. Notwithstanding the constitutional provision for progressive realisation of diaspora voting, this right should be qualified as it is too expensive to implement. The Court of Appeal has already ordered IEBC to have in place mechanisms to facilitate the participation of Kenyans in the diaspora as voters and candidates in the next general elections.

5. The IEBC should ensure early preparations for effective registration. In order to remedy delays in registration, the mandate of enacting of regulations related to registration of voters should be transferred from Parliament to IEBC.

6. The Supreme Court of Kenya ruled that setting the actual date for the next general elections is not within its mandate, but within that of the IEBC. Therefore, the IEBC should therefore fix a definite date for the next elections. Early settlement of questions regarding the dates of elections will create a conducive environment for elections by ensuring certainty and enabling effective planning.

7. The IEBC should also take measures to create awareness of the election date among the primary participants.

8. Political parties should conduct an audit on representation of women and vulnerable groups within their respective parties and put in place measures to enable these groups to exercise their rights in elections. To ensure realisation of gender parity in our politics, political parties must give special attention to women candidates in their party lists.

9. Political parties and other stakeholders including CSOs and the IEBC should undertake extensive civic education to overcome historic obstacles, such as cultural issues, to political participation.

10. The Registrar of Political Parties should take firm action, including de-registration, against political parties that do not comply with the provisions of the Political Parties Act.
11. The media and development partners should accelerate civic education projects earlier on in the electoral cycle.

B. Legal Reforms

1. There exists a need for the IEBC to have a final voter register to avoid confusion and rising disputes. The law should provide clarity on the final voter register and whether the IEBC should have the discretion to change the register after its gazetttement. Deadlines for updating of the voter registers must be clear and, after the expiration of such deadlines, the voter register should be closed to further changes. The law should prohibit changes or corrections of records after the legal deadline for changes and corrections. However, subject to specific conditions and an appropriate court order, the law may permit changes or corrections after the deadline.

2. If there is a necessity to maintain special registers e.g. register for voters without biometrics, registers for early voting, voting abroad, voting by persons charged with the administration of elections - the same should be the rules on transparency and accessibility governing the maintenance of voter register. A digitised national civil register that captures births, deaths and other demographics would obviate the need to maintain discrete registers. Additionally, weeding out dead voters from the Register is easier and more efficacious when the Register is electronic.

3. The Political Parties Act should provide safeguards to cushion the Office of the Registrar of Political Parties from interference. As it currently stands, the appointment of the Registrar to the Office is through a process largely controlled by the Executive which contaminates the independence of the Office. Changes should be made to enhance the Registrar’s independence.

4. There is a need for clarity on the realisation of the two-thirds gender principle which requires the concerted efforts of political parties that should examine their own commitments to the Constitution and ensure that their nomination processes adhere to the gender quota principle. They should prioritise internal party democracy to encourage effective women’s participation.

5. The Constitution provides that a presidential election petition shall be filed within seven days and heard and determined within 14 days. The Judiciary Working Committee on Election Preparation (JWCEP) opined that it may not be infeasible to challenge a presidential election within the 21-day period provided for in the legal framework. The electoral dispute resolution
timeframes should be reviewed to allow for adequate time for filing and adjudicating disputes.

6. The Elections Act should establish clear demarcation of the respective jurisdictions of the Courts, the IEBC, and the PPDT to eliminate multiple dispute resolution channels for resolving the same matters that risks cases of jurisdictional conflict.

7. The IEBC was overstretched and could not effectively assist the courts in determination of disputes. Thus, the IEBC should not be engaged in pre-election dispute resolution. It is important that the electoral timelines are established in a manner that facilitates the timely and effective administration of the election. Timeliness includes, but are not limited to, providing an adequate period for voter registration to be completed prior to the elections; ensuring candidate nominations are finalised and confirmed in good time for printing ballots; and, ensuring that voter education is conducted for a long enough period to ensure it is effective. Both Parliament and the election management body have to work together in this regard to ensure the legislative process and election administration are in harmony.

8. During the 2013 elections, the calculation as to whether a particular candidate had secured a majority of all the votes cast was defined as all of the valid votes cast plus all of the rejected ballots. It is important that this definition is clearly articulated for future elections to pre-empt any further uncertainty in this regard; the definition should be included in the Elections Act.

C. Institutional Reforms
1. Political parties should ensure in advance adequate preparations for its nomination processes to avoid the disorganisation witnessed during the January 2013 party primaries. They should ensure that the nominations are conducted at least one month before the deadline for submission to the IEBC.

2. Political parties should recruit party agents early and work with international partners to ensure they understand their role and follow the rules in the polling centres.

3. Party leadership should respect the will of voters and avoid imposing unpopular leaders on the people. Direct nominations should be disallowed except in those circumstances where there is only one candidate for a particular position.
4. The Registrar of Political Parties should commission an audit of political parties’ membership registration exercises and the resultant membership lists. The Registrar should sanction political parties found to flout rules regarding membership registration exercises.

5. Article 21 (1) (e) of the Political Parties act of 2011 should clearly stipulate that a political party can be de-registered if it is found to have obtained its registration in a manner that contravenes the Act and violates citizens rights as guaranteed in the Constitution.

6. Government and Parliament should ensure the IEBC has the resources needed to hold credible and free elections. If necessary, they should ask development partners for assistance.

7. Development Partners should support domestic and international election monitoring efforts.

8. The media should liaise with local civil society members who are gathering early warning information.

9. The National Cohesion and Integration Commission, the Media Council of Kenya and the Communications Commission of Kenya should be adequately financed and equipped to efficiently and effectively fulfil their respective mandates.

10. Training programmes should be developed on how media can cover the newly created elected institutions.
A. Reports

- FIDA Kenya: Key Gains & Challenges: A Gender Audit of Kenya’s 2013 Election Process

B. Press Statements/Briefings

- Joint Statement on the Media and Elections, UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information
- Statement of the National Democratic Institute Pre-Election Delegation to Kenya, Nairobi, Kenya, May 5, 2012