

# Ready or Not?

## An Assessment of Kenya's Preparedness for the General Election, September – December 2012.

The last General Election in Kenya was held on December 27, 2007. In its aftermath, violence broke out on an unprecedented scale in the country's Nyanza, Rift Valley, Coast and Nairobi provinces. A Commission of Inquiry chaired by Appeal Court judge Philip Waki reported that at least 1,133 people were killed and another 3,561 people injured. It also estimated that 117,216 private and 491 government-owned properties were destroyed. Approximately 350,000 people were displaced from their homes or usual places of business, with about 1,916 Kenyans seeking refuge in Uganda.<sup>1</sup>

The Kenya National Dialogue and Reconciliation (KNDR) process, led by former United Nations Secretary-General Kofi Annan, successfully negotiated an end to the political crisis through the formation of a Grand Coalition Government.

The Commission of Inquiry into the conduct of the 2007 elections, known as the Independent Review Commission, and chaired by retired South African Judge Johann Kriegler, as well as the above-mentioned Waki Commission recommended a range of reforms.

A number of these reforms, as well as others recommended earlier, have been undertaken. Kenyans adopted a new constitution in a referendum on August 4, 2010 and it was subsequently promulgated on August 27, 2010. This Constitution promises to re-shape institutions and change how the country is governed. Already, significant changes have been introduced in the Judiciary, and similar changes are expected in a number of other key institutions of government that will have a direct bearing on the upcoming March 2013 elections.

As the next General Election approaches, there are widespread concerns about whether or not they will be run as successfully as the by-elections conducted after the 2007 General Election and the 2010 referendum. Much will depend upon the performance of the new elections management body – the Independent Electoral and Boundaries Commission (IEBC), which was established under the new constitution and whose commissioners began work in 2011.

This report outlines the state of the country's preparedness for the March 2013 polls. It covers the period from September to December 2012.

<sup>1</sup> Republic of Kenya (2008). *Report of the Commission of Inquiry into Post-Election Violence* (Nairobi: Government Printer).

## The IEBC

Following the recommendations of the Kriegler Commission<sup>2</sup>, the Electoral Commission of Kenya (ECK), which was widely believed to have bungled the 2007 General Election, was disbanded at the end of 2008. In its place, the Interim Independent Electoral Commission (IIEC) was established to manage elections for 24 months, or three months after a new Constitution came into force, whichever happened first. At the same time, and for the same lifespan, the Interim Independent Boundaries Commission (IIBRC) was established to make recommendations to Parliament on drawing the boundaries of constituencies and local authority electoral units, as well as the optimal number of constituencies.

The Constitution 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 and 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 and 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 into the new commission to ensure the retention of some institutional memory.

### Elections and the Rule of Law

Elections are managed in accordance with the law. Managing elections effectively requires, therefore, an effective legal framework. The legal framework should also be organised in a clear manner so that is easy to understand, transparent, and addresses all the components of an electoral system necessary to ensure democratic elections.<sup>3</sup> In addition to the Constitution, Kenya's electoral laws have undergone some important changes since the 2007 General Election that create a substantively different legal framework. The Constitution lays down principles

that Kenya's electoral system should conform to; establishes requirements for registration as a voter; establishes a new elections management body; lays down criteria for the delimitation of electoral units; restructures key elective offices in the executive and the legislature; and establishes standards for the formation and management of political parties.

The constitution also guarantees the freedoms of assembly and association, both of which are critical for free and fair elections. As of October 2012, survey respondents indicated that the authorities were ensuring these freedoms. Fully 43 percent of respondents indicated that they "strongly agreed" that people were allowed to freely campaign. It was notable, for instance, that the police were well restrained in their responses to a wave of strikes by various categories of public servants.<sup>4</sup> On the other hand, recent violence in Kisumu is indicative of a curtailing of these rights. In October 2012, ODM politician Shem Kwegu died in what was rumored to be a politically-motivated murder. The killing, in addition to the police brutality that marked the protests afterwards, suggest that the freedoms of association and assembly are increasingly at risk as elections near.

The Political Parties Act, which came into force in 2008, removed political parties from the ambit of the Societies Act and required them to manage their affairs more democratically, while providing for state funding for their operations. It has recently been replaced by the Political Parties Act, 2011, to conform to the Constitution and to further improve the legal framework for the establishment and management of political parties. This law does not, however effectively, bar party hopping<sup>5</sup> nor does it institutionalise political parties.

Parliament also recently passed the Elections Act, which consolidates and strengthens electoral law.

<sup>2</sup> Republic of Kenya (2008). *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Nairobi: Government Printer).

<sup>3</sup> International IDEA (2002). *International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections* (Stockholm: International IDEA) p. 11.

<sup>4</sup> South Consulting/KPTJ (2012). "Kenya's 2013 General Election: Review of the Environment and Electoral Preparedness." pp. 34.

<sup>5</sup> Parliament recently extended the deadline for party hopping for a second time. Party members now have until January 18, 2013 to switch party allegiance.

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In addition to laws relating to elections in the strictest sense,<sup>6</sup> there are also a number of other reforms that are expected to impact elections by requiring political actors to behave more responsibly. These include the hate speech provisions in the National Cohesion and Integration Act; laws on human rights and administrative justice;<sup>7</sup> the constitutional separation of the offices of Attorney-General and the Director of Public Prosecutions, ostensibly giving the latter a freer hand in deciding upon and managing prosecutions; and all the laws relating to judicial<sup>8</sup> and police<sup>9</sup> reforms.

## Setbacks in Enforcing the Rule of Law

Unfortunately, there is also an emerging pattern of watering down important parts of the Elections Act and Political Parties Act to suit politicians' personal greed and agendas. In addition to allowing more time for party-hopping, as mentioned above, amendments eliminated the requirement that all candidates possess a university degree. In addition, Parliament extended the deadline for submitting party nomination rules and party membership lists. It also changed the law so that nominees submitted via party lists (for the reserved special seats in the National Assembly, Senate and County Assemblies) only have to be party members as of the date of the submission of the lists, instead of for at least three months preceding this submission. Finally, Parliament suspended the vetting requirement such that the IEBC will now not scrutinize candidates' backgrounds to ensure that they comply with the constitution's integrity requirements.

The constitution also stipulates that neither gender can make up more than two-thirds of any elective body in the nation, including the National Assembly, the Senate and county governments. Since no agreement on how to implement the requirement had been reached and the country risked being unable to legally form parliament without the gender ratio in place, the Attorney General recently asked the Supreme Court to rule as to whether the requirement had to be implemented immediately or progressively. In what is seen as a major blow to women's representation, the Court ruled that gender parity in the National Assembly and Senate can be implemented progressively and that Kenya has until August 2015 to implement it fully. Notably, however, Chief Justice Willy Mutunga dissented from the majority ruling, stating,

*I believe the immediate implementation of the two-thirds gender principle is reinforced by values of patriotism, equity, social justice, human rights, inclusiveness, equality and protection of the marginalized. Such values would be subverted by an interpretation of the provisions that accepts progressive realization of this principle...Equality here is substantive, and involves undertaking certain measures, including affirmative action, to reverse negative positions that have been taken by society. Where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive.<sup>10</sup>*

The majority ruling leaves Kenya lagging behind its neighbors with regard to gender parity. Currently, only 9.8 percent of its parliamentarians are female, compared to Rwanda's 56.3 percent, Tanzania's 36 percent and Uganda's 35 percent. In fact, in his dissent, Mutunga said, "...I must observe that Kenya, as an anchor state in the Eastern and Horn of Africa would demean its status, and that of its Parliament, if the patriotic duty of guaranteeing gender equity and equality was not seen in the region as one of its priorities."<sup>11</sup>

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6 The Independent Electoral and Boundaries Commission Act, 2011; The Political Parties Act, 2011; and The Elections Act, 2011.

7 The Commission on Human Rights and Administrative Justice Act, 2011; The Kenya National Human Rights Commission Act, 2011; and The National Gender and Equality Commission Act, 2011.

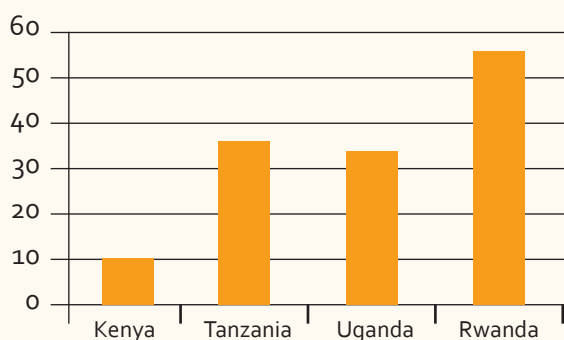
8 Judicial Service Act, 2011; The Vetting of Judges and Magistrates Act, 2011; and the Supreme Court Act, 2011.

9 The National Police Service Act, 2011; The Independent Policing Oversight Authority Bill, 2011; and the National Police Service Commission Bill, 2011.

10 Willy Mutunga. 2012. "In the Supreme Court of Kenya Reference No 2 of 2012. In the Matter of an Application for Advisory Opinion under Article 163(6) of the Constitution and in the Matter of Article 81, Article 27(4), Article 27(6), Article 27(8), Article 38, Article 96, Article 97, Article 98, Article 177(1)(b), Article 116, Article 125 and Article 140 of the Constitution of the Republic of Kenya and in the Matter of the Principle of Gender Representation in the National Assembly and the Senate and in the Matter of the Attorney General (on behalf of the Government) as the Applicant. Dissenting Advisory Opinion, pp. 42-43

11 Ibid, pp. 41.

**Percentage of Female Parliamentarians**



While the ruling does buy legislators time, they will have to find the political will to come to an agreement on which mechanism will be used to implement the rule. Some of the most prominent suggestions include rotating reserved constituencies for women, “twinning” of larger constituencies such that those areas elect one man and one woman, and a list of female party nominees, from which women representatives will be appointed to fulfill the one-third requirement. The Federation of Women Lawyers-Kenya also recommends that Kenya adopt the MMP electoral system, described below, for its proven ability to promote the inclusion of women in the legislature.

Despite these recent setbacks, there is a generally stronger legal framework to govern elections. Its success is nevertheless dependent on how the relevant implementing bodies, especially IEBC, will apply the law in the management of elections and other activities related to them. As indicated by the Kriegler Commission, the problem was not so much the lack of sufficient laws as the failure of institutions to act, and a general culture of lawlessness at election time.<sup>12</sup>

**Voter Registration: The BVR Kit Controversy**

One of the IEBC’s most important duties is to register voters and create a new electoral roll. In order to facilitate the creation of this new electronic register, all eligible Kenyan voters who wished to participate in the March 2013 polls were required to register afresh. The biometric voter registration (BVR) technology utilized to create the new register is a harbinger of hope, for its ability to capture identifying characteristics such as fingerprints and facial features – in addition to the usual requirements such as name, gender and ID numbers –

is believed to be able to prevent many of the types of malpractice that tarnished the 2007 election.

Unfortunately, however, the process was mired in controversy from the beginning. As a result of a series of issues, including a cancelled tender process and confusion over the delivery and cost of the kits, some Kenyans began to doubt the independence and capacity of the IEBC. Indeed, in July 2012, amidst controversy surrounding the reliability of some of the shortlisted companies and a lack of transparency in the entire process, civil society released a statement calling on the IEBC to cancel its BVR tender and restart the process. Citing concerns about the integrity of one of the companies being considered as well as the unexplained resignation of the committee in charge of overseeing the tender process, civil society demanded explanations. In response, the IEBC cancelled the tender process. Months later, however, the new tender process was called into question amidst questions regarding the cost and delivery of the kits, which were delayed several times. These delays caused the start of the voter registration process to be postponed four times.

Moreover, some are continuing to decry the commission for flaws in the registration process. Muslim women, who do not remove their head veils in public, faced problems in registration because the rules state that head covering must be removed for the registration photograph. There have also been complaints of malfunctioning kits, some of which lost their battery power and others of which did not function because of expired passwords. In Wajir South constituency, one BVR kit containing the information of more than 600 voters, disappeared altogether. It was later found, and the head of Civil Service, Francis Kimemia, reported that it had been stolen so that names could be added to the list.<sup>13</sup>

**Turnout for Registration**

The IEBC began the voter registration process with the aim of registering 100 percent of the country’s approximately 18 million eligible voters. Facing

<sup>12</sup> Republic of Kenya (2008). *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Nairobi: Government Printer) pp. 24.  
<sup>13</sup> Edith Fortunato. 2012. “Police recover stolen BVR kit in Wajir.” *Daily Nation*. December 23. Available at < <http://www.nation.co.ke/Counties/Police-recover-stolen-BVR-kit-in-Wajir/-/1107872/1650528/-/10x3awp/-/index.html>>.



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appallingly low turnout in the first weeks, however, the IEBC was forced to scale down its target number to 12 million. Thanks to a surge of turnout in the final week, the IEBC registered approximately 14 million voters, which is 79.7 percent of the voting population. One significant problem in the registration process was the inefficiency of the Department of the Registration of Persons, which issues the national ID cards necessary for voter registration. Thousands of pending applications were slow to be processed. The Krieger Commission recommended that synchronizing the electoral management body and the procedure for issuing ID cards be a priority,<sup>14</sup> but that has yet to be done. Interestingly, Parliament amended the Elections Act after the close of voter registration, allowing those with an “acknowledgement of registration” certificate from the Department of Registration of Persons to register to vote. This will allow those who have applied for national ID cards to be included on the voter roll in future elections. In order to actually cast a ballot, however, a national ID will still be required.

## Turnout and Violence

Perhaps the most disturbing obstacle to the voter registration process, however, was the recent pattern of violence around the country. Part of the reason the IEBC failed to register its initially targeted number of citizens was fear; many Kenyans were worried about the implications of registering to vote. On the coast, for instance, leaflets warning people not to register were distributed. Set against the backdrop of the secessionist Mombasa Republican Council and its threats against people who participated in elections, it is easy to see why people would stay away. In Nairobi and other big urban areas, eligible voters were not registering because they preferred to register and vote in their own, rural areas, where they felt they would be safer. In Kisumu and Garissa, sporadic violence has been a problem for months, revealing the low capacity of the police and security forces. In fact, Garissa was ravaged by the Kenya Defense Forces, members of which terrorized local residents in retaliation for the deaths of some of their comrades.

IEBC Chairman Hassan acknowledged public fear as a reason for low voter registration turnout. “This is evidence that the country has not healed from the last election violence and Kenyans should ask themselves

why,” Hassan said, adding that Kenyans employed in tea plantations across the country did not register to vote for fear of reprisal attacks.<sup>15</sup> As reports of violence continue to erupt across the country, high voter turnout on Election Day becomes less likely.

Perhaps unsurprisingly, the final voter registration figures revealed that areas afflicted by violence saw the lowest voter registration rates and also happened to be some of Kenya’s poorest areas. The counties of West Pokot and Turkana are striking examples. The Turkana and Pokot groups have engaged in violence conflict sporadically over the past several years, and the re-drawing of new administrative boundaries for electoral purposes, along with the discovery of oil in the region have contributed to increased inter-community tensions. These two districts suffer from high poverty rates, with 68.7 percent of the residents of West Pokot and 92.9 percent of Turkana residents living under the poverty line. Sadly, these two counties also share extremely low voter registration rates (see table below), suggesting that Kenyans from these areas will have little chance to make their voices heard, compounding their extant marginalization. In the table below, the five counties with the lowest numbers of registered voters are shown against their poverty rates. Wajir, Turkana and Mandera counties, which have the three lowest voter registration rates, are also amongst the five poorest counties in the nation. These areas have also suffered from recent violence, which has frightened some voters from turning out to register. In Garissa, which has been suffering from attacks since November 2012, the IEBC only managed to register 40 percent of the county’s voters. Garissa, Wajir and Mandera counties all border Somalia, and al-Shabaab militants from across the border have been accused of entering Kenya to carry out attacks in recent months.

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14 Republic of Kenya (2008). *Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007* (Nairobi: Government Printer), pp. 25.

15 John Njagi. 2012. “IEBC decries voter apathy in poll violence areas.” *Daily Nation*. December 11. Available at <http://www.nation.co.ke/News/politics/IEBC-decries-voter-apaty-in-PEV-areas/-/1064/1641560/-/fpmdovz/-/index.html>. “Non-indigenous” workers in tea plantations were targets of ethnic post-election violence in 2008.

**Voter Registration and Poverty Rates**

County	Voter Registration	Poverty Rate
West Pokot	45.1%	68.7%
Garissa	40%	54.5%
Wajir	35.7%	84.4%
Turkana	30.2%	92.9%
Mandera	25.3%	85.7%

Sources: Kenya Open Data. Available at <<https://opendata.go.ke/Counties/Poverty-Rates-by-County/z6za-eyyb>>

IEBC. "Registered Voters by 18th December 2012." Available at <[www.iebc.or.ke](http://www.iebc.or.ke)>

**Registration in the Diaspora**

The Kenyan diaspora is also up in arms over the IEBC's recent decision that bars many of them from voting. Hassan, citing the myriad logistical and technical problems arising in domestic registration, decided that attempting to implement registration worldwide would be too cumbersome at this point. Instead, he explained that only Kenyans residing in the East African region would be able to register. By the end of the registration period, approximately 1,700 such Kenyans were registered. It is difficult to assess how comprehensive the exercise was, however, because the IEBC did not set a target number, due to lack of information on how many Kenyans were residing in the eligible countries.<sup>16</sup>

Embassies outside of East Africa will be progressively equipped with voter registration capability over time. One Kenyan in the United Kingdom has already petitioned the Kenyan courts, challenging the IEBC decision. Indeed, while the constitution mandates parliament to enact legislation providing for the progressive registration of diaspora voters and the progressive realization of their right to vote, no such legislation exists as yet. It is long overdue, given that the constitution gave parliament one year from its promulgation to enact the relevant laws.

**Civic and Voter Education**

Since the 1990s, numerous civic and voter education programmes have been implemented in Kenya. From diverse initiatives by individual organizations, improved coordination – albeit at the urging of donors – saw the start of the third phase of the National

Civic Education Programme (NCEP) in 2011. This has evolved into the current national civic education programme managed by Uraia, which has now been converted into a public trust to provide leadership on the provision of civic education into the future. IEBC, like its predecessors the IIEC and ECK, has also been conducting voter education. The government, through initiatives such as civic education for the referendum, has also lent its efforts in the pursuit of a more informed citizenry. The Ministry of Justice, National Cohesion and Constitutional Affairs (MoJNCCA) has been promoting the need for civic education to be recognized as an integral part of implementing the Constitution. Together with participating non-state actors, MoJNCCA has established the Kenya National Integrated Civic Education (K-NICE) programme as a long-term strategy for enlightened citizen participation in the implementation of the Constitution.

**Recent developments in civic education**

There have also been recent innovations in civic education in the form of television programs such as *IEBC Countdown* and *Cheche*. One of the newest additions in this category is *Uongozi*, a show developed by Inuka and Nation Media Group in which 48 contenders will be tested on leadership skills. The Media Owners Association has also launched a live presidential debate forum. In October 2012, the IEBC launched its own voter education curriculum, including printed guides and explanations of the new electoral system, elective offices, and voting rules. There is a clear desire for information related to the elections. Google's annual survey revealed that the IEBC was the most frequently conducted Google search this year in Kenya, and Google Country Director Joseph Mucheru said that this indicated Kenyans' desire to learn about information related to the General Elections and the voting process.<sup>17</sup>

16 Lillian Onyango. 2012. "IEBC Registers 2000 Kenyans in East African bloc." *Daily Nation*. December 27. Available at <<http://www.nation.co.ke/News/politics/-/1064/1652458/-/ahslau/-/index.html>>

17 Fredrick Obura. 2012. "Kenyan media loses its place as source of news." *The Standard*. December 13. Available at [http://www.standardmedia.co.ke/?articleID=2000072725&story\\_title=Kenya-Kenyan-media-loses-its-place-as-source-of-news](http://www.standardmedia.co.ke/?articleID=2000072725&story_title=Kenya-Kenyan-media-loses-its-place-as-source-of-news).

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## Inadequate voter education

Critics, however, contend that these initiatives are largely uncoordinated, unstructured and unfocused. They also assert that the three months set aside for voter education is insufficient. The National Democratic Institute (NDI) stated that three months is not enough time to reach the whole population, especially when so many people do not understand the new devolution system and the role of their leaders.<sup>18</sup> In fact, an Infotrak survey commissioned by AfriCOG revealed that knowledge regarding devolution is sorely lacking in some parts of the country. Fully 52 percent of Central Province and 49 percent of Coast and Eastern provinces were, at the time of the survey, unaware of the devolution scheme. At the national level, a quarter of all Kenyans were unaware of the county governments established under the new constitution. Moreover, more than a quarter of Kenyans surveyed felt that they had no role to play in county governments.

Voter education, which tends to be conducted close to elections, is also reduced to no more than voter information on where to find polling stations and how to vote. In a country where immense resources have been spent on awareness campaigns for close to 20 years, some stakeholders are increasingly advising a different approach to civic education. Uraia's new strategy, for example places emphasis on civic engagement – equipping citizens with knowledge and skills on how they can engage with governance structures, and providing them with opportunities and resources to do so. They also recommend a policy and legal framework to guide national civic and voter education, beyond the conferment of powers on IEBC and other state organs such as the Ethics and Anti-Corruption Commission and the National Cohesion and Integration Commission (NCIC).

## Reporting Results

Finally, the IEBC has gained some experience in election management by virtue of recent by-elections. One critical issue in these elections was the reporting of results. The IEBC's transmission of live results of the September 2012 by-elections in Kajiado North, Kangema and Ndhiwa was interrupted when the commission's website crashed. Social media sites erupted soon afterwards as users questioned the IEBC's capacity and ability. Such problems will have to be addressed, because similar crashes during the general election have the potential to trigger citizen reporting of unofficial results, which can lead to rumors and violence.

## The IEBC and Lingering Enforcement Issues

Despite these problems, the IEBC still enjoys considerable public confidence. Fully 70 percent of survey respondents believe the IEBC is carrying out its work impartially and 72 percent of respondents believe that the commission is independent.<sup>19</sup> At the same time, however, the commission has shown a lack of will to enforce electoral laws. The IEBC was supposed to set up an Electoral Code of Conduct Enforcement Committee, but that has yet to be done. In addition, in spite of the Political Parties Act, which prohibits a person from being a member of more than one party, politicians belonging to one party have publicly expressed their support of other parties, suggesting their loyalties lie in the latter's camps. In the September 2012 by-elections, candidates who failed to secure nominations from certain parties were able to jump ship and win nominations from rival parties literally overnight. Despite the fact that such moves were in direct contravention of the rule that party membership must subsist for three months to be considered valid, the IEBC did nothing.<sup>20</sup>

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<sup>18</sup> *Daily Nation*. 2012. "Step up voter education, IEBC told." *Daily Nation*. November 27. Available at <<http://www.nation.co.ke/News/politics/Step-up-voter-education-IEBC-told/-/1064/1630732/-/eorpio/-/index.html>>.

<sup>19</sup> South Consulting/KPTJ (2012).

<sup>20</sup> *Ibid*, pp. 39.

## The Electoral System

It is widely recognized that unscrupulous politicians in deeply divided societies often “play the ethnic card” to win elections. Fear-mongering and demonization of the “other” are common tactics as politicians use communal appeals to mobilize voters. Such communalization can spiral out of control, and violence is often a risk. Kenya has experienced such scenarios since the advent of multi-party democracy in 1992, with the most severe violence rocking the country in the aftermath of the 2007 polls. It is also well-known that carefully crafted electoral systems can play a powerful role in successful conflict management. Given the variety of available options, it is somewhat surprising that the 2010 Kenyan constitution does so little in the way of utilizing electoral engineering to mitigate the pervasive ethnic fractionalization (at the national level) in the country.

Since independence in 1963, Kenya has used the plurality-majority electoral system known as first past the post (FPTP) to elect its state officials. FPTP functions in single-member districts, and the winner is simply the candidate with the most votes. In order to succeed electorally, parties choose candidates who will be the most broadly favorable in their districts. In Kenya, where communities tend to be geographically segregated, the result has been ethnically-based political parties with distinct geographic strongholds. These parties tend to base their campaigns on conceptions that are attractive to the majority of people in their districts but exclude others. Under this system, there is little incentive for parties to make appeals outside their home regions. The desire to choose “broadly favorable candidates” under FPTP also discourages the inclusion of women and minorities, which is discussed in more detail below.<sup>21</sup> FPTP is also criticized for its tendency to produce highly disproportionate seat allocations. For instance, in the first multi-party elections of 1992, the Kenyan African National Union party (KANU) won 24.5 percent of the votes but secured 53.2 percent of the legislative seats. In the 1997 parliamentary elections, KANU secured 50.9 percent of legislative seats with only 38.4 percent of the vote.

In its analysis, the Kriegler Commission recognized the problems with FPTP and noted that electoral system

reform, particularly the implementation of a mixed-member proportional system (MMP), has been under consideration since the pre-2010 constitutional reform process.<sup>22</sup> In this type of system, voters cast two ballots, one that uses FPTP and one that uses proportional representation (PR), explained in detail below. Seat allocations at the PR level are dependent upon the results of the FPTP ballots and compensate for any disproportionality that arises there.<sup>23</sup> Given, however, its relatively complicated structure and its vulnerability to manipulation by unscrupulous politicians, the Kriegler Commission was not in favor of its adoption. While it can produce more proportionate results, the Commission warned that Kenya’s party system is not strong enough to currently handle this change and that, as it stands, the Kenyan presidential system is not very compatible with the new parliamentary system which would result from MMP.<sup>24</sup>

### The Option of Proportional Representation

While it is true that MMP might not be the right system for Kenya at this time, there are other options that also produce more proportional results. Proportional representation (PR) is one such system, and it has been widely recommended for divided societies. Under PR, a party wins seats in proportion to the percentage of votes it wins. If, for example, a major party wins 40 percent of the vote under PR it will win roughly 40 percent of legislative seats. If a minor party wins 10 percent of the vote, it, too, will win about 10 percent of the seats. In this way, very few votes are “wasted.” The primary benefit of such a system is that it allows for smaller parties to gain access to the table, and such inclusion is often critical to stability in divided societies. It also discourages regional fiefdoms, because it is less likely that one party will command all the seats in a particular province or district. PR provides incentives for parties to campaign and court voters in areas

<sup>21</sup> Ace Electoral Project. “First Past the Post.” <http://aceproject.org/ace-en/topics/es/esd/esd01/esd01a/onePage>

<sup>22</sup> Republic of Kenya (2008). Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (Nairobi: Government Printer) pp. 18.

<sup>23</sup> Mixed systems include mixed-member proportional systems and parallel systems. In the latter, the two sets of elections are distinct and are not dependent on each other for seat allocation.

<sup>24</sup> Republic of Kenya (2008). Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (Nairobi: Government Printer) pp. 20-21.



outside of their strongholds. Since every vote, even from areas where a party might be weak, goes toward gaining another seat, PR makes it worth a party's time to invest resources in non-stronghold areas. Over time, this can lead to more politically mixed areas.

There are, of course, downsides to the system. Since PR facilitates the inclusion of many parties, coalition governments, which often face legislative deadlock, are generally the result of such elections. Also, minor parties can find themselves in disproportionately powerful positions, capable of holding larger parties to ransom. In some situations, small, extremist parties, who are necessary for a coalition to achieve a majority, can force a larger party to agree to demands that are not representative of most of the population simply because they are required for their numbers. In addition, PR tends to produce "coalitions of convenience," which typically do not have enough common ground in terms of their policies or support base to form a lasting union, instead of "coalitions of commitment," which are based on shared views and whose member parties are reciprocally dependent upon the votes of supporters of other parties.

### **The Option of a Centripetal System**

There are also other options, broadly described as "centripetalist" electoral systems, the central aim of which is to pull the parties toward moderate, compromising policies and to reinforce the center of a divided political spectrum. These systems, which focus electoral competition on the moderate center rather than at the extremes, advocate for inter-ethnic, centrist politics. Instead of focusing on organizing parties explicitly around ethnic identities, as promoted by PR, centripetalists focus on multi-ethnic parties and the use of preferential electoral systems, political party laws which require multi-regional party organization, and legislative selection procedures which encourage median, centrist outcomes. Centripetalists also encourage institutions which give parties and candidates incentive to "pool votes" across ethnic lines.

Because they enable politicians to make deals for reciprocal vote transfers with their rivals, in ethnically-diverse societies such systems present vote-maximising candidates with incentives to attract secondary preference votes from groups other than their own, so

as to ensure the broadest possible range of support for their candidacy. To obtain such cross-ethnic support, candidates may need to behave accommodatively on core issues, tempering their rhetorical and policy positions so as to attract broader support.<sup>25</sup>

These systems make use of the alternative vote (AV) or the single transferable vote (STV), both of which allow voters to rank-order their choice of candidates. In such systems, if no one wins an outright majority, voters' second, third and subsequent choices are transferred in order to elect a majority-supported winner. While any such change to Kenya's electoral system would require a constitutional amendment, it is worth considering for its potential to mitigate ethnic divisions around elections in the country.

### **Kenya and the Two-Round System for Presidential Elections**

For presidential elections, Kenya will use a two-round system (TRS), with modifications to ensure that the winner has broad support. In addition to garnering more than 50 percent of the vote, successful candidates must win at least 25 percent of the votes in each of more than half of the 47 counties in the country. If no candidate meets these criteria at the March 4 election, a second round election will be held within 30 days. In this round, only the two contenders with the most votes participate, and the winner is simply the candidate who wins the most votes. The two-round system is useful, because it allows for voters to react to changes in the political landscape between the two rounds and perhaps even vote for a different candidate in the second round. It also allows for diverse interests to coalesce around the successful candidates in the second round, which encourages bargaining and trade-offs. In the 2008 Ghanaian elections, the TRS worked well despite razor-thin vote margins which saw the opposition defeat the incumbent by a mere 1.06 percentage points.<sup>26</sup>

25 Benjamin Reilly. 2011. "Centripetalism." Available at <http://ethnopolitics.org/isa/Reilly.pdf>.

26 Erastus Wamugo. 2012. "Ready or Not: Notes on the forthcoming presidential elections." Available at [http://www.africog.org/kptj/publications/ready\\_or\\_not\\_lessons](http://www.africog.org/kptj/publications/ready_or_not_lessons).

On the other hand, however, the two-round system is expensive precisely because it requires the execution of two elections. It can also produce highly disproportionate results, and more importantly has been seen to provoke conflict in divided societies, largely because the TRS provides an "exit option" after the first round. If the results of the first round indicate that a party might perform worse than initially expected, that party has an interest in calling foul by alleging fraud. In many emerging democracies and conflict-ridden states, where the rule of law is weak, such claims carry considerable plausibility.<sup>27</sup> In the 1993 elections in Congo (Brazzaville), the opposition boycotted the second round when it became clear that it had little chance of winning, and war resumed thereafter.<sup>28</sup> In the 1992 elections in Angola, Jonas Savimbi alleged electoral fraud, withdrew from the run-off and took up arms when he realized his party would likely suffer electoral defeat.

Clearly, the period between the two elections is an extremely sensitive one, and Kenya's electoral legacy makes allegations of fraud or vote-rigging extremely dangerous. The situation is compounded by the fact that the ICC trials of the four accused Kenyans are set to begin on April 10, 2013, less than a week after a possible run-off election in Kenya. Given the significant opposition among certain segments of the population to the trials, questionable election results and the impending trials could make for an extremely volatile environment. As described earlier, a more representative system might produce a more broadly desirable candidate. The AV\* system is one option, for it would achieve in one round what TRS achieves in two. This would cut expenses and eliminate the dangerous inter-election period.

## The Role of the Media

Access to the media goes hand in hand with these freedoms, and the Constitution provides protections necessary to a free and vibrant media. There is still inadequate protection, however, against the undue control of the media by particular interests. The statutory Media Council of Kenya is perceived to prioritize protection of its members over the maintenance of discipline within the industry. At the same time, there are some important inroads. In April 2012 the Media Council, with input from the Editors Guild, the Media Owners Association, Kenya Union of Journalists, the IEBC and InterNews, issued new guidelines for election coverage. More than fifteen media institutions signed on to the new rules. Media regulation is also lagging behind technology, to the extent that social media and other Internet-based forms of publishing (e.g. Facebook, Twitter and blogs) are virtually unregulated. Finally, there are virtually no laws guaranteeing equitable access to the media at election time (though the Elections Act, 2011, anticipates that regulations will be made by the IEBC to that effect, and the Kenya Broadcasting Act, 1997, also makes suggestions about access to state-owned media) and access to information, both by the media and the general public, is also far from realised.

## Electoral participation and voter bribery

The Constitution and various electoral laws provide firm protection for free electoral participation. However, this participation is still endangered by political practices that are a legacy of the old political order, such as violence and bribery. Violence, or the threat of it (discussed above), remains a veritable constraint on electoral participation because it affects turnout,

<sup>27</sup> Sarah Birch. 2003. "Two-Round Electoral Systems and Democracy." *Comparative Political Studies* 36(3): 319-344. Pp. 325.

<sup>28</sup> Ibid, Pp. 325.

\* Alternative Vote - explained under the centripetal system.

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notably of women. Voter bribery is also rampant, and it is one of the ways in which money perfidiously influences electoral outcomes in Kenya – chiefly because many voters are poor. Although these two activities are crimes under Kenyan law, prosecution has been lax. Most recently, Garissa county political aspirants were accused of bribing and transporting Tana River county voters to register in Garissa. The accusers called on the IEBC to take action.<sup>29</sup> There were also reports of voter bribery in the September 2012 by-elections in Juja, Makadara and Starehe.<sup>30</sup> Unless action is taken to deter such activities, the two will continue to undermine free electoral participation in the foreseeable future.

## Political Parties and the Rule of Law

Constitutional provisions on political parties provide basic principles for political parties and require Parliament to enact laws on various aspects of political party regulation, the roles and functions of political parties, as well as the registration and supervision of political parties. Parliament passed the Political Parties Act, 2011, which provides for the registration, regulation and funding of political parties; the establishment and management of a political parties' fund; accounts and audit of political parties; and restrictions on the use of public resources to promote the interests of political parties. The office of Registrar of Political Parties, in existence since 2008 under the Electoral Commission, is now a separate state office with power to register, fund and deregister political parties based on clearly defined criteria. The law bars membership to more than one party and provides mechanisms for state funding of political parties. Over time, it is believed that this will rid parties of the undue control by individuals.

One significant problem is the absence of a Registrar of Political Parties. This state office, established under the Political Parties Act, 2011, is empowered to register, regulate, monitor, investigate and supervise political parties to ensure compliance with the Act. The Registrar is also empowered to administer the Political Parties Fund and investigate complaints received under the Act.

Thus far, the president has failed to appoint the Registrar. In June 2012, the House amended the law, eliminating the provision that a selection committee nominate candidates for the position and instead giving the duty to the Public Service Commission. In October 2012, the Public Service Commission published an advertisement for the position. After claims that the Office of the President intended to determine the appointment unilaterally, the Commission rescinded the advertisement. Moreover, since the Public Service Commission is being reconstituted, as per its operating Act, commissioners are yet to be appointed. As long as the nomination of candidates for the office of Registrar falls under this commission, it will be stalled until the commissioners are appointed. Most recently, Gem MP Jakoyo Midiwo is attempting to amend the law again, asserting that the selection committee requirement be reinstated so that political parties can be involved in the process of appointing the Registrar.<sup>31</sup> The result of this political wrangling is that with less than two months to go before the election, a Registrar is yet to be appointed. This state of affairs poses a serious challenge to the administration of the Act, because in the absence of a substantive holder of the Office of Registrar of Political Parties political parties have more impetus to breach their operating law. Indeed, acting Registrar Lucy Ndung'u is facing the monumental task of addressing an upsurge of complaints from Kenyans who have recently discovered that their names have been entered on party membership lists without their knowledge or approval. She is also attempting to mediate the fallout between Uhuru Kenyatta and Musalia Mudavadi, who is attempting to bar the former from using the Jubilee name for his coalition. Complaining that she is "overwhelmed with independents and transfers," Ndung'u is clearly struggling to keep up.<sup>32</sup>

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29 Boniface Onger. 2012. "IEBC asked to probe voter bribery." *The Standard*. December 2. Available at <[http://www.standardmedia.co.ke/?articleID=2000071942&story\\_title=Kenya-IEBC-asked-to-probe-voter-bribery](http://www.standardmedia.co.ke/?articleID=2000071942&story_title=Kenya-IEBC-asked-to-probe-voter-bribery)>.

30 *Daily Nation*. 2012. "Elections marred by war of words over voter bribery." *Daily Nation*. September 20. Available at <<http://www.nation.co.ke/News/politics/Elections-marred-by-war-of-words-over-voter-bribery-/1064/1015052/-/k8yckuz/-/index.html>>.

31 Alex Ndegwa and Martin Mutua. 2012. "MPs to face off over Registrar of Political Parties appointment." *The Standard*. November 18. Available at <[http://www.standardmedia.co.ke/index.php?articleID=2000070869&story\\_title=Kenya-MPs-to-face-off-over-Registrar-of-Political-Parties-appointment](http://www.standardmedia.co.ke/index.php?articleID=2000070869&story_title=Kenya-MPs-to-face-off-over-Registrar-of-Political-Parties-appointment)>.

32 Olive Burrows. 2013. "Kenya: Voter Beware, You Might 'Belong' to a Political Party." *Capital FM*. January 3. Available at <http://allafrica.com/stories/201301031031.html>.

On a more positive note, the Political Parties Act 2011 also includes features that promote inclusiveness within parties. While the only substantive requirement for provisional registration is submission of the party constitution to the Registrar of Political Parties, full registration – without which a party cannot contest elections – is only granted if a party succeeds in showing at least 1,000 members, all of whom must be registered voters, in each of more than half the counties. These members must reflect regional and ethnic diversity, gender balance and representation of minority and marginalized communities. Members of the party's governing body must also adhere to these diversity rules. In addition, not more than two-thirds of the members of a party's governing body can be of the same gender. In order to try and ensure that the party is truly established and has a genuine following, full registration is also conditional upon the party showing that it has branch offices in more than half the counties. The Act also stipulates that a party's constitution must contain rules for the governing body, party organization structure, financial structure and asset management. Parties must also include their policy documents. In terms of finance, the Act lays out contribution caps and creates a Political Party Fund, 95 percent of which is distributed to all eligible parties in proportion to the total number of votes received at the last general election and 5 percent of which is reserved for administration of the Fund. In order to be eligible for access to the Fund, a party must have received at least 5 percent of the vote in the last election and must adhere to the gender balance rule. It remains to be seen, however, how stringently these regulations will be implemented, especially in light of the delay over the appointment of the Registrar.

## Dispute Resolution

Following the post-election violence and the Waki Commission report, a number of measures have been taken by both the state and non-state actors to improve early warning, early response and mitigation of election-related violence. Discussions still continue on a more effective mechanism. One such mechanism is the UWIANO Platform for Peace, unveiled before the 2010 referendum. UWIANO regularly monitors political developments, with an eye for the potential for developing violence. It includes various mechanisms

through which people can report violence, including SMS, a phone hotline, email, and Facebook and Twitter pathways. It remains to be seen, however, how effective this platform will be.

NCIC is also seen as providing some leadership in this area, even though it has run into barriers erected by politicians bent on continuing the cycle of impunity. In November 2012, NCIC issued a warning to 48 politicians from several provinces about their use of hate speech. All 48 were served with cessation notices which warned them of their "tribal undertones."<sup>33</sup> Earlier this year, MP Ferdinand Waititu was also arrested and charged with incitement to violence and hate speech against the Maasai community.<sup>34</sup> The case is ongoing. The Kenyan Internal Security Ministry also mapped potential hotspots around the country and put in place measures to prevent violence. Working with provincial commissioners and county forum committees, the Ministry's initiative aims to mediate between warring communities.

The law provides for timely resolution of electoral disputes. The Political Parties Act, 2011 established the Political Parties Disputes Tribunal, empowered to determine disputes between the members of a party; disputes between a member of a party and that party; disputes between parties; disputes between an independent candidate and a party; disputes between coalition partners; and appeals from decisions of the Registrar. Notably, however, the law states that the Tribunal may not hear disputes between members of a party, between a member and a party or between parties unless that dispute has first been heard by the relevant political party's own internal dispute resolution mechanism. Aggrieved parties who are still unsatisfied can appeal the Tribunal's decision to the High Court, the Court of Appeal and the Supreme Court. The law makes it clear that the judiciary is only to be consulted when all other avenues have been exhausted.<sup>35</sup>

<sup>33</sup> Wambui Ndonga, 2012. "48 politicians under watch over hate speech." Capital FM. November 21. Available at <http://www.capitalfm.co.ke/news/2012/11/48-politicians-under-watch-over-hate-speech/>.

<sup>34</sup> In September 2012, MP Ferdinand Waititu was charged with hate speech and arrested after he made a speech encouraging his constituents to chase away members of the Maasai community. The speech was made in response to the killing of a street child, allegedly by a Maasai security guard, in response to the child's theft of a chicken. Parts of the speech was posted on YouTube. Waititu plans to run for re-election in March 2013.

<sup>35</sup> Willy Mutunga. 2012. "CJ's Remarks at the Unveiling of the Judiciary Working Committee on Election Preparations." May 10. Available at <http://www.kenyalaw.org/Forum/?p=471>.

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This system is important, because until now political parties would first turn to the courts to resolve their disputes, resulting in significant case overloads. The courts in Kenya have also been historically notorious for their inefficiency and lack of independence. When faced with a petition challenging the election of an incumbent president, the courts would either throw it out on technical grounds or dismiss it on the bases of shaky legal reasoning. Recent judicial reforms, including a new Chief Justice, a judicial vetting process and the overhaul of the administration of court system, however, have inspired public confidence. Chief Justice Willy Mutunga has set up an Electoral Dispute Resolution Court to handle all pending election petitions, and he has established a Supreme Court justice-led committee to handle petitions arising from the 2013 polls.

## Conclusion

Kenya has come a long way on the path of reform, but credible and peaceful elections depend upon the successful resolution of four critical outstanding issues.

- First, the IEBC's willingness to shift deadlines multiple times is worrying and dangerous. The delays in the BVR acquisition process ultimately pushed voter registration so far back that political parties did not have a finalized, publicly verified voter's roll to reference during their nominations. Without such a roll, it is not clear how or if parties confirmed that those who participated in nominations were even eligible to do so. This could potentially call the entire nominations process into question. The IEBC must adhere to deadlines for the remainder of the elections period. Failure to do so opens the door for foul play.
- Second, the ruling on gender parity was disappointing, and it was a betrayal of the public. The Kenyan public voiced their desire for change by voting for the new constitution. The decision to delay the implementation of the gender rule shows an unwillingness of the part of legislators to carry out the public's will.
- Third, the IEBC must be firm in its enforcement of the law. Thus far, it has been seen to be overly accommodating of political parties who do not seem committed to obeying the new regulations. If the IEBC does not stand firm, its public legitimacy is at risk.
- Fourth, a permanent Registrar of Political Parties must be appointed as soon as possible. As political parties move forward with their nominations and prepare to enter the official campaign phase, it will be critical that their activities be monitored and regulated, especially in light of the recent scandal regarding party membership lists, charges of illegal voter transport and vote-buying. Moreover, a permanent Registrar must address the confusion regarding the registration of independents and those party members who are changing their party allegiances.
- Fifth, it is imperative that Parliament immediately stops amending laws related to the election. With less than two months remaining before polls, candidates, parties and the public will find it increasingly challenging to understand the legal requirements around the elections. Given that this General Election is the first of its kind to be administered since the promulgation of the new constitution, there is already serious ambiguity around several electoral laws and procedures. If the law keeps changing, it will be difficult to conduct credible and transparent polls.
- Sixth, the new Inspector General of Police must clamp down on the increasing incidents of violence around the country. This general insecurity stands as a serious obstacle to voter turnout, and it also creates an atmosphere in which voter intimidation and harassment can thrive.

Armed with a world renowned constitution and a string of important reforms already implemented, Kenya now stands at a crossroads. Let us hope that the upcoming election directs the country on a path of peace into the future.



## Table: IEBC actions and deadlines

Action	Original deadline by law	First scheduled date	Second scheduled date
IEBC issues notice of election	January 3, 2013	November 4, 2012	
Begin voter registration	December 5, 2012	September 2012	October 11, 2012
Close voter registration	January 3, 2013	October 2012	November 10, 2012
Inspection of voter roll begins	December 4, 2012	January 4, 2013	
Compile amendments to voter register based on public inspection	February 2, 2013		
IEBC to gazette list of registered voters	February 2, 2013		
Political parties submit nomination rules to Registrar	October 17, 2012		
Political parties to hold nominations	January 18, 2013	December 2012	January 17, 2013
Political parties to submit list of members and record of assets and liabilities to Registrar	October 17, 2012	January 4, 2013	January 18, 2013

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Third scheduled date	Fourth scheduled date	Date action completed	On time?
		December 27, 2012	Yes
November 1, 2012	November 12, 2012	November 19, 2012	Yes
December 1, 2012	December 11, 2012	December 18, 2012	Yes
		January 13, 2013	NO, and period of inspection decreased from 30 days to 14 days
		TBD	TBD
		TBD	TBD, but period of gazettelement reduced from 30 days to 21 days
		October 17, 2012	Yes
		January 17, 2013	Yes, but only 1 day short of deadline
		TBD	No, not according to original law.

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