

KENYA



CASE STUDY: KENYA

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ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
AU	African Union
AGLI	Africa Great Lakes Initiatives
BVR	Biometric Voter Registration
CCK	Communications Commission of Kenya
CORD	Coalition for Reforms and Democracy
DRC	Dispute Resolution Committee
ECK	Electoral Commission of Kenya
ELOG	Elections Observation Group
EMBs	Election Management Bodies
EU EOM	European Union Election Observation Mission
EVT	Electronic Vote Transmission
FCPT	Friends Church Peace Teams
IEBC	Independent Electoral and Boundaries Commission
IIBRC	Interim Independent Boundaries Review Commission
IREC	Independent Review Commission
KBC	Kenya Broadcasting Corporation
KCCSP	Kenya Civil Service Society Strengthening Programme
KTI	Kenya Transitional Initiative
NCIC	National Cohesion and Integration Commission
ODM	Orange Democratic Movement
PCJLA	Parliamentary Committee on Justice and Legal Affairs
PNU	Party of National Unity
PPDT	Political Parties Disputes Tribunal
PPLC	Political Parties Liaison Committee

I. BACKGROUND

In assessing the state of Kenya's national electoral process, one must examine the prevailing political environment as well as review the laws that are in place to regulate elections and the judicial mechanisms for prompt and impartial adjudication of electoral disputes. In addition, one has to assess the capacity and preparedness of both the election management body and the nature and behaviour of political parties and candidates in the electoral process. The extent of enfranchisement of the people of Kenya must also be assessed, as must the readiness and ability of the national security organs to guarantee peaceful and orderly elections and the enabling framework for the observation and monitoring of the elections that is meant to give the cloth of integrity and legitimacy to the elections.

Over the years, three key features of the Kenyan electoral system have stood out. First, is the majoritarian electoral system and its zero-sum character, which has resulted in intense competition over access to state power and resources due to its winner-take-all predisposition. Second, political mobilization along ethnic lines has heightened identity politics at the expense of ideas and ideological politics, and, third, there has been electoral violence between communities as well as between parties since the country returned to multi-party politics in 1991.

In a nutshell, elections in Kenya have tended to revolve around identity politics. While there are different identities that have competed to influence the voting patterns in the country, the ethnic identity seems to have flourished and become entrenched over the years. This scenario has been replicated in every election year since the rebirth of multiparty elections in 1992. The other prominent identities that have attempted to gain a foothold in Kenyan politics include gender, youth and religion. The triumph of the ethnic identity in electioneering over the other identities can be attributed to the potency and the emotional attachment that politicians and the citizenry have attached to it.

The genesis of voting along ethnic lines can be attributed to the nature of political parties as well as key political personalities that have shaped politics in Kenya. Most, if not all, of the key political parties that have contested for presidential elections have tended to revolve around five dominant ethnic groups reaching out to the other ethnic groups to top up the numbers. Although most parties are on paper formed along ideological lines to champion specific issues that are central to any component of the body politic, the reality on the ground has time and again compelled them to shift gear and re-embark on the ethnic route so as to remain politically relevant. On the same note, individual politicians from the respective ethnic groups attract support not based

on the ideas or issues that they propagate but the extent to which they are perceived to have the political weight to bargain or defend their ethnic groups' interests.

Although ethnic animosity resulted in ethnic violence in both the 1992 and 1997 elections the violence in 2007 was unprecedented and followed the delayed and controversial announcement of the presidential election results. The results were rejected by the opposition and many independent commentators, and, coupled with the hasty installation of the new president, violence erupted in many parts of Kenya, where some 1,500 people were killed and an estimated 600,000 reportedly displaced.

Though the immediate trigger for the violence was the contested results, the violence was fed by pre-election political mobilization, long-standing grievances on land and marginalization claims, inter-ethnic inequalities, and a demographic structure in which Kenya's predominantly youthful population are without jobs and economic opportunities.

A negotiated agreement led to the formation of a coalition government that brought together the Party of National Unity (PNU) and Orange Democratic Movement (ODM). It is this coalition government that instituted the reforms that set the ground for conducting the 2013 general elections. A new constitution was inaugurated, the electoral commission reconfigured and the development of new electoral laws put in motion.

Despite these positive developments, the countdown to the 2013 general elections raised some concerns. In general, there were several uncertainties, and challenges abounded with respect to the state of national electoral preparedness. These included the date of the general elections, delimitation of new electoral units, issuance of identity cards to all eligible voters, establishment of clear judicial procedures for dealing with electoral disputes, operationalization of gender balance requirements in elective offices, procedures for the vetting of aspirants for political office, fresh registration of voters and reform of the Kenya Police Services. This was despite the recommendations for ensuring electoral integrity that had been proffered by both domestic and international observers after the much-maligned 2007 elections.

Arising from the above it is clear that the electoral process in Kenya still faces some challenges that have to be overcome if the country is to pass the electoral integrity test. We highlight some of them in the subsequent sections that follow, and tease out how the recommendations by local observers have either been addressed or not and reasons for this.

II THE CONSTITUTION, ELECTORAL LEGISLATION AND GUIDELINES

The Constitution of Kenya, 2010, provides a framework to streamline and strengthen the management of elections and referenda, as well as the governance of political parties as a way of consolidating democratic governance. The constitution creates a bicameral parliament at the national level, county governments and assemblies at the local level, introduces affirmative action and increases the number of single member constituencies from 210 under the old constitution to 290 under the 2010 constitution.

In addition to the provisions under the Constitution of Kenya, 2010, there are statutory provisions that include the Independent Electoral and Boundaries Commission (IEBC) Act, the Elections Act and the Political Parties Act, which form the legal foundations for conducting elections. The enactment of the IEBC Act, the Political Parties Act, and the Elections Act was in line with the recommendations of local observers and other bodies after the 2007 elections and are an improvement of the previous electoral laws, which were not only incoherent but scattered in several statutes. The latter legally undergirded the 2007 elections.

The constitution further endows the electoral system with a number of guiding principles: first, the freedom of citizens to exercise their political rights under Article 38. Second, the provision that no more than two thirds of the members of elective public bodies shall be of the same gender.¹ Third, fair representation of persons with disabilities.² Fourth, universal suffrage based on aspirations towards fair representation and equality of the vote³ and fifth, the right to free and fair elections.⁴

The constitution also provides that there shall be 290 constituencies,⁵ instead of the 210 that were provided for under the old constitution. Furthermore, unlike the old constitution, which was silent on a threshold, the new one establishes the maximum possible departure from the principle of the equality of the vote. This was also in line with the recommendations of local observers as well as other bodies after the 2007 elections. The constituencies are ideally supposed to be equal in size in terms of population, except for sparsely and densely populated areas, where there can be a variation of up to 40 per cent.⁶ But even for other areas not densely populated there can be a variation of 30 per cent. In short, the constitution envisages the move towards equality as a gradual process.

¹ Article 27 (8).

² Articles 97, 98, 100, 177 and 82.

³ Article 81 (d).

⁴ Article 81.

⁵ Article 97.

⁶ Article 89

It also provides that there is to be one woman elected from each county by the voters of the county in the National Assembly.⁷ So at a minimum there will be at least 47 women in the 349-member National Assembly. And, lastly, the constitution provides that there will be 12 members nominated to represent “special interests”, including youth, persons with disability and workers.⁸ The implementation of this requirement calls for the promulgation of a new law.⁹

In addition, the Senate shall have a total of 67 members. First, one member will be elected by the voters for each of the 47 counties.¹⁰ Second, 16 women members will be nominated from party lists, and allocated to the parties in proportion to the number of seats they won in the country elections for Senate members.¹¹ These members will be additional to any women elected directly from counties. Third, one man and one woman will represent youth and one man and one woman will represent persons with disability, all of whom will be taken from the party lists.

Each county is to be divided into wards, each of which will have one member directly elected by the voters of the ward.¹² And within the counties there must be no more than two-thirds men or two-thirds women in the overall leadership.¹³ Just as the Constitution (2010) caters for the representation of women in the counties it also caters for other marginalized groups, including persons with disabilities and the youth, as shall be prescribed by an Act of Parliament.¹⁴

When the constitution speaks of party lists, it means that before any election, each party should publish lists of candidates comprising women, youth, and persons with disabilities.¹⁵ If, on the basis of the results of the geographical seat election, a party is entitled to some seats for specific minorities, it must take those members from its party list in the order in which they were published. Therefore if the party gets a seat for one woman it must take the person who headed the list of women. A person on the list can also stand for election at the constituency level. If elected to a constituency, such a person would be passed over on the list.

The IEBC Act governs the establishment and operations of the IEBC. It specifies, among other things, the process of appointing commissioners and lists the functions

⁶ Article 89

⁷ Article 97 (b)

⁸ Article 97 (c).

⁹ Article 90 (2).

¹⁰ Article 98.

¹¹ Article 90.

¹² Article 177.

¹³ Article 177 (1) [b].

¹⁴ Article 177 (1) [c].

¹⁵ Article 9.

of the IEBC. It also implements Article 88 of the constitution, which provides for the establishment of the IEBC. The Elections Act 2011 is the substantive legislation governing the electoral process. The Act provides for, among other things, registration of voters and election-dispute resolution.

In summary, the new constitutional and legal framework, which benefited from the recommendations of local election observers, among other bodies, as well as agents, provided a positive framework and hope for improvement in conducting elections in Kenya in 2013. The new laws and regulations further reflected consensus on a normative framework to evaluate: the organization of elections; the registration of political parties and coalitions; the role of state bodies and institutions in the elections such as the Independent Electoral and Boundaries Commission (IEBC); political parties' primaries and nominations; and election disputes and the role of the judiciary.

But in spite of the foregoing, the 2013 elections revealed that many legal loopholes still exist. Such loopholes have, first, undermined the representation of women and people with disabilities. Second, going into the 2013 elections, the country had not addressed the issue of campaign financing, owing to the fact that a bill developed and tabled in Parliament in 2012 was never adopted. This has been done now. Third, the financing of political parties remains an opaque issue. Fourth, there is still a jurisdictional mess over which institution is in charge of which electoral disputes and offences, and, fifth, the legal framework for the use of technology needs to be further strengthened to remove all ambiguities.

III ELECTORAL SYSTEM

At the most basic level, electoral systems translate the votes cast in a general election into seats won by parties and candidates. The choice of an electoral system is therefore one of the most important institutional decisions for any democracy. Conversely, the electoral system provides an avenue for representation.

There are a number of shortcomings that have characterized Kenya's electoral system since independence. First, was the lack of equity of voice in the legislature and local authorities. This meant that minorities in Kenya either had very weak representation in the representative bodies or none at all. Such minority groups included women, the disabled, racial groups such as Asians, Arabs and Europeans and ethnic minorities such as the Sengwer, the Nubian, the Ogiek, the El Molo, the Sakweri and the Illchamus.¹⁶ This however has improved with the enactment of the Constitution of Kenya, 2010, which benefited from the recommendations of local observers and other bodies. Second, there was the mal-apportionment of votes due to gerrymandering of constituen-

¹⁶Oloo, 2007.

cies, which has also largely been redressed by the 2010 constitution. Third, there is the zero-sum character of electoral politics and winner-takes-all philosophy that persists to date, as the Constitution of Kenya, 2010, still largely retains the first-past-the-post majoritarian electoral system as opposed to proportional representation.

Under the 2010 constitution, the electoral system guarantees broad representation of diverse interests and political groups couched in affirmative action principles for women, persons with disabilities as well as other special groups that is balanced with universal suffrage based on the principle of equality of the vote. To this end, the constitution endows the electoral system with a number of guiding principles on the aforementioned, including the provision that no more than two thirds of the members of elective public bodies shall be of the same gender,¹⁷ fair representation of persons with disabilities¹⁸ and nomination of persons drawn from special groups to the National Assembly.

Furthermore, the Constitution of Kenya, 2010, provides that within five years there must be a new law to “promote” the representation of women, among other groups. A shortcoming, however, is that unlike the county assemblies, where the “one-third gender rule” has been met, the constitution does not provide a clear means through which the gender rule can be complied with in the National Assembly. The matter is yet to be resolved in spite of the established constitutional timelines in addition to the Supreme Court’s advisory opinion deadline.

In summary, although the electoral system has greatly improved it still faces some shortcomings, ranging from gender disparities and skewed boundary delimitations to the exclusionary majoritarian first-past-the-post system.

IV PARTY AND CAMPAIGN FINANCE

Campaign financing has to do with the manner in which money for campaigns is raised, spent and recouped. The Election Campaign Financing Act, 2013, was enacted to regulate and manage expenditure and accountability of election campaign funds during election and referendum campaigns. Since campaigns are expensive, candidates for elections and political parties need resources to compete for power. There are various ways in which parties can get funds for campaigns. These include personal accounts, public funding and donations. Within that framework, there are some criminal ways of obtaining campaign money, including money laundering, drug money and pyramid schemes.¹⁹

¹⁷ Article 27 [8].

¹⁸ Articles 97, 98, 100, 177 and 82.

¹⁹ Transparency in Campaign and Political Financing capf bill digest Issue No. 01/12 August 2012 Election Campaign Financing Bill, 2012.

However, the Election Campaign Financing Act was not enacted in time for the March 2013 elections despite recommendations to this effect by local observers and other bodies after the 2007 elections. As a result, spending during the 2013 campaign period was mostly unregulated, as was the case during the 2007 general elections.

The use of significant money in elections often creates an uneven playing field, since large sums of money give certain candidates unfair advantage. Likewise, the ruling party, which may have access to state resources, may gain an undue advantage during the election period by using state resources for campaigning. This has largely been the case in Kenya, where in successive elections the ruling party/coalition has misused state resources. In addition, there have also been mega corruption scandals geared towards financing elections such as the Goldenberg scandal and the Anglo-leasing scandal.²⁰

It has also been noted that elected leaders are usually more accountable to those who finance their campaigns than to their constituents. This fosters corruption and also removes the focus of elected leaders from being accountable to their constituents to being beholden to their campaign financiers.²¹

In summary, we can conclude that the campaign finance regulation that was enacted in 2013 is geared towards returning the political process to the people.²² The resultant effect of failing to regulate campaign finance is that those without access to money for campaigns or state resources may be excluded from the electoral process. It is also necessary to regulate campaign financing to ensure economic stability. Although the country has law on state funding the smaller parties have gone to court to challenge the formula for distribution that inevitably locks them out of the fund kitty.

V ELECTION MANAGEMENT

Election management bodies (EMBs) are central to any election. EMBs have the potential to respond to election conflict, as they are tasked with administering, coordinating, supervising and managing the electoral process for the purpose of choosing representatives who shall govern the country via a popular and legitimate mandate. Given that elections are a vehicle for the distribution of power, EMBs are subject to close scrutiny. Any perception of bias, partisanship or lack of integrity in the administration of elections impacts on the outcome of elections and holds the potential for election conflicts. Effective electoral governance therefore requires the impartiality, independence,

²⁰ KHRC, 2014, *The Democratic Paradox: A Report on Kenya's 2013 General Election*, Nairobi: KHRC; ELOG, 2013, *The Historic Vote: Elections 2013*, Nairobi: ELOG.

²¹ Transparency in Campaign and Political Financing capf bill digest Issue No. 01/12 August 2012 Election Campaign Financing Bill, 2012.

²² *Ibid.*

efficiency, professionalism and transparency of the EMB to avoid mutual suspicion and mistrust among political actors.²³

Prior to the promulgation of the Constitution of Kenya, 2010, the then Electoral Commission of Kenya (ECK) was legally the sole prerogative of the president. Accordingly, the opposition in 2007 felt that the stakes had been tilted in favour of the president. This was against the spirit of the 1997 Inter Parties Parliamentary Group gentleman's agreement, which, though not binding, had accommodated opposition nominees to the electoral body. The seeds of post-election violence in Kenya were thus planted by the president's unilateral appointment of ECK commissioners even though he did so within the legal stipulations.²⁴

In the run-up to the 2013 elections significant efforts were taken to streamline the management of elections in Kenya as recommended by the Independent Review Commission (IREC) that reviewed the electoral process in Kenya after the post-election violence and the local observers' recommendations that were incorporated in the commission's report. Against this background, the 2010 Constitution established a new electoral body, the IEBC, to oversee future elections. Following a competitive, public recruitment process, nine commissioners were appointed to the IEBC. Further, the legal framework established the Political Parties Liaison Committee (PPLC) as a statutory body to enable structured dialogue and consultations between political parties, the office of the Registrar of Political Parties, and the IEBC.²⁵

The functions of the IEBC and the required competencies for such functions are stipulated in both the Constitution of Kenya, 2010, and the IEBC Act. The IEBC is established to conduct and supervise elections and referenda in Kenya. Its functions include: the continuous registration of citizens as voters; delimitation of constituencies and wards; regulation of the process by which parties nominate candidates for elections; settlement of electoral disputes, including those related to nominations; voter education and facilitation of observation, monitoring and evaluation of elections. However, despite this new lease of life, its performance so far has been varied, with some of the roles executed better than others.

In summary, for the conduct of elections to be deemed to be free and fair, it is important that the institution charged with the management of elections be above reproach. Whereas several bodies share the blame for the anomalies that bedeviled the 2013 elections, there are some that fall squarely within the province of IEBC that created

²³ Ilona Tip, 2011, 'Do No Harm: Conflict Sensitive Election Design', in Andrea Iff, (ed.), *Ballots or Bullets: Potentials and Limitations of Elections in Conflict Contexts*, swisspeace Annual Conference 2010, Switzerland: Swisspeace.

²⁴ African Union Panel of Eminent African Personalities (AU PEAP), 2014, *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya*, Addis Ababa: African Union.

²⁵ NDI 2012.

suspicion and mistrust among Kenyans. The key events that fuelled suspicion and mistrust were the flawed use of technology; the failure to continuously and impartially register voters; the flawed delimitation of boundaries; and the inadequate enforcement of legal requirements for party nominations. These shortcomings mean that the IEBC has lost the confidence of a major section of Kenyans.

VI ELECTION DISPUTE RESOLUTION MECHANISMS

The impetus for the current legal and institutional framework for resolving election disputes can be traced to the developments that followed the disputed 2007 presidential general elections.²⁶ Aside from the IEBC, other institutions – notably, political parties, the Political Parties Dispute Tribunal and the judiciary – have roles in resolving election disputes, as stipulated in their legal mandates.

Under Art 88(4)(2), the IEBC is responsible for resolving electoral disputes except "election petitions and disputes subsequent to the declaration of election results". The Political Parties Act, for its part, establishes the Political Parties Disputes Tribunal (PPDT), which is given powers to determine disputes between: first, the members of a political party; second, a member of a political party and a political party; third, political parties; fourth, an independent candidate and a political party; and, fifth, coalition partners. As a precondition to activating the jurisdiction of the PPDT, parties must have exhausted the internal dispute resolution mechanisms of their respective political parties before they are referred to the tribunal. Under this Act, the tribunal also hears appeals of decisions of the registrar.²⁷

As the last bastion of dispute resolution, the judiciary laid the framework for electoral dispute resolution in the lead-up to the March 2013 general elections. First, the chief justice appointed the Judicial Working Committee on Elections to advise on the handling of disputes arising from elections. The committee was instrumental in formulating the Elections (Parliamentary and County Elections) Petition Rules, 2013, and Supreme Court (Presidential Election Petition) Rules, 2013, that provide procedures governing the conduct of election petitions. Second, and mainly as a result of the first, special election courts were established and specific timeframes for resolving disputes were established. This is unprecedented in the history of Kenya's elections.²⁸

The Supreme Court is tasked with the sole responsibility of hearing a presidential petition. The constitution provides that a person may petition a presidential election result within seven days of the announcement of the election result. The Supreme Court

²⁶Republic of Kenya, 2008, Report of the Commission of Inquiry into the Post-Election Violence, Nairobi: Government Printer.

²⁷AU PEAP 2014.

²⁸KHRC 2014; AU PEAP 2014.

subsequently has a maximum of 14 days within which to hear and determine the dispute. Where the court annuls the election, another election has to be held within the next 60 days. During the hearing of the presidential election petition of the 2013 general election, the Supreme Court pointed out the time constraints as the main reason of rejection of an affidavit that set out the substantive grounds for the petition for the candidate of the Coalition for Reforms and Democracy (CORD). Similarly, the election courts that were set up to determine matters related to the other election processes also cited time constraints as a challenge to the determination of disputes. The end result is that the judiciary has lost some credibility in the court of public opinion –especially arising from the verdict on the presidential petition.²⁹

Overall, the IEBC constituted the Dispute Resolution Committee (DRC) to handle disputes that fall within its mandate. The DRC decided over 2000 disputes revolving around party lists and more than 200 decisions touching on internal political parties' nominations. Most of the disputes handled by the committee centred on political parties' primaries and party lists.³⁰

Although by and large this arrangement led to successful resolution of the disputes that arose, it in some instances failed to function as seamlessly as expected. Most notably, it has led to concurrent jurisdiction, characterized by forum shopping, overlapping jurisdiction and in certain instances duplications. In light of this, the country needs to explore how to harmonize and synchronize the regime to remove the weaknesses and at the same time preserve the strengths.

Furthermore, although a disputes resolution mechanism was established, like the rest, it was belated, and mainly ineffective. For instance, the IEBC constituted an internal dispute committee that heard and determined over two hundred disputes arising from political parties nominations within a period of three days. Although the problem was occasioned by a belated amendment to the Elections Act, which allowed very restricted time for the conduct of political party primaries and the presentation of party nomination lists to the commission, the IEBC surprisingly gave the impression that it could very easily manage the nominations despite its clearly evident institutional weaknesses. A bigger problem was that the IEBC lacked transparency and accountability by, for instance, locking out key stakeholders in its dealings and activities.³¹

Although the infrastructure for dispute resolution improved markedly after 2007 owing to local observers and other bodies recommendations, implementation by the dispute resolution institutions has been far from satisfactory. The judiciary has been a major culprit in this regard. Its rulings on questions of leadership and integrity, its

²⁹ KHRC 2014; AU PEAP 2014; ELOG 2013.

³⁰ KHRC 2014; ELOG 2013.

³¹ KHRC 2014; AU PEAP 2014; ELOG 2013.

advisory opinion on the one-third rule for ensuring gender equity and its verdict and ruling on the 2013 presidential petition have seen a rollback in the confidence that it attracted after the promulgation of the 2010 constitution.

VII VOTER REGISTRATION

The Constitution of Kenya guarantees the right of all Kenyans who are aged 18 or older to register as voters. The IEBC is mandated to register voters to participate in elections. The regulations that guide the eligibility to register as a voter include proof of citizenship, demonstrated by either a national identity card or a passport. Voter registration is however not mandatory.

The Ministry for Immigration and Registration of Persons is responsible for the issuance of national identity cards. The failure to harmonize the issuance of national identity cards and voter registration has historically resulted in the disenfranchisement of most youths in the country. Bureaucratic processes and administrative delays have been cited as some of the factors responsible for this disenfranchisement. Secondly, the perceived politicization of the issuance of national identity cards in order to deny certain groups' participation in the electoral process is yet another challenge (NDI 2012).

During the 2007 elections, both local and international observers returned a verdict that the voter registration process had faced a number of challenges, including missing names in the register and black book, which ended up disenfranchising some voters.³² These problems led to calls for the reform of the voter registration system. However, in spite of the recommendations by the local election observers and other bodies that called for continuous voter registration and the cleanup of the register in good time before subsequent elections, several anomalies were still experienced.

For instance, in the lead-up to the 2013 elections, the IEBC was unable to continuously register voters. Several factors account for this. First was the decision to undertake a fresh registration of voters – to replace the register used during the referendum for the Constitution 2010 – using the biometric voter registration (BVR) system. This however did not start on time. According to IEBC timelines, voter registration was to start in August, but the date was changed to September and later still to 18 November 2012. The reason for these successive postponements was the delay in procuring BVR kits. The commission had in the meantime terminated the tender for procurement of the BVR kits, citing irregularities, and, instead, announced that it intended to use the manual registration system.³³

³² Republic of Kenya 2008.

³³ KHRC, 2013, Countdown to the March 2013 General Elections: Interim Elections Monitoring Report, Nairobi: KHRC.

This plan was however nipped in the bud by the government's intervention, which compelled the IEBC to reverse its decision: it duly bought BVR kits using a government-to-government arrangement between Kenya and Canada. The delay in the buying of BVR kits and the consequent delay in the start of voter registration impacted on the timelines for compilation, inspections and publication of the voters' register. Likewise, the time available for the commission to train its staff was very limited.³⁴

According to the IEBC, 14,296,180 voters were on the register for the 2013 elections (52.9 percent men and 47.1 percent women). This represents a significant 82.1 percent of the total eligible voter population. In principle, this should be expected given the fact that since 2002 the law has allowed for continuous voter registration. However, continuous voter registration did not work well in practice in both the 2007 and 2013 elections. The key problem has been that, in between elections, the primary site of the election management bodies' activity has been at the district (county) headquarters. The end result has been that where districts (counties) are geographically large, poorly served with roads and economically marginal, the expense of getting to the registration centre has been prohibitive to potential voters.

Another challenge has been that in practice and despite notification by the election management body the inspection campaigns have not had much impact. Few voters end up verifying if indeed they were registered.

Against this background there is need for the voter registration process to be continuous and for voter education towards registration to start early.

VIII BOUNDARY DELIMITATION

Constituency boundary delimitation in the country has suffered from gerrymandering tendencies from 1963 up to 2007, as boundary demarcations during this period did not follow prescribed constitutional criteria.

Accordingly, the Constitution of Kenya, 2010, sought to redress this anomaly. Thus, in the lead-up to the 2013 elections, the boundaries review was necessitated to overhaul the then existing electoral boundaries in conformity with a provision in the constitution³⁵ that increased the number of parliamentary seats from 210 to 290, and also created new electoral units at the county level known as County Assembly Wards. The IEBC subsequently updated an earlier report that was submitted by the Interim

³⁴ AU PEAP 2014; KHRC 2013.

³⁵ Article 89.

Independent Boundaries Review Commission (IIBRC) popularly known as the Ligale commission.³⁶

The report was then forwarded to the Parliamentary Committee on Justice and Legal Affairs (PCJLA) for review and onward transmission to the floor of the House. The MPs approved, with amendments, the PCJLA report. In its final resolution, the IEBC gazetted the final list of constituencies and electoral wards and pegged the numbers at 290 constituencies and 1,450 county assembly wards.³⁷

Subsequently, three constitutional petitions challenging the Ligale Report on constituency boundaries were lodged in the High Court of Kenya. In the long run, however, and consistent with the contentious nature of boundary delimitation, a total of 132 constitutional petitions and judicial review applications challenging the creation of 80 new constituencies were filed. However, the courts retained the IEBC proposals by endorsing the capped number of constituencies and only entertaining the redrawing of boundaries.³⁸

Given this, the disparity in the voting populations of Kenya's constituencies still breaches the fundamental equality principle of democracy, which is clearly articulated and enshrined in section 42(3) of the Constitution of Kenya, namely one person, one vote. This long-standing discrimination in itself impairs the integrity of the electoral process, mainly, but not only, in relation to parliamentary elections.

It is thus evident that the IEBC did not convincingly implement the delimitation of boundaries to the expectations of Kenyans, since it inherited an incomplete task from the Interim Independent Boundaries Review Commission (IIBRC) and was required to complete the delimitation process of constituency and ward boundaries within a constrained period of four months.

The end result was that its resolution was contested in court by way of the filing of over 125 applications – consolidated under *Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councilor Eliot Lidubwi Kihusa and 5 others* – made throughout the country challenging the boundary delimitations by the IEBC. The complaints were raised regarding the manner in which the 80 constituencies and 1,450 County Assembly Wards were created, their distribution, their names, boundaries and areas of allocation. There were also grievances and controversies regarding the number of wards given to particular constituencies mainly on the basis of

³⁶IIBRC, 2012, Report of the IIBRC: Delimitation of constituencies and recommendations on local authority electoral units and administrative boundaries for districts and other units, Nairobi: Government Printer.

³⁷AU PEAP 2014.

³⁸AU PEAP 2014.

population, geographical, ethnic, clan, community and other interests and the adequacy of the wards allocated.

In summary, although local observers and other bodies had after the 2007 elections recommended that constituency delimitation be made the clear mandate of an independent commission, the allocation of this function after an interim period to the election management body ended up overwhelming the IEBC, as it lacked the capacity and technical expertise to deal with both electoral boundary delimitation and the election process.

IX PROCUREMENT AND ELECTION ADMINISTRATION

The IEBC developed the first comprehensive procurement plan for the 2013 general elections materials in June 2011. An assessment by the auditor-general, however, later showed that the procurement plan generally failed to adhere to the provisions of the Public Procurement and Disposal Act of 2005. Likewise, In terms of electoral administration and for the purposes of the 2013 general elections the IEBC recruited and deployed a total of 301,593 temporary poll officials to manage 31,981 polling centres. In addition, the commission appointed 47 county returning officers.

Overall, there were a number of shortcomings in the procurement process and election administration.

First, some of the procurement activities experienced delays, which were attributed to the late and frequent amendments to the electoral laws as well as uncertainties in budgetary allocations.

Second, the late delivery of election materials to a great extent contributed to the high cost of distribution. In some areas, materials had to be delivered by air, thus escalating the cost of transportation.

Third, the training of poll officials, which lasted between two and three days, was not sufficient and in any case the actual training was conducted amid many other competing electoral activities.

Fourth, the cascade approach that was used did not sufficiently prepare the trainers to deliver in the technical areas.

Fifth, the result transmission system was not effective due to inadequate time for pre-testing and the lack of devices for practical training. It was against this background

that an external evaluation conducted by IFES on the technologies employed by the IEBC identified this as perhaps one of the major contributing factors to the failure of the technology during the 2013 general election. According to IFES, the training commenced prior to the arrival of the equipment and was therefore ineffective in building knowledge, familiarity and confidence in its use.

In summary, there were irrefutable shortfalls in the system, including insufficient voter education, which led to an unprecedented large number of rejected votes. The inadequate training of IEBC officials and the lack of cellular network coverage at some polling stations are also believed to have led to breakdowns in the electronic vote transmission (EVT) of results, which challenged the credibility of the provisional results. These early results were initially supposed to be electronically transmitted from polling stations to the national and county tallying centres to allow for easy comparison with final declarations, but the EVT system rapidly deteriorated. The commission was forced to revert to the manual tallying system that had been fatally compromised in 2007 and that had been recommended by local observers and other bodies to be declared obsolete.

X CIVIC AND VOTER EDUCATION

The 2007/2008 post-election violence spawned a number of civic education initiatives in Kenya. Some of the initiatives include Amkeni Wakenya, which supports grassroots civil society, while USAID supported Pact Kenya. In addition, the Kenya Civil Society Strengthening Programme (KCCSP) and the Kenya Transitional Initiative (KTI) were launched.

In addition to informing voters about the electoral process, these programmes also emphasized the importance of non-violence in the electioneering process. These civic and voter education programmes have since adopted different strategies that are on the one hand community-based as well as media-based. Some have also taken the form of town hall meetings.

Although the Constitution of Kenya, 2010, does not explicitly provide for civic education, it presumes it in two ways. First, Articles 1 (1) and (2) declare that sovereignty belongs to the people and that they can either exercise it directly or through democratically elected representatives, respectively. Second, Article 10 (2) (a) provides for public participation. Article 1 (2) also presupposes voter education, which is expressly provided for in Article 88 (4) (g). The latter provision is given force by Section 40 of the Elections Act, 2011, which requires the Independent Electoral and Boundaries Commission (IEBC) to establish mechanisms for the provision of continuous voter education and also prepare a voter education curriculum.

The constitution thus puts more emphasis on voter rather than civic education, yet Articles 1 (1) and (2) cannot be fully achieved without a civic and active citizenry. Overall, voter education is very narrow in focus and is periodic. Although the election management body has in the past two general elections conducted a modicum of voter education through the media, it does not have the capacity to carry out exhaustive and direct countrywide voter education, and its efforts to this end have been complemented by civil society.

Civic and voter education in Kenya, however, faces two major challenges. First is the culture of “handouts” and second is “timing”. On the first point, voter education programmes that are too close to the election are undermined by the embedded political culture and practices associated with elections, where voters expect to be paid not only to attend rallies or vote for an individual but also to attend a “voter education” workshop. In this respect a media-based strategy can offer some sort of solution. On the second point, civic and voter education are less effective when conducted close to the date of general elections. This is because emotionally charged activities such as party nominations and campaigns usually disrupt and compromise the integrity of such education. The timing of civic and voter education should therefore take into account the latter point.

XI CANDIDATE NOMINATION

Party primaries both during the 2007 elections and the 2013 elections remained a function of the respective political parties, which are expected to adhere to electoral laws and regulations. In the lead-up to the 2013 elections, the legal framework governing elections went through some changes in mid-2012 when parliament amended the Political Parties Act and Elections Act by reducing the period required for political parties to submit their nomination rules from six months to three months, effectively granting political parties more time to prepare themselves for party primaries.

The amendments also provide that in the lists of candidates presented for nomination for the 12 special seats in the National Assembly, political parties would be free to include the names of their presidential candidates. An amendment was also effected to the Election Act to provide for more time in service for the civil servants who had the intention of contesting a seat in the ensuing elections, with the MPs voting to reduce the time within which they must resign from seven to six months.

Another contentious enactment was an amendment of the Political Parties Act, 2011, that provided that a political party would be competent to nominate a candidate if that candidate had been a member of the party in the preceding two months. In doing so,

the MPs cut down this period from the five months that had earlier been stipulated in the Act. The net effect of this amendment was that MPs were given more time to party-hop. Party-hopping thus characterized both the 2007 and 2013 party nominations. In fact, the provision on the eligibility of independent candidates has not redressed the phenomenon of party-hopping in Kenya.

Although, ideally, political parties were expected to use the party membership lists submitted to the election management body to conduct internal party nominations, these were only nominally complied with, as most of the big parties allowed those voting to use either their party membership cards or their voter registration cards. The small parties, on the other hand, gave direct party nominations as long as they paid the nomination fee.

Furthermore, in the lead-up to the 2013 elections, parties were supposed to conduct their nominations between 4 and 17 January 2013, and to submit the final list of names on 18 January 2013. Most of the parties chose to have the nominations on the last day, i.e. 17 January 2013, in order to prevent losers from defecting and contesting in other parties. The decision to do last-minute nominations inevitably exerted pressure on the parties and this tested their capacity to conduct the exercise across the country. While last-minute nominations may have prevented other parties from exploiting weaknesses within the nomination process of their competitors, the parties found themselves constrained by time as they had little time for dispute resolution. Recognizing the tight schedule under which parties were operating, IEBC extended the nomination deadline by one day and allowed three days for dispute resolution.

Overall, each political party had a standing elections board that conducted the exercise across the country. Likewise, all parties attracted very few women aspirants for the open seats. This can be explained by the fact that most parties did not find it necessary to extend affirmative action to women due to the constitutional guarantees that they had secured beforehand.

XII ELECTION CAMPAIGNS

For elections to be free and fair there must be a level playing field for all candidates in the elections. This includes a level playing field during the campaign period. Likewise, for an electoral management system to ensure free and fair elections, the campaign period should also be regulated.

One of the laws governing campaigns in Kenya is the Elections Act. Under this Act, the campaign period is defined as the period specified as such in the notice issued by

the electoral management body in relation to an election.³⁹ In the 2013 elections, the commission set the official campaign period as from 1 February to 2 March 2013.⁴⁰ The Act regulates the campaign period in various ways, including the following.

First, the Act provides for access by all political parties to state-owned media services during the campaign period and allocation of reasonable airtime on all broadcasting media.⁴¹ The IEBC is allowed to monitor the equitable access to air time given to political parties by state-owned media during the campaign period in consultation with the independent candidates, political parties and officers of the state-owned media.⁴² For example, while preparing to cover the 2013 elections, the Media Council of Kenya, in April 2012, together with media houses, the IEBC, the Kenya Union of Journalists, other media stakeholders and the government, developed binding media guidelines for reporting elections. Their aim was to promote accurate, comprehensive, impartial, fair and responsible coverage of the elections and to ensure that journalists are sensitive to the risk of conflict.⁴³ The Act also prohibits public officers from engaging in political campaigns.⁴⁴

Second, the Act provides the various offences that parties and candidates can be held liable for. The offences include: interfering with free political campaigning and canvassing by using threatening, abusive or insulting language; and advocating hatred, inciting violence, influencing voters on grounds of ethnicity, race, religion, gender or any other ground of discrimination is an offence. In line with this provision, during the 2013 elections in Kenya, the Communications Commission of Kenya (CCK) issued guidelines to political parties regarding the content of campaign messages using SMS messages. According to these guidelines, no political message was to contain offensive, threatening, abusive, insulting, obscene or profane language.⁴⁵

Third, other offences provided for include using the threat of force or violence, preventing or interfering with opponents' political meetings, preventing the representative of a political party from accessing voters in an area and impeding a member of the IEBC from accessing an area to conduct voter registration.⁴⁶ Furthermore, refusal to comply with a lawful order issued by the IEBC is an offence, as is destroying or forging any campaign or promotional material belonging to an opposing candidate or political party.⁴⁷

³⁹ Section 2.

⁴⁰ Law Society of Kenya: Preliminary Report of the 2013 Election Observation.

⁴¹ Sections 41 & 108.

⁴² Section 41(2).

⁴³ Report of the Commonwealth Observer Group Kenya General Elections, 4 March 2013.

⁴⁴ Section 43(c).

⁴⁵ Report of the Commonwealth Observer Group Kenya General Elections, 4 March 2013.

⁴⁶ Section 67.

⁴⁷ Section 67(n).

Fourth, using public resources for campaigns during an election or referendum except as authorized under the Election Act is prohibited.⁴⁸ Arising from the foregoing, state resources used during the campaign can be impounded by the IEBC.⁴⁹

Fifth, under the Act, it is an offence to engage in bribery. Likewise, violence and intimidation against opposing candidates or any other person during the campaign period is illegal. The Act provides that a candidate who engages in these activities shall be disqualified from participating in the elections by the IEBC.⁵⁰

Despite these elaborate provisions both during the 2007 and 2013 election process, the campaign period in Kenya was characterized by incidents of violence, intimidation and voter bribery. The problem in Kenya in this case is thus not necessarily lack of laws and regulations, but lack of enforcement, which has institutionalized impunity during the election period.

In addition to the Elections Act, the IEBC has an electoral code of conduct. Parties that subscribe to the electoral code of conduct affirm the rights of all participants in an election to distribute non-offensive electoral literature and campaign materials and promote free electoral campaigns by all lawful means.⁵¹ Further, parties bound by the code are prohibited from campaigning in places of worship or during burial ceremonies.⁵² They are further prohibited from plagiarizing the symbols, colours or acronyms of other parties, and are discouraged and, if possible, prevented from removing, disfiguring or destroying the political campaign materials of any party. Media houses and their representatives are also required to adhere to media professional ethics in coverage of public meetings, campaign rallies and demonstrations.⁵³

In summary, it is important to note that the responsibility of conducting free and fair elections does not lie solely with the election management body. Since political parties and candidates are some of the main players, they should conduct their affairs in a way that inspires public confidence in the electoral process. Thus, the above mentioned laws will facilitate free and fair elections only if political parties adhere to the laws and also take ownership as stakeholders.

XIII ELECTION STAKEHOLDERS

In any given election there are usually several stakeholders that enable the election to

⁴⁸ Section 68(1).

⁴⁹ Section 107.

⁵⁰ Section 72(1).

⁵¹ Clause 5 (j).

⁵² Clause 6(d).

⁵³ Clause 14(a).

gain legitimacy both internally and externally. Such stakeholders include the media, civil society groups, religious bodies and the security apparatus.

The Kenyan media is arguably well developed, with a diverse composition of electronic, print, and cyber media. But in spite of this, the media has attracted both negative criticism and positive commendation in equal measure. The violence that accompanied the disputed 2007 elections saw the media come under intense criticism, with claims that some sections exacerbated and even incited the contenders, thus contributing to the violent aftermath.

In the lead-up to the 2007 general elections, two key areas of concern were raised with respect to the role of the media. First was the skewed coverage by the public broadcaster Kenya Broadcasting Corporation (KBC) in favour of the ruling party, thus leading to an uneven playing field. Second was a weak legal and institutional regulatory framework, which was blamed for the failure to ensure professional conduct and ethical reporting. The conduct of the media, particularly the privately owned vernacular FM radio stations, was criticized for stoking tensions in the country. Moreover, there were concerns over media ownership by politicians and failures of self-regulation.⁵⁴

Against this background the Independent Review Commission (IREC) made recommendations to strengthen the legal and institutional framework for media regulation. The recommendations aimed to ensure professional conduct through oversight by the Media Council of Kenya. Further, they provided for equitable coverage by state media of all political parties and contestants. IREC also recommended the enactment of legislation prohibiting hate speech, which was subsequently incorporated into the National Cohesion and Integration Commission (NCIC) Act (2008), while the Kenya Communications Amendment Act (2009) also addressed some of the challenges in media regulation. The Act provided for the formation of a Broadcasting Content Advisory Council, which was inaugurated in June 2010.

The Constitution of Kenya, 2010, has considerably raised the standard of freedom of expression and the media. It prohibits the state from infringing on decisions of the media, including that of the public broadcaster. Article 34 of the constitution guarantees the independence of the media, and provides that all state-owned media shall operate independently and impartially and afford opportunity for the presentation of divergent views and opinions. The constitution also empowers parliament to enact legislation to establish an independent body responsible for setting media standards, regulating media and ensuring compliance with the set standards. The Media Act of 2010 provides for the establishment of the Media Council of Kenya, and gives it the responsibility for regulating the conduct of media.

⁵⁴ NDI 2012.

In the same vein, the Kenyan civil society has played an active role in the restoration of the democratic process. Since 2008 and as reaction to the 2007 post-election violence civil society organizations and faith-based groups have reflected on the contribution they can make to prevent future election-related violence. Important changes are taking place in terms of coalition-building and the application of new methodologies and technologies, both for explicit conflict mitigation and domestic election observation.

In April 2010, the Elections Observation Group (ELOG) was formed by several civil society and faith-based organizations as a permanent platform for election observation in Kenya. As part of its observation efforts, ELOG fielded observers to all of Kenya's 210 constituencies. They successfully piloted Parallel Vote Tabulation to verify the tallying of the results and provided feedback on the voting, counting and tallying process within 24 hours of the closing of the polls.

During the 2013 elections ELOG also observed the election process and conducted Parallel Vote Tabulation and extensive monitoring of the voting and counting process on Election Day. To this end ELOG observed the voter registration process; implementation of the Political Parties Act and Political Financing; constituency delineation; conduct of campaign; representation and promotion of marginalized groups in the electoral process; conduct of voter education; and conduct of the media.

XIV ELECTION DAY AND RESULTS MANAGEMENT PROCESS

One of the salient problems that has characterized the last two elections and led to dispute is Election Day events and the results management process. In 2007 there were numerous reported cases of a defective voter register that either disenfranchised some voters or was manipulated to rig elections.

Election Day in 2007 witnessed numerous implausibly high turnout figures reported in the strongholds of both main political parties, which evidently suggested extensive perversion of the polling process, probably ballot-stuffing, organized impersonation of absent voters, vote buying and/or bribery.⁵⁵

A likely facilitator and catalyst for ballot-stuffing (of which effect the political parties and the ECK could hardly have been unaware) was the indulgence granted by the ECK shortly before the elections for "black books" (in which the names of voters had been entered at the time of registration) to be used in certain circumstances and for double registrants to be allowed to vote, contrary to previous regulation.⁵⁶

⁵⁵ Republic of Kenya, 2008.

⁵⁶ Kenya National Commission on Human Rights (2008), *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence*, Nairobi: KNCHR.

A further contributor and facilitator for manipulation at polling stations was the disturbing feature that in many instances (in the strongholds of both main political parties) only agents representing the majority party were represented during polling and counting. The alert self-interest of competitors is all but indispensable for honest elections, and it is a matter of serious concern that this safeguard was absent in many instances.⁵⁷

In 2013, the system of tallying, recording, transcribing, transmitting and announcing results was defective and poorly executed – this in spite of the recommendations of local observers and the IREC after the 2007 elections. The IEBC had long been aware of the need to revise the system fundamentally, which necessitated the introduction of readily available information and communications technology.

The gross disparity in constituency sizes also contributed to defects and delays in tallying, recording, transcribing and transmitting results in the large constituencies (and had, moreover, to be done by outdated methods). These defects and delays also contributed to the explosive political climate that then built up as the country awaited the transmission and announcement of results.⁵⁸

There were also allegations of irregularities in conducting these elections. These revolved around results being received and announced without the requisite, authenticated documentation, doctoring of results and improper tallying.⁵⁹

Election results, which must immediately be posted at the polling stations, become public information the moment the count has been completed. Inevitably, political parties and the media disseminated this partial information and used it to predict the outcome of the election. It is important, therefore, in order to avoid confusion and manipulation, that the electoral management body should be in a position to receive, verify and publish the results as quickly as possible: delays in the publication of results as they arrive inevitably lead to accusations of manipulation.

Furthermore in 2007, conscious of the importance of ensuring that the results process should be credible in the eyes of all stakeholders, and to forestall the difficulties experienced in the 2002 elections, it was agreed that the IFES would take the lead in providing advice and technical assistance to ECK in the development of a results system. This, however, was not done.

Arising from the 2007 elections debacle, one of the general principles for the electoral system in the Constitution of Kenya, 2010, is that elections should be administered

⁵⁸ Africa Great Lakes Initiative (AGLI) and Friends Church Peace Teams (FCPT) (2013), Africa Great Lakes Initiative Report on Observation of March 2013 Kenya National Elections, Nairobi: AGLI and FCPT AGLI and FCPT.

⁵⁹ Republic of Kenya, 2008.

in an impartial, neutral, efficient, and accurate and accountable manner. The Elections Act provides that the IEBC shall declare and publish election results immediately and may announce provisional results. In the past, the IEBC had established a process of voter tallying that was composed of constituency-based tallying centres and the national tallying centre. The process usually involves the transmission of votes from constituency-based tallying centres across the country to the national tallying centre in Nairobi for the final tallying and announcement of the presidential result. In the past, this proved to be a challenge and raised controversy, with major political sides making claims of rigging of elections during the tallying stage of election results.⁶⁰

The situation was no different in 2013, as the technology transmission system collapsed and despite opposition lamentations the IEBC reverted to the manual system, which had the same fragilities experienced in 2007, including the lack of a single principal register, the existence of a “green book” that was not known to political parties, unexplained varying tallies between votes cast for the president and those cast for the other elective positions. In the end these unresolved issues formed the basis for CORD’s 2013 presidential petition.

XV APPLICATION OF AFRICAN ELECTIONS TOOLS AND INSTRUMENTS

The following instruments are in place and are supposed to help guide the electoral process in Kenya: the African Charter on Human and People’s Rights (ACHPR) (although the relevant article 13(1) is not explicit in its definition of the right to participate in free and fair elections); the African Union (AU) Declaration on the Principles Governing Democratic Elections in Africa; and the African Charter on Democracy, Elections and Governance.

Using these instruments, ELOG found the electoral process “generally credible”.⁶¹ The African Union Observer Mission likewise called the elections “credible”.⁶² Despite the shortcomings, the EU⁶³ concluded that the “integrity of the vote was protected”, while the Carter Center⁶⁴ found “enough guarantees to persevere the expression of the will of the Kenyan voters”. On the contrary, as reflected by Long and his colleagues, the problems were serious enough to raise questions about the validity of the first-round win by now-president Kenyatta, if not the ultimate outcome. From this perspective the election was neither “free and fair” nor credible.⁶⁵

⁶⁰ AGLI and FCPT, 2013.

⁶¹ Elections Observations Group (ELOG). 2013. The Historic Vote: ELOG Observation Report of the General Elections 2013. Nairobi, Kenya (July 30). Available at: <http://www.elog.or.ke/>.

⁶² African Union Observer Mission (African Union). 2013. African Union Election Observer Mission to the 4 March 2013 General Elections in Kenya, Preliminary Statement. Addis Ababa, Ethiopia (no date). Available at: <http://www.eisa.org.za/PDF/ken2013au1.pdf>.

⁶³ European Union Election Observation Mission Kenya (EU). 2013. General Elections 2013: Final Report. Nairobi.

These irregularities notwithstanding, international observers – from the A U, East African Community, European Union and Carter Center, among others – immediately released a joint statement to commend the initial phase of the election process as transparent and credible, despite initial delays. On 6 March, the European Union Election Observation Mission (EU EOM) said the “integrity of the vote [had been] protected”.

XVI POST-ELECTION REFORMS

Arising from the last two elections EOMs both local and International have made some recommendations for reform. While some recommendations and suggestions have been addressed, some have not. We highlight their status below.

The first recommendation after the 2007 elections was the need for the enactment of a broad consultative process prior to the appointment of ordinary members and the chairman of the election management body. This was achieved. However, confidence in the election management body has since plummeted, mostly because of personal integrity questions over the commissioners rather than over the procedure of their appointment.

Second was a reduction in the maximum number of commissioners. This was achieved after a reduction from the initial 21 to the current nine commissioners. A new challenge has however arisen with focus being turned to strengthen the functions of the secretariat vis-à-vis that of the commissioners.

Third was the need to reorganize the expiry of the terms of office of ECK members to ensure that their retirement does not coincide with election years and that all commissioners have at least two years' experience before every election. This was partially achieved, as the law now gives commissioners a non-renewable six-year term. However, most commissioners who were appointed under this law did not have any electoral experience, with the shortcoming of this being that most of them had to learn on the job.

Fourth was that the election date should be pre-set, taking into account all the required timelines for efficient conduct of the election. This has been achieved, as the election date is now fixed by the constitution.

Available at: http://eeas.europa.eu/eueom/missions/2013/kenya/reports_en.htm.

⁶⁴Carter Center. 2013. The Carter Center Finds Kenya Election Results Reflect Will of Voters. News Release. Atlanta-Nairobi (April 4).

⁶⁵Long, James D.; Kanyinga, Karuti; Ferree, Karen E.; and Gibson, Clark. 2013. Kenya's 2013 Elections: Choosing Peace Over Democracy. *Journal of Democracy* 24(3): 141-155.

Fifth was the recommendation that the Media Council of Kenya should oversee the conduct of media and properly enforce its code of conduct. This has been achieved, although enforcement still experiences some challenges.

Sixth was that the ECK and CSOs should be encouraged to work together, and particularly in voter education, as this can help in ease tensions in addition to improving delivery. This has partially been achieved.

Seventh was that a permanent domestic observer group, comprising diverse civil society interests and serving as an umbrella body, should be constituted. This has been achieved, as ELOG is now in place and all domestic observation in the 2013 elections was carried out under its banner.

Eighth was the recommendation that election regulations should be amended to allow for the observation of the tallying process at all levels and provision of copies of all authentic statutory forms to observers. This has not been implemented, and the aforementioned formed the ground for most petitions after the 2013 elections.

Ninth was the recommendation that the basic principle for the delimitation of constituencies should be the equality of the vote, and the maximum departure from that principle should be clearly defined in the law (equality of voting strength should be aimed at in all cases, although in special circumstances a 5-20% deviation range should be accepted). This has partially been implemented but needs further review and enforcement.

Tenth was the recommendation that a Boundary Review Commission be established and constituency delimitation be removed from the ECK. This was partially implemented, but there has been a return to the previous situation and has contributed to dissatisfaction with the last electoral boundary delimitation.

Eleventh was that the country should move to a new registration system to integrate the issuance of the national ID cards with voter registration, so that when someone requests an ID card, he/she will automatically be entered in the voter register and informed of the location of the polling station where he/she should vote (a cheap voter card containing such information can be provided). This has not been implemented and has led to the opposition crying foul over disenfranchisement in their strongholds.

Twelfth was that a special court be established to deal expeditiously with disputes arising from party primaries. This has partially been implemented.

Thirteenth was that the election management body should establish a clear, non-adjustable timeframe within which all parties should hold their primaries and certify their nominees. This was enacted, but was subsequently amended and violated and partly contributed to the shambolic nominations conducted by some parties in the run-up to the 2013 elections.

Fourteenth was that electoral law reform should give powers to the election management body to enforce its orders. This was achieved, but the IEBC lacks the brevity to enforce such orders.

Fifteenth was the recommendation that “the black book” should be eliminated. This was not achieved, as the “green book” replaced the black book in mischievous circumstances.

Sixteenth was that an integrated and secure tallying and data transmission system should be put in place. This has not been achieved and was at the heart of the presidential petition of 2013.

BIBLIOGRAPHY

Africa Centre for Open Governance (2014), Election Day 2013 and its Aftermath, Nairobi: Africog.

Africa Great Lakes Initiative (AGLI) and Friends Church Peace Teams (FCPT) (2013), Africa Great Lakes Initiative Report on Observation of March 2013 Kenya National Elections, Nairobi: AGLI and FCPT.

African Union Election Observer Mission (2013), 4 March 2013 General Elections in Kenya: Preliminary statement, Nairobi: AU-EOM.

African Union Panel of Eminent African Personalities (2014), Back from the Brink: The 2008 Mediation Process and Reforms in Kenya, Addis Ababa: African Union.

Commonwealth Secretariat (2008), Kenya General Election 27 December 2007: The report of the Commonwealth Observer Group, London: Commonwealth Secretariat.

Commonwealth Secretariat (2013), Report of the Commonwealth Observer Group: Kenya General Elections 4 March 2013, London: Commonwealth Secretariat.

East African Community Observer Mission (2008), Report on Kenya December 2007 Elections, Arusha: EAC.

Elections Observation Group (ELOG) (2014), The Historic Vote: Election 2013, Nairobi: ELOG.

European Union Election Observation Mission (2008), Kenya: General Elections 27 December 2007, EU-EOM.

European Union Election Observation Mission to Kenya (2013), General Election 2013, Nairobi: EU-EOM.

Independent Electoral and Boundaries Commission (2014), 4th March 2013 General Election: Election Data, Nairobi: IEBC.

International Republican Institute (2008), Kenya Presidential, Parliamentary and Local Elections December 27 2007, Washington: IRI.

Kenya Elections Domestic Observation Forum (2007), Preliminary Statement and Verdict of the 2007 Kenya General Elections, Nairobi: KEDOF.

Kenya Human Rights Commission (2008), Violating the Vote: A Report on the 2007 Elections, Nairobi: KHRC.

Kenya Human Rights Commission (2013), Countdown to the March 2013 General Elections: Interim election monitoring Report, Nairobi: KHRC.